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THE ESSENTIALS
OF
AMERICAN TIMBER LAW

BY

J. P KINNEY, A.B., LLB., M.F.

FIRST EDITION

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TO THE MEMORY OF

A FATHER

FROM WHOM THE PRACTICE OF FOREST CONSERVATION WAS LEARNED MANY YEARS BEFORE THE AUTHOR FIRST MET THE WORD "FORESTRY",

THIS BOOK IS DEDICATED.

THE ESSENTIALS OF AMERICAN TIMBER LAW

PREFACE

In the newspapers there has recently appeared what purported to be a true account of the experiences of an Indian who, in the autumn of 1915, became separated from his companions in the extensive uninhabited region south of Hudson Bay. Surrounded by conditions peculiarly unfavorable to human existence and confronted by dangers that would have overwhelmed a man lacking in courage and initiative, this native American maintained his poise and applied himself to the task of mastering the situation into which a seemingly unkind fate had brought him.

Not only did this Indian successfully resist the hostile forces that threatened his destruction but, with no mechanical appliance other than a knife, he started a fire, erected a shelter, fashioned traps for fish and game and supplied himself with the three essentials of life,—food, clothing and a habitation. Before the long sub-arctic winter was over he had gathered a large stock of furs and had constructed a canoe in which to transport his furs to a place where they would have a value a hundred fold greater than in the wilderness in which he had collected them.

The situation of those Americans who began the study of forestry in the early years of the first decade of the twentieth century was not entirely unlike that of the Ca-

nadian Indian lost in the wilds of the inhospitable northland. The author vividly remembers the time when the number of books printed in English that were devoted chiefly to a discussion of the principles and practice of forestry as applicable to American conditions, could be counted with one bout of the fingers. However, with this inadequate supply of equipment, comparable to the single mechanical device possessed by the Indian, there went a resourcefulness of nature and a persistency of spirit that has effected a marvelous development within less than a score of years from the first announcement that an American university would give a full course in the science and practice of forestry. To-day there are courses leading to degrees in forestry in many universities and almost monthly one or more books are added to the long list of publications now available to the student of this fascinating subject. The individual forester is no longer required to devise and construct his equipment but, in pushing forward to new fields of accomplishment, he may use the means contributed by the efforts of others.

Yet in one field—and, in the opinion of the writer, a field of the greatest importance to the profession—nothing has been published other than pamphlets and circulars for the information of the public as to statutes regarding fire, trespass and reforestation laws. In the field of forest law there is available to the American forester almost nothing in the form of practical and convenient equipment. Without tools any artisan is handicapped; without books for guidance and reference a forester cannot find the time to contribute to the further development of his profession.

It was with the purpose of saving others, as well as himself, the laborious task of "looking-up" the law in widely scattered places each time that a specific question in forest law arose, that the author undertook the work of bringing together into a volume of convenient size the essentials of American forest law.

For a long time subsequent to the formation of a purpose to prepare such a compilation and discussion of the law, the writer found no opportunity to begin the work. In fact the material for the book now published has been gathered chiefly during the early morning hours and the late evenings

of days devoted to work of another character. Fortunately in this other work there was frequent occasion to realize how valuable would be a book in which a forester or a lumberman could find quickly the elements of the law appliable to his profession or business and in which a lawyer could find conveniently a more or less exhaustive citation of the authorities supporting established views of the law. Had the author foreseen at the start how completely the undertaking was destined to absorb, for a period of four years, the hours and minutes that should have been devoted to rest and recreation, he would possibly have abandoned his purpose; and had the material to be collected been less extensive or the time available for selection and arrangement greater, certain general features of the book could have been improved and numerous imperfections eradicated.

There being no similar work in English—nor in any other language so far as the knowledge of the writer extends—the selection of the headings under which the information should be presented required considerable attention. To a large extent the methods of the woodsman were employed. Each line, first run and marked only by a few light blazes and broken twigs, was later rerun one or more times and checked up with other lines before it was definitely blazed as constituting a part of the boundary of a chapter. At times in this work, as in woods-work, the lines could not be made to "close" as one would wish and occasionally upon the completion of a chapter it became apparent, too late for correction, that a different order of progression would have proven more satisfactory. The author desires to acknowledge his indebtedness to the Cyclopedia of Pleading and Practice, published by the American Law Book Company of New York, which has been relied upon largely both as to the statement of the law and as to the references supporting such statement.

Previous to the time when the present volume began to take shape chapter by chapter, the writer had comtemplated the production of a work in a single volume that should trace the development of all forest and timber statutory law in America and also present the existing law as determined by the statutes and by court decisions. As the work proceeded it became evident that the whole field

could not be appropriately treated in a volume of moderate size. Furthermore it appeared practicable to divide the whole subject into two fairly distinct branches; namely, the law that was concerned with trees, forest and forest products as subject to public or private property interests, and the law that found its stimulus in the interest that the public had in the protection, extension and maintenance of both public and private forests as a means of preserving and advancing the general welfare.

Accordingly the present volume is confined to a presentation of the existing law regarding trees and their products as property, with only such observations and references to historical development as are considered necessary to an understanding of the reasons for existing law. No attempt is made to present the substance of the existing statutes in the various states, but much effort has been expended in ascertaining and citing the page or section of the compiled laws or session laws of the different states where the reader may find the law set out in full. The author felt that by this method he could best serve the requirements of both foresters and lawyers.

The statutory law, constantly subject to amendment and repeal, can be ascertained at any particular time only by a first hand study of the law in each state as established or modified by the latest enactment of the legislature. On the other hand, the interpretation of the law by the courts, though ever subject to new definition and differentiation and occasionally to reversal, has much greater stability and for this reason prominence is given in this volume to the law as determined by the courts.

It is the purpose of the author to trace in another volume the development in America of statutory law directed primarily to the advancement of the social and economic welfare of the people.

J. P KINNEY.

Washington, D. C.
August 1, 1916.

THE ESSENTIALS OF AMERICAN TIMBER LAW

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THE ESSENTIALS
OF
AMERICAN TIMBER LAW

CHAPTER I

CLASSIFICATIONS OF PROPERTY

§1. Corporeal and Incorporeal Things. The term "property" has been, and still is, used in more than one sense. Thus at times the word is used to signify the thing owned, and again the word denotes the right or interest which one has in a thing that is susceptible of ownership. The latter use of the term is better adapted to the requirements of a legal discussion.

Some writers on English jurisprudence have made a classification of property into corporeal things, or physical objects that are visible and tangible, and incorporeal things, or those that have no physical existence but are mere rights or groups of rights which are related to and dependent upon corporeal things. It will be noted that the word "thing" is here used in a broad sense, and includes not only material objects that have physical existence, but also immaterial concepts that have only an ideal existence. The term "thing" is here equivalent to the word "res," or the word "chose," as used in legal parlance.

§2. The Development of the Terms Real Property and Personal Property. While learned jurists were writing profound works upon the theory of corporeal and incorporeal rights, and attempting to explain the abstruse and subtle distinctions between lands, tenements and hereditaments on the one hand and goods and chattels on the

other, there gradually developed in the common law a division of the same rights along an entirely different line of cleavage. This distinction appears to have had its origin in the pleadings, or procedure, by which property rights were enforced. Thus there were certain actions in which a tangible, specific thing, or right, which formed the subject matter of a legal contest could be recovered and there were other actions in which the complainant could demand, only, either the restitution of the thing of which he was deprived or money damages sufficient to redress the wrong which gave rise to the action at law. The first class of actions were called "real actions"; the second class "personal actions." Real actions were allowed only in those instances in which the subject matter of the dispute was considered of such importance that its value could not be measured in money, where the character of the property right was such that the restoration of the thing, or right, to its true owner was the only just solution of the controversy. When the subject matter of the dispute was not something which was considered by the administrators of the law to have this peculiar character the complainant was not permitted to bring a "real" action. The things held in highest estimation at the time of the development of this distinction were land and the rights or privileges which were incident to, or sprang from, land ownership.

Thus things which could be recovered in a "real" action came to be called "realty" instead of "lands, tenements and hereditaments," while all things which were not considered to be of such a character as to support a "real" action for specific recovery came to receive the appellation, "personalty." In a further development of the law, it was recognized that there were certain interests in land which could not consistently be held to form the basis of "real" actions, and gradually such intersts in land assumed the full character of personal property. Thus descendible rights in land, an interest in land during the life of the one holding the interest, and, except where modified by statute, an interest in land during the lifetime of another person (an estate pur autre vie) and a few other special interests in land were considered realty, while leaseholds of lands, liens on land in the form of mortgages, and the interest

which partners hold in land were determined to be personalty.[1] One well defined exception to the general rule of law exists in what is known as equitable conversion. By this doctrine money which has been left by will with a direction that it be invested in land for the benefit of the legatee (devisee) is considered realty while land which, by direction of a will, is to be converted into money before passing into the possession of the beneficiary of the will is considered personalty.[2] Although under modern procedure any tangible thing can be specifically recovered, the distinction between realty and personalty remains of the greatest importance in the law.

§3. The Distinction Between Movables and Immovables. A classification which was never formally recognized in the English common law, but which is nevertheless of the greatest practical importance is that which classes all actually existent things that form the subject matter of property rights into movables and immovables. Both movables and immovables are comprised within the term corporeal as heretofore defined, and the term "immovables" is in a sense co-extensive with the word "land" as used in law. The word "land" as used in law has a different significance than it has in common usage, and many objects which are classed as immovables in the eye of the law because of the relationship which they sustain to land are in fact susceptible of removal. The spherical pyramid of which any portion of the earth's surface is the base and which has its apex at the center of the terrestrial globe is of course immovable; and the base itself (considered geometrically, and apart from the rock and soil upon its surface) is not susceptible to movement by the power of man from the position which it occupies in relation to the remainder of the earth's surface. However, in law not alone the surface of the earth within the defined superficial area but also all material substances placed by nature within such area are immovables and even things which become attached to or closely associated with the land through the industry of man are classed as a part of the land and there-

1. Bopp v. Fox, 63 Ill. 540.
2. Craig v. Leslie, 3 Wheaton 563.

fore immovable. All tangible objects which are not so related to land as to be considered a part thereof are considered "movables."

§4. Modern Application of the Phrases Real Property and Personal Property. Accordingly we may say that real property consists of land or of things so attached, or annexed, to land as to be properly considered a part of the land; and we may define personal property as including all things and objects, subject to private property rights, which are of a movable character; i. e., things which are not annexed to land in any way, or if annexed, the annexation is of such a loose and temporary nature that the objects may not properly be considered a part of the land to which they are attached. As was indicated above certain property rights in immovable things are considered personalty. These legal rights which partake of the nature of both realty and personalty are often called "chattels real," the term chattel in itself being broad enough to include both goods and rights. The law seems to regard these rights not as interests in the realty itself, but as security for the personal claims from which they arise and upon which they rest.

Under both the Roman and the common law the ownership of any portion of the earth's surface carried with it, as an incident thereto, the ownership and control of every object or substance permanently affixed to such land, and a theoretical right of control not only over the solid geometric figure which would be produced by the extension of lines from each bounding point, or angle, of the superficial tract inward to the center of the earth, but also over the space included within the extensions of such lines outward from the earth's surface to the limit of the celestial sphere (*Cuius est solum, eius est usque ad caelum*). In the development of English law the inflexibility of this common law rule as to ownership by the holder of the realty of all objects which might be annexed to the soil was greatly weakened in the efforts of the courts to protect the equitable interests of tenants for life or for years and was eventually modified by statutory provisions.

§5. The Meaning of the Terms Tenements and Hereditaments. Although we shall not have occasion,

to enter into any extended discussion of the terms "tenements" and "hereditaments," it may be well to here state broadly the distinction between these and the term "land."

The word "tenement" was said by Blackstone to signify "everything that may be holden, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial, ideal, kind."[1] Thus, this term included all that was covered by the term "land" and in addition embraced all incorporeal things which had a connection with land. It included even some things which were not subject to common law tenure.[1]

The term "hereditament" covered all those objects of property, undisposed of by will, which upon the death of the owner passed, by act of law, to the heir, and not to the executor. The term usually includes everything signified by the term "tenement" and even, in England at least, may include property of a personal nature.[2]

§6. The Descent of Real Property and of Personal Property. On the death of the owner, personal property, at common law, passed to the executor or administrator of the estate, for distribution to the legatees or next of kin after the payment of the debts of the deceased. Real property, on the other hand, passed immediately to the heirs or devisees, and could be held for the debts of the deceased only when the personal property was insufficient to meet them.[3] This rule has been modified by a statute in England and in a number of American states, so that the executor or administrator, in many instances, now takes possession of real property as well as personal property in effecting a settlement of the estate of a decedent.[4]

In England those who take the real property as heirs of an intestate decedent are generally different from those who take the personalty as next of kin. In the United States statutory provisions usually insure that the realty and personalty of an intestate decedent shall pass to the same person, or persons.[5]

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1 2 Bl. Com. 17.

2. *See* 2 Pollock & Maitland, Hist. Eng. Law, 148.
Challis, Real Prop. 37; Co. Litt. 18a; Gray Perpetuities, Sec. 43, note.

3. Co. Litt. 6a; Bl. Com. 17; Challis Real Prop. 39; Stafford v. Buckley, 2 Ves. Sr. 170; Mitchell v. Warner, 5 Conn. 518.

4. 1 Woerner, Administration, Sec. 276; 11 Am. & Eng. Enc. Law(2d Ed.) 830-845, 984, 1035, 1068, 1085; See Webster v. Parker, 42 Miss. 465, Finch's Cases 42.

5. 60 and 61 Vict. C. 65 (1897); 11 Am. & Eng. Enc. Law (2nd Ed.), 1037 et seq.

6. See 1 Stimson, Am. St. Law, Secs. 3101, 3104.

§7. Fundamental Distinctions Between Realty and Personalty. The fundamental difference between land and personal property in their legal relations which must be accentuated arises from the fact that the one class of property is fixed or "immovable" in nature while the other class consists of "movable" things. Thus it happens that one person may enjoy the ownership of a piece of land while another contemporaneously enjoys certain privileges of use and possession, and the owner need under ordinary circumstances have no particular concern as to the possibility of the value of his property right being diminished as a result of the advantages which the other person enjoys through possession, nor need he generally feel disquietude lest the one in possession, through evil purpose, attempt to deprive him permanently of the subject of his right. Such is not the case, however, with personalty, for the enjoyment of the advantages of such property is relatively much more dependent upon possession and because of its movable character personalty is more exposed to the danger of an appropriation by the one in possession to the permanent loss of the rightful owner. From this difference in character it occurs that there is no counterpart in personal property law, to the doctrine of "estates" as developed in real property law, through which different persons are enabled to enjoy separate and distinct rights in the same property contemporaneously, which rights may not comprise the enjoyment of present possession.

Statute law usually makes a distinction between real and personal property as to the form of creation and transfer of rights therein. Delivery of possession coupled with an intention to part with the property right is generally sufficient to transfer a right of property in movables; while a written instrument is required for the transference of an interest in land of any importance.[1]

Again, all legal rights pertaining to land are determined by the law of the place where the land is situated, (the *lex rei sitae*). All legal rights pertaining to movable chattels

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1. Williams, Pers. Prop. 36; Browne, Statute of Frauds, C. 1; 1 Stimson Am. St. Law, Sec. 4143.

are determined by the law of the place of domicile of the owner. [1]

At common law the legal proceedings necessary to recover land were essentially different from those necessary for the recovery of movables. Although the procedure has been harmonized by statute to a large extent, yet actions regarding land must generally be brought in the jurisdiction where the land is situated; but this rule is not applicable to actions as to movables. [2]

1. Minor, Conflict of Laws, Sec. 13; Dicey, Conflict of Laws (Am. Ed.) 72; Freke v. Lord Carbery, L. R. 16 Eq. 461. (The distinction here made between movables and immovables is not the same as that between real and personal property.) See Sec. 6 of Tiffany Modern Law Real Prop., Chicago 1912, disapproving of decision in Despard v. Churchill, 53 N. Y. 192.

2. 3 Bl. Com. 294; Brantley, Pers. Prop., Sec. 7; Notes to Moctyn v. Fabrigas, 1 Smith's Lead. Cases 652; McGonigle v. Atchison, 33 Kan. 726, Finch's Cas. 65.

CHAPTER II.

FORMS OF PRIVATE POSSESSION OF LAND AND INCIDENTS THEREOF

§8. **Ownership in Fee.** An owner of land in fee simple is, under the common law, subject to no restrictions as to the manner in which he shall manage the property, provided he does not use it in such manner as to injure the persons or property of others; but there are important restrictions as to the use of real estate which must be observed by persons who are in possession of it under a title which is less than a fee simple.

§9. **Tenancy in Tail.** Under the common law estates in tail might be created. Real estate held in tail did not descend to the holder's heirs generally but only to the heirs of his body; i. e., his lawful issue. Through failure of issue, the estate ended with the death of the tenant. The holder did not have the full control over the disposition of the property which was enjoyed by one holding a fee simple title. Estates in tail no longer exist in the United States.

§10. **Tenancy in Entirety.** This is the tenancy by which husband and wife hold land conveyed or demised to them by a single instrument which does not expressly require them to hold it by another form of tenancy. There is but a single estate between the two. Neither is liable for waste during such tenancy.[1] The rights, privileges and duties of the husband and wife as to timber on estates thus held will require no separate discussion. In a few American states property acquired during marriage takes a peculiar status as community property which is held in equal shares by the husband and wife.

§11. **Tenancy in Common.** Tenants in common are

1. Davis v. Gilliam, 40 N. C. 308.

persons who hold property, real or personal, by several and distinct titles, or by a single title and several rights, but by unity of possession. The qualities of the estates of the co-tenants may be different, the shares unequal and the manner of acquisition of title not uniform. Possession may be the only unity between them, and there may be an entire disunion of interest, title and time. A tenancy in common springs up whenever an estate in real or personal property is owned concurrently by two or more persons under a conveyance or under circumstances which do not either expressly or by necessary implication call for some other form of co-tenancy. Such tenancy may be created by will, by descent, by purchase, sale or conveyance.[1] Before severance, or partition, each co-tenant is entitled to an interest in every inch of the soil; but no one of them is entitled to the exclusive possession of any particular part of the land, each being entitled to occupy the whole in common with the others or to receive his share of the rents and profits.[2]

§12. Joint Tenancy. A joint tenancy exists where a single estate in property, real or personal, is owned by two or more persons, other than husband and wife, under one instrument or act of the parties.[3] Such estate can be created only by a devise, conveyance or act of purchase *inter vivos* and not by descent or act of law. Unlike tenants in common, joint tenants hold by a single title and one right. A joint tenant can convey his interest to his co-tenant by a release and upon his death his interest goes to the surviving co-tenant or co-tenants. A tenant in common cannot release his interest to his co-tenant nor does the right of survivorship exist in his favor. In both England and the United States the modern tendency of both statutes and court decisions is to hold a conveyance to two or more persons to create a tenancy in common rather than a joint tenancy unless the words of creation expressly require the tenancy to be held joint.

§13. Coparcenary. An estate in coparcenary is an

1. 38 Cyc. of Law & Proc. Ed. 1904, p. 6.
2. 38 Cyc. of Law & Proc., p. 4.
3. 23 Cyc., p. 483.

estate acquired by two or more persons, usually females, by descent from the same ancestor. There is but a single estate and it resembles a joint tenancy more closely than a tenancy in common, but it is like the latter in that there is no survivorship. Estates in coparcenary are now generally abolished or changed into tenancies in common in the United States by statute.

§14. Life Tenancy. "An estate for life is a freehold interest in land, the duration of which cannot extend beyond the life or lives of some particular person or persons, but which may possibly endure for the period of such life or lives."[1] During the period that the estate endures, the life tenant is entitled to the exclusive possession and enjoyment of the premises but he cannot take advantage of this possession and beneficial use in such a manner as to diminish or abridge the right of the reversioner or remainderman who is to take the full title as soon as the life estate is ended.

§15. Dower. Dower consists at common law of a third part of all the lands and tenements of which a husband was seized in fee simple or fee tail at any time during coverture, and to which any issue which his wife might have had, might by possibility have been heir, to be held by the wife for the term of her natural life.[2] After assignment of dower in particular lands by metes and bounds and entry thereon, the widow is seized of an immediate freehold and is vested with a life estate therein.[3] As standing timber is part of the realty a widow's dower attaches thereto. The general rule in the United States is that a wife is dowable of wild lands which are not valuable except for the timber thereon,[4] but in some states court decisions or statutes exclude dower in such lands unless they are used

1. 16 Cyc. 614.
2. 14 Cyc. 880.
3. 14 Cyc. 1013.
4. Pike v. Underhill, 24 Ark. 124; Chapman v. Schroeder, 10 Ga. 321; Schnebly v. Schnebly, 26 Ill. 116; Hickman v. Irvine's Heirs, 3 Dana (Ky.) 121; In re Campbell 2 Dougl. (Mich.) 141; Brown v.Richards, 17 N. J. Eq. 32; Walker v. Schuyler 10 Wend. (N. Y.) 480; Allen v.McCoy 8 Ohio 418; Macaulay v. Dismal Swamp Land Co., 2 Rob., Va., 507; *Canada.* Titus v. Haines, 11 Nova Scotia 542; See 17 Cent. Dig. tit. "Dower," Sec. 35. *Contra.* Conner v. Shepherd, 15 Mass. 164.

in connection with the dwelling house of the widow or with cultivated lands held by her as dower,[1] even when improved by grantee of husband.[2]

§16. Curtesy. Curtesy is the estate to which by common law a man is entitled on the death of his wife, in the lands or tenements of which she was seized in possession in fee simple or in tail during their coverture, provided they had lawful issue born alive which might have been capable of inheriting the estate. A tenant by the curtesy is entitled to exercise the same rights in the reasonable enjoyment of his estate as may be exercised by any tenant for life.[3] In many of the States of the American Union estates by curtesy have been abolished and in lieu thereof the husband has been given a dower right of the same quality and character as the dower of a wife, which is essentially a life estate in one-third of the real estate of which the deceased spouse was seized during the period of the married life.

§17. Tenancy for Years. A tenancy for years is any tenancy which is created for a definite ascertained period, and is ordinarily evidenced by writing. Such a tenancy may embrace any fixed time whether a number of weeks or months or a single year, as well as a definite number of years. "To create an estate for years the lease must be certain or capable of being made certain as to beginning, duration and termination of the term."[4]

§18. Tenancy at Will. A tenancy at will in lands is the estate held by a tenant who has the right to remain in possession of the land during the joint wills of himself and the one holding the fee to the land. A tenant at will is in possession by right, with the consent of the landlord either express or implied; and he is the owner of the premi-

1. See Ford v. Erskine, 50 Me. 227; Stevens v. Owen, 25 Me. 94; Mosher v. Mosher, 15 Me. 371; Kuhn v. Kaler, 14 Me. 409; Shattuck v. Gragg, 23 Pick. (Mass.) 88; White v. Willis, 7 Pick. (Mass.) 21, 11 Am. Dec. 132; Fuller v. Watson, 7 N. H. 341; Johnson v. Perley, 2 N. H. 56; 9 Am. Dec. 35.
2. Webb v. Townsend, 1 Pick. (Mass.) 21, 11 Am. Dec. 132.
3. 12 Cyc. 1013. Armstrong v. Wilson, 60 Ill. 226; Babb v. Perley 1 Me. 6 (Husband's interest in trees cannot be taken on execution). Cf. Garnett Smelting & Development v. Watts, 37 So. 201 (Ala. 1904.) Dower case.
4. 24 Cyc. 959.

ses he occupies, until the tenancy has been terminated by notice from his landlord to vacate, but he has no certain and indefeasible estate which he can assign or grant to any other person. [1]

§19. Tenancy from Year to Year. Tenancies of this character have arisen, through the application by the courts of principles of policy and justice, out of what were once tenancies at will, determinable at any time by either party without notice. [2] A tenant from year to year has a lease for a year certain, with a growing interest during every year therafter, springing out of the original contract and parcel of it. But, although it has many of the qualities of a term for years, the tenancy is substantially a tenancy at will, except that such tenancy cannot be determined by either party without due notice to quit. Such a tenancy may arise either expressly or by implication and either by writing or by parol. A lease for no definite term with an annual rent, which may be payable quarterly or monthly, is a lease from year to year. The incidents of this estate are generally the same as those of an estate for years.

§20. Tenancy from Month to Month or Week to Week. A tenancy from month to month or from week to week, like one from year to year, is of the same nature as a tenancy at will, but requires notice for its termination.

§21. Tenancy by Sufferance. A tenancy by sufferance exists where a person who has come into possession of premises lawfully continues to remain thereon after the right to do so has ended. He does not have even the interest possessed by a tenant at will but is in possession wrongfully and holds such possession only by the laches or neglect of the rightful owner. The so-called "tenant by sufferance" has no estate which he can transfer or transmit and strictly speaking is not a tenant. However, although, in most respects, he has possession only like a

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1. 24 Cyc. 1037.
2. 24 Cyc. 1027; Real Prop., Tiffany, Ed. 1912, Sec. 57 et seq., p. 144.

disseizor, yet he cannot be sued in trespass until the owner enters. [1]

§22. Quasi Tenancies. A vendor of land who remains in possession after the execution of a contract of sale, a judgment debtor in possession of attached land, or a mortgagor in possession, in a jurisdiction in which a realty mortgage is held to vest the title to the land in the mortgagee prior to redemption, is a tenant at will or by sufferance. Likewise a purchaser in possession under an executory contract of sale, a purchaser at a tax sale in possession prior to the period allowed for redemption, or a mortgagee in possession under a mortgage having the legal effect of a lien, is ordinarily considered to occupy the premises as a tenant. Executors, administrators, trustees and guardians also may sustain relationships toward land similar to forms of tenancy.

1. Modern Law of Real Property, Tiffany, Chicago 1912, Sec. 60, p. 150.

CHAPTER III.

TREES AND TIMBER AS PROPERTY

§23. The Use of the Terms Tree, Timber, Wood, Forest and Woods. The Century Dictionary defines a "tree" as "a perennial plant which grows from the ground with a single permanent woody self-supporting trunk or stem, ordinarily to a height of at least 25 or 30 feet." Perennial plants with woody structure which do not have a single well-developed trunk but several main stems or branches starting near the ground and which do not normally reach a height of over 25 feet are called shrubs. The word "wood," from which the adjective used above is derived, is the name commonly applied to the hard fibrous substance that composes the main portion of the trunk and branches of a tree or shrub.[1] The word "timber" is generally used in its original sense as designating standing trees that are suitable for building houses and ships or for other construction purposes, or the portions of severed trees that are adapted to such uses or that have been actually hewn or sawn into coarse constructional material.[2]

In early English law the word "forest" was applied exclusively to a tract of land composed entirely of a wooded area or of both woods and pastures that was kept as a refuge or breeding place for wild beasts and fowls, and within which the sovereign or other political dignitary enjoyed exclusive privileges for recreation and hunting. Such tracts often bore distinctive names, were governed by special laws and were supported at public expense. In

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1. *See* Clay v. Postal Tel., Cable Co., 70 Miss. 406, 411; 10 So. 658, which defined a tree as a woody plant whose branches spring from and are supported upon a trunk or body.
Patterson v. McCausland, 3 Bland (Md.) 69, (Dec. 1830) which discusses wood structure at length and strangely reaches the conclusion that the successive rings of growth are not evidence of the age of a tree.
2. Leigh v. Heald, 1 B. & Ad. 622, 625, 20 E. C. L. 624. But *see* Strout v. Harper, 72 Me. 270, 273; Duren v. Gage, 72 Me. 118; Darling v. Clement, 69 Vt. 292, 37 Atl. 779; Hutchinson v. Ford, 62 Vt. 97, 18 Atl. 1044, Swift v. David 16 B. C. 275.

America the words forest, wood, woods, and also timber, are all used to designate "a large and thick collection of growing trees." [1] Such terms have been held to include in meaning not only the trees but also the land upon which the trees grow. [2]

The word "woods" as used in statutes prescribing penalties for firing the woods has been held to mean forest lands in their natural state as distinguished from lands cleared and enclosed for cultivation, [3] but an abandoned field covered with bushes and trees may fall within the purview of such a statute. [4] However, a North Carolina Court refused to extend such a statute so as to cover a field which was still surrounded by an old fence and used as pasture land even though it had grown up to bushes and resembled a wood in its natural state. [5]

§24. The Special Significance of the Word Timber as used in England and America. The word "timber" as denoting growing trees yielding wood suitable for construction purposes requires further consideration. Blackstone says "timber also is part of the inheritance. Such are oak, ash, elm, in all places; and in some particular counties, by local custom, where other trees are generally used for building, they are for that reason considered as timber; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste." [6] The determination of what trees were "timber" became so important a matter in England as to claim the attention of the legislature. A parliamentary act of 1766 [7] named oak, beech, chestnut, walnut, ash, elm, cedar, fir, asp (aspen), lime (basswood), sycamore and birch as timber trees. A supplementary act of 1773 [8] declared poplar, alder, larch,

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1. *See* Century Dictionary, Godden v. Coonan, 107 Iowa 209, 77 N. W. 852; State v. Howard, 72 Me. 459, 464; Donworth v. Sawyer, 94 Me. 243, 253, 47 Atl. 521.
2. People v. Long Island R. Co., 126 N. Y. App. Div. 477, 110 N. Y. Suppl. 512; Boults v. Mitchell, 15 Pa. St. 371, 380; Whistler v. Paslow, Cro. Jac. 487, 79 Eng. Reprint 416.
   But see Fletcher v. Alcona Tp., 72 Mich. 23, 40 N. W. 36.
3. Brunell v. Hopkins, 42 Iowa 429; Averitt v. Murrell, 49 N. C. 322, 323.
4. Hall v. Cranford, 50 N. C. 3, 5.
5. Achenbach v. Johnston, 84 N. C. 264.
6. Black. Com., Vol. 2, p. 281.
7. 6 Geo. 3, Chap. 48, Stat. at Large, Ruffhead Series, London, 1771, Vol. 10, pp. 260, 261.
8. 13 Geo. 3, Chap. 33, Stat. at Large, Ruffhead Series, London, 1774, Vol. 11, p. 701. Cf. 35 Henry 8 (1543-4) ch. 17 repealed as to England in 7th and 8th Geo. 4 ch. 27.

maple, and hornbeam to be timber trees and imposed the penalties of Chapter 48, 6 Geo. III, for the destruction of these trees after May 1, 1773.

Some of the early trespass statutes in the United States named the timber species, but in America the courts have generally been influenced by the view that land should be devoted to its most profitable use, even though preparation for such use required the removal of trees suitable for the manufacture of beams, planks, boards, etc., and a liberization of the law against waste has resulted. It appears, however, that this departure from the English rule has been announced principally in cases which have involved the relationship of tenancy. The law has been construed more closely in accord with the English common law rule when controversies have arisen between vendor and purchaser, or in the administration of civil or criminal statutes imposing penalties for the unlawful cutting of trees.[1] Thus in a Maine case it was held that the construction to be placed upon the word "timber" as used in a contract for the sale of standing timber was a matter of law and could not be given to the jury for a determination of the meaning of the word as a matter of fact, and that a contract which gave the purchaser "the right to cut and haul all the timber and bark," on certain land, "down to as small as ten inches at the stump or butt of the trees," did not authorize the cutting and removal of trees fit only for firewood.[2]

In a prosecution for the unlawful cutting of timber in violation of a criminal statute which imposed a penalty for the cutting and removal of live oak, red cedar and other timber trees from the public lands of the United States (Act of March 2, 1831, Sec. 2461, U. S. R. S.), the Federal district court held that mesquite was not a timber tree such as was contemplated by the statute and that the one who was charged with the cutting of mesquite on public lands of the United States was not liable to the penalties

1. Com. v. LaBar, 32 Pa. Sup. Ct. 228; Wilson v. State 17 Tex. App. 393; Fogo v. Boyle 130 Wis. 154, 109 N. W. 977.

2. Nash v. Drisco, 51 Me. 417.; Baldwin v. Seeley, 160 Mich. 186, 125 N. W. 37; Lbr. Co. v. Lyman, (Vt.) 94 Atl. 837 (all standing timber means that fit for lumber only) See also Lbr. Co. v. Jernigan, 185 Ala. 125, 64 So. 300 (Local custom may limit to pine timber only.)

of the act. In rendering this decision the judge said that mesquite was "a brittle, knotty, skraggy, fibreless wood that can only be used for firewood. It is used in the manufacture of no useful article." [1] However, when a later case arose under the same section of the Revised Statutes regarding the cutting of mesquite the Supreme Court of Arizona questioned the propriety of the action of the judge in Bustamente v. United States in assuming that mesquite was as a matter of common knowledge not a timber tree, declined to follow the decision in that case, quoted from the definition of mesquite given in the Century Dictionary which indicated that mesquite trees sometimes attained a height of more than thirty feet and the wood was used for various purposes, including foundations for buildings, and held that whether the mesquite trees cut were of such character as to come under section 2461 U. S. R. S. was a question of fact which should be submitted to the jury. [2] Another court decided that this Federal Statute included trees fit only for firewood and charcoal wood. [3] In another prosecution under the same section it was held that the term "timber" as used in the federal statute did not embrace manufactured articles such as boards and shingles. [4]

As generally applied to standing trees in the United States and Canada, the word "timber" signifies those trees which are suitable for the construction of buildings, ships, furniture, fences and tools, [5] but it does not include immature trees of such timber species. [6] The courts will give to the word the restricted application which was evidently contemplated in a contract or conveyance [7] and in particular cases it has been held that "timber" did not

1. Bustamente v. United States, 42 Pac. Rep. 111, 4 Ariz. 344.
2. United States v. Soto, 7 Ariz. 230, 64 Pac. 420.
3. United States v. Stores, et al., 14 Fed. Rep. 824. See Donworth v. Sawyer, 94 Me. 243, 47 Atl. 523; Wilson v. State, 17 Tex. App. 393; Liu Kong v. Keahialoa, 8 Hawaii 511.
4. United States v. Schuler, 6 McLean 28, 27 Fed. Cas. No. 16, 234, Decided June, 1853.
5. Alcutt v. Lakin, 33 N. H. 507, 66 Am. Dec. 739; Lord v. Meader, 73 N. H. 185. 60 Atl. 434; Corbett v. Harper, 5 Ont. 93, 97. See Com. v. Noxon, 121 Mass. 42
6. Corbett v. Harper, 5 Ont. 93; See Campbell v. Shields, 44 U. C. Q. B. 449.
7. Kollock v. Parcher, 52 Wis. 393, 9 N. W. 67; See Keeton v. Audsley, 19 Mo. 362, 61 Am. Dec. 560; Bryant v. United States, 105 Fed. 941, 45 C. C. A. 145.

embrace lath,[1] shingles,[2] fence rails,[3] railroad ties[4] or pulpwood;[5] that "saw timber" did not include telegraph poles;[6] and that "lumber and timber," as used in a statute giving a lien for work in manufacturing the same did not include slabs.[7] However, a Maine statute regulating the driving of "timber" in streams has been held to include pulpwood.[8]

§25. The Legal Meaning of the words "Stumpage," "Lumber," "Firewood," etc. The word "stumpage" as generally used denotes the value of the timber standing in the tree,[9] but the term has sometimes, improperly, been used to mean the value of the trees after they were cut down.[10] The word "wood" may not only mean a forest,[11] or timber which has been cut down,[12] but it may include lumber and bark.[13] Although the word "timber" has been given the restricted meaning of material fit for building and allied purposes,[14] it has been held that "standing wood" includes trees suitable for timber as well as those fit only for fuel.[15] However, where the expression "wood and underwoods" was used in a lease following the phrase "timber and other trees," it was held to denote only such trees as were not fit for timber.[16]

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1. Babka v. Eldred, 47 Wis. 189, 2 N. W. 559.
2. Battis v. Hamlin, 22 Wis. 669.
3. McCauley v. State, 43 Tex. 374. But see Hunter v. Hunter, 17 Barb. (N. Y.) 25.
4. Johnson v. Truitt, 122 Ga. 327, 50 S. E. 135; Butler v. McPherson, 95 Miss. 635, 49 So. 257. Hubbard v. Burton, 75 Mo. 65. But *see* Kollock V. Parcher, 52 Wis. 393, 9 N. W. 67.
5. Kaul v. Weed, 203 Pa. St. 586, 53 Atl. 489;
6. Elliott v. Bloyd, 40 Ore. 326, 67 Pac. 202; Cf. Kelly v. Robb, 58 Tex. 377.
7. Engi v. Hardell, 123 Wis. 407, 100 N. W. 1046.
8. Bearce v. Dudley, 88 Me. 410, 34 Atl. 260. See Slight v. Frix, 165 Ala. 230, 51 So. 601 ("Lumber" in pleading not fatal, "timber" Stat.)
9. Ciapusci v. Clark, 12 Calif. App. 44, 106 Pac. 436; Ray v. Schmidt & Co., 7 Ga. App. 380, 66 S. E. 1035; Stanley v. Livingston, 9 Ga. App. 523, 71 S. E. 878; Gordon v. Grand Rapids Etc. R. Co., 103 Mich. 379, 61 N. W. 549; Nitz v. Bolton, 71 Mich. 388, 39 N. W. 15; Skeels v. Starrett, 57 Mich. 350, 24 N. W. 98; U. S. v. Mills, 9 Fed. 684, 687; Baker v. Whiting, 2 Fed. Cas. No. 787, 3 Summ. 475, 484.
10. Blood v. Drummond, 67 Me. 476; Ayres v. Hubbard, 71 Mich. 594, 40 N. W. 10; Single v. Schneider, 30 Wis. 570, 574.
11. State v. Howard, 72 Me. 459.
12. Darling v. Clement, 69 Vt. 292, 37 Atl. 779.
13. Hutchinson v. Ford, 62 Vt. 97, 18 Atl. 1044.
14. Gulf Yellow Pine Lbr. Co. v. Monk, 159 Ala. 318, 49 So. 248. Cf. Webb. v. National Fire Ins. Co. 2 Sandf. (N. Y.) 497, 504. Cf. U. S. v. Schuler, 27 Fed. Cas. No. 16234, 6 McLean, 28, 37.
15. Strout v. Harper, 72 Me. 270.
16. Leigh v. Heald, 1 B. & Ad. 622, 20 E. C. L. 624.

The words "refuse wood" in a statute were construed to include "shingle sawdust" and "shingle shavings," but not the fuel which had been prepared from trees cut for fuel,[1] and "firewood" as used in a statute regulating the measurement of wood for sale was held not to include chips and trimmings of lumber which were sold by the load instead of by the cord.[2] It has been held that an allowance for roads was not included in a devise of woodland,[3] and woodland has been judicially distinguished from prairie land.[4] "Woodleave" has been defined as a license to take wood.[5]

It has been held that contracts for the cutting of dead timber include trees which have been so badly injured that a prudent owner would cut them to prevent further loss.[6]

A sawlog has been defined as a part of the trunk of a tree stripped of its branches and cut into suitable lengths for the manufacture of lumber.[7] It has been held that a sale of logs upon the basis of a scale did not include a mast upon the same scale bill.[8]

Lumber has been defined by the courts as timber sawed or split for use in building.[9] Some courts have held that shingles are lumber[10], and others that they are not.[11] Pieces of cedar four feet long, rived for shingle spurpoes, have been held subject to a lien for the cutting and hauling of lumber.[12] In some states lumber is defined very com-

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1. State v. Howard, 72 Me. 459, 465.
2. Duren v. Gage, 72 Me. 118.
3. Blaine v. Chambers, 1 Serg. & R. (Pa.) 169.
4. Buxton v. St. Louis, etc. R. Co. 58 Mo. 55.
5. Osborne v. O'Reilly, 42 N. J. Eq. 467, 9 Atl. 209.
6. U. S. v. Bonness, 125 Fed. Rep. 485; U. S. v. Pine River Logging & Impr. Co., 89 Fed. 907, 915.
7. Hardwood Co. v. R. R. Co., 6 Ala. App. 629, 66 So. 949. State v. Addington, 121 N. C. 538, 27 S. E. 988. Cf. in re Gosch, 121 Fed. 604. Cincinnati Etc. R. Co. v. Dickey, 30 Ohio 16 (Sticks refers to square timber rather than logs.)
8. Haynes v. Hayward, 40 Me. 145.
9. Craze v. Land Co., 155 Ala. 431, 46 So. 479; Ward v. Kadel, 38 Ark. 174, 180; McKinney v. Matthews, 166 N. C. 576, 580, 82 S. E. 1036; Dutch v. Anderson, 75 Ind, 35; Williams v. Stevens Point Lbr. Co., 72 Wis. 487, 40 N. W. 154; Allen v. Redward, 10 Hawaii 159; Townsend v. Bank, 49 Can. S. Ct. 394, 28 Ont. L. 521, 27 Ont. L. 479, 26 Ont. L. 291, 4 Dom. L. R. 91, 3 Ont. W. N. 1105, 21 Ont. W. R. 961.
10. Gross v. Eiden, 53 Wis. 543, 11 N. W. 9; Lbr. Co. v. Ross, 19 B. C. 289.
11. Dexter Horton & Co. v. Sparkman, 2 Wash. 165, 25 Pac. 1070.
12. Sands v. Sands, 74 Me. 239. Cf. Bondur v. LeBourne, 79 Me. 21; Hadlock v. Shumway, 11 Wash. 690; Hurlburt v. Lake Shore R., 2 Int. St. Com. 122.

prehensively by statutes regulating liens.[1] The phrase "wood and manufactures thereof," as occurring in tariff schedules, has also received judicial interpretation.[2]

Crude turpentine which has exuded from trees cut or boxed for turpentining purposes is personalty which belongs to the one who lawfully prepared the trees,[3] and conversion will lie for the unlawful taking of such personalalty.[4]

§26. Growing Trees are Real Property. Standing or growing trees, as *fructus naturales*, have always been held to form a part of the realty[5] and under a State statute regarding the recording and filing of real and chattel mortgages, an interest in timber must be considered to be real es-

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1. Ryan v. Guilfoil, 13 Wash. 373, 43 Pac. 351; Hadlock v. Shumway, 11 Wash. 690, 40 Pac. 346; Baxter v. Kennedy, 35 N. Brunsw. 179.
2. *In general.* Hartranft v. Wiegmann, 121 U. S. 609, 7 S. Ct. 1240, 30 L. Ed. 1012.
   Lumber. Dudley v. U. S., 74 Fed. 548, 19 Sup. Ct. Rep. 801.
   Holly whips. Davies v. U. S., 107 Fed. 266.
   Picture frames. Hensal v. U. S., 99 Fed. 722; U. S. v. Gunther, 71 Fed. 499, 18 C. C. A. 219.
   Dry wood powder. Goldman v. U. S., 87 Fed. 193. (Not wood-pulp.)
   Whipstocks, etc. In re Foppes v. U. S., 72 Fed. 45; In re Foppes, 56 Fed. 817.
   Bamboo blinds, etc. U. S. v. China, etc. Trading Co., 71 Fed. 864, 18 C. C. A. 335 (Revs'g. 66 Fed. 733.)
   Furniture. Richard v. Hedden, 42 Fed. 672.
   Gun blocks. U. S. v. Windmuller, 42 Fed. 292.
   Shingles. Stockwell v. U. S., 23 Fed. Cas. No. 13, 466, 3 Cliff. 284. Cf. Lueders v. U. S., 131 Fed. 655; Sill v. Lawrence, 22 Fed. Cas. No. 12, 850, 1 Blatch, 605.
3. Lewis v. McNatt, 65 N. C. 63 (1871) 1 Gray Cas. 638; Branch v. Morrison, 50 N. C. 16, 69 Am. Dec. 770, 5 Jones L, 16, 6 Id. 16.
4. Melrose Mfg. Co. v. Kennedy, 59 Fla, 312, 51 So. 595; Branch v. Morrison, 50 N. C. 16; Quitman Naval Stores Co. v. Conway, 58 So. 840.
5. Ala. Gibbs v. Wright, (Ala. App.) 57 So. 258; Milliken v. Faulk, 111 Ala. 658, 660, 20 So. 594; Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776.
   Ark. Lbr. Co. v. Development Co. 176 S. W. 129. Starnes v. Boyd 142 S. W. 1143.
   Fla. Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 So. 687.
   Ga. Morgan v. Perkins, 94 Ga. 353, 21 S. E. 574; Moore v. Vickers, 126 Ga. 42, 54 S. E. 814; Balkcom v. Empire Lumber Co., 91 Ga. 651, 655, 17 S. E. 1020, 44 Am. St. Rep. 58; Coody v. Gress Lumber Co., 82 Ga. 793, 10 S. E. 218.
   Ill. Osborn v. Rabe, 67 Ill. 108; Adams v. Smith, 1 Ill. 283.
   Ind. Armstrong v. Lawson, 73 Ind. 498.
   Me. Emerson v. Shores, 95 Me. 237, 49 Atl. 1051, 85 Am. St. Rep. 404.
   Md. But *see* Whittington v. Hall, 116 Md. 467, 82 Atl. 163.
   Miss. Harrell v. Miller, 35 Miss, 700, 72 Am. Dec. 154.
   N.H. Howe v. Batchelder, 49 N. H. 204; Kingsley v. Holbrook, 45 N. H. 313, 86 Am. Dec. 173; Olmstead v. Niles, 7 N. H. 522; Putney v. Day, 6 N. H. 430, 25 Am. Dec. 470.
   N. J. Slocum v. Seymour, 36 N. J. L. 138, 13 Am. Rep. 432.
   N. Y. Vorebeck v. Roe, 50 Barb. 302, 306; Goodyear v. Vosburgh, 39 How. Pr. 377; Green v. Armstrong, 1 Den. 550; McIntyre v. Barnard, 1 Sandf. Ch. 52.
   N. C. Mizell v. Burnett, 49 N. C. 249, 69 Am. Dec. 744.

(Foot note 5 continued on next page)

tate.[1] Trees cannot be considered emblements but are a part of the inheritance.[2] A sale of land passes the title to the trees standing upon the land,[3] but they may be reserved by deed.[4] The term "tree" without explanation implies a standing tree and therefore it has been said that it was not actionable slander to say "A stole my bee tree," since a standing tree, as realty, was not subject to larceny.[5] However, it has been held that timber within the New York State forest lands is subject to larceny,[6] and in several states the wrongful taking of standing timber has been declared larceny by statute.[7]

(Foot note 5 concluded from preceding page)

Ohio. Hirth v. Graham, 50 Ohio St. 57, 33 N. E. 90, 40 Am. St Rep. 641, 19 L. R. A. 721.

Pa. Miller v. Zufall, 113 Pa. St. 317, 6 Atl. 350; Bowers v. Bowers, 95 Pa. St. 477; Pattison's Appeal, 61 Pa. St. 294, 100 Am. Dec. 637.

Tenn. Knox v. Haralson. 2 Tenn. Ch. 232.

Vt. Buck v. Pickwell, 27 Vt. 157.

Wis. Williams v. Jones, 131 Wis. 361, 111 N. W. 505; Lillie v. Dunbar, 62 Wis. 198, 22 N. W. 467; Daniels v. Bailey, 43 Wis. 566; Strasson v. Montgomery, 32 Wis. 52.

U. S. Marthinson v. King, 150 Fed. 48, 82 C. C. A. 360.

Eng. Scorell v. Boxall, 1 Y. & J. 396.

Growing fruit trees are considered as part of the land.

Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 So. 687; Adams v. Smith, 1 Breese (Ill.) 221, (1828).

1. Williams v. Hyde, 98 Mich. 152, 57 N. W. 98.
2. Slocum v. Seymour, 36 N. J. L. 138, 13 Am. Rep. 432.
3. Cockrill v. Downey, 4 Kans, 426.
4. McClintock's Appeal, 71 Pa. St. 365; Heflin v. Bingham, 56 Ala. 506, 28 Am. Rep. 776; Goodwin v. Hubbard, 47 Me. 595; Howard v. Lincoln, 13 Me. 122; See also, Putnam v. Tuttle, 10 Gray (Mass,) 48.
5. Idol v. Jones, 13 N. C. 162, 164, (2 Dev. L.).
6. People v. Gaylord, 139 N. Y. App. Div. 814, 124 N. Y. Suppl. 517; Pashley v. Bennett, 108 N. Y. App. Div. 102, 95 N. Y. Suppl. 384.

The unlawful taking of turpentine which has flowed into boxes in trees may be larceny.

State v. King 98 N. C. 648 (1887); State v. Moore 33 N. C. (11 Ired.) 70.

The same should be true of other products of trees. See distinction between objects physically and constructively annexed in Jackson v. State 11 Ohio St. 104; but compare U. S. v. Wagner 1 Cranch C. C. 314, Fed. Cas. No. 16,630; U. S. v. Smith 1 Cranch C. C. 475, Fed. Cas. No. 16,325.

7. Fla. Compiled Laws, 1914, Sec. 3295, (Act June 3, 1907).

Kan. Gen. St. 1909 Sec. 2577.

Md. Cf. Laws 1813, Ch. 162; Laws 1826, Ch. 260, (Both given in Laws of Md. 1692-1839, Dorsey, Vol. 1, pp. 622 and 918). Pub. St. 1904 Sec. 265 (willows).

Minn. Rev. Laws, 1905, Sec. 5084.

Mo. Rev. Stat. 1889, Sec. 3603-3606. Rev. Stat. 1909 Sec. 4547.

Neb. Rev. Stat., 1913, Sec. 8683.

N. C. Cf. Code of 1883, Sec 1070, (Laws of 1866, Ch. 60).

Wash. Code of 1910, Rem. & Bal. Sec. 2801.

§27. Severed Trees are Personal Property. Upon severance from the land, either actual,[1] as by physical detachment, or constructive,[2] as by valid sale and conveyance, trees become personalty. They are then subject to all the rules of law applicable to personal property and do not pass with a subsequent conveyance of the land.[3] However, it has been held that under a statute making timber an immovable even when separated in ownership from the land upon which it stands,[4] trees will retain

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1. Ala. Carpenter v. Lewis, 6 Ala. 682.
   Ark. Brock v. Smith, 14 Ark. 431.
   Cal. Kimball v. Lohmas, 31 Cal. 154.
   Fla. Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19.
   Ill. Cf. Brown v. Throckmorton, 11 Ill. 529; Wincher v. Shrewsbury, 3 Ill. 283, 35 Am. Dec. 108.
   Iowa, Robertson v. Phillips, 3 Greene 221.
   La. Woodruff v. Roberts, 4 La. Ann. 127; But see, Frank v. Magee, 49 La. Ann. 1250.
   Me. Goodwin v. Hubbard, 47 Me. 595; Whidden v. Seelye, 40 Me. 247, 63 Am. Dec. 661; Moody v. Whitney, 34 Me. 563; Richardson v. York, 14 Me. 216.
   Md. Cranch v. Smith, 1 Md. Ch. 401.
   Mass. Giles v. Simonds, 15 Gray 441, 77 Am. Dec. 373; Douglas v. Shumway, 13 Gray 498; Clark v. Holden, 7 Gray 8, 66 Am. Dec. 450; See Fletcher v. Livingston, 153 Mass. 388.
   Mich. Macomber v. Detroit etc. R. Co., 108 Mich. 491, 66 N.W. 376, 62 Am. St. Rep. 713, 32 L. R. A. 102; White v. King, 87 Mich. 107, 49 N. W. 518.
   Minn. Berthold v. Holman, 12 Minn. 335, 93 Am. Dec. 233.
   Mo. Kelly v. Vandiver, 75 Mo. App. 435; Keeton v. Audsley, 19 Mo. 362, 61 Am. Dec. 560.
   Nev. Peck v. Brown, 5 Nev. 81.
   N. H. Kingsley v. Holbrook, 45 N. H. 313, 86 Am. Dec. 173; Plumer v. Prescott, 43 N. H. 277.
   N. J. Porch v. Fries, 18 N. J. Eq. 204.
   N. Y. Bennett v. Scutt, 18 Barb. 347; Pierrepont v. Barnard, 6 N. Y. 279 (Reversing 5 Barb. 364); Warren v. Leland, 2 Barb. 613.
   N. C. Wall v. Williams, 91 N. C. 477.
   Ore. Schmidt v. Vogt, 8 Ore. 344.
   Pa. Brewer v. Fleming, 51 Pa. St. 102; Altemose v. Hufsmith, 45 Pa. St. 121; But *see*, Rogers v. Gilinger, 30 Pa. St. 188, 72 Am. Dec. 694; and Leidy v. Proctor, 97 Pa. St. 492.
   Tenn. New York etc. Iron Co. v. Green Co. Iron Co., 11 Heisk. 434.
   Vt. Yale v. Seely, 15 Vt. 221.
   Wis. Hicks v. Smith, 77 Wis. 146, 46 N. W. 133; Golden v. Glock, 57 Wis. 118, 15 N. W. 12, 46 Am. Rep. 32; Paine v. White, 21 Wis. 423; State v. School etc. Lands, 19 Wis. 237.
   See, 40 Cent. Dig., tit. "Property," Sec. 8.
2. Kingsley v. Holbrook, 45 N. H. 313, 86 Am. Dec. 173; Warren v. Leland, 2 Barb. (N. Y.) 613; Asher Lumber Co. v. Cornett, 58 S. W. 438, 22 Ky. L. Rep. 569, 56 L. R. A. 672; For other cases see 32 Cyc. 674, note 66.
3. Woodruff v. Roberts, 4 La. Ann. 127; Berthold v. Holman, 12 Minn. 335, 93 Am. Dec. 233; Peck v. Brown, 5 Nev. 1; Schmidt v. Voght, 8 Ore. 344; But *see*, Byasse v. Reese, 4 Metc. (Ky.) 372, 83 Am. Dec. 481; Lockeshan v. Miller, 16 Ky. L. Rep. 55; Musser v. McRae, 44 Minn. 343, 46 N. W. 673.
4. Smith v. Huie-Hodge Lumber Co., 123 La. 959, 49 So. 655. Wolff Rev. L. 1908 Vol. 3, p. 723.

their immovability, even after sale, until they are cut down.[1]

§28. Trees as Subject to Taxation and Execution. Trees constructively severed by a timber lease giving merely the right to cut and carry away the trees have been held to be subject to execution.[2] But a mere license to enter and cut timber on another's land has been held to partake of the nature of a personal trust and not to be subject to levy and sale under execution.[3]

Ordinarily trees and their fruits cannot be seized and sold as chattels until severed from the soil.[4] Timber felled after a judgment lien attached to land passes with the land at an execution sale.[5] Easements and other special rights and interests in land are taxable only when made so by statute.[6] Thus it has been held that a demise giving a lessee the right to enter, box trees, and make turpentine, did not create a taxable interest in the land,[7] even under a very inclusive statute regarding taxation;[8] and the same was held as to a right to cut timber and erect buildings.[9] However, under a Minnesota statute a right to cut trees from non-taxable railroad lands was considered a taxable interest.[10] Prior to physical severance from the soil trees are ordinarily taxable as realty;[11] but if through a valid sale trees have been constructively severed, they may be assessed to the true owner while still

1. Morgan v. O'Bannon, 125 La. 367, 51 So. 293.
2. Caldwell v. Fifield, 24 N. J. L. 150; Cf. Sparrow v. Pond, 49 Minn. 412, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103, holding blackberries on bushes not subject to execution as personalty; See 17 Cyc. 942, Note 90, 1291, Note 41.
3. Potter v. Everett, 40 Mo. App. 152; Cf. Adams v. Smith, 1 Breese (Ill.) 283; Rogers v. Elliott, 59 N. H. 201, 47 Am. Rep. 192.
4. State v. Gemmill, 1 Houst. (Del. 1855) 9, 16; Osborne & Rabe 67 Ill. 108 (1873, Nursery trees); Bank of Lansingburgh v. Crary, 1 Barb. (N. Y.) 542 (1847). But *see* Batterman v. Albright, 122 N. Y. 484 (1890 nursery trees); State v. Fowler, 88 Md. 601 (1898) and Purner v. Piercy, 40 Md. 212. Cf. Late v. McLean, 2 Nova S. Dec. 69 (1870).
5. Frank v. Magee, 49 La. Ann. 1250, 22 So. 739; Leidy v. Proctor, 97 Pa. St. 486; Duff v. Bindley, 16 Fed. 178.
6. DeWitt v. Hays, 2 Cal. 463, 56 Am. Dec. 352; Boreel v. New York, 2 Sandf. (N. Y.) 552; Willis v. Com., 97 Va. 667, 34 S. E. 460.
7. Hancock v. Imperial Naval Stores Co. 93 Miss. 822, 47 So. 177.
8. Ashe Carson Co. v. State, 138 Ala. 108, 35 So. 38.
9. Clove Springs Iron Works v. Cone, 56 Vt. 603.
10. Pine County v. Toyer, 56 Minn. 288, 57 N. W. 796.
11. Wilson v. Cass County, 69 Iowa 147, 28 N. W. 483; Williams v. Triche, 107 La. 92, 31 So. 926; Palfrey v. Connely, 106 La. 699, 31 So. 148; Fletcher v. Alcona Tp., 72 Mich. 18, 40 N. W. 36.
Cf. Cottle v. Spitzer, 65 Cal. 456 (1884.)

standing on the land of another.[1] In many States there are statutes regulating the taxation of standing timber that is owned separately from the land.[2]

Ordinarily, when land is sold because of the non-payment of taxes, the former owner of the land is entitled to the possession and enjoyment of the land until the period allowed for redemption has expired. Accordingly if the purchaser at the tax sale enters during such period without the consent of the owner and cuts timber, he is liable for trespass.[3] However, under some statutes the purchaser at the tax sale is entitled to possession until the property is redeemed, and where the purchaser has actual possession no action for trespass will lie in favor of the owner,[4] and it has been held that a redemption, or an offer to redeem, must be shown to justify an injunction restraining the tax purchaser from cutting.[5]

And although a court of equity may restrain an owner from the cutting of timber to such an extent as to injure the lien of the one who has purchased at a tax sale,[6] any cutting which does not involve a stripping of the land may be done by the owner during the redemption period, and the purchaser cannot maintain replevin for timber thus removed.[7]

When the purchaser obtains a deed after the expiration of the period for redemption, he obtains title not only to timber then standing, but also to that cut subsequent to

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1. Williams v. Triche, 107 La. 92, 31 So. 926; Globe Lbr. Co. v. Lockett, 106 La. 414, 30 So. 902; Fox v. Pearl River Lbr. Co. 80 Miss. 1, 31 So. 583.
2. Ark. Castle's Suppl. of 1911 to Kirby's Digest of 1904, Sec. 6905 (Act Apr. 7 1905, S. L. No. 146, p. 361); See also sec. 6905b-6905e (Act May 6, 1905, S. L. No. 303, p. 738, Tax Sales).
   Va. Suppl. of 1910 to Pollard Code of 1904, p. 82, Sec. 470.
   Wash. Code & Stat. 1910, Rem. & Bal. Sec. 9095-96.
   W. Va. Code 1906, Sec. 723; Code 1913 Sec. 923.
3. Sullivan v. Davis, 29 Kan. 28; Brewer v. Ireland, 67 N. J. Law 31, 50 Atl. 437; Millard v. Breckwoldt, 100 N. Y. App. Div. 44, 90 N. Y. Suppl. 890; Shalemiller v. McCarty, 55 Pa. St. 186; Wing v. Hall, 47 Vt. 182; Paine v. Libby, 21 Wis. 425.
4. Cromelin v. Brink, 29 Pa. St. 522.
5. Wright v. King, 18 Wis. 45. See also Busch v. Nester, 62 Mich, 381, 28 N. W. 911; Eureka Lumber Co. v. Terrell (Miss. 1909), 48 So. 628; 45 Cent. Dig. tit. Taxation, Sec. 1462.
6. Millard v. Breckwoldt, 100 N. Y. App. Div. 44, 90 N. Y. Suppl. 890.
7. Woodland Oil Co. v. Shoup, 107 Pa. St. 293; Shalemiller v. McCarty, 55 Pa. St. 186; Gaults Appeal, 33 Pa. St. 94; Woodland Oil Co. v. Lawrence, 1 Pennyp. (Pa.) 480; Lightner v. Mooney, 10 Watts (Pa.) 407; Lacy v. Johnson, 58 Wis. 414, 17 N. W. 246; Smith v. Sherry, 54 Wis. 114, 11 N. W. 465. But *see* Gallaher v. Head, 108 Iowa 588, 79 N.W. 387, and McKean v. Gammon, 33 Me. 187.

the sale but not removed before the title was perfected.[1] However, he can maintain no action for timber removed before the tax sale by either the owner or a trespasser.[2]

§29. The Taxation of Logs and Other Timber Products under Statute. In a number of states there are statutes regulating the taxation of sawlogs and lumber.[3] These statutes ordinarily state that such property shall be taxable in the political subdivision of the state in which it shall be on a certain fixed day of the year, unless it be in transit, in which case under provisions of the law it is taxable either at the point of shipment or at the place of destination.[4] The franchise of a boom company to require a toll on logs has been held to constitute a taxable interest.[5]

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1. Nicklase v. Morrison, 56 Ark. 553, 20 S. W. 414; See Gates v. Lindey, 104 Cal. 451, 38 Pac. 314.
2. Taylor v. Frederick, McGloin (La.) 380; Hickey v. Rutledge 136 Mich. 128, 98 N. W. 974.
3. Minn. General Stat., 1913, Tiffany, Sec. 2000, Cf. Sec. 2184.
   Miss. Code 1906, Ch. 45, Sec. 9, p. 179.
   N. H. Public Stat. 1901, Ch. 56, Sec. 16, p. 207; Amendment, Suppl. to Stat. 1913, p 105; Cf. Acts July 4, 1860, S. L. Ch. 2351; Act Aug. 16, 1878, S. L. Ch. 48.
   Wis. Statutes, 1913, Sec. 1040, Paragraph 4.
4. Me. See Farmingdale v. Berlin Mills Co., 45 Atl. 39; Bradley v. Penobscot Chemical Fibre Co. 104 Me. 276.
   Mich. See Mitchell et al v. Lake Township, 85 N. W. 865.
   N. H. See Berlin Mills Co. v. Wenthworth's Location, 60 N. H. 156.
5. Chehalis Boom Co. v. Chehalis Co., 63 Pac. 1123 (Wash.) But *see* State v. A. Wilbert's Sons Lbr. Co., 51 La. Ann. 1223, 26 So. 106; State v. Barnes, 35 S. E. 605 (Lumber Dealer). N. C. case.

CHAPTER IV

LIABILITY OF TENANT AS TO WASTE

§30. The Definition of Waste. Uner the English common law as developed at the time of the formation of the American Union an obligation rested upon every tenant of land to treat the premises in such manner that no harm should be done them and that the estate should revert to those having an underlying interest, undeteriorated by any wilful or negligent act. Any violation of this obligation by a tenant was considered an act of waste.[1] Legal waste has been defined as any spoil or destruction, done or permitted, to lands, houses, gardens, trees, or other corporeal hereditaments, by the tenant thereof, to the prejudice of the heir, or of the reversioner or the remainderman.[2] An American court in stating the English common law doctrine of waste has said that any act or omission of duty by a tenant of land which does a permanent and substantial injury to the freehold or inheritance is waste.[3]

§31. The Development of the Doctrine of Waste. In the early development of the common law the only persons against whom the legal action called waste could be successfully maintained were the tenants of estates created by act of law.[4] It was held that where an estate was created by act of law there was an obligation assumed by the law to insure that the estate should finally be turned over to the one entitled to the fee undiminished as a result of the intervening estate which the law had created.[5] Unless restrained by particular words from committing waste, tenants for life, for years or at will were not liable

1. 40 Cyc. Law and Proc., Ed. 1904, p. 498. Am. and Eng. Ency, of Law, 2d Ed., Vol. 30, p. 236.
2. Black's Law Dictionary.
3. King v. Miller, 99 N. C. 593, 6 S. E. 660.
4. 40 Cyc. 512. For contrary view see Land. & Ten., Tiff. 1910, p. 724.
5. Am. & Eng. Ency, of Law, 2d Ed. Vol. 30, p. 259.

for waste; upon the theory, evidently, that in all estates created by conveyance or deed it was the duty of the party creating the estate to provide such protection for the reversion or remainder as was necessary. It was found advisable to widen the scope of the action of waste as a protection against the destruction or diminution of landed estates by persons occupying them temporarily under wills, leases, etc. Accordingly, the Statutes of Marlbridge[1] and Gloucester[2] extended the common law action for waste to tenancies for life and for years, but these statutes did not specifically include tenancies at will.

§32. Waste under Tenancies of Dower and Curtesy and for Definite Periods. Tenancy of real estate by either the right of dower or that of curtesy is essentially a life estate. The incidents of such an estate are substantially the same as those enjoyed by a life tenant and the general rules of liability for waste applicable to a life estate will be applied in legal controversies arising in connection with the use of realty by one claiming either by dower or curtesy. Furthermore, the rules of law as to waste which are enforced against a life tenant are likewise applicable to a tenant for years or from year to year.

§33. Waste by Tenants at Will. In addition to the fact that tenancies at will were not covered by the Statutes of Marlbridge and of Gloucester, the courts considered that the other legal remedies available for a landlord, who could at any time enter and thus end the tenancy at will, were sufficient.[3] Although this theoretical distinction between a tenancy at will and the other forms of tenancy has been generally observed in England, and although authorities have announced this distinction as an American rule of law,[4] it appears that American courts have held tenants at will to be guilty of waste.[5]

1. St. 52 Henry III, Chap. 23, Sec. 2, A. D. 1267.
2. St. 6 Edw. I, Chap. 5, A. D. 1278.
3. Eng. & Am. Ency. of Law, 2d Ed. Vol. 30, p. 269, Note 6.
4. 40 Cyc. 512.
5. In the cutting of timber. Suffern v. Townsend, 9 Johns, (N. Y.) 35; Phillips v. Covert, 7 Johns (N. Y.) 1; Wright v. Roberts, 22 Wis. 161.
   In destroying fruit trees. Bellows v. McGinnis, 17 Ind. 64; Cf. Freeman v. Headley, 33 N. J. L. 523; and Chalmers v. Smith, 152 Mass. 561.
   Contra. Coale v. Hannibal, etc. R. Co., 60 Mo. 227; Lothrop v. Thayer, 138 Mass. 466. However, both of these cases refer to permissive waste.

§34. Commissive, Permissive and Equitable Waste. Different forms of waste were recognized by the common law. Any positive action on the part of the tenant which resulted in a permanent and substantial injury to the inheritance constituted what was known as voluntary waste. Any neglect, or omission, of a legal duty which resulted in such injury was known as permissive waste. Thus if a tenant tore down a building or cut down a growing timber tree he would be held liable for voluntary waste while if he suffered a building to become ruinous or allowed young timber trees to be destroyed through neglect he might be held liable for permissive waste. There was still another form of waste for which the common law afforded no adequate remedy but of which cognizance was taken in the equity court. This was called "equitable waste" and arose when a tenant did something which was not inconsistent with his legal rights, but which, nevertheless, was not such as a prudent man would do in the management of his own property and which actually resulted in an injury to the inheritance. It has been said that the doctrine of equitable waste has not been developed in the United States.[1] However, the doctrine has been defined in American cases.[2]

There appears to have been much doubt and conflict of opinion as to whether the Statutes of Marlbridge and of Gloucester comprehended permissive as well as voluntary, or commissive, waste. This uncertainty as to the law has found expression in conflicting American opinions.[3] The weight of opinion seems to be that in the United States

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1. Landlord and Tenant. Tiffany, Ed. 1910, p. 721.
2. Belt. v. Simkins, 113 Ga. 894; Clement v. Wheeler, 25 N. H. 361; Gannon v. Peterson, 193 Ill. 372; Chapman v. Epperson Circled Heading Co., 101 Ill. App. 164.
3. Following hold tenant liable for permissive waste. Moore v. Townshend, 33 N. J. L. 284; Cargill v. Sewall, 19 Me. 288; White v. Wagner, 4 Harr. & J. (Md.) 373, 7 Am. Dec. 674; Stevens v. Rose, 69 Mich. 259, 37 N. W. 305; Newbold v. Brown, 44 N. J. L. 266; Sampson v. Grogan, 21 R. I. 174, 42 Atl. 712, 44 L. R. A 711; Parrott v. Barney, 18 Fed. Cas. No. 10,773a, Deady 405.
   Contra Danziger v. Silberthau, 18 N. Y. Suppl. 350, 21 N. Y. Civ. Proc. 283; Shult v. Barker, 12 Serg. & R. (Pa.) 272; Smith v. Follansbee, 13 Me. 273; Richards v. Tarbert, 3 Houst. (Del.) 172; Smith v. Mattingly, 96 Ky. 228, 28 S. W. 203, 16 Ky. L. Rep. 418.

tenants for life[1] and for years[2] are liable for permissive waste, but tenants at will are not liable for permissive waste[3] on the ground largely that the tenancy is too uncertain for the tenant to assume obligations as to repair, etc.[4] Thus upon the theory that the Statutes of Marlbridge and Gloucester form a part of the common law in the United States, except as modified by American statutes,[5] American courts have held that, in the absence of a special agreement to the contrary, a tenant is ordinarily responsible for waste committed on the premises of which he has lawful possession, by whomever committed, unless such waste is the result of an act of God, of a public enemy, or of the person holding the unltimate fee.[6]

§35. Waste under a Joint Tenancy or a Tenancy in Common. Under the early common law a tenant in common or joint tenant[7] could not be held for waste, but the statute of Westminster II[8] gave to every tenant in common the right to bring an action for waste against his co-tenant.[9] To remove any doubt as to the liability of co-tenants for waste statutes have been enacted in many American states under which relief against waste is given a tenant in common.[10] In some jurisdictions the common law as modi-

1. Miller v. Shields, 55 Ind. 71; Stevens v. Rose, 69 Mich. 259; Wilson v. Edmonds, 24 N. H. 517; Schulting v. Schulting, 41 N. J. Eq. 130; Moore v. Townshend, 33 N. J. L. 284; Harvey v. Harvey, 41 Vt. 373. *Contra* Richards v. Torbert, 3 Houst. (Del.) 172.
2. White v. Wagner, 4 Harr & J. (Md.) 373; Moore v. Townshend, 33 N. J. L. 284; Newbold v. Brown, 44 N. J. L. 266; Suydam v. Jackson, 54 N. Y. 450; Long v. Fitzsimmons, 1 W. & S. (Pa.) 530.
3. Lothrop v. Thayer, 138 Mass. 466. Harnett v. Maitland, 16 M. & W. 257.
4. Moore v. Townshend, 33 N. J. L. 284.
5. Parker v. Chanbliss, 12 Ga. 235; Sackett v. Sackett, 8 Pick. 309; Chase v. Hazelton, 7 N. H. 171; Sherrill v. Conner, 107 N. C. 543, 12 S. E. 588; Dozier v. Gregory, 46 N. C. 100; Parrott v. Barney, 18 Fed. Cas. No. 10773a, Deady 405. But *see*, Stetson v. Day, 51 Me. 434; Smith v. Follansbee, 13 Me. 273; Moss Point Lumber Co. v. Harrison County, 89 Miss. 448, 42 So. 290, 293; Hamden v. Rice, 24 Conn. 350.
6. Miller v. Shields, 55 Ind. 71; Babb v. Perley, 1 Me. 6; Neel v. Neel, 19 Pa. St. 323; Real Prop. Tiff., Sec. 254, N. 234-5.
7. Nelson v. Clay, 7 J. J. Marsh (Ky.) 138, 23 Am. Dec. 387; 23 Cyc. 492.
8. 13 Edw. I, Chap. 22, A. D. 1285.
9. Shiels v. Stark, 14 Ga. 429; Nelson v. Clay, supra.
10. Cal. McCord v. Oakland Quicksilver Min. Co., 64 Cal. 134; 49 Am. Rep. 686.
    Ga. Shiels v. Stark, 14 Ga. 429.
    Ill. Murray v. Haverty, 70 Ill. 318.
    Ky. Nevels v. Ky. Lumber Co. 108 Ky. 550; Nelson v. Clay, 7 J. J. Marsh 138, 23 Am. Dec. 387.
    Me. Maxwell v. Maxwell, 31 Me. 184, 50 Am. Dec. 657; Hubbarb v. Hubbard, 15 Me. 198; Moody v. Moody, 15 Me. 205.

(Foot note 10 continued on next page)

fied by the Statute of Westminster II has been held applicable and co-tenants have been held liable for waste without a statutory provision.[1]

Rather more liberty than is enjoyed by life tenants appears to have been given to tenants in common and joint tenants so long as the action of the tenant could be considered consistent with a reasonable enjoyment of the estate, but any action by such a tenant that is not necessary to a reasonable enjoyment of the estate which he holds will be restrained in accordance with the general principles of waste applicable to other forms of tenancy. Possibly it may be said that the right of use is somewhat broader, but there is no special liberty to go beyond the limitations of such use as is considered reasonable.

§36. The Avoidance of Liability for Waste. Through the use of proper words,[2] or by other evidence of intention, in the creation of an estate a tenant of any class may hold "without impeachment for waste." Against one holding under such a tenancy an action at law cannot be brought to prevent the doing of acts which would ordinarily constitute waste, nor can the tenant be compelled to account for an injury done to the inheritance.[3] However, even where

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(Foot note 10 concluded from preceding page)

Mass. Jenkins v. Wood, 145 Mass, 494; Byam v. Bickford, 140 Mass. 31.

Mich. Benedict v. Torrent, 83 Mich. 181, 21 Am. Dec. 589.

Minn. Shepard v. Pettit, 30 Minn. 119.

Mo. Childs v. Kansas City, Etc. R. Co. (Mo. 1891) 17 S. W. Rep. 954.

N. Y. Cosgriff v. Dewey, 164 N. Y. 1; Aff. 21 N. Y. App. Div. 129; Elwell v. Burnside, 44 Barb. 447.

N. C. Morrison v. Morrison, 122 N. C. 598; Hinson v. Hinson. 120 N. C. 400; Smith v. Sharpe, Busb. L. (44 N. C.) 91, 57 Am. Dec. 574; See Darden v. Cowper, 7 Jones L. (52 N. C.) 210, 75 Am. Dec. 461.

S. C. Hancock v. Day, McMull, Eq. (S. C.) 69, 36 Am. Dec. 293; Johnson v. Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72.

W. Va. Cecil v. Clark, 47 W. Va. 402; Williamson v. Jones, 43 W. Va. 562.

For destruction of trees, a tenant has an action on the case in the nature of waste, against his co-tenant but never an action of trespass *quare clausum fregit*. Anders v. Meredith, 4 Dev. & B. L. (20 N. C.) 199, 34 Am. Dec. 376. Cf. Smith v. Sharp, 44 N. C. 91, 57 Am. Dec. 574.

Childs v. Kansas City Et. R. Co. 117 Mo. 414, 17 S. W. 954, held that where one tenant occupies land to exclusion of co-tenant, he is liable for waste irrespective of statute such as 4th and 5th Anne, but Prescott v. Nevers, 4 Mason (U. S.) 326, 19 Fed. Cas. No. 11,390, holds contrary.

1. Dodge v. Davis, 85 Io. 77; Johnson v. Johnson, 2 Hill Eq. 277, 29 Am. Dec. 72; Hancock v. Day, McMull. Eq. (S. C.) 69, 36 Am. Dec. 293; Thompson v. Bostwick, McMull. Eq. (S. C.) 75.

2. Belt v. Simkins, 113 Ga. 894, 39 S. E. 490; Chapman v. Epperson Circled Heading Co., 101 Ill. App. 161; Stevens v. Rose, 69 Mich. 259, 37 N. W. 205; Webster v. Webster, 33 N. H. 18, 66 Am. Dec. 705; McDaniel v. Callan, 75 Ala. 329.

3. 40 Cyc. 500.

a tenant holds realty without impeachment for waste, he cannot lawfully commit malicious waste and if his action is unconscientious a court of equity will restrain him as one committing equitable waste.[1] It should be noted that waste is an injury to the estate by one who is rightfully in possession, while trespass is an injury by one who is a stranger to the title and has no right whatever to the property.

§37. **The Essential Elements of Waste.** Although it has always been the rule in common law that there was a presumption that waste had not been committed or contemplated by the one charged with it,[2] and that the complainant must show that an injury to the inheritance had been, or was about to be, done,[3] yet the doctrine of waste has been very strictly construed against the one in possession under a life estate or other tenancy whenever the plaintiff succeeded in establishing a permanent and substantial injury. The essence of the doctrine was that the reversioner, remainderman, or other owner of the fee was entitled to have the property come to him, after the termination of the tenancy, in substantially the same form in which it was at the time the tenant took possession. Acts which actually increased the pecuniary value of the inheritance but nevertheless tended to destroy the identity of the property, to increase the burden upon it or to impair the evidence of title were held to constitute waste.[4] Such waste has been called "meliorating waste." A legal duty rested upon the tenant to preserve the character of the estate, and, as a matter of law, irrespective of whether the market value of the estate or its capacity for producing income were actually diminished or increased, it was waste for him either to convert woodland into arable land or pasturage, or to permit arable land or pasturage to grow up to brush or woods.

1. Clement v. Wheeler, 25 N. H. 361; Duncombe v. Felt, 81 Mich. 332, 45 N. W. 1004; Stevens v. Rose, 69 Mich. 259, 37 N. W. 205; Kane v. Vanderburgh, 1 Johns, Ch. (N. Y.) 11. For English cases see: 16 Cyc. 627; 40 Cyc. 500.
2. Lynn's App., 31 Pa. St. 44, 72 Am. Dec. 721; Rutherford v. Wilson, 95 Ark. 246, 129 S. W. 534; Morris v. Knight, 14 Pa. Super. Ct. 324; Glass v. Glass, 6 Pa. Co. Ct., 408.
3. Morris v. Knight, 14 Pa. Super. Ct. 324.
   Act must be more than merely bad husbandry. Patterson v. Central Canada Loan, Etc. Co., 29 Ont. 134.
4. Palmer v. Young, 108 Ill. App. 252, 255; McCullough v. Irvine, 13 Pa. St. 438; Livingston v. Reynolds, 26 Wend. (N. Y.) 115.

CHAPTER V

THE DOCTRINE OF WASTE AS APPLIED TO TIMBER

§38. Right of Tenant to Estovers. Under the common law a person who is lawfully in possession of land through life tenancy, dower, curtesy, tenancy in common, tenancy for years, or tenancy from year to year, if not restrained by a stipulation to the contrary, is entitled to estovers, or botes; i. e., he may take from the premises, if available, so much wood as is needed for fuel, fences, agricultural equipment and other necessary repairs and improvements.[1] However, if the amount of wood available for fuel is limited, or the only trees growing upon the premises are of such species or character as to be especially valu-

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1. Co. Litt., 41 b, 53 b, 54 b; 2 Minor's Inst. 531; Lee v. Alston, 1 Ves. Jr. 78; Landlord and Tenant, Tiffany, Ed. 1910, p. 714.
   - Ala. Alexander v. Fisher, 7 Ala. 514.
   - Del. Harris v. Goslin, 3 Harr. 340.
   - Ga. Dickenson v. Jones, 36 Ga. 97.
   - Ind. Walters v. Hutchins Admsx, 29 Ind. 136; Miller v. Shields, 55 Ind. 71.
   - Iowa. Anderson v. Cowan, 125 Iowa 259, 101 N. W. 92, 68 L. R. A. 641, 106 Am. St. Rep. 303.
   - Ky. Calvert v. Rice, 91 Ky. 533, 16 S. W. 35, 34 Am. St. Rep. 240; Loudon v. Warfield, 28 Ky. (5 J. J. Marsh) 196; Hinton v. Fox, 3 Litt. (Ky.) 380.
   - La. Patureau v. Wilbert, 44 La. Ann. 355, 10 So. 782.
   - Mass. Padelford v. Padelford, 24 Mass. (7 Pick.) 152; Hubbard v. Shaw, 92 Mass. (12 Allen) 120; Dorrell v. Johnson, 17 Pick. 263.
   - N. H. Smith v. Jewett, 40 N. H. 530; Webster v. Webster, 33 N. H. 18, 66 Am. Dec. 705; Miles v. Miles, 32 N. H. 147, 64 Am. Dec. 362.
   - N. J. Den v. Kinney, 55 N. J. L. 552.
   - N. Y. Gardiner v. Derring, 1 Paige 573; Harder v. Harder, 26 Barb. 409; Van Deusen v. Young, 29 N. Y. 9.
   - N. C. Parkins v. Cox, 3 N. C. 339.
   - Ohio Kent v. Bentley, 3 Ohio St. 173.
   - Pa. Morris v. Knight, 14 Pa. Super. Ct. 324; Beam v. Woolridge, 3 Pa. Co. Ct. 17.
   - R. I. Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621.
   - S. C. Smith v. Poyas, 2 Desauss. Eq. 65.
   - Wis. Wright v. Roberts, 22 Wis. 161. But see Leyman v. Abeel, 16 Johns (N. Y.) 30; Livingston v. Ketcham, 1 Barb. (N. Y.) 592; Van Rensiaer v. Radcliff, 10 Wend. (N. Y.) 639.
   - U. S. Loomis v. Wilbur, 15 Fed. Cas. 8,498, 5 Mason 13. Canada Titus v. Sulis, 3 Nova Scotia 497; Campbell v. Shields, U. C. Q. B. 449; St. Paul's Church v. Titus, 6 N. Brunsw. 278.

able for building purposes, or ornamental or protective uses, the right of the tenant to estovers will be restricted to such extent as a prudent management of the estate shall require.[1]

§39. Waste in England. Both the general policy of the English common law to preserve the established character of land while in the possession of others than those holding the fee simple title and the relative scarcity in England of forests containing trees suitable for construction purposes served to cause English courts to show the greatest consideration to property rights in growing trees, and the cutting of certain kinds or classes of trees, known as "timber trees," by a tenant was early determined to be waste against which summary relief would be given. The word "timber" was used technically in English law to denote green trees of an age of twenty years, or by the custom of the place of even a greater age, such as oak, ash, elm and other trees, the wood of which was adapted to constructional uses.[2] The determination of whether certain species should be considered timber trees in contemplation of law depended upon the custom of the locality where the question of waste arose.[3] In England it is waste to cut any timber tree, or to permit it to be cut,[4] except upon land where it has been the custom to fell suitable wood at intervals as a part of the regular profits.[5] The exception has been announced in the consideration of cases involving

1. 7 Bac. Abr. 252; Simmons v. Norton, 7 Bing. 640, 20 E. C. L. 270; Arch Deacon v. Jennor, Cro. Eliz. 604; Hogan v. Hogan, 102 Mich. 641; Rutherford v. Aiken, 3 Thomp. & C. (N. Y.) 60; Gorges v. Stanfield, Cro. Eliz. 593. (Present repairs only.)
2. Co. Litt. 53a; Comyn's Dig. "waste," D; 5; 2 Roll. 28 1. 10; 3 Danes Abr. 218, 233; Tudor's Lead. Cas. 65, Ambrey v. Fisher, 10 East 446; Chandos v. Talbot, 2 P. Wms. 606; Honywood v. Honywood, L. R. 18 Eq. 306, 43 L. J. Ch. 652, 30 L. T. Rep. N. S. 671, 22 Wkly, Rep. 749; Dunn v. Bryan, Ir. R. 7 Eq. 143; Dashwood v. Magniac (1891) 3 Ch. 306; Dickenson v. Jones, 36 Ga. 97; Kidd v. Dennison, 6 Barb. (N. Y.) 9; Jackson v. Brownson, 7 Johns (N. Y.) 227, 5 Am. Dec. 258. See Landlord & Tenant, Tiffany, St. Paul 1910, p. 711, Sec. 109.
3. Honywood v. Honywood, L. R. 18 Eq. 306, 43 L. J. Ch. 652, 30 L. T. Rep. N. S. 671. 22 Wkly, Rep. 749; Cook v. Cook, Cro. Car. 531, 79 Eng. Reprint 1059; Cumberland's Case, Moore K. B. 812, 72 Eng. Reprint 922; Chandos v. Talbot, 2 P. Wms. 606, 24 Eng. Reprint 877; Coke Litt. 53a; Bewes, Waste 98; Guffly v. Pindar, Hob. 219; Bullen v. Denning, 5 B. & C. 842.
4. See Bond v. Lockwood, 33 Ill. 212; McGregor v. Brown, 10 N. Y. 114; Ward v. Sheppard, 3 N. C. 283, 2 Am. Dec. 625; Glass v. Glass, 6 Pa. Co. Ct. 408; Brown v. O'Brien, 4 Pa. L. J. 454; Profitt v. Henderson, 29 Me. 325; Keeler v. Eastman, 11 Vt. 293.
5. Perrot v. Perrot, 3 Atk. 94; Ferrand v. Wilson, 4 Hare 344; Dashwood v. Magniac (1891) 3 Ch. 306.

the right of a tenant for life under a demise or settlement, but, apparently the same rule would obtain under a lease, except as the lease itself should extend or abridge the right to cut timber.

§40. **Waste in America.** Because of the large quantity of wild and wooded land which has heretofore always existed in most parts of America, and the consequent supply of construction timber readily available, the distinction between timber trees and non-timber trees which obtained under the common law as administered in England has been softened and evaded by American courts. The distinction still exists in the law but the differentiation is not so clear as formerly and the test as to whether the cutting of certain trees constitutes waste has become one as to the purpose of the cutting and the actual effect of the cutting upon the estate as capital, or a source of income, rather than one as to the intrinsic character of the individual trees cut.[1] A marked modification of the English doctrine of waste has resulted. Acts which in England would unquestionably constitute waste are not considered waste in the United States.[2] All related facts and surrounding circumstances, including the relation to the land which is sustained by the tenant, will be taken into consideration in each case that arises under the American doctrine of legal waste.[3]

§41. **General Principles in both England and America.** The common law rule still obtains that trees which are not classed as timber trees, either by general, or by local, custom, may, generally speaking, be cut by a tenant in reasonable quantity without liability for waste.[4] The

1. Babb v. Perley, 1 Me. 6; Cannon v. Barry, 59 Miss. 289.
2. Drown v. Smith, 52 Me. 141; Crockett v. Crockett, 2 Ohio St. 180.
   See citations under Note 37, 16 Cyc. 627.
3. Moss Point Lumber Co. v. Harrison County, 89 Miss. 448, 42 So. 290, 873; Webster v. Webster, 33 N. H. 18, 25, 66 Am. Dec. 705; McCullough v. Irvine, 13 Pa. St. 438. Am. & Eng. Ency. Law, 2d Ed., Vol. 30, p. 240; Note 4. 40 Cyc. 501; Cf. Acts of Ex'r and Adm'r, McNichol v. Eaton, 77 Me. 246; McCracken v. McCracken, 6 T. B. Mon. (Ky.) 342. Finley v. Pearson, 76 S. W. 374, 25 Ky. L. Rep. 766; Gordon v. West, 8 N. H. 444; Costo v. Kurz, 27 W.Va. 750; Overton v. Overton, 10 La. 472.
   Acquiescence in waste by another. Pearson v. Darrington, 32 Ala. 227.
4. Zimmerman v. Shreeve, 59 Md. 357; Miles v. Miles, 32 N. H. 147, 64 Am. Dec. 362; 4 Kent's Com. 73. Am. Eng. Enc. Law V. 28 p. 537, 2d ed.

tenant may, therefore, cut the inferior species and inferior individuals of the timber species provided the removal of timber is not of such extent or done in such manner as to destroy the character of the land as woodland.[1] Such wood is considered somewhat like an ordinary crop on the land, and is called "underwood" in some English authorities. The cutting of dead trees, or "dotards," by a tenant for the clearing of land, the giving of better opportunity for growth to the green timber, or simply for use is not waste;[2] and in an American case, involving a question of waste, the court held that evidence tending to show that the trees cut and sold were in a dying condition was properly admissible.[3] In England and, generally at least, in the United States trees capable of forming the subject matter of waste belong to the owner of the inheritance after severance whether severed by act of the tenant,[4] of a third party,[5] or by the elements[6] and the tenant will be guilty of waste if he appropriate timber trees blown down by storm.[7] However, trees which the tenant may lawfully cut, without waste, belong to the tenant,[8] and he is entitled to the proceeds, whether they have been severed by himself,[9] by the lessor,[10] by a third party,[11] or by the elements,[12] and the tenant is not guilty of waste in removing such

1. Hogan v. Hogan, 102 Mich. 641, 61 N. W. 73.
   See Landlord and Tenant, Tiffany, Ed. 1910, p. 711, Sec. 109.
2. Co. Litt. 53a; Herlakenden's Case, 4 Coke 62; Gage v. Smith, 2 Rolle Abr. 817; Cowley v. Wellesley, L. R. 1 Eq. 656, 3 Beav. 635, 14 L. T. Rep. N. S. 425, 14 Wkly. Rep. 528, 55 Eng. Reprint 1043; Perrot v. Perrot, 3 Atk. 94, 26 Eng. Reprint 857; Sawyer v. Hoskinson, 110 Pa. 473, 1 Atl. 308; Keeler v. Eastman, 11 Vt. 293; King v. Miller, 99 N. C. 583, 6 S. E. 660; Waples v. Waples, 2 Harr. (Del.) 28; Drown v. Smith, 52 Me. 141; Kent v. Bentley, 3 Ohio Dec. 173; Houghton v. Cooper, 6 B. Mon. (Ky.) 281.
3. Morris v. Knight, 14 Pa. Super. Ct. 324.
4. Bulkley v. Dolbeare, 7 Conn. 232; White v. Cutler, 34 Mass. (17 Pick.) 248, 28 Am. Dec. 296; Johnson v. Johnson, 18 N. H. 594; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411; Hill v. Burgess, 37 S. C. 604, 15 S. E. 963; Richardson v. York, 14 Me. 216; Lester v. Young, 14 R. I. 579.
5. Lane v. Thompson, 43 N. H. 320; See Porch v. Fries, 18 N. J. Eq. 204.
6. Stonebreaker v. Zollickoffer, 52 Md. 154, 36 Am. Rep. 364.
7. Ward v. Andrews, 2 Chit. 636, 18 E. C. L. 435; Mooers v. Wait, 3 Wend. (N. Y.) 104; Cf. Shult v. Barker, 12 Serg. & R. (Pa.) 272.
   Wind-thrown trees pass with land as realty; Leidy v. Procter, 97 Pa. St. 486; See also Am. & Eng. Ency. Law, Vol. 30, p. 305, Note 2.
8. Mooers v. Wait, 3 Wend. (N. Y.) 104; Hastings v. Cruncleton, 3 Yeates (Pa.) 261; Crockett v. Crockett, 2 Ohio St. 180; Lewis v. Godson, 15 Ont. 252.
9. Profitt v. Henderson, 29 Mo. 325; Clement v. Wheeler, 25 N. H. 361; Crockett v. Crockett, supra; Keeler v. Eastman, 11 Vt. 293.
10. Am. & Eng. Ency. Law, Vol. 30, p. 304.
11. Ibid.; Land & Ten., Tiffany, Ed. 1910, p. 737.
12. Ibid.

trees when blown down by a storm.[1] The parts of wind-thrown timber that are fit only for wood belong to the tenant.[2] Similarly, when a tenant holds without impeachment for waste trees which have been cut belong to the tenant by whomever severed.

§42. Limitations upon the Amount of Timber A Tenant May Cut. The amount of wood and timber which can be cut by any tenant without waste is only such as is reasonably necessary to the enjoyment of the estate which he holds.[3] He is entitled to take that which is suitable for the uses permitted and may, ordinarily, take that which is conveniently situated.[4] The taking of a reasonable amount for fuel for the use of servants living on the land, either in the same house or in another, has been permitted.[5] However, the allowance for firewood for servants or employees will not be liberally extended and it has been held that on a farm of one hundred and sixty-five acres a tenant for life was not entitled to firewood for the dwelling of a laborer on the premises in addition to that needed for the principal dwelling.[6] The tenant cannot take growing timber trees for firewood when there is a sufficient quantity of dead timber or inferior trees available.[7]

The right to cut timber for repairs has been held to exist even where the tenant had agreed to make repairs at his own expense,[8] and the right has been considered so fundamental that a tenant for life could cut timber for the construction of a new building in place of one that had become dilapidated, or ruinous.[9] Yet, he cannot take tim-

1. Houghton v. Cooper, 6 B. Mon. (Ky.) 281; Shult v. Barker, 12 Serg. & R. (Pa.) 272; See Am. & Eng. Ency. Law, 2 Ed., Vol. 30, p. 242.
2. Stonebreaker v. Zollickoffer, 52 Md. 154, 36 Am. Rep. 364.
3. Zimmerman v. Shreeve, 59 Md. 357; Miles v. Miles, 32 N. H. 147, 64 Am. Dec. 362; Smith v. Jewett, 40 N. H. 530; Simmons v. Norton, 7 Bing. 640; Doe v. Wilson, 11 East. 56; Pardoe v. Pardoe, 82 L. T. Rep. N. S. 547; Padelford v. Padelford. 24 Mass. (7 Pick.) 152; Phillips v. Allen. 89 Mass. (7 Allen) 115; Johnson v. Johnson, 18 N. H. 594; Anderson v. Cowan, 125 Iowa 259, 101 N. W. 92, 68 L. R. A. 641, 106 Am. St. Rep. 303.
4. Webster v. Webster, 33 N. H. 18, 66 Am. Dec. 705; Rutherford v. Aiken, 2 Thomps & C. (N. Y.) 281, (3 Thomps. & C., p. 60.)
5. Smith v. Jewett, 40 N. H. 530; Gardiner v. Derring, 1 Paige (N. Y.) 573.
6. Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 604.
7. Hogan v. Hogan, 102 Mich, 641, 61 N. W. 73.
8. Harder v. Harder, 26 Barb. (N. Y.) 409; See Coke Litt. 54 b.
9. Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 601.

ber for repairs made necessary by his own fault,[1] nor to rebuild a structure destroyed by an act of God.[2] Timber cannot be used for the making of repairs to an extent greater than is necessary.[3] If there are mines upon the premises which the tenant is entitled to work he may, in the absence of special restrictions, take the timber necessary for mining operations, at least to the extent to which timber has previously been taken from the premises for such purposes.[4] A life tenant has been permitted to use wood in the operation of salt works[5] upon the premises and on principle the right should be extended to other industries which have customarily been conducted upon the premises or which may reasonably be considered one of the privileges incident to the enjoyment of the possession of the premises.[6]

§43. The Relationship Between the Possession of Land and Use of Timber Must be Intimate. A tenant cannot take wood or timber for use at other times[7] or upon other premises,[8] or for an industrial enterprise which is conducted upon the same premises but which bears no intimate relation to the land, or its possession, and for which no special provision was made in the demise or other instrument under authority of which the premises are held,[9] and it has been held that the cutting of wood by a life tenant for the burning of brick which were to be sold constituted waste.[10] In the absence of express stipulations granting him the privilege American courts generally hold that a tenant for life

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1. Co. Litt. 53b.
2. Miller v. Shields, 55 Ind. 71.
3. Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 601; Gorges v. Stanfield, Cro. Eliz. 593.
4. Neel v. Neel, 19 Pa. St. 323.
5. Findlay v. Smith, 6 Munf. (Va.) 134, 18 Am. Dec. 733.
   See Bond v. Godsey, 99 Va. 564, 39 S. E. 216, where in estimating commuted value of estate in curtesy court declined to exclude share in value of standing timber, and McCaulay v. Dismal Swamp Land Co. 2 Rob. (Va.) 507, giving dower in profits of timber cutting .
6. Den v. Kinney, 5 N. J. L. 634; Wilson v. Smith, 5 Yerg. (Tenn.) 379.
7. Morehouse v. Cotheal, 22 N. J. L. 521; Kidd v. Dennison, 6 Barb. (N. Y.) 9.
8. Armstrong v. Wilson, 60 Ill. 226.
9. McCracken v. McCracken, 6 T. B. Mon. (Ky.) 342.
10. Livingston v. Reynolds, 26 Wend. (N. Y.) 115.

or for years has no right to cut for sale[1] either timber trees or those fit only for firewood, nor to exchange the same either for fuel[2] or for materials for repairs;[3] and some courts have declined to accept as a justification for such exchange the proffered showing of the tenant that he procured fuel or repair timber elsewhere and that he took no more from the premises than was allowable.[4] On the other hand it has been held in some jurisdictions that a

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1. Ala. Ladd v. Shattuck, 90 Ala. 134, 7 So. 764.
Ark. Rutherford v. Wilson, (1910) 129 S. W. 534; McLeod v. Dial, 63 Ark. 10, 37 S. W. 306.
Del. Fleming v. Collings, 2 Del. Ch. 230.
Ga. Smith v. Smith, 105 Ga. 106, 31 S. E. 135; Jones v. Gammon, 123 Ga. 47, 50 S. E. 982.
Ind. Miller v. Shields, 55 Ind. 71; Modlin v. Kennedy, 53 Ind. 267.
Ky. Loudon v. Warfield, 5 J. J. Marsh 196; Brashear v. Macey, 3 J. J. Marsh 93.
Mass. Padelford v. Padelford, 24 Mass. (7 Pick.) 151; Noyes v. Stone, 163 Mass. 490, 40 N. E. 856.
Me. Babb v. Perley, 1 Me. 6; Richardson v. York, 1 Me. 216.
Mich. Duncombe v. Felt, 81 Mich, 332, 45 N. W. 1004; Webster v. Peet, 97 Mich. 326.
Miss. Moss Point Lumber Co. v. Harrison Co., 89 Miss. 448, 42 So. 290, 873; Warren Co. v. Gans, 80 Miss. 76, 31 So. 539; Learned v. Ogden, 80 Miss. 769, 32 So. 278, 92 Am. St. Rep. 621.
Mo. Profitt v. Henderson, 29 Mo. 325; Davis v. Clark, 40 Mo. App. 515.
N. H. Chase v. Hazelton, 7 N. H. 171; Fuller v. Wason, 7 N. H. 341; Webster v. Webster, 33 N. H. 18, 60 Am. Dec. 705; Johnson v. Johnson, 18 N. H. 594.
N. J. Morehouse v. Cotheal, 22 N. J. L. 521; Van Syckel v. Emery, 18 N. J. Eq. 387.
N. Y. Robinson v. Kinne, 70 N. Y. 147; Kidd v. Dennison, 6 Barb. 9; Weatherby v. Wood, 29 How. Pr. 404; Sarles v. Sarles, 3 Sandf. Ch. 601; Van Deusen v. Young, 29 N. Y. 9; Clarke v. Cummings, 5 Barb. 339; Schermerhorn v. Buell, 4 Denio 422; Mooers v. Wait, 3 Wend. 104, 20 Am. Dec. 667; People v. Davidson, 4 Barb. 109.
N. C. Ward v. Sheppard, 3 N. C. 283, 2 Am. Dec. 625; Parkins v. Cox, 3 N. C. 339; Davis v. Gilliam, 40 N. C. (5 Ired. Eq.) 308; Dorsey v. Moore, 100 N. C. 41, 6 S. E. 270; Jones v. Britton, 102 N. C. 166, 9 S. E. 554, 4 L. R. A. 178.
Ohio. Crockett v. Crockett, 2 Ohio St. 180.
Pa. Glass v. Glass, 6 Pa. Co. Ct. 468.
R. I. Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621; Lester v. Young, 14 R. I. 579.
S. C. Hill v. Burgess, 37 S. C. 604, 15 S. E. 963.
Texas Johnson v. Gurley, 52 Tex. 222.
U. S. Thurston v. Muston, 23 Fed. Cas. No. 14,013, 3 Cranch. C. C. 335.
Can. Titus v. Sulis, 3 Nova Scotia Dec. 497; Lewis v. Godson, 15 Ont. 252; Tayler v. Tayler, 5 U. C. Q. B. O. S. 501.
Eng. Raymond v. Fitch, 2 C. M. & R. 588, 1 Yale 337, 5 L. J. Exch. 45, 5 Tyrw. 985; Goulin v. Caldwell, 13 Grant Ch. (U. C.) 493.
See 33 Cent. Dig. title, Life Estates, Sec. 42; and 48 Cent. Dig., title, Waste, Secs. 12 and 13.

2. Padelford v. Padelford, 7 Pick. (Mass.) 152; Hogan v. Hogan, 102 Mich. 641, 61 N. W. 73; Miles v. Miles, 32 N. H. 147.

3. Dennett v. Dennett, 43 N. H. 499; Elliott v. Smith, 2 N. H. 430; Miller v. Shields, 55 Ind. 71; Kidd v. Dennison, 6 Barb. (N. Y.) 9.

4. Clarke v. Cummings, 5 Barb. (N. Y.) 339 (Character of wood may have been a factor.) Morehouse v. Cotheal, 22 N. J. L. 521; Gorges v. Stanfield, Cro. Eliz. 593, 78 Eng. Reprint 836; Contra, Phillips v. Allen, 7 Allen (Mass.) 115.

tenant can exchange timber cut on the premises for other timber to use in repairs, if such course shows a clear saving to the reversioner or remainderman;[1] and even that a tenant may sell timber and use the proceeds to buy other fencing material.[2] In accordance with the principles above stated it has been held that a tenant by curtesy cannot cut and sell trees merely for profit,[3] nor can he grant to another a license to cut and remove timber;[4] but he may work mines already opened[5] and undoubtedly may use timber from the premises in reasonable amount for such working.

§44. The Judge and Jury Exercise Broad Discretion. It is the duty of the court to define what constitutes waste for this is a matter or law,[6] but the question whether waste has been committed in a particular case is one of fact which is to be determined by the jury,[7] except in those cases in which the acts complained of are *per se* injurious to the inheritance[8] or are clearly in violation of an obligation which rests upon the tenant.[9] The question

1. Loomis v. Wilbur, 5 Mason 13, 15 Fed. Cas. No. 8,498; Hixon v. Reaveley, 9 Ont. L. Rep. 6, 4 Ont. Wkly. Rep. 437; Contra Miller v. Shields, 55 Ind. 71; See King v. Miller, 99 N. C. 583, 6 S. E. 660. Cf. U. S. v. Niemeyer, 94 Fed. 147 (Homestead in Ark. U. S. Land.)
2. In re Williams, 1 Misc. (N. Y.) 35, 22 N. Y. Suppl. 906.
3. Learned v. Ogden, 80 Miss. 769, 32 So. 278, 92 Am. St. Rep. 621; Cf. Noyes v. Stone, 163 Mass. 490; Van Hoozer v. Van Hoozer, 18 Mo. App. 19; Joyner v. Speed, 68 N. C. 236.
4. McLeod v. Dial, 63 Ark. 10, 37 S. W. 306.
5. Rose v. Hays, 1 Root (Conn.) 244; in re Steele, 19 N. J. Eq. 120. Cf. Bond. v. Godsey 99 Va. 564, 39 S. E. 216, McCaulay v. Dismal Swamp Land Co 2 Rob. (Va.) 507 (Timber cases.)
6. Van Syckel v. Emery, 18 N. J. Eq. 387.
7. Me. Down v. Smith, 52 Me. 141; Hasty v. Wheeler, 12 Me. 434.
   Md. Machen v. Hooper, 73 Md. 342.
   Mass. Pynchon v. Stearns, 11 Met. 304, 45 Am. Dec. 207.
   Mo. Proffitt v. Henderson, 29 Mo. 325.
   N. H. Webster v. Webster, 33 N. H. 18, 66 Am. Dec. 705.
   N. J. Morehouse v. Cotheal, 22 N. J. L. 521.
   N. Y. McGregor v. Brown, 10 N. Y. 114; Harder v. Harder, 26 Barb. 409; Kidd v. Dennison, 6 Barb. 9; Jackson v. Andrew, 18 Johns. 431; Jackson v. Brownson, 7 Johns. 227, 5 Am. Dec. 258; Jackson v. Tibbitts, 3 Wend. 341; See also Eysaman v. Small, 61 Hun, 618, 15 N. Y. Suppl. 288.
   N. C. King v. Miller, 99 N. C. 583; Davis v. Gilliam, 5 Ired. Eq. (40 N. C.) 308; Ward v. Sheppard, 3 N. C. 283; 2 Am. Dec. 625.
   Ohio. Crockett v. Crockett, 2 Ohio St. 180.
   Pa. Lynn's Appeal, 31 Pa. St. 46, 72 Am. Dec. 721; McCullough v. Irvine, 13 Pa. St. 438; Hastings v. Cruncleton, 3 Yeates, 261.
   Vt. Keeler v. Eastman, 11 Vt. 293.
   Eng. Young v. Spencer, 10 B. & C. 145, 21 E. C. L. 47; Doe v. Burlington, 5 B. & Ad. 507, 27 E. C. L. 117; Phillips v. Smith, 14 M. & W. 595.
8. McGregor v. Brown, 10 N. Y. 114.
9. Ibid. See also Agate v. Lowenbein, 57 N. Y. 604.

whether trees have been cut in good faith for purposes of repair,[1] like the question of whether cutting for other purposes has been reasonable and in accordance with the custom of the country, has been regarded as one for the jury.[2]

§45. Local Custom and Previous Use are Important Factors. In the United States, as in England, a tenant may cut and use timber in the ordinary manner in which it has been used on the premises,[3] or for such uses as are necessarily incident to the purposes for which the land was demised or leased.[4] Thus where land was devised chiefly to provide a source of support to a life tenant and the testator had so used the property as to indicate that the cutting of timber was one of the profits which the land was expected to produce, the cutting of a reasonable amount by the life tenant was held not to constitute waste;[5] but the fact that the amount of land already cleared was not sufficient to support a life tenant has been held not to authorize the removal of valuable timber trees to the injury of the inheritance.[6]

The cutting of oak for fuel has been held not to be waste if such cutting were common usage in the locality where done.[7] Under the same general rule a tenant in dower has been permitted to cut and sell hoop-poles,[8] staves and

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1. Doe v. Wilson, 11 East, 56.
   Cutting trees on a ward's land is waste, except for necessary repairs. Moorhead v. Hobbs, 7 Ky. L. Rep. 748; Torry v. Black, 58 N. Y. 185, (rever'g 65 Barb. 414, 1 Thomp. & C. 42); Truss v. Old, 6 Rand. (Va.) 556, 18 Am. Dec. 748; Knight v. Duplessis, 2 Ves. 360, 28 Eng. Reprint 230.
2. Jackson v. Brownson, 7 Johns. (N. Y.) 233, 5 Am. Dec. 258; Drown v. Smith, 52 Me. 141; King v. Miller, 99 N. C. 583, 6 S. E. 660; McCullough v. Irvine's Exr's, 13 Pa. 438; Rutherford v. Wilson, 95 Ark. 246, 129 S. W. 534; Warren Co. v. Gans, 80 Miss. 76, 31 So. 539; Chase v. Hazelton, 7 N. H. 171; Kidd v. Dennison, 6 Barb. (N. Y.) 9; Keeler v. Eastman, 11 Vt. 293. *Eng.* Doe v. Wilson, 11 East. 56, 103 Eng. Reprint 925. *Can.* Campbell v. Shields, 44 U. C. Q. B. 449.
3. Patureau v. Wilbert, 44 La. Ann. 355, 10 So. 782.
4. Neel v. Neel, 19 Pa. St. 323; Wilson v. Smith, 5 Yerg. (Tenn.) 379, 381; Findlay v. Smith, 6 Munf. (Va.) 134, 8 Am. Dec. 733; Den v. Kinney, 5 N. J. L. (2 Southard) 552; McDaniel v. Callan, 75 Ala, 327
5. Beam v. Woolridge, 3 Pa. Co. Ct. 17; See also Honywood v. Honywood, L. R. 18 Eq. 306; Williard v. Williard, 56 Pa. St. 119; Dashwood v. Magniac (1891) 3 Ch. 306; Angier v. Agnew, 98 Pa. St. 587, 42 Am. Rep. 624.
6. Robertson v. Meadors, 73 Ind. 43
7. Babb v. Perley, 1 Me. 6; Padelford v. Padelford, 7 Pick (Mass.) 152; Lester v. Young, 14 R. I. 579.
8. Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621.

shingles[1] and to tap trees for the making of turpentine.[2]

§46. The Express or Implied Terms of the Conveyance or Demise, will be Given Effect. In fact in the United States, the same as in England, any cutting which is contrary to good husbandry and causes any permanent injury to the freehold or inheritance is waste provided the tenant has no special right or license to cut,[3] and the general rule against the cutting of an unnecessary amount for fuel,[4] or repairs and improvements[5] will be more strictly enforced where the terms of a lease recite that no waste is to be committed.[6] Where a lease forbade any cutting except for the lessee's use or for the improvement of the premises the court left to the jury the question whether the tapping of trees for sugar making purposes had an effect of shortening the lives of the trees with instructions to hold the lessee guilty of waste if they found that injury to the trees had resulted from the tapping;[7] and where a farm was leased for dairy purposes with a covenant against waste the clearing of woodland was held waste *per se* as a matter of law.[8] A lease giving a right

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1. Ballentine v. Poyne, 2 Hayne (3 N. Car.) 110.
2. Carr v. Carr, 4 Dev. & B. L. (20 N. Ca..) 179; But see Parkins v. Cox, 2 Hayne (3 N. Car.) 339.
3. Ala. Moses v. Johnson, 88 Ala, 517, 7 So. 146, 16 Am. St. Rep. 58; Special Right, McDaniel v. Callan, 75 Ala. 329.
   Del. Waples v. Waples, 2 Harr. 281; Fleming v. Collins, 2 Del. Ch. 230.
   Ga. Powell v. Cheshire, 70 Ga. 357, 48 Am. Rep. 572.
   Ind. Robertson v. Meadors, 73 Ind. 43.
   Ky. McCracken v. McCracken, 6 T. B. Mon. 342.
   Mich. Webster v. Peet, 97 Mich. 326, 56 N. W. 558.
   Minn. Butman v. James, 34 Minn. 547, 27 N. W. 66.
   Mo. Proffitt v. Henderson, 29 Mo. 325.
   N. Y. Van Deusen v. Young, 29 N. Y. 9; McGregor v. Brown, 10 N. Y. 114; Elwell v. Burnside, 44 Barb. 447; Hawley v. Clowes, 2 Johns. Ch. 122; McCay v. Wait, 51 Barb. 225; Jackson v. Brownson, 7 Johns. 227, 5 Am. Dec. 258; Selden v. Mann, 2 N. Y. Leg. Obs. 328.
   N. C. King v. Miller, 99 N. C. 583, 6 S. E. 660; Parkins v. Cox, 3 N. C. 339.
   Pa. Smith's Appeal, 69 Pa. St. 474.
   S. C. Smith v. Poyas, 2 Desauss. Eq. 65.
   Eng. Hale v. Thomas, 7 Ves. Jr. 586, 6 Rev. Rep. 195, 32 Eng. Reprint 237; Turner v. Wright, 2 Fisher & J. 234 (1860.)
4. Zimmerman v. Shreeve, 59 Md. 357; Phillips v. Allen, 89 Mass. (7 Allen) 115; Smith v. Jewett, 40 N. H. 530.
5. People v. Davidson, 4 Barb. (N. Y.) 109; Mooers v. Walt, 3 Wend. (N. Y.) 104, 20 Am. Dec. 667; Ballentine v. Poyner, 3 N. C. 110; See also Holden v. Clarke, 7 Gray (Mass.) 9, 66 Am. Dec. 450.
6. Livingston v. Reynolds, 2 Hill (N. Y.) 157, 26 Wend. (N. Y.) 115; McGregor v. Brown, 10 N. Y. 114; Sheriden v. McMullen, 12 Oreg. 150, 6 Pac. 497.
7. Campbell v. Shields, 44 U. C. Q. B. 449.
8. McGregor v. Brown, 10 N. Y. 114.

to cut from one part of the land leased will not be construed so as to permit cutting from another part.[1] An unwarranted cutting will not be considered waste if it causes only a slight or temporary injury.[2]

§47. Waste by Tenants in Common. A tenant in common is given great liberty not only in the matter of taking estovers from the land held in common but even in the cutting of timber for sale. Where the extent of the cutting and the attendant circumstances are not such as to present evidence of an ouster of the co-tenants, cutting by a tenant in common is considered an incident to the enjoyment of the estate to which he is entitled[3] and will not be held to constitute an adverse possession as against his co-tenant.[4] Only when the cutting clearly causes a substantial injury to the inheritance to the manifest disadvantage of his co-tenants will he be held chargeable with the value of the timber cut during his occupation of the land.[5] If the cutting is unreasonable, in view of all the circumstances, the co-tenants may require an accounting for timber sold,[6] but where a lifeowner of common land cut and used a few hundred dollars worth of timber

1. Ladd v. Shattuck, 90 Ala. 134, 7 So. 764; Jones v. Gammon, 123 Ga. 47, 50 S. E. 982.
2. Sheppard v. Sheppard, 2 Hayw. (3 N. C.) 382; Bandlow v. Thieme, 53 Wis. 57; Davenport v. Magoon, 13 Oreg. 3, 57 Am. Rep. 1.
3. Whiting v. Dewey, 15 Pick. (Mass.) 428; Shumway v. Holbrook, 1 Pick. (Mass.) 114, 11 Am. Dec. 153; Strong v. Richardson, 19 Vt. 194; Johnson v. Conant, 64 N. H. 109, 7 Atl. 116; Hihn v. Peck, 18 Cal. 640; Partureau v. Wilbert 44 La. Ann. 355; Darden v. Cowper, 7 Jones L. (52 N. C.) 210, 75 Am. Dec. 461; Dodd v. Watson, 4 Jones Eq. (57 N. C.) 48, 72 Am. Dec. 577; See also Alford v. Bradeen, 1 Nev. 228. *Eng.* Martyn v. Knowllys, 8 T. R. 145, 101 Eng. Reprint 1313; Arthur v. Lamb, 2 Drew & Sm. 428.
4. McQuiddy v. Ware, 67 Mo. 74; Griffles v. Griffles, 8 L. T. Rep. N. S. 758, 11 Wkly. Rep. 943.
5. Nevels v. Kentucky Lumber Co., 108 Ky. 550, 56 S. W. 969, 22 Ky L. Rep. 247, 99 Am. St. Rep. 388, 49 L. R. A. 416; Strong v. Richardson, 19 Vt. 194; Munsie v. Lindsay, 10 Ont. Pr. 173; Rice v. George, 20 Grant Ch. (U. C.) 221; Griffin v. Patterson, 45 U. C. Q. B. 536, 591; But see Gillum v. St. Louis, etc. R. Co., 5 Tex. Civ. App. 338, 23 S. W. 717; Thompson v. Bostwick, McMull. Eq. (S. C.) 85; Hancock v. Day, McMull. Eq. 69. 36 Am. Dec. 293.
6. Hodges v. Heal, 80 Me. 281, 14 Atl. 11, 6 Am. St. Rep. 199; Kimbal v. Sumner, 62 Me. 305; Bradley v. Boynton, 22 Me. 287, 39 Am. Dec. 582; Mee v. Benedict, 98 Mich. 260, 57 N. W. 175, 39 Am. St. Rep. 543, 22 L. R. A. 641; Gillum v. St. Louis, etc. R. Co., 4 Tex. Civ. App. 622, 23 S. W. 716; See also, Hole v. Thomas, 7 Ves. Jr. 589; Maxwell v. Maxwell, 31 Me. 184, 50 Am. Dec. 657; Hawley v. Clowes, 2 Johns. Ch. (N. Y.) 122; Elwell v. Burnside, 44 Barb. (N. Y.) 447; Bradley v. Reed, 2 Pittsb. (Pa.) 519; Johnson v. Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72; Hancock v. Day, McMull. Eq. (S. C.) 69, 36 Am. Dec. 293; McDodrill v. Pardee, etc. Lbr. Co., 40 W. Va. 564; Dodge v. Davis, 85 Iowa 77; State v. Judge, 52 La. Ann. 103; Clow v. Plummer, 85 Mich. 550; Blake v. Milliken, 14 N. H. 213.

for manufacture in a sawmill owned by the tenants in common, and yet left an abundance of timber for all purposes, he was held not chargeable with the value of the timber cut.[1] However, this freedom of use does not extend to unoccupied and unimproved land held in common, and not only will statutes, making cutting timber from such lands waste, be strictly enforced,[2] but such cutting has been held waste under the common law when shown to be unreasonable and unnecessary in the enjoyment and use of the property or injurious to the interests of the co-tenants.[3] A co-tenant is not entitled to contribution from a co-tenant for expenditures for the preservation or benefit of woodland.[4]

§48. A Liberal Construction is Given the Law in America when Land is Cleared for Cultivation. In most American jurisdictions consideration will be given not only to the effect of the cutting upon the inheritance, but also to the purpose of the cutting, and it is usually held that a tenant is not guilty of waste if he cuts timber only to a reasonable extent and for the purpose of fitting the land for cultivation or pasture.[5] The stern purpose of

1. Dodd v. Watson, 57 N. C. 48, 72 Am. Dec. 577; See also Adamson v. Adamson 17 Ont. 407.
2. Hensal v. Wright, 10 Pa. Co. Ct. 416 (Act May 4, 1869).
3. Benedict v. Torrent, 83 Mich. 181, 47 N. W. 129, 21 Am. St. Rep. 589, 11 L. R. A. 278; See Elwell v. Burnside, 44 Barb. 447.
4. Beaty v. Bordwell, 91 Pa. St. 438; Deck's Appeal, 57 Pa. St. 467; Anderson v. Greble, 1 Ashm. 136; Ward v. Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449; Alexander v. Ellison, 79 Ky. 148; Carver v. Miller, 4 Mass. 559; Gregg v. Patterson, 9 Watts & S. (Pa.) 197; Bowles' Case, 11 Coke 79b, 77 Eng. Reprint 1252.
5. Ala. Alexander v. Fisher, 7 Ala. 514.
   Cal. McCord v. Oakland Quicksilver Min. Co., 64 Cal. 134, 49 Am. Rep. 686.
   Ga. Dickinson v. Jones, 36 Ga. 97; Woodward v. Gates, 38 Ga. 205.
   Ill. Bond v. Lockwood, 33 Ill. 220.
   Ind. Dawson v. Coffman, 28 Ind. 220.
   Ky. McCracken v. McCracken, 6 T. B. Mon. 342; Hickman v. Irvine, 3 Dana 121.
   Me. Drown v. Smith, 52 Me. 141.
   Md. Adams v. Brereton, 3 Harr. & J. 124.
   Mass. Pynchon v. Stearns, 11 Metc. 304, 45 Am. Dec. 207.
   Miss. Cannon v. Barry, 56 Miss. 289; Warren Co. v. Gans, 80 Miss. 76.
   Mo. Profitt v. Henderson, 29 Mo. 325; Davis v. Clark, 40 Mo. App. 515.
   Nebr. Disher v. Disher, 45 Nebr. 100, 65 N. W. 368.
   N. H. Chase v. Hazelton, 7 N. H. 171; Miles v. Miles, 32 N. H. 147, 64 Am. Dec. 362.
   N. J. Morehouse v. Cotheal, 22 N. J. L. 521; Den V. Kinney, 5 N. J. L. 634; Gaines v. Green Pond Iron Min. Co., 33 N. J. Eq. 603.
   N. Y. Harder v. Harder, 28 Barb. 409; Kidd v. Dennison, 6 Barb. 9; People v.

(Foot note 5 continued on next page)

the law as administered in England to prevent the conversion of woodland into arable land or pasturage even though the value of the estate be increased[1] does not find favor in American courts which, in the absence of special obligations on the part or the tenant to refrain from cutting timber, will consider whether the clearing has been such as a prudent farmer would make, having regard to the land as an inheritance, and whether such clearing has as a matter of fact, and not in theory, alone, diminished the value of the land as an estate.[2] The custom of the neighborhood

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(Foot note 5 concluded from preceding page)

Davison, 4 Barb. 109; McGregor v. Brown, 10 N. Y. 114; Jackson v. Brownson, 7 Johns. 227, 5 Am. Dec. 258; Elwell v. Burnside, 44 Barb. 447; Jackson v. Tibbitts, 3 Wend. 341.

N. C. King v. Miller, 99 N. C. 583; Davis v. Gilliam, 5 Ired. Eq. (40 N. C.) 308; Parkins v. Cox, 2 Hayw. (3 N. C.) 283, 2 Am. Dec. 625; Crawley v. Timberlake, 2 Ired. Eq. (37 N. C.) 460; Sherrill v. Conner, 107 N. C. 630, 12 S. E. 588.

Ohio. Crockett v. Crockett, 2 Ohio St. 180; Hall v. Rohr, 10 O. Dec. (Reprint) 690, 23 Cin. L. Bul. 121.

Pa. McCullough v. Irvine, 13 Pa. St. 438; Lynn's Appeal, 31 Pa. St. 44, 72 Am. Dec. 721; Givens v. McCalmont, 4 Watts. 460; Hastings v. Cruncleton, 3 Yeates (Pa.) 261; Morris v. Knight, 14 Pa. Super. Ct. 324; Sayers v. Hoskinson, 110 Pa. St. 473, 1 Atl. 308; Beam v. Woolridge, 3 Pa. Co. Ct. 17.

R. I. Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621.

S. C. Smith v. Poyas, 2 Desaus. 65; Hancock v. Day, McMull. Eq. 69, 36 Am. Dec. 293; Johnson v. Johnson, 2 Hill Eq. 277, 29 Am. Dec. 72.

Tenn. Lunn v. Oslin, 96 Tenn. 28; Owen v. Hyde, 6 Yerg. 334, 27 Am. Dec. 467.

Vt. Keeler v. Eastman, 11 Vt. 293.

Va. Findlay v. Smith, 6 Munf. 134, 8 Am. Dec. 733; Crouch v. Puryear, 1 Rand. 258, 10 Am. Dec. 528.

Wis. Wilkinson v. Wilkinson, 59 Wis. 557, 18 N. W. 513.

U. S. Loomis v. Wilbur, 5 Mason (U. S.) 13.

Can. Titus v. Sulis, 9 Nova Scotia 497; Saunders v. Breakie, 5 Ont. 603; Drake v. Wigle, 24 U. C. C. P. 405.

Eng. Arthur v. Lamb, 2 Dr. & Son 428, 12 L. T. Rep. N. S. 338, 62 Eng. Reprint 683.

1. But see, Meux v. Cobley (1892) 2 Ch. 253.

2. Ga. Woodward v. Gates, 38 Ga. 205.

Ill. Bond v. Lockwood, 33 Ill. 212.

Ind. Dawson v. Coffman, 28 Ind. 220.

Me. Drown v. Smith, 52 Me. 141.

Mich. Hogan v. Hogan, 102 Mich. 641, 61 N. W. 73.

Miss. Cannon v. Barry, 59 Miss. 289; Warren Co. v. Gans, 80 Miss. 76, 31 So. 539; Moss Point Lumber Co. v. Board of Supr. Harrison Co., 89 Miss. 448, 42 So. 290.

Mo. Davis v. Clark, 40 Mo. App. 515.

Nebr. Disher v. Disher, 45 Neb. 100, 63 N. W. 368.

N. H. Chase v. Hazelton, 7 N. H. 171.

N. Y. Jackson v. Brownson, 7 Johns 227, 5 Am. Dec. 258.

N. C. Davis v. Gilliam, 40 N. C. (5 Ired. Eq.) 308.

Pa. Morris v. Knight, 14 Pa. Super. Ct. 324.

S. C. Thompson v. Bostwick, McMull. Eq. 85; Hancock v. Day, McMull. Eq. 69, 36 Am. Dec. 293.

Vt. Keeler v. Eastman, 11 Vt. 293.

Wis. Wilkinson v. Wilkinson, 59 Wis. 557, 18 N. W. 513.

will have a bearing upon this question,[1] and the decision whether the cat complained of was good husbandry or not is one of fact, to be left to the jury.[2] It has been said that, where a farm was leased for a rental and all of the farm except a few acres consisted of wild and uncultivated land, the parties to the lease must be held to have intended that the lessee might fell part of the timber so as to fit the land for cultivation.[3] The clearing of sixteen acres in addition to thirty acres already cleared on premises which comprised two hundred and forty acres of heavily timbered land has been held not to be unreasonable nor so prejuidicial to the rights of the remainderman as to constitute waste.[4] Where a lease required the tenant to reduce to cultivation the uncleared portions of the premises the cutting of timber on such portions was held not to be waste.[5] But although a tenant for years may gradually clear woodland in preparation for cultivation, he will not be permitted to cut timber, on that pretext, just before the completion of his lease.[6] In such cases the proportion of the woodland to the whole tract in possession of the tenant and the relative value of the trees destroyed must be considered in deciding whether the act complained of is actually waste,[7] and the fact that but a small proportion is woodland will go far toward limiting the tenant's right to remove.[8] Where a life tenant had permitted a pasture go grow up to trees, it was held he could not then cut the trees even though it might

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1. Morehouse v. Cotheal, 22 N. J. L. (2 Zab. 521; McCullough v. Irvine's Exr's, 13 Pa. 438; Proffitt v. Henderson, 29 Mo. 329; Drown v. Smith, 52 Me. 141; Findlay v. Smith, 6 Munf. (Va.) 134. 8 Am. Dec. 733.
2. Woodward v. Gates, 38 Ga. 205; Drown v. Smith, 52 Me. 141; Morehouse v. Cotheal, 22 N. J. L. 521; Keeler v. Eastman, 11 Vt. 293; McCay v. Wait, 51 Barb. (N. Y.) 225; Drake v. Wigle, 22 U. C. C. P. 341; Jackson v. Brownson, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258.
3. Kidd v. Dennison, 6 Barb. (N. Y.) 9.
4. Lambeth v. Warner, 2 Jones Eq. (55 N. C.) 165; See likewise, Joyner v. Speed, 68 N. C. 236.
5. McDaniel v. Callan, 75 Ala. 327.
6. Kidd v. Dennison, supra.
7. Alexander v. Fisher, 7 Ala. 514; Warren County v. Gans, 80 Miss. 76, 31 So. 539; McCracken v. McCracken, 6 T. B. Mon. (Ky.) 342; Lambeth v. Warner, 55 N. C. 165; Joyner v. Speed, 68 N. C. 236; Shine v. Wilcox, 21 N. C. 631; See McCaulay v. Dismal Swamp Land Co., 2 Rob. (Va.) 507.
8. Powell v. Cheshire, 70 Ga. 357, 48 Am. Dec. 572; Duncombe v. Felt, 81 Mich. 332, 45 N. W. 1004; Hastings v. Cruncklеton, 3 Yeates (Pa.) 261; McLeod v. Dial, 63 Ark. 10, 37 S. W. 306; Kidd v. Dennison, 6. Barb. (N. Y.) 9; Jackson v. Brownson, 7 Johns. (N. Y.) 227. 5 Am. Dec. 258.

be good husbandry for the owner in fee to restore the land to pasture.[1]

§49. But the Removal of Timber Must be Beneficial to the Estate. If it is clearly established that the timber was cut for the purpose of making the land arable, the mere fact that the timber thus removed was sold will not make the tenant liable for waste.[2] If land is cleared for any other purpose than fitting it for cultivation and the clearing is not manifestly beneficial to the estate it is waste.[3] In fact, clearing for any purpose whatever is waste if it decreases rather than enhances the value of the land,[4] The removal of all the valuable timber even for purposes of cultivation,[5] or of so much that there is not enough left for repairs upon the premises[6] will be held waste.

§50. Cutting of Immature Trees or Those Bearing a Special Relationship to Land. Timber trees under twenty years of age can be cut by a tenant only for the purpose of thinning the growth for the benefit of the other

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1. Clark v. Holden, 7 Gray (Mass.) 8, 66 Am. Dec. 450.
2. Cannon v. Barry, 59 Miss. 289; Warren Co. Supr. v. Gans, 80 Miss. 76, 31 So. 539; Proffitt v. Henderson, 29 Mo. 325; Kidd v. Dennison, 6 Barb. (N. Y.) 9; Davis v. Gilliam, 40 N. C. (5 Ired. Eq.) 308; King v. Miller, 99 N. C. 583, 6 S. E. 660; Crockett v. Crockett, 2 Ohio St. 180; Keeler v. Eastman, 11 Vt. 293; Honywood v. Honywood, 18 Eq. 306; Lewis v. Godson, 15 Ont. 252; But see Saunders v. Breakie, 5 Ont. 603.
3. Armstrong v. Wilson, 60 Ill. 226; Cook v. Cook, 7 Mass. (11 Gray) 123.
4. Ala. Moses v. Johnson, 88 Ala. 517, 16 Am. St. Rep. 58; Alexander v. Fisher, 7 Ala. 514.
   Del. Fleming v. Collins, 2 Del. Ch. 230; Waples v. Waples, 2 Harr. 281.
   Ky. Calvert v. Rice, 91 Ky. 533, 34 Am. St. Rep. 240; Loudon v. Warfield, 5 J. J. Marsh, 196.
   Me. Maxwell v. Maxwell, 31 Me. 184, 50 Am. Dec. 657.
   Mass. Pynchon v. Stearns, 11 Metc. 304, 45 Am. Dec. 207.
   Mich. Clow v. Plummer, 85 Mich. 550.
   Miss. Warren Co. v. Gans, 80 Miss. 76, 31 So. 539.
   Mo. Proffitt v. Henderson, 29 Mo. 325; Davis v. Clark, 40 Mo. App. 515; Van Hoozer v. Van Hoozer, 18 Mo. App. 19.
   Nebr. Disher v. Disher, 45 Neb. 100, 63 N. W. 368.
   N. H. Fuller v. Wason, 7 N. H. 341.
   N. Y. Kidd v. Dennison, 6 Barb. 9; Elwell v. Burnside, 44 Barb. 447; Hawley v. Clowes, 2 Johns. Ch. 122; Mooers v. Wait, 3 Wend. 104; McCay v. Wait, 51 Barb. 225; Johnson v. Brownson, 7 Johns. 227, 5 Am. Dec. 258.
   N. C. Sherrill v. Conner, 107 N. C. 543; Davis v. Gilliam, 5 Ired. Eq. (40 N. C.) 308; Crawley v. Timberlake, 2 Ired. Eq. (37 N. C.) 480.
   S. C. Johnson's Admr. v. Johnson, 2 Hill Eq. 277, 29 Am. Dec. 72; Hancock v. Day, McMull. Eq. 69, 36 Am. Dec. 293.
5. Proffitt v. Henderson, 29 Mo. 325; Jackson v. Brownson, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; Duncombe v. Felt, 81 Mich. 332, 45 N. W. 1004.
6. Johnson v. Johnson, 2 Hill (S. C.) 277, 29 Am. Dec. 72.

trees,[1] except that trees which sprout from the stump may evidently be cut while immature if it has been customary to handle the woodland as a coppice.[2] Fruit trees[3] and non-timber trees which sustain a special relationship to the land and are beneficial to the estate, such as willows protecting the bank of a stream,[4] shade trees,[5] or ornamental trees, cannot ordinarily be cut by a tenant[6] even though the tenant hold without impeachment for waste.[7]

§51 Prudent Husbandry is the Test as to Waste. Mere failure of a tenant to do the things required by good husbandry may not be waste,[8] but suffering a pasture to become overgrown with brush in such manner as a farmer of ordinary prudence would not permit was considered waste.[9] Allowing cattle or hogs to injure a meadow or fruit trees would ordinarily be waste,[10] but not if the tenant had the right to keep stock and the injury to the trees were the natural result of the keeping of the stock.[11] The same rules

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1. Honywood v. Honywood, L. R., 18 Eq. 306, 43 L. J. Ch. 652, 30 L. T. Rep. N. S. 671, 22 Wkly. Rep. 749; Hole v. Thomas, 7 Ves. Jr. 589, 6 Rev. Rep. 195; Bagot v. Bagot, 32 Beav. 509, 8 Jur. N. S. 1022, 33 L. J. Ch. 116, 9 L. T. Rep. N. S. 217, 12 Wkly. Rep. 35; Dunn v. Bryan, Ir. R. 7 Eq. 143; Aston v. Aston, 1 Ves. 264; Brydges v. Stephens, 6 Madd. 279; Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621.
2. Phillips v. Smith, 14 M. & W. 589; Stripping's Case, 22 Vin. Abr. 449, pl. 11; Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621; Patureau v. Wilbert, 44 La. Ann. 355, 10 So. 782; Cf. Jackson v. Andrew, 18 Johns. (N. Y.) 431; Lashmer v. Avery, Cro. Jac. 126; Humphreys v. Harrison, 1 Jac. & W. 561.
3. Bewes, Waste, 95; Co. Litt. 53a; Silva v. Garcia, 65 Cal. 591, 4 Pac. 628; Bellows v. McGinnis, 17 Ind. 64; Duncombe v. Felt, 81 Mich. 332, 45 N. W. 1004; Welling v. Strickland, 161 Mich. 235, 126 N. W. 471; Kaye v. Banks, 2 Dick. 431; Cf. Anderson v. Hammon, 19 Ore. 446, 20 Am. St. Rep. 832. But removing and selling nursery stock in regular course of business not necessarily waste. Robinson v. Russell., 24 Cal. 467; Hamilton v. Austin, 36 Hun. (N. Y.) 138.
4. Phillips v. Smith, 14 M. & W. 589.
5. But shade trees in open field which prevent growth of vegetation may be cut as required by good husbandry. Sayers v. Hoskinson, 110 Pa. St. 473, 1 Atl. 308.
6. Honywood v. Honywood, L. R., 18 Eq. 306 above; Dickenson v. Jones, 36 Ga. 97; Calvert v. Rice, 91 Ky. 533, 16 S. W. 351, 13 Ky. L. Rep. 107, 34 Am. St. Rep. 240.
7. Stevens v. Rose, 69 Mich. 259, 37 N. W. 305; Clement v. Wheeler, 25 N. H. 361; Hawley v. Wolverton, 5 Paige (N. Y.) 522. For many English citations see 40 Cyc. 508, Note 81. See also Am. and Eng. Ency. Law. Vol. 30. p. 256, 257.
8. Richards v. Torbert, 3 Houst. (Del.) 172; Darden v. Cowper, 52 N. C. 210, 75 Am. Dec. 461.
9. Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621.
   But see Clark v. Holden, 7 Gray (Mass.) 8, 66 Am. Dec. 450; Shine v. Wilcox, 21 N. C. 631.
10. Warder v. Henry, 117 Mo. 530, 23 S. W. 776; Bellows v. McGinnis, 17 Ind. 64.
11. Fowler v. Johnstone, 8 Tinnes Law R. 327.

would apply to injuries to young timber trees. The turning of water into a swamp in such manner as to destroy the timber has been held not to be waste if the act was one of good husbandry. [1]

There has been a tendency on the part of New England courts to follow the English common law more strictly than other American jurisdictions, ane the decisions in some of those states indicate that any tenant in possession is entitled only to estovers; [2] and that any extension of the cultivated portion of a farm, at the expense of the timberland, even when the greater part of the premises is woodland, will be considered waste regardless of an increase in the value of the premises as a result of such clearing. [3]

§52. Special Statutes Permitting or Forbidding the Cutting of Timber. Early laws in the New England states made provision for the cutting of timber from lands held under a tenancy other than fee simple, or by a guardian or administrator, in order to preserve its value. [4] There are now laws in many states authorizing the removal of growing timber under order of a court from lands held in dower, curtesy, or other life tenency, or by a guardian or an administrator. [5] Such laws provide that the proceeds of the sales shall be administered as realty.

Any cutting not done under authority of an order of a

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1. Jackson v. Andrew, 18 Johns (N. Y.) 431.
2. Ford v. Erskine, 50 Me. 227; White v. Cutler, 34 Mass. (17 Pick.) 248, 28 Am. Dec. 296; Clark v. Holden, 73 Mass. (7 Gray) 8, 66 Am. Dec. 450; Chase v. Hazelton, N. H. 171.
3. Pynchon v. Stearns, 52 Mass. (11 Metc.) 304, 45 Am. Dec. 207; Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621; See Landlord and Tenant, Tiffany, Ed. 1910, p. 708, Sec. 109 a-2.
4. Me. Act. Feb. 28, 1821, Laws of Me., Brunswick, 1821, Vol. 1, p. 126.
   Mass. Act. Feb. 18, 1819, S. L. 1818, ch. 96. See Gen. Laws Mass., Boston, 1823, Vol. 2, p. 484.
   N. H. See Gen. Stat. Manchester, 1867, ch. 182, sec. 6, p. 372.
5. See the following:
   Conn. Gen. Stat. 1902, sec. 226 and 241.
   Me. Rev. St. 1903, p. 649, sec. 1 (for ward), p. 869, sec. 1-4 (life estates).
   Md. Public Gen. Laws 1904, Art. 93, sec. 159.
   Mass. Rev. Laws 1902, ch. 146, sec. 19, Vol. 2, p. 1318 (for ward); ch. 134, sec. 11, Vol. 2, p. 1269 (life estates).
   Miss. Annotated Code, 1906, sec. 2418 (1892, sec. 2202.)
   N. H. Public Statutes, 1901, Chase, ch. 194, sec. 4, p. 637.
   N. C. Revised Laws 1908, Pell, sec. 1790 (guardian may sell.)
   R. I. Gen. Laws 1909, p. 871 (any tenancy not in fee simple.)
   Va. Code 1904, sec. 2616 and 2620.

court, or with the consent of the other parties holding an interest, by a guardian, administrator, tenant, or cotenant, is forbidden by statute in most American States. [1] And in many states there are statutes forbidding the cutting of timber during the time that land is subject to redemption except in accordance with the customary use of the land. [2]

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1. See the following:
   - Ga. Code 1910, sec. 3695 (tenant), 3724 (tenant in common).
   - Ida. Rev. Code 1908, Vol. 2, sec. 4530.
   - Me. Rev. St. 1903, p. 827, sec. 5, cutting by cotenant without notice (treble damages.)
   - Md. Cf. Pub. Gen. L. 1904, Art. 93, sec. 194 and 303 (guardian and widow.)
   - Mich. Cf. Comp. L. 1897, sec. 1116-1122.
   - Minn. Rev. L. 1905, sec. 4404.
   - Miss. Code 1906, sec. 2418.
   - Mont. Rev. Code 1907, sec. 6866.
   - Neb. Rev. St. 1913, sec. 8252, repairs allowed by tenant; 8523, waste by tenant.
   - Nev. Rev. Laws 1912, sec. 5505. *See* Price v. Ward, 25 Nev. 203, 58 Pac. 849, 46 L. R. A. 459.
   - Pa. Purdon's Digest, 13th Ed. Stewart, ch. on Waste, sec. 17 and 18.
   - Utah Compiled Laws 1907, sec. 3507.
   - Va. Code 1904, sec. 2775-2778.
   - W. Va. Code 1913, Hogg, sec. 4122-26.
   - Wis. Statutes, 1915, secs. 3170-3179.
2. See the following:
   - Ariz. Rev. St. 1901, par. 2583, sec. 27.
   - Fla. Laws of 1895, ch. 4416; Act June 3, 1907, S. L. ch. 5683.
   - Minn. Gen. St. 1913, Tiffany, sec. 8089 (waste).
   - Tenn. Annotated Code 1896, Shannon, sec. 3820, 3821.
   - Utah Comp. Laws 1907, sec. 3266.

CHAPTER VI

REMEDIES FOR WASTE

§53. Early Common Law Remedies. Under the early common law the prevention of waste could be effected only through a writ of estrepement or a writ of prohibition of waste. The latter was abolished in the year 1285 A. D. by the statute of Westminster II, and, although the former is still available in Pennsylvania, [1] and possibly a few other jurisdictions, it has generally fallen into disuse both in England and America. [2] In modern practice the equitable remedy of injunction is regularly employed for the accomplishment of the purposes once effected through a writ of estrepement. [3]

By the common law satisfaction for injuries which had actually been committed was obtained through a writ or action of waste. This was a mixed action which sought both the recovery of the premises wasted and recovery of damages. The writ of waste fell into disuse in England and was abolished in 1834. [4] Although adopted in many of the older American states and still retained in a few, [5] the writ of waste has generally been superseded in the United States, the same as in England, by an action on the case in the nature of waste. [6] The latter action, which is an action for damages, may be maintained in all cases where the old writ of waste lay and the principles developed under the writ of waste have been applied in actions on the case; [7]

1. See citations in 40 Cyc. 519, 520, Ed. 1904.
2. See citations in 40 Cyc. 519; and in Am. & Eng. Ency. Law, Vol. 30, p. 273, 2d Ed.
3. See citations in 40 Cyc. 521, Note 63.
4. 3 and 4 Wm. IV, Ch. 27, Sec. 36 (A. D. 1833); See Stevens v. Rose, 69 Mich. 259, 37 N. W. 205.
5. Am. & Eng. Ency. Law, 2d Ed., Vol. 30, p. 274; 40 Cyc. 517.
6. Stetson v. Day, 51 Me. 434; Shattuck v. Gragg, 23 Pick. (Mass.) 88; Fay v. Brewer, 3 Pick. (Mass.) 203; Roots v. Boring Junction Lbr. Co., 50 Oreg. 298, 92 Pac. 811, 94 Pac. 182; Rogers v. Coal River Boom etc. Co., 41 W. Va. 593, 23 S. E. 919, 26 S. E. 1008; and numerous American and English citations under note 44, 40 Cyc. 518 and in following pages.
7. Patterson v. Cunliffe, 11 Phila. (Pa.) 564.

but the action on the case has a wider use than the old action of waste had.

Under the common law no one but a person having an immediate estate of inheritance could bring the action of waste.[1] There must be privity of estates between the parties to the action.[2] A contingent remainderman could not maintain an action for waste already committed but might obtain equitable relief against future waste. The party bringing the action must have the legal title or a right to it or be a trustee. Although the estate must be in the plaintiff at the time of waste to support the action, it need not continue until the action was brought. Neither a person having a future life estate, nor a mortgagee, could bring the action for the reason that the estate of each might be defeated and thus no injury would be suffered. In some American states many of the restrictions of the old common law regarding the action of waste have been removed by statute.[3] After the passage of the statutes of Marlbridge and Gloucester the action might be brought against tenants for life or years as well as against those estates which were created by law, but there is a conflict of opinion as to the extent to which these two statutes affect procedure in the United States.[4]

§54. Modern Remedies at Law. The action on the case for damages, unlike the old writ of waste, may be maintained where the waste alleged might also form the basis of an action for a breach of an express covenant or of a promise implied by law.[5] Although earlier cases held that action on the case did not lie for permissive waste,

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1. 40 Cyc. 527; Co. Litt. 218b.
2. Co. Litt. 53b; 2 Inst. 301; Foot v. Dickinson, 2 Metc. (Mass.) 611; Bates v. Shraeder, 13 Johns (N. Y.) 260; Lauder v. Hall, 69 Wis. 331; 1 Washburn Real Prop. 118.
   Cf. Coale v. Hannibal etc. R. R. Co. 60 Mo. 227 (Tenant at will has no action vs. stranger for fire damage, he not being liable for waste).
3. 40 Cyc. 529.
4. To effect that they are not in force: Moore v. Ellsworth, 3 Conn. 483; Smith v. Follansbee, 13 Me. 273; Parker v. Chambliss, 12 Ga. 235; Woodward v. Gates, 38 Ga. 205, 95 Am. Dec. 385; Moss Point Lumber Company v. Board of Sup. of Harrison County, 89 Miss. 448, 42 So. 290; That they are in force in part or whole: Dozier v. Gregory, 46 N. C. (1 Jones Law) 100; Sackett v. Sackett, 25 Mass. (8 Pick.) 309; See also Alexandr's British Statutes in force in Maryland, pp. 46, 83.
5. Moere v. Townshend, 33 N. J. L. 284.

it seems the rule now that it does lie.[1] However, it has been held that it does not lie against a tenant who converted to his use trees which had been thrown by the wind.[2] Privity of estate seems to be necessary in a few jurisdictions,[3] but generally privity is unnecessary to the maintenance of an action on the case in the nature of waste.[4] It cannot be maintained by one having merely a contingent interest.[5] In most jurisdictions the action may be brought by one having a future estate for life or years, as well as by one having an estate in fee with an intervening estate for life or years;[6] and it may be maintained even against a stranger.[7]

§55. Statutory Remedies for Waste. In mnay American states there is express statutory provision for the recovery of damages for waste committed by a tenant for life or years,[8] and in some states the statute covers waste by any tenant of land. It is probable that a tenant from year to year or month to month would be included within the purview of a statute applying in terms to a tenant for years.[9] Even where the statutes of Marlbridge and Gloucester are held not to be in force and there is no state statute on the subject, an action of trespass on the case, or its equivalent code action, will doubtless be available

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1. Parrott v. Barney, Deady (U. S.) 409; White v. Wagner, 4 Har. & J. (Md.) 373, 7 Am. Dec. 674; Stevens v. Rose, 69 Mich. 259; Dozier v. Gregory, 1 Jones L. (46 N. C.) 100.
2. Shult v. Barker, 12 S. & R. (Pa.) 272.
3. Hatch v. Hatch, 1 Ohio Dec. 270; Lauder v. Hall, 69 Wis. 326; Whitney v. Morrow, 34 Wis. 644; Foot v. Dickinson, 2 Metc. (Mass.) 611.
4. Dickinson v. Baltimore, 48 Md. 583; Dozier v. Gregory, 1 Jones L. (46 N. C.) 100; Williams v. Lanier, Bush. L. (44 N. C.) 30; Dupree v. Dupree, 4 Jones L. (49 N. C.) 387, 69 Am. Dec. 757; Chase v. Hazelton, 7 N. H. 171; Randall v. Cleaveland, 6 Conn. 328; Robinson v. Wheeler, 25 N. Y. 252; But see, Hunt v. Hall, 37 Me. 363.
5. Sager v. Galloway, 113 Pa. St. 500.
6. Purton v. Watson, 19 N. Y. St. Rep. 6; Howard v. Patrick, 38 Mich. 795; McLaughlin v. Long, 5 Har. & J. (Md.) 113; Dozier v. Gregory, 46 N. C. 100.
7. Parrot v. Barney, Deady, U. S. 405, 18 Fed. Cas. No. 10,773a; Randall v. Cleaveland, 6 Conn. 328; Chase v. Hazelton, 7 N. H. 171; Elliott v. Smith, 2 N. H. 430; Williams v. Lanier, Busb. L. (44 N. C.) 30; See Ripka v. Sergeant, 7 W. & S. (Pa.) 9, 42 Am. Dec. 214; But to Contrary: Livingston v. Haywood, 11 Johns (N. Y.) 429; Bates v. Shraeder, 13 Johns (N. Y.) 260, both under N. Y. statute; and see Livingston v. Mott, 2 Wend. (N. Y.) 605.
8. For statutes see Land. & Ten., Tiffany, Ed. 1910, p. 725 and 726, Vol. 1; and see Curtiss v. Livingston, 36 Minn. 380; Robinson v. Wheeler, 25 N. Y. 252.
9. Land. & Ten., Tiff., page 726.

for the recovery of damages due to the commission of voluntary waste by a tenant for life or years. [1]

§56. The Effect of Special Conditions upon the Form and Time of Action. If a lease contains a covenant by the lessee not to commit waste the landlord has an option, if waste is committed, of suing on the covenant or of bringing an action on the case or other action, directly for the waste. [2] It was held in an Oregon case that if a tenant has an option under a lease to purchase the premises leased, no action for waste can be brought until the option expires, [3] but Tiffany thinks that even though it be held that the purchase of a reversion by a tenant would constitute a defense to an action for waste, committed before the purchase, yet the mere existence of an option could not have this effect. [4] Coke and other authorities hold that the lessor loses his action for waste if he accepts the premises when surrendered by the lessee, but a Wyoming case holds that the lessor's right of action is not thus lost. [5] In a Massachusetts case in which the landlord permitted a lessee to remain in possession after committing waste and accepted rent from him, the court held that the landlord did not thereby necessarily waive his right to recover damages for the waste and that the question of waiver was one for the jury. [6] The right of a lessor to bring an action in tort for waste is well established [7] and many court dicta indicate that an action will probably lie in contract for a breach of the implied contract of the lessee to use the premises leased in a tenant-like manner. [8]

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1. 4 Kent Comm. 81; Randall v. Cleaveland, 6 Conn. 328; Dozier v. Gregory, 46 N. C. (1 Jones L.) 100; Yocum v. Zahner 162 Pa. 468, 29 Atl. 778; Thackeray v. Eldigan, 21 R. I. 481, 44 Atl. 689; Moss Point Lbr. Co. v. Harrison County, 89 Miss. 448, 22 So. 290, 873; Greene v. Cole, 2 Saund. 233, Note; Brewer, Waste, 5.
2. Kinlyside v. Thornton, 2 Wm. Bl. 1111; City of London v. Hedger, 18 Ves. Jr. 355; Marker v. Kenrick, 13 C. B. 188; Moore v. Townshend, 33 N. J. L. 284; Moses v. Old Dominion Iron & Nail Works Co., 75 Va. 95; Parrott v. Barney, 2 Abb. 197, Fed. Cas. No. 10,773.
3. Powell v. Dayton S. & G. R. Co., 16 Ore. 33, 16 Pac. Rep. 683, 8 Am. St. Rep. 251.
4. Land. & Ten., Tiffany, p. 724; See Dupree v. Dupree, 49 N. C. (4 Jones Law) 387, 69 Am. Dec. 757; Dickinson v. City of Baltimore, 48 Md. 583.
5. Marshall v. Rugg, 6 Wyo. 270, 44 Pac. 486, 33 L. R. A. 679.
6. Chalmers v. Smith, 152 Mass. 561, 26 N. E. 95, 11 L. R. A. 769. See Ashton .v Golden Gate Lbr. Co. (Calif.) 58 Pac. 1. (Tenant cannot deny title of lessor while tenancy exists.)
7. Landlord and Tenant, Taylor, Pub. Little, Brown & Co., Boston, Mass. 1904, 9th. Ed. Vol. 1, pp. 211, 212, 229 and Vol. 2, p. 400. Landlord and Tenant, Tiffany, Pub. Keefe-Davidson Co. St. Paul, Minn. 1910, Vol. 2, p. 2115.
8. See pp. 727-729, Tiffany, Land. & Ten., and notes.

§57. The Remedy Applicable to Tenants at Will. As has been previously observed tenants at will were not generally regarded as within the purview of the statutes of Marlbridge and Gloucester on the ground that acts, which would constitute waste if done by other classes of tenants, would constitute trespass if done by tenants at will. Such trespass would end the tenancy and give rise to an action for damages against the tenant at will as against any person guilty of a tort.[1] The proper form of such action is evidently trespass and not trespass on the case.

§58. Damages Recoverable at Law. In an action for waste the measure of damages will be the harm done the inheritance.[2] The jury must determine the extent of the diminution in value of the estate in reversion or remainder by reason of the acts of waste committed and they cannot consider an increase in the value of the property as a result of the unlawful acts in the fixing of the damages to the inheritance.[3] Under a count in trover in an action on the case in the nature of waste for the cutting of timber the plaintiff may recover the value of the timber as appreciated by the wrong-doer's skill and labor;[4] but the extent of the damage to the inheritance resulting from the cutting of timber is not determined solely by the value of the wood and timber removed.[5]

§59. Multiple Damages and Forfeiture Provided by Statute. Although under the early common law only single damages were recoverable for waste and no forfeiture of the estate of the wrong doer could be decreed, the Statute of Gloucester provided for treble damages and the forfeiture

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1. Chalmers v. Smith, 152 Mass. 561; Perry v. Carr, 44 N. H. 118; Phillips v. Covert, 7 Johns (N. Y.) 1; Tobey v. Webster, 3 Johns (N. Y.) 468; Campbell v. Arnold, 1 Johns (N. Y.) 511; Land. & Ten., Tiffany, Ed. 1910, p. 724.
2. Amer. Freehold Land Mortg. Co. v. Pollard, 132 Ala. 155, 32 So. 630; Evans v. Kohn, 113 Minn. 45, 128 N. W. 1006; Tate v. Field, 57 N. J. Eq. 632, 40 Atl. 206; Robinson v. Kinne, 1 Thomps. & C. (N. Y.) 60; Kent v. Bentley, 10 Ohio Cir. Ct. 132, 6 Ohio Cir. Dec. 457; McCullough v. Irvine, 13 Pa. St. 438; Morris v. Knight, 14 Pa. Super. Ct. 324; Bodkin v. Arnold, 48 W. Va. 108, 35 S. E. 980.
3. Van Deusen v. Young, 29 N. Y. 9; Purton v. Watson, 2 N. Y. Suppl. 661; Fagan v. Whitcomb (Tex. App.), 14 S. W. 1018; Hamden v. Rice, 24 Conn. 350.
4. Harris v. Goslin, 3 Harr. (Del.) 340; But see Nelson v. Churchill, 117 Wis. 10, 93 N. W. 799.
5. Perdue v. Brooks, 85 Ala. 459, 5 So. 126; Disbrow v. Westchester Hardwood Co., 164 N. Y. 415, 58 N. E. 519 (reversing 17 N. Y. App. Div. 610, 45 N.Y. Suppl. 376); Harder v. Harder, 26 Barb. (N. Y.) 409; Winship v. Pitts, 3 Paige (N. Y.) 259; But *see* Worrall v. Nunn, 53 N. Y. 185.

of the estate.[1] In several of the United States the provisions of the Statute of Gloucester are held to be still in force.[2] However, forfeiture will be decreed only when there is wanton voluntary waste, or the injury to the estate in inheritance is considered equal to the value of the unexpired term.[3] Forfeiture is not favored[4] and in the United States, as in England, must be confined to the particular thing wasted.[5] Thus the cutting of a few trees in a woodlot has been held not to work a forfeiture of the whole lot;[6] but the whole would be forfeited if the cutting were scattered over the lot.[7] A forfeiture may be waived by the reversioner.[8] Statutes in many American States allow either double or treble damages[9] for waste and several allow forfeiture.[10] Most of these statutes are held to be merely supplementary to or confirmatory[11] of the common law rule. However, they are considered to be penal in nature and will be construed strictly.[12] Some of them say that treble damages "shall"[13] be allowed

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1. Roby v. Newton, 121 Ga. 679, 49 S. E. 694, 68 L. R. A. 601; Smith v. Sharpe, 44 N. C. 91, 57 Am. Dec. 574; Richards v. Noble, 3 Meriv. 673, 36 Eng. Reprint 258.
2. Hasty v. Wheeler, 12 Me. 434; Sackett v. Sackett, 8 Pick. (Mass.) 309; Sherrill v. Conner, 107 N. C. 543, 12 S. E. 588; Willard v. Willard, 56 Pa. St. 119; Robinson v. Kinne, 70 N. Y. 147; McCartney v. Titsworth, 119 N. Y. App. Div. 547, 104 N. Y. Suppl. 45; Thurston v. Muston, 23 Fed. Cas. No. 14,013, 3 Cranch C. C. 335.
3. Roby v. Newton, 121 Ga. 679; Bollenbacher v. Fritts, 98 Ind. 50; Harder v. Harder, 26 Barb. (N. Y.) 409.
4. Willard v. Willard, 56 Pa. St. 119; Phelan v. Boylan, 25 Wis. 679; Woodward v. Gates, 38 Ga. 205; Sackett v. Sackett 5 Pick. (Mass.) 191; Kent v. Bentley, 6 Ohio Cir. Dec. 457, 10 Ohio Cir. Ct. 132.
5. Chipman v. Emeric, 3 Cal. 273; Smith v. Mattingly, 96 Ky. 228, 28 S. W. 503, 16 Ky. L. Rep. 18; Morehouse v. Cotheal, 22 N. J. L. 521; Jackson v. Tibbitts, 3 Wend. (N. Y.) 341; Coke Litt. 54a.
6. Waples v. Waples, 2 Harr. (Del.) 281; Padelford v. Padelford, 7 Pick. (Mass.) 152.
7. Waples v. Waples, 2 Harr. (Del.) 281; Morehouse v. Cotheal, 22 N. J. L. 521; Smith v. Sharpe, 44 N. C. 91, 57 Am. Dec. 574.
8. Hickman v. Irvine, 3 Dana (Ky.) 121.
9. See Mich. Comp. Laws 1897, Sec. 11121; Wisconsin St. 1898, Sec. 3176.
10. Del. Rev. Code, 1893, p. 666, Sec. 9; Ky. St. 1903, Sec. 2328; Me. Rev. St. 1903, Ch, 97, Sec. 1; Neb. Ann. St. 1903, Sec. 1646 (if injury over two thirds value of tenant's estate); N. J. Gen. St., p. 3749, Sec. 3; N. C. Rev. St. 1905, Sec. 853; R. I. Gen. Law 1896, Chap. 268, Sec. 1; S. C. Civ. Code, Sec. 2425; Forfeiture when done maliciously and equal to residue of tenant's estate. See many cita- under note 830 on p. 736, Tiffany, Land. & Ten. 1910 Ed.
11. Bullock v. Hayward, 10 Allen (Mass.) 460.
12. Adams v. Palmer, 6 Gray (Mass.) 338.
13. Kentucky St. 1903, Secs. 2328, 2334; Maine Rev. St. 1903, C. 97, Sec. 1; Nebraska Ann. St. 1907, Sec. 1645; 3 New Jersey Gen. St., p. 3749, Sec. 3; New York Code Civil Proc., Sec. 1655; Bell & C. St. Oregon Sec. 347; Virginia Code 1904, Sec. 2778 (if waste wanton)

for waste while others provide that the damages "may" [1] be assessed at three times the waste. Under some of them forfeiture cannot be decreed, [2] and generally the allowance of multiple damages is discretionary with the court and will be confined to cases of wilful or malicious waste. [3] Double and treble damages cannot be obtained in an equitable action. An action on the case in the nature of waste is generally used to recover actual damages as a penalty for the waste. [4]

§60. Multiple Damage and Forfeiture Statutes are not Strictly Enforced Against Co-tenants. The cutting down of trees by one tenant in common to the injury of his co-tenant constitutes waste for which an action on the case or the statutory action regarding waste may be brought. [5] Double and treble damages have been allowed [6] against a co-tenant, but the courts show a reluctancy to apply this rule where property is held in common [7] and where, subsequent to the enactment of a statute giving treble damages for waste, a statute gave to co-tenants all existing remedies against a tenant cutting without notice, it was held that the last act did not extend the first act to property held in common. [8] It has also been

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1. California Code Civ. Proc., Sec. 732; Idaho Code Civ. Proc. 1901, Sec. 3374; Minn. Rev. Laws, 1905, Sec. 4447; Montana Rev. Code 1907, Sec. 6866; Nevada Comp. Laws 1900, Sec. 3347; N. Car. Rev. St. 1905, Sec. 7539; North Dakota Rev. Codes 1905, Sec. 753; So. Dakota Code Civ. Proc., Sec. 693; Utah Comp. Laws 1907, Sec. 3507.
2. Chipman v. Emeric, 3 Cal. 273; See p. 736 of Tiffany's Land. & Ten.
3. Isom v. Book, 142 Cal. 666, 76 Pac. 506; Isom v. Rex Crude Oil Co., 140 Cal. 678, 74 Pac. 294; Sherrill v. Conner, 107 N. C. 543, 12 S. E. 588.
4. Shields v. Lawrence, 72 N. C. 43.
5. Nevels v. Ky. Lbr. Co., 108 Ky. 550, 56 S. W. 969, 22 Ky. L. Rep. 247, 94 Am. St. Rep. 388, 49 L. R. A. 416; Elwell v. Burnside, 44 Barb. (N. Y.) 447; Hawley v. Clowes, 2 Johns (N. Y.) 122; Johnson v. Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72; Dodge v. Davis, 85 Iowa 77, 52 N. W. 2; Sheppard v. Pettit, 30 Minn. 119, 14 N. W. 511; Dodd v. Watson, 57 N. C. 48, 72 Am. Dec. 577; Bradley v. Reed, 2 Pittsb. (Pa.) 519; Cf. Darden v. Cowper, 52 N. C. 210, 75 Am. Dec. 461, action for accounting; See 30 Am. & Eng. Ency. Law 294.
6. Mills v. Richardson, 44 Me. 79; Dwinell v. Larrabee, 38 Me. 464; Clow v. Plummer, 85 Mich. 550, 48 N. W. 795; Wheeler v. Carpenter, 107 Pa. St. 271; See also Cyc. 38, p. 89, 90.
7. Smith v. Sharpe, Busb. L. (44 N. C.) 91, 57 Am. Dec. 574.
8. Central Trust Co. v. N. Y. Equipment Co., 87 Hun. (N. Y.) 421, 34 N. Y. Suppl. 349; Wheeler v. Carpenter, 107 Pa. St. 271.

held that a general statute for an accounting may not be applicable in a case of waste between co-tenants. [1]

§61. The Use of Injunction for the Prevention of Waste. As a remedy for waste injunction has not only generally taken the place of the writ of estrepement and the common law action of waste, but it has also to a large extent superseded the common law action on the case for damages. [2] The use of the remedy is no longer confined to cases founded on privity of title. [3] and will be granted against a trespasser [4] where irreparable injury is threatened. Even though a statute gives a remedy at law injunction may be used if the legal remedy is not adequate. [5]

Where there is privity of title it is probably unnecessary for the applicant to show irreparable injury to the inheritance or insolvency of the tenant to entitle him to the remedy of injunction, but if the parties are stangers or claim adversely most courts require a very clear showing that the injury will be irreparable [6] and that there is not an adequate remedy at law. [7] If upon the facts stated in the application for an injunction the applicant has an ade-

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1. Cecil v. Clark, 47 W. Va. 402, 35 S. E. 11, 81 Am. St. Rep. 802.
   See Lumber Co. v. Lumber Co. (Ky.) 64 S. W. 652 (Tenant in common can convey nothing less than full undivided interest; action in equity) Sullivan v. Sherry, (Wis.) 87 N. W. 471 (Cutting of timber by licensee of cotenant such ouster as to justify trespass or trover.)
2. Georges Creek Coal etc. Co. v. Detmold, 1 Md. Ch. 371; Poertner v. Russell, 33 Wis. 193.
3. Powell v. Cheshire, 70 Ga. 357, 48 Am. Rep. 572; Attaquin v. Fish, 5 Metc. (Mass.) 140; Leighton v. Leighton, 32 Me. 399; Duvall v. Waters, 1 Bland. 569, 18 Am. Dec. 350; Kane v. Vanderburgh, 1 Johns Ch. 11; Garth v. Cotton, 3 Atk. 751, 26 Eng. Reprint 1231, 1 Ves. 524, 546; 27 Eng. Reprint 1182, 1196.
4. Del. Fleming v. Collins, 2 Del. Ch. 230.
   Ga. Bingham v. Overstreet, 128 Ga. 447, 57 S. E. 484, 10 L. R. A. N. S. 452, 11 Ann. Cas. 75; Markham v. Howell, 33 Ga. 508; Smith v. City of Rome, 19 Ga. 89, 63 Am. Dec. 298.
   Ill. Palmer v. Young, 108 Ill. App. 252.
   Md. Georges Creek Coal etc. Co. v. Detmold, 1 Md. Ch. 371 .
   N. J. Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756.
   N. Y. Rodgers v. Rodgers, 11 Barb. 595; Stevens v. Beckman, 1 Johns Ch. 318; People v. Alberty, 11 Wend. 160; Kane v. Vanderburgh, 1 Johns 11.
   S. C. Crawford v. Atlantic Coast Lumber Corp., 77 S. C. 81, 57 S. E. 670.
   Eng. Hanson v. Gardiner, 7 Ves. Jr. 305, 32 Eng. Reprint 125; Mitchell v. Dors, 6 Ves. Jr., 147, 31 Eng. Reprint 984: Courthope v. Mapplesden, 10 Ves. Jr. 290, 32 Eng. Reprint 856.
5. Duncombe v. Felt, 81 Mich. 332, 45 N. W. 1004; Harris v. Thomas, 1 Hen. & M. (Va.) 18.
6. Timber case, Green v. Keen, 4 Md. 98; Cf. Atkins v. Chilson, 48 Mass. (7 Metc.) 398, 41 Am. Dec. 448.
7. Brown v. Niles, 165 Mass. 2 6, 43 N. E. 90; Cutting v. Carter, 4 Hen. & M (Va.) 24.

quate remedy at law for the injury which has been or will be suffered an injunction will not be granted.[1] Although it is not necessary that the complainant be in possession of the premises he must ordinarily be able to show a good title to the premises upon which waste is being committed or as to which it is apprehended. If the defendant is in possession and claiming adversely or the complainant's title is otherwise doubtful, an injunction will not ordinarily be granted. However, even in such cases it is within the discretion of the court to intervene if the character of the waste or the irresponsibility of the defendant be such that the complainant will not have an adequate remedy at law. Thus the court will enjoin irreparable injury to the property pending a determination of the title of the complainant.

§62. Injunctions are Granted Liberally in Modern Practice. Injunctions to restrain waste have been granted not only where the estate of the injured party is entirely equitable, but even where it is legal if no action at law can be maintained. Threatened acts which are not inconsistent with the legal rights of a tenant but which will manifestly injure the inheritance will be restrained as equitable waste, in modern practice.[2] Proof of one instance of substantial waste intentionally committed,[3] or of slight waste under conditions clearly indicating an intention[4] on the part of the tenant or trespasser to do more will entitle the complainant to an injunction. Although injunction has been granted where waste was threatened but none actually committed prior to the issuance

1. Poindexter v. Henderson, Walk. (Miss.) 176; Cutting v. Carter, 4 Hen. & M. (Va.) 424; Lefforge v. West, 2 Ind. 514; See 30 Am. & Eng. Ency. Law, p. 285.
2. See Stevens v. Rose, 69 Mich. 259; Duncombe v. Felt, 81 Mich. 332; Crove v. Wilson, 65 Md. 479, 57 Am. Rep. 343.
3. Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 601; Same as to equitable waste, Coffin v. Coffin, 6 Madd. 17, 56 Eng. Reprint 995.
4. Livingston v. Reynolds, 26 Wend. (N.Y.) 115; Rodgers v. Rodgers, 11 Barb. (N. Y.) 595; Loudon v. Warfield, 5 J. J. Marsh (Ky.) 196; Barry v. Barry, 1 Jac. & W. 651, 37 Eng. Reprint 516; See Webster v. Peet, 97 Mich. 326, 56 N. W. 558.

of the writ,[1] mere apprehension[2] on the part of the complainant that waste will be permitted, without satisfactory proof that it may reasonably be expected, will not be accepted by the courts as ground for an injunction. Injunction will be refused if the acts complained of are trivial or amount only to meliorating waste,[3] and the application must allege facts showing that further acts of waste may reasonably be apprehended.[4]

§63. An Equity Court may even Redress Past Injuries after its Jurisdiction Attaches. Equity will ordinarily interfere only to prevent future waste, and only under special circumstances will cognizance be taken of waste already committed. This is upon the theory that the complainant has an adequate remedy in law for the waste already committed. However, where an equity court entertains the request for an injunction to prevent future waste it may also decree an account and satisfaction for waste already committed in order to prevent a multiplicity of suits[5] provided there exists a right in equity

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1. Ala. Lyon v. Hunt, 11 Ala. 295, 46 Am. Dec. 216.
   Ga. Dickinson v. Jones, 36 Ga. 97.
   Ill. Palmer v. Young, 108 Ill. App. 252.
   Ind. White Water Valley Canal Co. v. Comegys, 2 Ind. 469.
   Ky. Loudon v. Warfield, 5 J. J. Marsh 196; Calvert v. Rice, 11 Ky. L. Rep. 1001, 12 K. L. Rep. 252.
   Md. Duvall v. Waters, 1 Bland. Md. 569, 18 Am. Dec. 350.
   Mich. Duncombe v. Felt, 81 Mich. 332, 45 N. W. 1004.
   Neb. Hayman v. Rownd, 82 Neb. 598, 118 N. W. 328.
   Ore. Sheridan v. McMullen, 12 Ore. 150.
   Wash. Arment v. Hensel, 5 Wash. 152, 31 Pac. 464.
   Wis. Poertner v. Russell, 33 Wis. 193.
   U. S. Poor v. Carleton, 3 Summ. 70.
   Eng. Gibson v. Smith, 3 Ath. 182, 26 Eng. Reprint 514; Jackson v. Cator, 5 Ves. Jr. 688, 31 Eng. Reprint 806.
2. Kidd v. Dennison, 6 Barb. (N. Y.) 9; Campbell v. Allgood, 17 Beav. 623, 51 Eng. Reprint 1177.
3. Butts v. Fox, 107 Mo. App. 370, 81 S. W. 493; Brown v. Niles, 165 Mass. 276, 43 N. E. 90; Hubble v. Cole, 85 Va. 87, 7 S. E. 242; Barry v. Barry, 1 Jac. & W 651, 37 Eng. Reprint 510; Meux v. Cobley (1892) 2 Ch. 253; Doherty v. Allman, 3 App. Cases 709; Grand Canal Co. v. McNamee, 29 L. R. Ir. 131; But see Duvall v. Waters, 1 Bland. (Md.) 569, 18 Am. Dec. 350; Cf. People v. Marquette Co., Cir. Judge, 38 Mich. 244.
4. Green v. Keen, 4 Md. 98; Rodgers v. Rodgers, 11 Barb. (N. Y.) 595; Perkins v. Collins, 3 N. J. Eq. 482; Leavenworth v. Plunkett, 7 La. 341; Crockett v. Crockett, 2 Ohio St. 180; St. Clair v. Sedgwick, 39 Neb. 562, 58 N. W. 185; Jackson v. Cator, 5 Ves. Jr. 688; Hext v. Gill, 7 Ch. App. 699; Bewes, Waste, 340.
5. Jesus College v. Bloom, 3 Atk. 262; Winship v. Pitts, 3 Paige (N. Y.) 259; Fleming v. Collins, 2 Del. Ch. 230; Ackerman v. Hartley, 8 N. J. Eq. (4 Halst) 476; Armstrong v. Wilson, 60 Ill. 226; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411; Disher v. Disher, 45 Neb. 100, 63 N. W. 368, under code.

to relief for the waste already committed which is independent of the ground upon which the applicant is entitled to an injunction to restrain future waste. Relief for waste already committed cannot be granted in equity if the injunction is refused,[1] except in a case involving equitable waste where the relief as to past injury rests upon the ground that there is no adequate remedy in law for such injury. An injunction will even be granted against waste by a co-tenant when necessary to prevent irreparable injury to the common property, especially upon a showing that the wrong doer is insolvent.[2]

§64. Injunctions regarding Timber. The cutting of timber will ordinarily be considered such a destruction of the inheritance as to justify the granting of an injunction.[3]

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1. Jesus College v. Bloom, 3 Atk. 263; Smith v. Cooke, 3 Atk. 378; Gent v. Harrison, Johns 517; Parrott v. Palmer, 3 Mylne & K. 632; Crockett v. Crockett, 2 Ohio St. 180; Winship v. Pitts, 3 Paige (N. Y.) 259.
2. See Real Prop., Tiffany, Sec. 257, Note 274, p. 580; Am. & Eng. Ency. Law, Vol. 30, p. 294.
3. Ala. Thomas v. James, 32 Ala. 723.
   Cal. Halleck v. Mixer, 16 Cal. 574; Natoma Water etc. Co. v. Clarkin, 14 Cal. 574.
   Fruit Trees: Silva v. Garcia, 65 Cal. 591, 4 Pac. 628.
   Del. Fleming v. Collins, 2 Del. Ch. 230.
   Ga. Enterprise Lumber Co. v. Clegg, 117 Ga. 901, 45 S. E. 281; Jones v. Gammon, 123 Ga. 47, 50 S. E. 982; Powell v. Cheshire, 70 Ga. 357, 48 Am. Rep. 572; Camp v. Dixon, 38 S. E. 71.
   Ind. Thatcher v. Humble, 67 Ind. 444; Owens v. Lewis, 46 Ind. 488, 15 Am. Rep. 295.
   Iowa. Palmer v. Butler, 36 Iowa 583.
   Ky. Peak v. Hayden, 3 Bush. 125; McDowell v. Wiseman, 3 Ky. L. Rep. 332.
   La. De la Croix v. Villere, 11 La. Ann. 39.
   Md. Fulton v. Harman, 44 Md. 251; Shipley v. Ritter, 7 Md. 408, 61 Am. Dec. 371.
   Mich. Collins v. Rea, 86 N. W. 811 (In favor of mortgagee.)
   Minn. Butman v. James, 34 Minn. 547.
   Mo. Powell v. Canady, 95 Mo. App. 713, 69 S. W. 686; Palmer v. Crisle, 92 Mo. App. 510.
   N. J. Piper v. Piper, 38 N. J. Eq. 81; Chenango Bank v. Cox, 26 N. J. Eq. 452; Shreeve v. Black, 4 N. J. Eq. 177; but *see* Kerlin v. West, 4 N. J. Eq. 449.
   N. Y. Relyea v. Beaver, 34 Barb. 547; Kidd v. Dennison, 6 Barb. 9; Herring v. Dean of St. Pauls, 2 Wils. Ch. 1.
   Pa. Smith's Appeal, 69 Pa. St. 474; Kerns v. Harbison, 1 Chest. Co. Rep. 506; Echert v. Ferst, 10 Phila. 514.
   S. C. Shubrick v. Guerard, 2 Desauss, Eq. 616.
   Vt. Smith v. Rock, 59 Vt. 232, 9 Atl. 551; Smith v. Pettingil, 15 Vt. 82, 40 Am. Dec. 667.
   Va. Bruce v. John L. Roper Lbr. Co., 87 Va. 381, 13 S. E. 153, 24 Am. St. Rep. 657.
   Wash. Arment v. Hensel, 5 Wash. 152, 31 Pac. 464; Colwell v. Smith, 1 W. T. 92.
   W. Va. Fluharty v. Mills, 49 W. Va. 446, 38 S. E. 521.
   Wis. Bunker v. Locke, 15 Wis. 636.
   U. S. King v. Campbell, 85 Fed. 814; King v. Stuart, 84 Fed. 546; U. S. v. Guglard, 79 Fed. 21; Wood v. Braxton, 54 Fed. 1005.

(Footnote 3 continued on next page)

In some cases the court has rested the relief upon the particular relationship of the trees to the enjoyment of the premises on which they stand or of other property held by the plaintiff.[1] Injunction has been allowed on the ground that the cutting would defeat the purpose for which the trees had been grown, such as for a sugar orchard[2] and refused where the injury alleged would result from a use which accorded with the purpose for which they were adapted.[3] Cutting trees from land valuable only or chiefly for the timber upon it was held in New Jersey not to constitute the irreparable injury required to support an injunction,[4] but a Federal court has held to the contrary.[5] The remedy will not be granted as a matter of course[6] and it has frequently been refused where the complainant failed to show that the injury which would result from the cutting would be irreparable,[7] or where it did not appear that the trees had any special or peculiar value.[8]

(Footnote 3 concluded from preceding page)

Eng. Gilmour v. Maurvit, 14 App. Cas. 645, 59 L. J. P. C. 38, 6 L. T. Rep. N. S. 442 (Affirming 33 L. C. Jur. 231, 3 Montreal Q. B. 449). Usborne v. Usborne, 1 Dick 75; Hippesley v. Spencer, 5 Madd. 422; King v. Smith, 2 Hare 239.

See Humphrey v. Harrison, 1 Jac. & W. 561; Harper v. Alpin, 54 L.T.N.S. 383

Can. McLean v. Burton, 24 Grants Ch. (U. C.) 134; Wightman v. Fields, 19 Grants Ch. (U. C.) 559; McDougall v. Grignon, 15 Quebec Super. Ct. 535. *See* Robins v. Porter, 2 Can. L. J. 230.

1. Powell v. Cheshire, 70 Ga. 357, 48 Am. Rep. 572, shade trees; Musch v. Burkhart, 83 Iowa 301, 48 N. W. 1025, 32 Am. St. Rep. 305, 12 L. R. A. 484; Davis v. Reed, 14 Md. 152; Griffith v. Hilliard, 64 Vt. 643, 25 Atl. 427, charcoal plant; Camp v. Dixon, 112 Ga. 872, 37 S. E. 71, 52 L. R. A. 755; But see Heaney v. Butte, etc. Commercial Co., 10 Mont. 590, 27 Pac. 379.
2. Clendening v. Ohl, 118 Ind. 46, 20 N. E. 639; Smith v. Rock, 59 Vt. 232, 9 Atl. 551.
3. Carney v. Hadley, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233; Gause v. Perkins, 56 N. C. 177, 69 Am. Dec. 728.
4. West v. Walker, 3 N. J. Eq. 279.
5. Wood v. Braxton, 54 Fed. 1005.
6. But see Markham v. Howell, 33 Ga. 508; Smith v. Rome, 19 Ga. 89, 63 Am. Dec. 298. See St. Regis Paper Co. v. Santa Clara Lbr. Co., 67 N. Y. Suppl. 149 (1900.) (Court will not unnecessarily assume responsibility of business enterprises.)
7. Fla. Woodford v. Alexander, 35 Fla. 333, 17 So. 658.
   Ga. Morgan v. Baxter, 113 Ga. 144, 38 S. E. 411.
   Ind. Smith v. Weldon, 73 Ind. 454.
   Iowa. Cowles v. Shaw, 2 Iowa 496.
   Kan. Jordan v. Updegraff, McCahon 103.
   Ky. Hillman v. Hurley, 82 Ky. 626.
   Miss. Blewitt v. Vaughn, 5 How. 418.
   N. J. Cornelius v. Post, 9 N. J. Eq. 196.
   N. Y. Griffin v. Winne, 79 N. Y. 637; Van Rensaclaer v. Griswold, 3 N. Y. Leg. Obs. 94 (Wild lands); Stevens v. Beekman, 1 Johns Ch. 318.
   N. C. Thompson v. McNair, 62 N. C. 121.
   W.Va. Cox. v. Douglass, 20 W. Va. 175. Eng. Atty-Gen'l v. Hallett, 16 L. J. Exch. 131, 16 M. & W. 569.
8. Hatcher v. Hampton, 7 Ga. 49; Powell v. Rawlings, 38 Mich. 239.

Where the title to the timber was in the complainant but the title to the land in another a Florida court refused an injunction,[1] but a California case announced the contrary view;[2] and where the applicant for an injunction urged that there was a mistake in the contract of sale under which the defendant claimed the right to cut the trees, but the contract was not ambiguous in terms, a Georgia court refused to grant an injunction when no suit was pending.[3] Injunctions against the cutting of timber have been granted to prevent a multiplicity of suits.[4] Although damages for such injury may be recovered at law, injunctions will be granted to prevent the destruction of ornamental, shade and fruit trees,[5] regardless of whether the trees were planted or grew naturally. The extent to which injunction against the cutting of timber will be granted is regulated by statute in some states.[6] In accordance with the general principle that where there is an adequate legal remedy injunction should not issue most courts will refuse to enjoin the removal of trees which have been cut down.[7] But if timber has been cut after the issuance of a restraining order but before service thereof its removal will be enjoined,[8] and where injunction lies to restrain further cutting

1. Doke v. Peek, 45 Fla. 244, 34 So. 896.
2. Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171.
3. Swindell v. Saddler, 122 Ga. 15, 49 S. E. 753.
4. Owens v. Lewis, 46 Ind. 488, 15 Am. Rep. 295; O'Hara v. Johns, 7 Ky. L. Rep. 296; Echert v. Ferst, 10 Phila. (Pa.) 514; King v. Stuart, 84 Fed. 546.
5. Cal. Silva v. Garcia, 65 Cal. 591, 4 Pac. 628.
   Ill. Smith v. Price, 39 Ill. 28, 89 Am. Dec. 284.
   Md. Shipley v. Ritter, 7 Md. 408, 61 Am. Dec. 371.
   Neb. Sapp v. Roberts, 18 Neb. 299, 25 N. W. 96.
   N. J. Tainter v. Morristown, 19 N. J. Eq. 46.
   Vt. Smith v. Pettingill, 15 Vt. 82, 40 Am. Dec. 667.
   Wis. Wilson v. Mineral Point, 39 Wis. 160.
6. Fla. McDonald v. Padgett, 46 Fla. 501, 35 So. 336; Doke v. Peet, 45 Fla. 244, 34 So. 896; McMillan v. Wiley, 45 Fla. 487, 33 So. 993; Louisville, etc. R. Co. v. Gibson, 43 Fla. 315, 31 So. 230.
   Ga. Swindell v. Saddler, 122 Ga. 15, 49 S. E. 753; Wiggins v. Middleton, 117 Ga. 162, 43 S. E. 432; Powell v. Brinson, 120 Ga. 36, 47 S. E. 499; Wilcox Lumber Co. v. Bullock, 109 Ga. 532, 35 S. E. 52; Camp v. Dixon, 111 Ga. 674, 36 S. E. 878.
   N. C. John L. Roper Lbr. Co. v. Wallace, 93 N. C. 22; Kistler v. Weaver, 135 N. C. 388, 47 S. E. 478.
7. Miss North Lumber Co. v. Gary, 83 Miss. 640, 36 So. 2. N. J. Worthington v. Moon, 53 N. J. Eq. 46, 30 Atl. 251. N. Y. Van Wyck v. Alliger, 6 Barb. 507; Spear v. Cutter, 5 Barb. 486, 4 How. Pr. 175, 2 Code Rep. 100; Winship v. Pitts, 3 Paige 259; Watson v. Hunter, 5 Johns Ch. 169, 9 Am. Dec. 295; Johnson v. White, 11 Barb. 194; Cf. Disbrow v. Westchester Hardwood Co., 17 N. Y. App. Div. 610, 45 N. Y. Suppl. 376.
8. King v. Campbell, 85 Fed. 814.

an accounting may be decreed for that already cut.[1] Where defendants were insolvent and the timber which had been cut constituted a principal part of the security, a mortgagee has been granted an injunction against the removal of timber already severed.[2] On similar ground creditors have been permitted to restrain the removal of timber by heirs of a deceased debtor[3] and a trespasser has been enjoined from removing timber pending a suit for the determination of the plaintiff's title to the land from which it had been cut.[4]

§65 Injunction Against the Cutting of Timber by a Vendor or Purchaser under an Executory Contract. A vendor of land remaining in possession after the execution of a contract of sale will be liable for waste in the cutting of trees, except in reasonable quantity for estovers, or under an express or implied agreement or license from the purchaser,[5] and by an injunction the latter can restrain an unauthorized cutting.[6] A judgment debtor may be enjoined from committing waste in the cutting of trees from the attached land.[7]

While a contract for the purchase of land is executory, a purchaser in possession is an equitable owner occupying a position similar to a mortgagor in possession in a jurisdiction where the equitable theory of a mortgage prevails. Such a purchaser may ordinarily cut timber provided such action does not imperil the security of the vendor for the payment of the contract price.[8] It has been held that a reservation of title to timber by a vendor until full payment for the timber was made operated only as a security and the vendor could not sell the timber to another.[9]

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1. Fleming v. Collins, 2 Del. Ch. 230; Weatherby v. Wood, 29 How. Pr. (N. Y.) 404.
2. Terry v. Robbins, 122 Fed. 725.
3. Tessier v. Wise, 3 Bland. (Md.) 28.
4. Staples v. Rossi, 7 Ida. 618, 65 Pac. 67.
5. Smith v. Forbes 89 Miss. 141, 42 So. 382 (held liable for statutory penalty.) But see Crawley v. Timberlake 37 N. C. 460 (clearing permitted in accord with custom.)
6. Holmberg v. Johnson, 45 Kan. 197, 25 Pac. 575.
7. Camp v. Bates, 11 Conn. 51, 27 Am. Dec. 707; Moulton v. Stowel 16 N. H. 221; Jones v. Britton 102 N. C. 166, 9 S. E. 554, 4 L. R. A. 178; See also Vandermark v. Schoonmaker 9 Hun. (N. Y.) 16 and Witmer's appeal 45 Pa. St. 455 84 Am. Dec. 505.
8. Van Wyck v. Alliger 6 Barb. (N. Y.) 507. Laughlin v. North Wisconsin Lumber Co. 176 Fed. 772. See also Moreton v. Reese, Wright (Ohio) 381.
9. Bruley v. Garvin 105 Wis. 625, 81 N. W. 1038, 48 L. R. A. 839.

Where the purchaser has no right to possession,[1] or where he is in possession merely by the acquiescence of the vendor,[2] he can take timber only with the consent of the vendor.

Contracts for the sale of timber, or of land chiefly valuable for its timber, often provide that there shall be no cutting of timber until payment is made;[3] that none is to be cut except for fuel or repairs;[4] that proceeds of timber cut is to be applied toward payment of the purchase price;[5] that there shall be no cutting after default in payments,[6] or that the purchaser shall hold as a tenant of the vendor.[7] If any of these restrictions is in the contract, an injunction to retrain waste will be granted upon a violation of the agreement. If the contract of sale authorizes the purchaser to cut timber without restriction, the vendor cannot obtain an injunction to restrain the cutting even though his security is imperiled.[8]

§66 Grounds for a Refusal of an Injunction. The refusal of courts to grant injunctions to restrain the cutting of timber on the ground that there is an adequate remedy at law;[9] that the injury is merely threatened;[10] that the plaintiff has shown no title;[11] or that the insolvency of the defendant has not been averred or proved;[12] has to a large extent been overcome by statutes which authorize the issuance of injunctions upon a showing of certain facts and the giving of a bond, without an establishment of the

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1. Phinney Land Co. v. Collidge-Schussler Co. 97 Minn. 26x, 105 N. W. 553.
2. Cook v. Doolittle 5 Hun (N. Y.) 342. cf. Brewer v. Craig, 18 N. J. L. 214.
3. Gumaer v. White Pine Lumber Co. 11 Idaho 591, 83 Pac. 771.
4. Lesser v. Dame, 77 Miss. 798, 26 So. 961.
5. Willis v. Adams, 66 Vt. 223, 28th Atl. 1033.
6. Nelson v. Graff, 12 Fed. 389.
7. Huddleston v. Johnson, 71 Wis. 336, 37 N. W. 407. cf. Jennison v. Stone, 33 Mich. 99.
8. Hoile v. Bailey 58 Wis. 434, 17 N. W. 322.
9. Powers v. Heery, R. M. Chart. (Ga.) 523; Davis v. Reed, 14 Ind. 152; Green v. Keen, 4 Md. 98; Hamilton v. Ely 4 Gill. (Md.) 34; Bogey v. Shute 1 Jones Eq (54 N. C.) 180; Thompson v. Williams 1 Jones Eq. (54 N. C.)176.
10. Griffin v. Winne 10 Hun (N. Y.) 571.
11. Wearin v. Munson 62 Iowa 466; See also Small v. Slocumb 112 Ga. 279, 81 Am. St. Rep. 50; Cox v. Douglass 20 W. Va. 175.
12. Hihn v. Peck 18 Cal. 640; Gause v. Perkins 3 Jones Eq. (56 N. C.) 177, 69 Am. Dec. 728; McCormick v. Nixon 83 N. C. 113. Dunkart v. Rhinehart 87 N. C. 224.

insolvency of the defendant or the irreparable character of the injury. [1]

§67. Injunction is Available for the Protection of Public Timber. The United States enjoys the same rights as a private individual in the protection of its property, [2] and the remedy of injunction is available to the United States in the prevention of timber trespass on public lands. [3]

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1. See citations under note 6 p. 62. Fla. General Statutes, 1906, Sec. 1919. Ga. Code of 1895, Sec. 4927 and 4928. If Pl. shows title and gives bond, need not show insolvency of def. or irreparable injury. Minn. General Statutes, Tiffany, 1913, Sec. 8089. N. C. Revised Laws, Pell, 1908, Vol. 1 Secs. 807 to 809, not necessary to allege insolvency. Tenn. Code, Shannon, 1896, Sec. 3820, 3821. Wash. Codes & Statutes, Remington & Ballinger, 1910, Sec. 941.
2. U. S. v. Lee, 106 U. S. 222. Dugan v. U. S. 3 Wheaton 181. Stephenson v. Little et al. 10 Mich. 433. 1 Opin. Atty. Gen. 471, May 27, 1821; 2 Op. Atty. Gen. 575, Aug. 22, 1833.
3. Erhardt v. Boaro et al. 113 U. S. 537. U. S. v. Gear 3 Howard 120. Nichols v. Jones et al. 19 Fd. 855. Wilson v. Rockwell et al. 29 Fed. 674. LeRoy v. Wright et al. 4 Sawyer 530 (Cir. Ct. of Cal.)
See Teller v. U. S. 113 Fed. 463, 51 C. C. A. 297 injunction refused where it was urged the injunction would do no harm but no affirmative reason for its issuancewas shown.

CHAPTER VII

CIVIL LIABILITY FOR TRESPASS UPON TIMBER AND FOR THE CONVERSION OF TIMBER PRODUCTS.

§68. Trespass upon Realty. Every unauthorized entry upon the land of another constitutes trespass,[1] and the offense will be established though the actual injury shown be only slight,[2] or even though no damage whatever be proven.[3] In an action for trespass it is not necessary that the plaintiff prove an unlawful intent on the part of the defendant. The defendant may be liable for trespass even though his action were due to a mistake of fact, or a mistake of law.[4] Thus a timber trespass may be due to misunderstanding as to the description of the land, as to the boundaries or as to the rights of the plaintiff or the defendant regarding the land or timber,[5] and actual damages may be recovered even when the trespass was not wilful.[6] The burden of proving the act unintentional rests upon defendant.[7] However, only nominal damages

1. Tubbs v. Lynch, 4 Harr. (Del.) 521; Pfeiffer v. Grossman, 15 Ill. 53 Hatch v. Donnell, 74 Me. 163; Brown v. Manter, 22 N. H. 468; Barneycastle v. Walker, 92 N. C. 198 (wrongful entry by landlord); Dougherty v. Stepp, 18 N. C. 371; Norvell v. Gray, 1 Swan (Tenn.) 96; Ripy v. Less (Civ. App. 1909), 118 S. W. 1084 (Texas); See 46 Cent. Dig. tit. "Trespass," Sec. 10.
2. Postal Tel. Cable Co. v. Kuhnen, 127 Ga. 20, 55 S. E. 967; Keirn v. Warfield, 60 Miss. 799; For other citations see 38 Cyc. 995, Note 15.
3. For citations of cases in many states see 38 Cyc. 995, Note 15, Ed. 1911.
4. Mistake, generally: Mishler Lumber Co. v. Craig, 112 Mo. App. 454, 87 S. W. 41; As to land: Quillen v. Betts, 1 Pennew (Del.) 53, 39 Atl. 595; Cahill v. Harris, 6 D. C. 214; As to boundaries, Gosdin v. Williams, 151 Ala. 592, 44 So. 611; Jeffries v. Hargis, 50 Ark. 65, 6 S. W. 328; Atlantic etc. Consolidated Coal Co. v. Maryland Coal Co., 62 Md. 135; Blaen Avon Coal Co. v. McCulloch, 59 Md. 403, 43 Am. Rep. 560; Chase v. Clearfield Lbr. Co., 209 Pa. St. 422, 58 Atl. 813; Contra by statute: Blackburn v. Bowman, 46 N. C. 441; As to land being a parcel owned by Def.: Sunnyside Coal etc. Co. v. Reity, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46; Perry v. Jefferies, 61 S. C. 292, 39 S. E. 515.
5. Waverly Timber etc. Co. v. St. Louis Cooperage Co., 112 Mo. 383, 20 S. W. 566; Forsyth v. Wells, 41 Pa. St. 291, 80 Am. Dec. 617; But see, Richardson v. Stevens, 6 N. Y. Suppl. 361, (Mutual mistake of parties).
6. Bolton v. Hendrix, 84 S. C. 35, 65 S. E. 947.
7. Trustees Dartmouth College v. Intn'l Paper Co., 132 Fed. 92.

can be recovered in trespass if the timber taken belonged to the trespasser [1] or there was no actual injury. [2] The malice required in an action of trespass need not be ill-will or hatred; it is only necessary that the wrongful act be intentional and committed in known violation of the real owner's rights. [3] The fact that the trespass was done with evil purpose may afford ground for punitive, or exemplary, damages but the burden of proving wilfulness is upon the plaintiff. [4]

A *bona fide* claim of right [5] is no defense to an action for a timber trespass, even though the mistake in law or fact may have resulted from statements or acts of the plaintiff, provided such statements or acts were not intentionally directed toward such result. [6] In some jurisdictions it is held that if one who has entered lawfully thereafter exceeds or misuses his authority he may be held in an action of trespass from the time of entry. Thus the cutting of trees of a larger size than was authorized by a license [7] and the construction of a telephone line in a different place than that designated when the permission was given, [8] have both been held to constitute trespass. The more logical remedy in such cases would evidently be trespass upon the case.

§69 Interest Necessary for a Realty Action. The basis of the legal wrong in trespass is essentially an interference with the possession of the property and in England the plaintiff must be able to show actual possession to maintain the action of trespass. This doctrine has been followed in some American jurisdictions but the general rule in the United States is that either actual or constructive

1. Brock v. Smith, 14 Ark. 431; Whittier v. Sanborn, 38 Me. 32; Plumer v. Prescott, 43 N. H. 277; Dame v. Dame, 38 N. H. 429, 75 Am. Dec. 195.
2. Elbridge v. Gorman, 77 Conn. 699, 60 Atl. 643; Ballio v. Burney, 3 Rob. (La.) 317; Loomis v. Green, 7 Me. 386; Clark v. Hart (Miss. 1887), 3 So. 33; Keirn v. Warfield, 60 Miss. 799; Huddleston v. Johnson, 71 Wis. 336, 37 N. W. 407; U. S. v. Mock, 149 U. S. 273; See U. S. v. Humphries, 149 U. S. 277.
3. Southern R. Co. v. McEntire (Ala. 1910), 53 So. 158; Teller v. United States, 113 Fed. 273.
4. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 S. E. 270.
5. Higginson v. York, 5 Mass. 341; Fisher v. Naysmith, 106 Mich. 71, 64 N. W. 19; Scribner v. Young, 111 N. Y. App. Div. 814, 97 N. Y. Suppl. 866; Hazelton v. Week, 49 Wis. 661, 6 N. W. 309, 35 Am. Rep. 796.
6. Pearson v. Inlow, 20 Mo. 322, 64 Am. Dec. 189.
7. Shiffer v. Broadhead, 126 Pa. St. 260, 17 Atl. 592.
8. Burnett v. Postal Tel. etc. Cable Co., 79 S. C. 462, 60 S. E. 1116.

possession at the time of the commission of the act complained of is sufficient to support the action of trespass. [1] The mere title to property which is held adversely by another is not sufficient. Since trespass is an injury to the property itself and not merely one to a right in the property, the plaintiff in an action for trespass must have a right *in rem* and cannot rely upon a right *in personam* against another for the property. Title in the plaintiff will be necessary only when the land is unoccupied, [2] or no one is in possession. [3] If possession alone is relied upon it must be actual [4] and not merely constructive. Trespass may be maintained by the one entitled to possession even though the premises be occupied by another, if such occupation is not adverse to the one entitled. [5]

A lessor cannot bring an action in trespass on the realty while the leased premises are in the possession of the lessee; but after reentry and the taking of possession upon the termination of the lease he may maintain an action for any act of trespass committed subsequent to the reentry even though committed by the tenant himself who still remains upon the premises, [6] and it is generally held that if the tenancy be one at will or by sufferance an act of waste by the tenant terminates the tenancy and trespass may be maintained by the owner without a previous entry. [7] During the term of a lease the tenant has possession and may maintain an action of trespass *quare clausum fregit.* If the premises are occupied merely under a right to cut a limited number of trees, the occupant has not sufficient possession to maintain an action of trespass. [8]

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1. Whiddon v. Williams Lbr. Co., 98 Ga. 700, 25 S. E. 770; Phillips v. Babcock Bros. Lbr. Co., 5 Ga. App. 634, 63 S. E. 808; Ramos Lbr. etc. Co. v. Labarre, 116 La. 559, 40 So. 898; Lindsay v. Latham 107 S. W. 267, 32 Ky. L. Rep. 867. Chandlee v. Walker, 21 N. H. 282; Sawyer v. Newland, 9 Vt. 383.
2. Shipman v. Baxter, 21 Ala. 456; Wadleigh v. Marathon Co. Bank, 58 Wis. 546, 17 N. W. 314.
3. Moore v. Vickers, 126 Ga. 42, 54 S. E. 814; Whiddon v. Williams Lbr. Co., 98 Ga. 700, 25 S. E. 770; Gray v. Peay, 82 S. W. 1006, 26 Ky. L. Rep. 989; Drake v. Howell, 133 N. C. 162, 45 S. E. 539.
4. Webb v. Sturtevant, 2 Ill. 181.
5. Spencer v. Weatherby, 46 N. C. 327, (Grantor, still occupying, liable for cutting tree); Cf. Gordner v. Blades Lbr. Co., 144 N. C. 110, 56 S. E. 695; Garbutt Lbr. Co. v. Wall, 126 Ga. 172, 54 S. E. 944. Branch v. Mosrrion 51 N. C. 16.
6. Dorrell v. Johnson, 17 Pick. (Mass.) 263.
7. Daniels v. Pond, 21 Pick. (Mass.) 307, 32 Am. Dec. 269; Catlin v. Hayden, 1 Vt. 375; Treat v. Peck, 5 Conn. 280; Phillips v. Covert, 7 Johns. (N. Y.) 1; Sheak v. Mundorf, 2 Browne (Pa.) 106; But see, Russell v. Fabyan, 34 N. H. 218.
8. Monahan v. Foley, 4 U. C. Q. B. 129.

The grantee [1] or lessee [2] of land cannot maintain an action of trespass for the removal of trees which were severed by his grantor or lessor, nor for any property of another which is upon or attached to the land for he acquires neither actual nor constructive possession of such personalty; but the action of *quare clausum fregit* lies in his favor against the grantor or a third person for an effort to use a sawmill site for a different purpose than that contemplated in the reservation of the same. [3]

Any one owning trees standing upon the land of another can maintain the action of trespass *quare clausum fregit* for any injury to them, [4] either by a stranger after entry by the purchaser, [5] or by the owner of the land, [6] and a qualified interest in the trees gives sufficient possession for the maintenance of the action. [7] In such cases the title in the trees may arise either from a reservation in a grant of the land, [8] or from a direct grant of the trees. [9] A mere license [10] to enter upon land and cut trees, an agreement of sale giving a certain time for removal, [11] which is effective only as a license, or a mere stipulation by a lessor that the trees shall not be cut [12] does not afford the possession required to support an action of trespass upon realty.

§70. Adverse Possession. It has been held that if land is in the possession of an adverse holder, the land owner cannot, during the time of such adverse holding, maintain an action of trespass *de bonis* against the adverse holder for the taking of trees and other things attached to the realty; [13] but in some juridsictions, although action on the case is the only remedy for severance, trespass is

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1. Cohen v. Bryant, 65 S. W. 347, 23 Ky. L. Rep. 1448.
2. Brock v. Smith, 14 Ark. 431.
3. Dygert v. Matthews, 11 Wend. (N. Y.) 35.
4. Gronour v. Daniels, 7 Blackf. (Ind.) 108; Haskin v. Record, 32 Vt. 575; But see, Whitehouse Cannel Coal Co. v. Wells, 74 S. W. 736, 25 Ky. L. Rep. 60.
5. Goodrich v. Hathaway, 1 Vt. 485, 18 Am. Dec. 701.
6. Narehood v. Wilhelm, 69 Pa. St. 64.
7. Burleigh Tp. etc. Corp. v. Hales, 27 U. C. Q. B. 72.
8. Goodwin v. Hubbard, 47 Me. 595; Phillips v. DeGroat, 2 Lans. (N. Y.) 192; Schermerhorn v. Buell, 4 Den. (N. Y.) 422; Robinson v. Gee, 26 N. C. 186; Greber v. Kleckner, 2 Pa. St. 289; Irwin v. Patchen, 164 Pa. St. 51, 30 Atl. 436.
9. Clap v. Draper, 4 Mass. 266, 3 Am. Dec. 215.
10. Fletcher v. Livingston, 153 Mass. 388, 26 N. E. 1001.
11. Gates v. Comstock, 107 Mich. 546, 65 N. W. 544.
12. Schermerhorn v. Buell, 4 Den. (N. Y.) 422.
13. Jarvis v. Edgett, 6 N. Brunsw. 66.

allowed for the asportation.[1] It is also held that during such adverse holding the owner cannot bring trespass against a third person. However, after reentry the land owner can maintain trespass *de bonis* against either the disseizor or his grantee.[2] Although some decisions seem to be to the contrary,[3] the weight of authority is that the occasional cutting of timber on land,[4] or repeated occupancy for short periods, as during sugar making seasons, even though the practice be continued annually for the

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1. McLain v. Todd, 5 J. J. Marsh (Ky.) 335, 22 Am. Dec. 37.
2. Alliance Trust Co. v. Nettleton Hardwood Co., 74 Miss. 584, 21 So. 396, 60 Am. St. Rep. 531, 36 L. R. A. 155.
3. Brett v. Farr, 66 Iowa 684, 24 N. W. 275; Forey v. Bigelow, 56 Iowa 381, 9 N. W. 313; Clement v. Perry, 34 Iowa 564; Barker v. Towles, 11 La. 432; McGregor v. Keiller, 9 Ont. 677; And see, Hubbard v. Kiddo, 87 Ill. 578; Brooks v. Bruyn, 18 Ill. 539; Colvin v. McCune, 39 Iowa 502; Henry v. Henry, 122 Mich. 6, 80 N. W. 800; Murray v. Hudson, 65 Mich. 670, 32 N. W. 889; Goltermann v. Schiermeyer, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161.
4. Ala. Burks v. Mitchell, 78 Ala. 61; Farley v. Smith, 39 Ala. 38; See also, Rivers v. Thompson, 46 Ala. 335; Childress v. Callaway, 76 Ala. 128.
   Ga. Hilton v. Singletary, 107 Ga. 821, 33 S. E. 715; Strong v. Powell, 92 Ga. 591, 20 S. E. 6; Carrol v. Gillion, 33 Ga. 539; Durham v. Holeman, 30 Ga. 619; Long v. Young, 28 Ga. 130; Keller v. Dillon, 26 Ga. 701.
   Ill. Travers v. McElvain, 181 Ill. 382, 55 N. E. 135; Austin v. Rust, 73 Ill. 491.
   Ky. Barr v. Potter, (Ky. 1900) 57 S. W. 478; Ohio etc. R. Co. v. Wooten, (Ky. 1898) 46 S. W. 681; Wait v. Gover, (Ky. 1890) 12 S. W. 1068; Wilson v. Stivers, 4 Dana 634.
   La. Gardner v. Leger, 5 La. Ann. 594; Macarty v. Foucher, 12 Mart. 11.
   Me. Millett v. Mullen, (Me.) 49 Atl. 871.
   Md. Thistle v. Frostburg Coal Co., 10 Md. 129.
   Mass. Parker v. Parker, 1 Allen 245; Slater v. Jopherson, 6 Cush. 129.
   Mo. Robinson v. Claggitt, 145 Mo. 153, 50 S. W. 280; Carter v. Hornback, 139 Mo. 238, 40 S. W. 893; Goltermann v. Schiermeyer, 125 Mo. 291, 28 S. W. 616; Musick v. Barney, 49 Mo. 458; Cook v. Farrah, 105 Mo. 492, 16 S. W. 692. Morgan v. Pott, 124 Mo. App. 371, 101 S. W. 717.
   N. J. Townsend v. Reeves, 44 N. J. L. 525.
   N. C. Shaffer v. Gaynor, 117 N. C. 15, 23 S. E. 154; McLean v. Smith, 114 N. C. 356, 19 S. E. 279; Bartlett v. Simmons, 49 N. C. 295.
   Ore. Wheeler v. Taylor, 32 Oreg. 421, 52 Pac. 183, 67 Am. St. Rep. 540.
   Pa. Douglass v. Lucas, 63 Pa. St. 9; Beaupland v. McKeen, 28 Pa. St. 124, 70 Am. Dec. 115; Murphy v. Springer, 1 Grant 73.
   S. C. McBeth v. Donnelly, Dudley (S. C.) 177; White v. Reid, 2 Nott & M. 534; Bailey v. Irby, 2 Mott & M. 343, 10 Am. Dec. 609.
   Tenn. Pullen v. Hopkins, 1 Lea 741.
   Texas. Boone v. Hulsey, 71 Tex. 176, 9 S. W. 531; Stegall v. Huff, 54 Tex. 193; Soape v. Doss, 18 Tex. Civ. App. 649, 45 S. W. 387; Cook v. Lister, (Tex. Civ. App. 1896) 38 S. W. 380.
   Vt. Wells v. Austin, 59 Vt. 157, 10 Atl. 405.
   Va. Anderson v. Harvey, 10 Gratt. 386; Pasley v. English, 5 Gratt. 141.
   W.Va. Yokum v.Fickey, 37 W. Va. 762, 17 S. E. 318; Oney v. Clendenin, 28 W. Va. 34.
   Wis. Ladd v. Hildebrant, 27 Wis. 135, 9 Am. Rep. 445.
   Can. Doe v. White, 3 N. Brunsw. 595.
   See also:
   Pa. Heller v. Peters, 140 Pa. St. 648, 21 Atl. 416; McArthur v. Kitchen, 77 Pa. St. 62; Olewine v. Messmore, 128 Pa. St. 470, 18 Atl. 495.

statutory period,[1] will not alone afford such evidence of ownership as to support a claim of possession adverse to the true owner—such occupation comprising rather a series of trespasses. It has also been held that mere entry upon land and the cutting of timber thereon was not sufficient possession in itself to support an action of forcible entry and detainer.[2]

§71 Trespass upon Severed Trees as Personalty. A conveyance of land does not pass title to timber that has been lawfully severed by either the owner or another,[3] but it does revoke any license that has been given for the cutting of timber thereon.[4] A license from a mortgagor to take timber has been held to constitute no defense against an action by a purchaser under a foreclosure sale,[5] nor will authority from a widow before the assignment of dower afford protection from an action of trespass.[6] It has even been held that the licensor may revoke the license as to wood already severed and maintain trespass for a subsequent removal[7] but other courts have held that if the timber was lawfully severed under the license the owner of the land cannot prevent its removal by the one who severed or by his assignee.[8]

If land is in the possession of a tenant, severance ends the tenant's interest in the trees severed and the owner can without entry bring an action in trover or replevin against a third person who servers and removes during the ten-

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1. Caskey v. Lewis, 15 B. Mon. (Ky.) 27: Adams v. Robinson, 6 Pa. St. 271; Washabaugh v. Entriken, 34 Pa. St. 74, 36 Pa. St. 513; Ewing v. Alcorn, 40 Pa. St. 492; Wilson v. Blake, 53 Vt. 305; See, Voight v. Meyer, 42 N. Y. App. Div. 350, 59 N. Y. Suppl. 70; But See, Bynum v. Carter, 26 N. C. 310 (Annual turpentining); Flannery v. Hightower, 97 Ga. 592, 25 S. E. 371; See also, Frederick v. Goodbee, 120 La. 783, 45 So. 606; Safford v. Basto, 4 Mich. 406; Tredwell v. Reddick, 23 N. C. 56; Haseltine v. Mosher, 51 Wis. 443, 8 N.W. 273.
2. Wilson v. Stivers, 4 Dana (Ky.) 634; Humphrey v. Jones, 3 T. B. Mon. (Ky.) 261; Powell v. Davis, 54 Mo. 215; Bell v. Cowan, 34 Mo. 251; See, Chessen v. Harrelson, 119 Ala. 435, 24 So. 716; See Also, Conway v. Duane, 45 Cal. 597; Hammond v. Doty, 184 Ill. 246, 56 N. E. 371 (Aff'm'g 84 Ill. App. 19). Millett v. Mullen, (Me.) 49 Atl. 871.
3. Woodruff v. Roberts, 4 La. Ann. 127; Berthold v. Holman, 12 Minn. 335, 93 Am Dec. 233; Peck v. Brown, 5 Nev. 81; Schmidt v. Voght, 8 Ore. 344.
4. Putney v. Day, 6 N. H. 430, 25 Am. Dec. 470; Paine v. Northern Pac. R. Co., 14 Fed. 407, 4 McCrary 586 (Aff'd in 119 U. S. 561, 7 Sup. Ct. 323, 30 L. Ed. 513.)
5. Jarvis v. Edgett, 6 N. Brunsw. 66.
6. Lowery v. Rowland, 104 Ala. 420, 16 So. 88.
7. Buker v. Bowden, 83 Me. 67, 21 Atl. 748.
8. Yale v. Seely, 15 Vt. 221 (1843).

ancy,[1] or against the tenant himself for a taking after the severance,[2] at least if the taking is at another time from the severance.[3] A tenant cannot maintain an action for the carrying away of severed trees.[4]

§72 The Taking of Timber after the Expiration of the time Limited for Removal. One who reserves growing trees in a grant of land, or purchases such trees, with provision for removal within a limited time ordinarily becomes a trespasser if he enters and removes either standing or severed trees after the expiration of the limited time,[5] even though the removal within the limited time was prevented by the plaintiff.[6] While some courts hold that he still has title and that no damages can be recovered for the value of the timber,[7] others hold that all interest in the timber is lost and full damages can be recovered[8] If there be an agreement that upon severance the trees shall become the property of the one severing, the latter or his assignee may maintain an action of *de bonis asportatis* against one who appropriates the severed trees[9] even though the offender be the land owner.[10] However if some act subsequent to the cutting such as payment therefor, is necessary before title shall vest in the severed trees as chattels, the action cannot be maintained prior to the accomplishment of such act,[11] except where the terms of the agreement were such as to give the one severing them possession in the form of a lien.[12]

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1. Lane v. Thompson, 43 N. H. 320.
2. Chestnut v. Day, 6 U. C. Q. B. O. S. 637; Warren County v. Gans, 80 Miss. 76, 31 So. 539.
3. Bulkley v. Dolbeare, 7 Conn. 232; Schermerhorn v. Buell, 4 Den. (N. Y.) 422.
4. Zimmerman Mfg. Co. v. Daffin, 149 Ala. 380, 42 So. 858, 123 Am. St. Rep. 58, 9 L. R. A. N. S. 663; Cf. Matthews v. Bennett, 20 N. H. 21.
5. Howard v. Lincoln, 13 Me. 122; Pease v. Gibson, 6 Me. 51; Bunch v. Eliz. City Lbr. Co., 134 N. C. 116, 46 S. E. 24.
6. Inderlied v. Whaley, 65 Hun. (N. Y.) 407, 20 N. Y. Suppl. 183.
7. Zimmerman Mfg. Co. v. Daffin, 149 Ala. 380, 42 So. 858, 123 Am. St. Rep. 58,9 L. R. A. 663; Dyer v. Hartshorn, 73 N. H. 509, 63 Atl. 231; Hoit v. Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119; Plumer v. Prescott, 43 N. H. 277.
8. Morgan v. Perkins, 94 Ga. 353, 21 S. E. 574; Bunch v. Eliz. City Lbr. Co., 134 N. C. 116, 46 S. E. 24; Boults v. Mitchell, 15 Pa. St. 371; See Clark v. Guest, 54 Ohio St. 298.
9. Fiske v. Small, 25 Me. 453.
10. Hamilton v. McDonnell, 5 U. C. Q. B. 720.
11. Creps v. Dunham, 69 Pa. St. 456; Cf. Goodwin v. Fall, 102 Me. 353, 66 Atl. 727.
12. Haverly v. State Line etc. R. Co., 125 Pa. St. 116, 17 Atl. 224.
    Cf. McAllister v. Walker, 69 Mo. App. 496 (1897) (Clearing of land paid for from timber cut in clearing.)

§73 A Trespasser Acquires No Right in Timber Cut. If trees are cut by a trespasser the title to them remains in the owner of the land and his subsequent grantee or lessee may maintain an action of *de bonis* against the trespasser for a removal after the grantee or lessee obtains possession. [1] In fact the trespasser can acquire no rights as against the true owner who may without legal liability appropriate the timber product [2] upon which the trespasser has bestowed labor and enjoy the benefit of such expenditure. [3] A recovery by the land owner from the trespasser for breaking and entering does not vest in the trespasser the title to the trees severed, [4] even though they have been made into charcoal, [5] or the full value of the trees has been paid in a compromise of the action. [6] Nor does a trespasser acquire the title to severed timber necessary to support an action against a stranger. [7] A person who gives a license for the cutting of trees upon another's land is himself liable at law for the trespass whether the authorization be express [8] or implied; [9] and so is one who advises or encourages the trespass. [10]

§74 The Measure of Damages in Trespass upon Realty. If the action for the cutting of standing trees is brought in the form of a trespass upon realty (*quare clausum fregit*), the measure of damages should evidently be the difference between the market value of the land before the trespass and its value after the trespass, [11] but the recovery of an additional amount for a trespass upon the logs cut from the trees, as personal property, has been allowed in such action. [12] The determination of the amount of damage done to the land will often rest largely, or entirely, upon

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1. Glenwood Lbr. Co. v. Phillips (1904) A. C. 405, 73 L. J. P. C. 62, 90 L. T. Rep. N. S. 741, 20 T. L. R. 331.
2. Burris v. Johnson, 1 J. J. Marsh (Ky.) 196; Stevens v. Perrier 12 Kan. 297.
3. Bush v. Fisher, 89 Mich. 192, 50 N. W. 788; Stewart v. Tucker, 106 Ala. 319, 17 So. 385. Gates v. Rifle Boom Co. 70 Mich 309.
4. Loomis v. Green, 7 Me. 386.
5. Curtis v. Groat, 6 Johns, (N. Y.) 168, 5 Am. Dec. 204.
6. Betts v. Lee, 5 Johns (N. Y.) 348, 4 Am. Dec. 368.
7. Brock v. Smith, 14 Ark. 431; See Carpenter v. Lewis, 6 Ala. 682.
8. Cook v. Amer. Exch. Bank, 129 N. C. 149, 39 S. E. 746; Chandler v. Speer, 22 Vt. 388; State v. Smith, 78 Me. 260, 4 Atl. 412, 57 Am. Rep. 802.
9. Marshall v. Eggleston, 82 Ill. App. 52; Sanborn v. Sturtevant, 17 Minn. 200.
10. Quillen v. Betts, 1 Pennew (Del.) 53.
11. Davies v. Miller-Brent Lbr. Co., 151 Ala. 580, 44 So. 639.
12. Trustees Dartmouth College v. Intn'l Paper Co., 132 Fed. 95.

the value of the timber removed. It has been held that the diminished value of the land is not the measure of the damage where the land is wild and more valuable for its timber than for its soil, [1] and where it is shown that the land is valuable only for its timber, the value of the timber may be held the measure of the damage to the land. [2] It has also been held that in an action in the form of trespass upon realty, if the value of the timber, together with any incidental damage to the land, resulting from the cutting, exceeds the diminution in the market value of the land the larger amount should be allowed in damages. [3] In a New York case in which the timber was not removed and it was shown that it was as valuable cut as it was standing, only nominal damages were allowed. [4]

If the trees cut are non-timber trees or immature trees of the timber species, the market value of the trees after they are severed would evidently not be a proper measure of the damage done the owner, and in such a case suit should ordinarily be brought for damage to the land. In determining the damage the fact that the land may be of little value, or of no value, without the trees will be considered and evidence will be received as to the value of the trees while standing. [5] This rule has been applied in the case of trees in a sugar bush, [6] fruit trees, [7] trees which

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1. Meehan v. Edwards, 92 Ky. 574, 18 S. W. 519, 13 Ky. L. Rep. 803, 19 S. W. 179; Cf. Koonz v. Hempy, 142 Io. 337, 120 N. W. 976.
2. Gates v. Comstock, 113 Mich. 127, 7 N. W. 515.
3. Milltown Lbr. Co. v. Carter, 5 Ga. App. 344, 63 S. E. 270.
4. DeCamp v. Wallace, 45 Misc, (N. Y.) 436, 92 N. Y. Suppl. 746.
   See Disbrow v. Westchester Hardwood Co. (N. Y.) 59 N. E. 519 (Mature timber, Damages value of wood.)
5. Chipman v. Hibberd, 6 Cal. 162; Wallace v. Goodall, 18 N. H. 439, 456; Gilman v. Brown, 115 Wis. 1, 91 N. W. 227; United States v. Chicago, Mil. & St. P. R. Co. 207 Fed. 164, (Aff'd in 218 Fed. 288.); Doak v. Mammoth Copper Min. Co. 192 Fed. 748 (1911) Trees injured by smelter fumes. In U. S. v. Bailey, Receiver Mo. R. & N. W. Ry. Co. etc. (unreported) the damages awarded by the jury were equal to the estimated cost of restocking the area burned over and of caring for the young trees until they reached the age of those destroyed.)
6. Humes v. Proctor, 73 Hun. (N. Y.) 265, 26 N. Y. Suppl. 315, (Aff'd. in 151 N. Y. 520, 45 N. E. 948.)
7. Ala. Mitchell v. Billingsley, 17 Ala. 391.
   Cal. Montgomery v. Locke, 72 Cal. 75., 13 Pac. 401.
   Ill. Louisville E. & S. L. C. R. R. v. Spencer, 149 Ill. 97, 36 N. E. 91 (Fire, Act Mar. 29, 1869, places upon R. R. presumption of carelessness.)
   Iowa. See Hamilton v. Des Moines & K. C. Ry., 84 Ia. 131, 50 N. W. 567. (Dam. to trees, not cost of restoration. Only partially injured.)
   Kan. Kansas Zinc Mining & Smelting Co. v. Brown, 8 Kan. App. 802, 57 Pac. 304 (Gases.)

(Footnote 7 continues on next page)

formed a wind break,[1] shade trees,[2] and in other cases where the value of the trees after severance was not equivalent to the damage done. If the trees cut by a trespasser are also carried away by him the action for redress should in most instances be brought in replevin or trover.

§75. The Highest Measure of Damages Allowed. It appears to be the general policy of all courts to allow the party injured to bring action in such form and to recover damages upon such basis as will afford him full compensation for the injury, and to permit him to recover either the value of the timber[3] or the depreciation of the

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(Footnote 7 concluded from preceding page)

St. Louis & S. F. Ry. v. Hoover, 3 Kan. App. 577, 43 Pac. 854 (fire) (reasonably prudent operation of engine required.)

Atchison T. & S. F. Ry. v. Geiser 68 Kan. 281, 75 Pac. 68.

Mo. Doty v. Quincy, O. & K. C. R. R., 136 Mo. App. 254, 116 S. W. 1126 (fire).

N. H. Foote v. Merrill, 54 N. H. 490, 20 Am. Rep. 151.

N. Y. Dwight v. Elmira Etc. R. Co. 132 N. Y. 199, 30 N. E. 398, 28 Am. St. Rep. 563, 15 L. R. A. 612; Carter v. Pitcher 87 Hun 580, 24 N. Y. Suppl. 549.

Tex. Galveston Etc. R. Co. v. Warnecke, 43 Tex. Civ. App. 83, 95 S. W. 600.

1. Nixon v. Stilwell, 52 Hun. (N. Y.) 353, 5 N. Y. Suppl. 248.

2. Conn. Eldridge v. Gorman, 77 Conn. 699, 60 Atl. 643.; Hoyt v. Southern New E. Tel. Co. 60 Conn. 385, 22 Atl. 957.

Del. Jordan v. Delaware & A. T. Co. 75 Atl. 1014 (1909).

Ind. Delaware & M. C. T. Co. v. Fisk, 40 Ind. App. 348, 81 N. E. 1100 (1907).

Iowa. Meyer v. Standard Tel. Co. 122 Ia. 514, 98 N. W. 300 (exceeded license.)

Kan. Wichita G. E. L. & P. Co. v. Wright 9 Kan. App. 730, 59 Pac. 1085 (Gas).

La. Tissot v. Great S. T. & T. Co., 39 La. Ann. 996, 3 So. 261.

Me. Longfellow v. Quimby, 33 Me. 457.

Mass. Pinkerton v. Randolph, 200 Mass. 24, 85 N. E. 892. (In street).

N. Y. Edsall v. Howell 86 Hun. 424, 33 N. Y. Suppl. 892; Gorham v. Eastchester El. Co. 80 Hun 290, 30 N. Y. Suppl. 125 (1894); Nixon v. Stilwell 52 Hun. 353, 5 N. Y. Suppl. 248; Ferguson v. Buckell, 101 App. Div. 213, 91 N. Y. Suppl. 724 (Trees about summer home.)

N. D. Cleveland School Dist. v. Gt. Northern Ry., 20 N. Dak. 124, 126 N. W. 995; 28 L. R. A. (N. S.) 757.

3. Cal. Cleland v. Thornton, 43 Cal. 437.

Ga. Western & A. R. R. v. Tate, 129 Ga. 526, 59 S. E. 266; Smith v. Gonder, 22 Ga. 353.

Ill. Birket v. Williams, 30 Ill. App. 452. (Trees in nursery).

Ind. Halsted v. Sigler 35 Ind. App. 449, 74 N. E. 257.

Iowa. Leiber v. Chi. M. & St. P. Ry. 84 Ia. 97, 50 N.W. 547. Greenfield v. Chicago Etc. R. Co. 83 Iowa 270; 49 N. W. 95; Graessle v. Carpenter 70 Ia. 166. Freeland v. Muscatine, 9 Iowa 461; Krejci v. Chi. etc. R. Co. 117 Ia. 344, 90 N. W. 708.

Kan. Missouri, K & T. Ry. v. Steinberger, 6 Kan. App. 585, 51 Pac. 623. Missouri, K & T. Ry. v. Lycan 57 Kan. 635, 47 Pac. 526. Atchison, Etc. R. Co. v. Hamilton, 6 Kan. App. 447; 50 Pac. 102; Atch. etc. R. Co. v. Emerson, 50 Pac. 70.

Ky. Lindsay v. Latham 107 S. W. 267, 32 Ky. L. Rep. 867; Louisville & N. R. R. v. Beeler 126 Ky. 328, 103 S. W. 300, 11 L. R. A (N. S.) 930; Meehan v. Edwards 92 Ky. 574, 18 S. W. 519.

La. Guarantee T. & S. D. Co. v. Holsell, 107 La. 745, 31 So. 999. Stoner v. Tex. & Pac. Ry. 45 La. Ann. 115, 11 So. 875.

Mass. Cutts v. Spring 15 Mass. 135 (1818); Bliss v. Ball 99 Mass. 597, 97 Am. Dec. 58.

(Footnote 3 continued on next page)

land[1] according to which gives the highest measure of damages.[2] Furthermore, the injured party has been allowed to recover both for the value of the trees and for the diminution in value of the land caused by the cutting.[3] And in deter-

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(Footnote 3 concluded from preceding page)

Mich. Gates v. Comstock, 113 Mich. 127, 7 N. W. 515; Skeels v. Starrett; 57 Mich. 350.
Minn. Carner v. Chicago, St. P. M. & O. Ry. 43 Minn. 375, 45 N. W. 713.
Mo. Atkinson v. Atlantic Etc. R. Co., 63 Mo. 367.
Mont. Nelson v. Big Blackfoot Min. Co. 17 Mont. 553, 44 Pac. 81.
Neb. Hart v. Chi. & N. W. Ry. 83 Neb. 652, 120 N. W. 933; Kansas City & O. R. R. v. Rogers 48 Neb. 653, 67 N. W. 602. Fremont, Etc. R. Co v. Crum, 30 Neb. 70.
N. H. Beede v. Lamprey, 64 N. H. 510, 10 Am. St. Rep. 426.
N. J. Delaware Etc. R. Co. v. Salmon, 39 N. J. L. 316, 23 Am. Rep. 214.
N. Y. Whitbeck v. N. Y. C. R. R. 36 Barb. (N. Y.) 644.
Pa. Chase v. Clearfield Lbr. Co. 209 Pa. 422, 58 Atl. 813.
R. I. Spink v.N. Y. N. H. & H. R. R. 26 R. I. 115, 58 Atl. 499.
S. D. White v. Chicago Etc. R. Co., 1 S. Dak. 326.
Tenn. Burke v. Louisville Etc. R. Co. 7 (Heisk) 451, 19 Am. Rep. 618.
Vt. Kilby v. Erwin, 84 Vt. 270, 78 Atl. 1021; Chase v. Hoosac T. & W. R. R. 81 Atl. 236.
Va. Virginia Ry. v. Hurt 72 S. E. 110 (Holding value after the burning must be considered, *contra* Manitou & P. P. Ry. v. Harris 45 Col. 185, 101 Pac. 61, Dec. 1909).
U. S. U. S. v. Taylor 35 Fed. 484 (1888).
Eng. Wild v. Holt, 9 M. & W. 672; Martin v. Porter, 5 M. & W. 351.

1. Ala. Southern Bell Telephone Co. v. Francis, 109 Ala. 234, 55 Am. St. Rep. 930.
Ark. St. Louis etc. R. Co. v. Ayres, 67 Ark. 371.
Cal. Chipman v. Hibbard, 6 Cal. 162.
Del. Bullock v. Porter 77 Atl. 943 (1910) fire.
Ky. Kentucky Stave Co. v. Page (1910) 125 S. W. 170.
Mich. Thompson v. Moiles, 46 Mich. 42; Achey v. Hull, 7 Mich. 423.
Minn. Carner v. Chicago etc. R. Co., 43 Minn. 375; 45 N. W. 713.
N. H. Wallace v. Goodall, 18 N. H. 439.
N. Y. Evans v. Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681; McCrudden v. Rochester R. Co., 5 Misc. 59, 25 N. Y. Suppl. 114 [Aff'd. in 77 Hun. 609, 28 N. Y. Suppl. 1135 (Aff'd. in 151 N. Y. Suppl. 623, 45 N. E. 1133)]; Parker v. Sherwood, 125 N. Y. Suppl. 297 (1910) fire; Argotsinger v. Vines, 82 N. Y. 308; Van Deusen v. Young 29 N. Y. 9; Easterbrook v. Erie R. Co., 51 Barb. 94; Harder v. Harder, 26 Barb. 409; Cook v. Brockway, 21 Barb. 331; Bevier v. Del. etc. Canal Co., 13 Hun. 254.
N. C. Brickell v. Camp Mfg. Co. 147 N. C. 118. 60 S. E. 905 (1908). (Declaration of agent admissible.) Wall v. Holloman 72 S. E. 369; Jenkins v. Montgomery Lbr. Co. 70 S. E. 633.
Tex. Hooper v. Smith (Tex. Civ. App. 1899), 53 S. W. 65.
Wis. Nelson v. Churchill, 117 Wis. 10, 93 N. W. 799. (Evidence as to value mfd. product & cost mf'r admissible to show depreciation of land.)

2. Knisely v. Hire, 2 Ind. App. 86, 28 N. E. 195; Park v. Northport Smelting etc. Co., 47 Wash. 597, 92 Pac. 442; Hooper v. Smith (Tex. Civ. App. 1899), 53 S. W. 65; Cf. Gustin v. Jose, 11 Wash. 348, 39 Pac. 687; Fremont etc. R. Co. v. Crum, 30 Neb. 70; Cathcart v. Bowman, 5 Pa. St. 317; Bailey v. Chicago etc. R. Co., 3 S. Dak. 531, 54 N. W. 596, 19 L. R. A. 653.

3. Kan. Atchison, Topeka & S. F. R. v. Geiser, 68 Kan. 281. 75 Pac. 68 (1904). (Fire, setting of by engine prima facie evidence of negligence under statute.)
Ky. Lindsay v. Latham, 107 S. W. 267, 32 Ky. L. Rep. 867.
Mich. Miller v. Wellman, 75 Mich. 353, 42 N. W. 843. Skeels v. Starret, 57 Mich 350.

(Footnote 3 continued on next page)

mining the damages consideration will be given to the relation of the area on which cutting took place to other lands held by the owner, [1] and to the value of the particular trees cut in connection with the use of the premises. [2] The measure of damages will not ordinarily be affected by changes in the market subsequent to the time of the injury, [3] but the owner is entitled to the value of the wood when put to the most advantageous use for which it was fitted and for which it may reasonably be assumed it might have actually been used. [4] In timber cases as in others speculative damages will not be allowed, [5] but damages may be exemplary. [6] Damages have been given for the destruction of immature timber trees which had no market value. [7]

(Footnote 3 concluded from preceding page)

N. C. Whitfield v. Rowland Lbr. Co. 152 N. C. 211, 67 S. E. 512. Gaskins v. Davis, 115 N. C. 85, 20 S. E. 188, 44 Am. St. Rep. 439, 25 L. R. A. 812.
Ore. Oregon & C. R. R. v. Jackson, 21 Ore. 360, 28 Pac. 74 (Value added by labor cannot be trebled.)
Pa. Krider v. Lafferty, 1 Whart. 302, 319 (1836) Willows. Chase v. Clearfield Lbr. Co. 209 Pa. St. 422, 58 Atl. 813.
Tenn. Ensley v. Nashville, 2 Baxt. (Tenn.) 144.
See Union Bank v. Rideau Lbr. Co., 4 Ont. L. Rep. 721.
See 4 L. D. 1, Dep't Interior.

1. Ala. Lowery v. Rowland, 104 Ala. 420 (1893).
Minn. Carner v. Chi. St. P. M. & O. R. Co., 43 Minn. 375 (1890);.
N. Y. Morrison v. American Tel. Co., 115 N. Y. Appl. Div. 744, 101 N. Y. Suppl. 140.
Argotsinger v. Vines, 82 N. Y. 308.

2. Conn. Hoyt v. Southern N. E. Tel. Co. 60 Conn. 385, 22 Atl. 957.
Kan. See Atchison v. Geiser (Kan.) 75 P. 68.
N. Y. Donahue v. Keystone Gas. Co., 85 N. Y. S. 478.
Wis. Miller v. Neale, 137 Wis. 426, 119 N. W. 94.
Gilman v. Brown, 115 Wis. 1, 91 N. W. 227.
But see Missouri Pac. R. Co. v. Haynes, 1 Kan. App. 586, 42 Pac. 259, (Value annual crop of fruit too speculative as basis of damages.)

3. Schlater v. Gay, 28 La. Ann. 340 (1876); Walrath v. Redfield, 11 Barb. (N. Y.) 368, (1851).

4. Spink v. N. Y. N. H. & H. R. R. Co., 26 R. I. 115 (1904).

5. Longfellow v. Quimby, 29 Me. 196, 48 Am. Dec. 525; Lee v. Briggs, 99 Mich. 487. See Hayden v. Albee, 20 Minn. 159 (overflow,) Mackey et al v. Olssen, 12 Ore. 429. (road cost); Griffen v. Colver, 16 N. Y. 489 (Sawmill case.)
Kolb v. Bankhead, 18 Tex. 228. Tissot v. Great South. Tel. & Tel. Co. 39 La. Ann. 996. See Barry v. Edmunds, 116 U. S. 550 (1885); Day v. Woodworth 13 How. 362, 371 (1851).

7. Colo. See Manitou & P. P. Ry. v. Harris, 45 Col. 185, 101 Pac. 61 (1909) (Partially burned.)
Ga. Central R. R. & B. Co. v. Murray 93 Ga. 256, 20 S. E. 129 (Fire).
Iowa Burdick v. Chicago, M. & St. P. Ry. 87 Ia. 384, 54 N. W. 439. Striegel v. Moore 55 Ia. 88; See Leiber v. Chicago M. St. P. & O. Ry. 84 Ia. 97, 50 N. W. 547. (Difficulty of restoration because of shade considered.)
Ky. Lindsay v. Latham, 107 S. W. 267, 32 Ky. L. Rep. 867.
Mich. Bockes v. McAfee & Son Co. 165 Mich. 7, 130 N. W. 313.
Minn. Hoye v. Chicago, M. & St. P. Ry. 46 Minn. 269, 48 N. W. 1117. (Fire, engine must have best spark arresters available.)

(Footnote 7 continued on next page)

§76. Choice of Actions in Timber Trespass Cases. If trees are severed and carried away by a trespasser or by another who has no lawful right to cut them the owner of the land or of the trees may either bring an action in trespass *quare clausum fregit*, [1] trespass *de bonis asportatis* for the damage done in the carrying away of the severed trees, [2] an action in replevin for the specific recovery of the trees taken, or their value, [3] an action in trover for the value of the property converted, [4] or, waiving the tort, he may bring an action of implied assumpsit for the value [5] or one for money had and received for his use. [6] He may also obtain possession by recapture of the property and, even though he be liable for a breach of the peace, his title will be good. [7] If the owner is not in possession of the land he may enter and take possession of the timber, [8] whether it was cut by a trespasser or by one in possession of the land; or he may bring an action on the case in the nature of waste for the injury done. [9] If timber trees are wrongfully severed by a tenant for years or for life, the lessor, reversioner or remainderman is entitled to the trees and may maintain replevin, [10] trover, [11]

(Footnote 7 concluded from preceding page)

Neb. Alberts v. Husenetter 77 Neb. 699, 110 N. W. 657 (1906).
N. C. Williams v. Elm City Lbr. Co., 70 S. E. 631.
Pa. Com. v. LaBar, 32 Pa. Super. Ct. 228 (Act Feb. 25, 1911, S. L. 11)
U. S. U. S. v. Chi., Mil. & St. P. Ry. Co., 207 Fed. 164, (Aff'd in 218 Fed. 288.) Damages have been allowed for the leaving of brush on land: Halsted v Sigler, 35 Ind. App. 419, 74 N. E. 257; Chase v. Clearfield Lbr. Co. 209 Pa. 422, 58 Atl. 813; *Contra.* Nelson v. Big Blackfoot Min. Co., 17 Mont 553, 44 Pac. 81 (The land to be cleared for homestead purposes).

1. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 S. E. 270.
2. Taylor v. Burt etc. Lbr. Co., 109 S. W. 348, 33 Ky. L. Rep. 199; Dennis v. Strunk, 108 S. W. 957, 32 Ky L. Rep. 1230.
3. Kimball v. Lohmas, 31 Cal. 154; Halleck v. Mixer, 16 Cal. 574; Sanborn v. Franklin County Lbr. Co., 55 Fla. 389, 46 So. 85; Anderson v. Hopler, 34 Ill. 436, 85 Am. Dec. 318; Richardson v. York, 14 Me. 216; Washburn v. Cutter, 17 Minn. 361; Brewer v. Fleming, 51 Pa. St. 102; Coomalt v. Stanley, 3 Pa. L. J. Rep 389; Millar v. Humphries, 2 A. K. Marsh (Ky.) 446.
4. Whidden v. Seelye, 40 Me. 247, 63 Am. Dec. 661; Moody v. Whitney, 34 Me. 563.
5. Milltown Lbr. Co. v. Carter, 5 Ga. App. 344, 63 S. E. 270.
6. Wall v. Williams, 91 N. C. 477.
7. Trustees Dartmouth College v. Intn'l Paper Co., 132 Fed. 92, 94.
8. Clark v. Holden, 7 Gray (Mass.) 8, 66 Am. Dec. 450.
9. Wall v. Williams, 91 N. C. 477.
10. Richardson v. York, 14 Me. 216; Warren County v. Gans, 80 Miss. 76, 31 So. 539; See McNally v. Connolly, 70 Cal. 3, 11 Pac. 320; and Cases cited 13 Am. & Eng. Enc. Law, (2d Ed.) 680, Note. 4.
11. Brooks v. Rogers, 101 Ala. 111, 13 So. 386; Warren County v. Gans, 80 Miss. 76; Schermerhorn v. Buell, 4 Den. (N. Y.) 422.

or trespass for their value [1] if they are subsequently removed by the tenant.

Since co-tenants of land each have an equal right of possession of the premises, it is held that a tenant in common cannot, except under statutory provisions, maintain an action of trespass *quare clausum fregit* or trover for entering and removing timber; [2] nor does replevin lie against a co-tennant for seizing and holding timber which the first tennant has cut for removal from the common land, [3] but the cutting and removal of timber to which a tenant in common is not entitled or the sale of the same will render him liable to his co-tenants in trover or trespass. [4] In the absence of statute, or agreement to the contrary, the ordinary measure of the liability of a tenant in common for timber removed by him in good faith from the lands held in common is the value of the timber while standing. [5] If no question as to title in land is involved, [6] a tenant in common who receives money or other property for timber unlawfully cut from the land held in common will be liable in assumpsit to his co-tenants for their shares of the amount received, [7] and it has been held that an action for an accounting is not the proper method of determining the interest of the co-tenants in a case of wrongful timber cutting. [8]

§77. Recovery by Replevin. Where the circumstances are such as to sustain the action of replevin the owner may not only recover the logs [9] cut from the trees wrongfully severed but he may ordinarily follow the product of the

1. Lane v. Thompson, 43 N. H. 320; Schermerhorn v. Buell, 4 Den. (N. Y.) 422.
2. Kane v. Garfield, 60 Vt. 79, 13 Atl. 800; Wait v. Richardson, 33 Vt. 190, 78 Am. Dec. 622; But See, Mills, v. Richardson, 44 Me. 79.
3. Bohlen v. Arthurs, 115 U. S. 482, 6 S. Ct. 114, 29 L. Ed. 454; See also, LeBarren v. Babcock, 46 Hun. (N. Y.) 598, (affd. in 122 N. Y. 153, 25 N. E. 253, 19 Am. St. Rep. 488, 9 L. R. A. 625).
4. Clow v. Plummer, 85 Mich. 550, 48 N. W. 795; See, Trout v. Kennedy, 47 Pa. St. 387; Wilson v. Reed, 3 Johns. (N. Y.) 175.
5. Paepcke-Leicht Lbr. Co. v. Collins, 85 Ark. 414, 108 S. W. 511; Dodge v. Davis, 85 Iowa 77, 52 N. W. 2; See also, Clow v. Plummer, 85 Mich. 550, 48 N. W. 795; Walling v. Burroughs, 43 N. C. 60.
6. Kran v. Case, 123 Ill. App. 214.
7. Miller v. Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264; White v. Brooks, 43 N. H. 402; Blake v. Milliden, 14 N. H. 213; Holt v. Robertson, McMull. Eq. (S. C.) 475; But see, Mooers v. Bunker, 29 N. H. 420; Gilmore v. Wilbur, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; Grossman v. Lauber, 29 Ind. 618.
8. U. S. v. Northern Pac. R. Co., 6 Mont. 351, 12 Pac. 769; See also, McGahan v. Rondout Nat'l Bank, 156 U. S. 218, 15 S. Ct. 347, 39 L. Ed. 403.
9. Firmin v. Firmin, 9 Hun. (N. Y.) 572; Nesbitt v. St. Paul Lbr. Co., 21 Minn. 491; Bly v. U. S., 4 Dillon 464 (U. S. Cir. Ct. Minn. 1867).

rees as long as indentification is possible and regain possession of railroad ties, [1] rails and posts, [2] lumber, [3] staves, [4] shingles, [5] cordwood, [6] charcoal, [7] or other goods and articles manufactured from the trees. [8] However, in a Michigan case in which the timber taken had been manifactured into hoops which had a value twenty-seven times the value of the timber as originally converted, it was held that the amount expended upon the timber by the defendant was so much greater than the value of the timber taken as to give the defendant title by accession, and the plaintiff was given only the value of the timber originally taken. [9] This was evidently a border line case. Replevin cannot be maintained if the land from which the trees were cut was in the adverse possession of the defendant or of a third party. [10] Where through a valid sale growing trees have been constructively separated from the land and become chattels in contemplation of law the purchaser of the trees may maintain replevin against a subsequent purchaser of the land who cuts and removes the trees [11] or against one who removes the trees under claim of a purchase of them subsequent to the first purchase. [12]

If it be established by the owner that the trees were cut not only unlawfully but wilfully i. e., deliberately [13] by one who knew [14] the trees did not belong to him—the

1. Eaton v. Langley, 65 Ark. 448; Stotts v. Brookfield, 55 Ark. 307, 18 S. W. 179; McKinnis v. Little Rock etc. R. Co., 44 Ark. 210; Strubbee v. Cincinnati R. Co., 78 Ky. 481, 39 Am. Rep. 251.
2. Snyder v. Vaux, 2 Rawle (Pa.) 423, 21 Am. Dec. 466; But See, Ricketts v. Dorrell, 55 Ind. 470 (1876).
3. Davis v. Easley, 13 Ill. 192; Wingate v. Smith, 20 Me. 287; Brown v. Sax, 7 Cow. (N. Y.) 95.
4. Heard v. James, 49 Miss. 236.
5. Betts v. Lee, 5 Johns (N. Y.) 348, 4 Am. Dec. 368; Chandler v. Edson, 9 Johns (N. Y.) 362; Rice v. Hollenbeck, 19 Barb. (N. Y.) 664.
6. Brock v. Smith, 14 Ark. 431; Isle Royal Min. Co. v. Hertin, 37 Mich. 332, 26 Am. Rep. 550.
7. Riddle v. Driver, 12 Ala. 590; Curtis v. Groat, 6 Johns. (N. Y.) 168, 5 Am. Dec. 204.
8. See Austin v. Baker, F. Moore 17, 20; Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307; Murphy v. Sioux City etc., R. Co. 55 Ia. 473, 8 N. W. 320, 39 Am. Rep. 175; Eaton v. Monroe, 52 Me. 63; Ryder v. Hathaway, 21 Pick. (Mass.) 298; Barry v. Brune 8 Hun. 395; Cf. Harding v. Coburn, 12 Metc. 333, 46 Am. Dec. 680.
9. Whetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653.
10. Anderson v. Hapler, 34 Ill. 436, 85 Am. Dec. 318; Clarke v. Hyde, 25 Wash. 661, 66 Pac. 46.
11. Warren v. Leland, 2 Barb. (N. Y.) 613.
12. See Goodrich v. Hathaway, 1 Vt. 485; McCoy v. Herbert, 9 Leigh (Va.) 548 (1838).
13. People v. Sheldon, 68 Cal. 434.
14. Wong v. Astoria, 13 Ore. 538.

article or goods manufactured from the trees if capable of identification may generally be taken from an innocent purchaser, [1] as well as from one having notice of the wrongful cutting, [2] however great may have been the change in form since the cutting [3] Where the manufactured article cannot be identified with the original by inspection the original may be traced by testimony of witnesses through the various processes of transformation into the form in which specific recovery is sought. [4] By the weight of authority it is held that if the original taking was not intentionally wrongful and done in bad faith, the original owner cannot maintain replevin if the material has been transformed into an article substantially different from the original form. [5] If the identity of the article wrongfully taken is destroyed, the original owner must bring his action for conversion, [6] and he may then recover the value at the time when the identity was destroyed. [7]

§78. **Conversion.** Conversion has been defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. [8] A mere verbal assertion of ownership under circumstances which indicate an intention to deprive the real owner of his property and an ability to carry out the intention may support an action for conversion, [9] but even the carrying away of the personal property of another will not amount to conversion if there were no tinent to deprive the real owner of his possession or property

1. McKinnis v. Little Rock etc. R. Co., 44 Ark. 210. Blodgett v. Seals, (Miss.) 29 So. 852.
2. Nelson v. Graff, 12 Fed. 389.
3. Gray v. Parker, 38 Mo. 160.
4. Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307 (corn converted into whiskey).
5. Heard v. James, 49 Miss. 236; Whetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653; Gray v. Parker, 38 Mo. 160; Potter v. Marde, 74 N. C. 36; *Contra*, Stotts v. Brookfield, 55 Ark. 307, 18 S. W. 179.
6. Snyder v. Vaux, 2 Rawle (Pa.) 423.
7. Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307. Gates v. Rifle Boom Co., 70 Mich. 309, 38 N. W. 245; Godwin v. Taenzer, 122 Tenn. 101, 119 S. W. 1133; Bly v. U. S., 4 Dillon, 464.
8. Law Dict., Bouvier, p. 2016.
9. Gillet v. Roberts, 57 N. Y. 28.

right. [1] A refusal to deliver a chattel to the rightful owner when proper demand is made for it is prima facie evidence of conversion and this presumption will be conclusive if the refusal is not satisfactorily explained or justified. The time of such demand or refusal will ordinarily constitute the time of conversion. If the defendant is rightfully in possession of the property, demand and refusal must precede an action for conversion, but neither is necessary if the property was wrongfully taken, or acts of ownership or other clear acts of conversion have been done by the defendant. [2] In an action of trover the law of the place where the conversion took place [3] and that which was in effect at the time [4] of the conversion must be applied. If personal property is taken from land, trover may be brought by the person who has legal title to the land and the right to an immediate possession of the property taken [5] or by the one who has actual possession of the land at the time. [6] Constructive possession under a valid title will enable one to maintain an action in trover for the taking of trees. [7] The plaintiff must have a right to possession [8] to maintain the action and cannot rely upon the weakness of the defendant's claim. [9] However one who fells timber or raises crops on unoccupied or wild land may maintain the action against one who converts the timber or crops. [10]

The conversion of a part of a lot of personal goods under circumstances which indicate an intention to convert all

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1. State v. Staed, 72 Mo. App. 581; Gude Co. v. Farley, 25 Misc. (N. Y.) 502, 54 N. Y. Suppl. 998; Strickland v. Barrett, 20 Pick. (Mass.) 415.
   However action does not depend upon proof that taking was "wrongful", Foster. Lbr. Co. v. Kelly (Kan.) 58 Pac. 124. Cf. Bynum v. Gay 161 Ala. 140, 49 So. 757, 135 Am. Rep. 121.
2. Ensley Lbr. Co. v. Lewis, 121 Ala. 94, 25 So. 729; Crane Lbr. Co. v. Bellows, 116 Mich. 304, 74 N. W. 481; See, Ward v. Carson River Wood Co., 13 Nev. 44.
3. Holbrook v. Bowman, 62 N. H. 313; Torrance v. Buffalo Third Nat'l Bank, 70 Hun. (N. Y.) 44, 23 N. Y. Suppl. 1073.
4. Rogers v. Moore, Rice (S. C.) 60; But See, Tulley v. Tranor, 53 Cal. 274.
5. White v. Yawkey, 108 Ala. 270, 19 So. 360, 54 Am. St. Rep. 159, 32 L. R. A. 199; Wilson v. Hoffman, 93 Mich. 72, 52 N. W. 1037, 32 Am. St. Rep. 485; Haven v. Beidler Mfg. Co., 40 Mich. 286.
6. Skinner v. Pinney, 19 Fla. 42, 45 Am. Rep. 1; Woods v. Banks, 14 N. H. 101; Branch v. Morrison, 51 N. C. 16; Martin v. Schofield, 41 Wis. 167.
7. McCoy v. Herbert, 9 Leigh (Va.) 548, 33 Am. Dec. 256.
8. U. S. v. Loughrey, 172 U. S. 206, 19 Sup. Ct. 153, 43 L. Ed. 420.
9. Moore v. Walker, 124 Ala. 199, 26 So. 984.
10. Searles v. Oden, 13 Neb. 344, 14 N. W. 420; Lyon v. Sellew, 34 Hun. (N. Y.) 124.

will amount to a conversion of all, [1] and the same is true where the conversion of the part has impaired the value of that remaining even though the intention to convert the remainder is not shown. [2] Conversion by an agent will ordinarily render his principal liable, [3] but where a manufacturing corporation had leased a mill to another, the fact that the lessee had conducted the mill in such manner as to lead people doing business with him to believe that the mill was operated by the owners was held not to make the owners of the mill liable in trover for shingle blocks delivered to the lessee of the mill. [4] An innocent purchaser of personal property at an invalid public sale will be liable for conversion if he appropriates the property to his own use. [5]

§79. Conversion in Actions against an Innocent Timber Trespasser. Although the doctrine of conversion in the common law applied only to personalty and the action of trover was not applicable to injuries to the realty, in modern practice trover is one of the most common remedies for the severance and asportation of growing trees. Unfortunately there has been no uniform theory as to the basis upon which recovery of damages should be allowed, and in many decisions, where substantially the same measure of damages was allowed, the legal ground upon which the damages were fixed has been differently stated. The variation has arisen largely from the efforts of the court in each case of innocent trespass to make reasonable allowance to the trespasser for the expenditures which he had in good faith laid out upon the timber, or other object severed from the soil, so far as such expenditures had resulted in an enhanced value of the thing severed; but confusion has also resulted partly from the more liberal manner in which some

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1. Gentry v. Madden, 3 Ark. 127; Thompson v. Moesta, 27 Mich. 182; Brown v. Ela, 67 N. H. 110, 30 Atl. 412; Corotinsky v. Cooper, 26 Misc. (N. Y.) 138, 55 N. Y. Suppl. 970. *See* Wolf v. Wolf, 158 Pa. St. 621, 28 Atl. 164.
2. Bowen v. Fenner, 40 Barb. (N. Y.) 383.
3. Southern Ry. v. Raney (Ala.) 23 So. 29; Kentucky Stave Co. v. Page, (Ky. 1910) 125 S. W. 170; Schlater v. Gay, 28 La. Ann. 340; Bockes v. McAfee & Son Co., 165 Mich. 7, 130 N. W. 313; Ayres v. Hubbard, 71 Mich. 594, 40 N. W. 10; Smith v. Webster, 23 Mich. 298 (Mistake of servant); Carman v.New York,14 Abb. Pr. (N. Y.) 301; But *see* Satterfield v. Western Union Tel. Co., 23 Ill App. 446, and Fairchild v. New Orleans etc. R. Co., 60 Miss. 931, 45 Am. Rep. 427.
4. Fox v. Burlington Mfg. Co., 7 Wash. 391, 35 Pac. 126.
5. Harrell v. Harrell, 75 Ga. 697; Ward v. Carson River Wood Co., 13 Nev. 44; Ross v. McGriffin, 2 Tex. App. Civ. Cas. Sec. 458.

courts regard technical rules of the common law and from a loose use of the word "stumpage." Thus the amount to which the owner of the timber is entitled when the trespass was innocent has been stated, either directly or by analogy, to be the value of the trees while standing; [1] their value while standing plus the defendant's profit;[2] the profit received by defendant; [3] their value immediately after severance; [4] their value after severance, less defendant's expense of severing; [5] their value after severance less what it would have cost the plaintiff to sever them; [6] their value when removed from plaintiff's land; [7] their value at the time of the bringing of the action, less the value added to them by the defendant; [8] their value at the time of the bringing of an action, or at the time of demand after severance, less the expense of improvement. [9]

It is impossible to completely harmonize these divergent holdings, but the cases specifically referring to timber fall mainly into two general classes: those which, following the analogy of some of the mineral cases, hold the measure of damages to be value of the trees in place before any labor was expended on them; and those which, resting upon the fundamental principle of the common law that there can be no conversion of realty, hold that the trees are not susceptible to conversion until they are severed and make the trespasser liable for the value which the severed trees have as chattels.

The theory that the measure of damages for intentional trespass in the cutting and carrying away of trees should be the value of the standing trees not only ignores the common law principle that there can be no conversion of realty, but it is neither logical nor equitable when applied to trees

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1. U. S. v. Northern Pac. R. Co., 67 Fed. 890; Ross v. Scott, 83 Tenn. (15 Lea) 479.
2. Anderson v. Besser, 131 Mich. 481, 91 N. W. 737; Winchester v. Craig, 33 Mich. 205; Skeels v. Starrett, 57 Mich. 350, 24 N. W. 98.
3. Colorado Min. Co. v. Turck, 70 Fed. 294, 17 C. C. A. 128, (Silver Ore).
4. U. S. v. Van Winkle, 113 Fed. 903, 51 C. C. A. 533.; Beede v. Lamprey, 64 N. H. 510.
5. Durant Mining Co. v. Percy Min. Co., 93 Fed. 166, 35 C. C. A. 252 (Ore.)
6. Morgan v. Powell, 3 Q. B. 278; See, Dunbar Furnace Co. v. Fairchild, 121 Pa. St. 563.
7. Wright v. Skinner, 34 Fla. 453, 16 So. 335.
8. Peters Co. v. Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367.
9. Powers v. U. S., 119 Fed. 562, 56 C. C. A. 128; Herdic v. Young, 55 Pa. St. 176, 93 Am. Dec. 739.

that are valuable principally for the wood or timber in them. This rule enables a wrongdoer to avoid full responsibility for the consequences of his unlawful act. By its application the owner of growing trees is forced, through the mistake or blunder of another, to forego the money profit or personal satisfaction which he might have gained from leaving the trees standing for a time. If the cutting of the trees is to be made at once, the owner should have the opportunity of cutting them himself with an attendant profit, or he should be compensated for the deprivation of such property right by a reasonable sum in addition to the value of the standing trees in lieu of such profit. The limitation of the recovery to the value of the trees on the stump undoubtedly tends to encourage an unlawful interference with the property of another on the part of the unscrupulous in the hope of deriving pecuniary gain through a feigned innocence. The value of the trees while standing may be a just compensation for fruit or shade trees, provided proper consideration is given to the productivity of the fruit trees or to the additional value which fruit trees or shade trees give to realty. Where actions have been brought for trespass *quare clausum fregit*, the faithful application of this rule has afforded satisfactory results as to fruit trees, shade trees and immature trees of timber species. Confusion has arisen through an application of the same rules to actions under trover as to those under trespass, and from a failure of the courts to recognize the essential difference between actions for the destruction of fruit, shade or immature timber trees, which have little or no value because of the wood or timber therein, and actions for the cutting of timber trees which have value chiefly because of the suitability of their wood for commercial uses.

In an effort to follow precedents the courts have applied the special rules developed in decisions regarding fruit, shade and ornamental trees to cases involving the cutting and carrying away of merchantable timber; and on the other hand, many decisions have sought to measure the damage sustained through the destruction of fruit or shade trees by an ascertainment of the value of such trees for wood or timber purposes. Much uncertainty and conflict of

authority has resulted. The rules applicable to fruit and shade trees are better suited to cases involving the destruction of immature trees of timber species, for in such cases the trees have no substantial value as chattels after their severance, and the gist of the unlawful act is an injury to the land and not a conversion of chattels which have been severed from the land.

With the development of the art of forestry in America and the acceptance of the view that a forest is a crop, a new and distinct viewpoint regarding the measure of damages for the premature cutting or destruction of timber trees will undoubtedly be adopted. It is probable that the rules of law as to the damage allowable for the unlawful cutting of mature timber trees will also be modified. However, it is necessary for us to obtain, if possible, the most satisfactory rule that at present has the sanction of judicial authority.

There have been many decisions which have directly announced or have approved by dicta the rule that a trespasser who cuts growing trees under an honest mistake or in reliance upon a bona fide claim of right is liable only for the value of the trees while standing. [1]

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1. Ark. Cf. Eaton v. Langley, 65 Ark. 448.
Mich. See citations under note 2, page 92.
Minn. State v. Clarke, 109 Minn. 123, 123 N. W. 54; Hasty v. Bonness, 86 N. W. 896; Mississippi River Logging Co. v. Page et al., 68 Minn. 269, 71 N. W. 4; State v. Shevlin-Carpenter Co. 62 Minn. 99, 64 N. W. 81; King v. Merriman, 38 Minn. 47, 35 N. W. 570; Whitney v. Huntington, 37 Minn. 197, 33 N. W. 561; Hinman v. Heyderstadt, 32 Minn. 250, 20 N. W. 155 (Grass). [Distinguishing Nesbitt v. St. Paul Lumber Co. 21 Minn. 491 (wilful)].
Mo. Missouri Sligo Furnace Co. v. Holart-Lee Tie Co. (Mo. App. 1911) 134 S. W. 585; Hosli v. Yokel 57 Mo. App. 622 (Grass). See Mueller v. St. Louis etc. R. R. Co. 31 Mo. 262 (value of soil taken.)
N. Y. Fergusen v. Buckell, 101 N. Y. App. Div. 213, 91 N. Y. Suppl. 724; Clark v. Holdridge 12 N. Y. App. Div. 613, 43 N. Y. Suppl. 115 (1897). (Misinterprets Woodenware Co. v. U. S. 106 U. S. 432; *contra* Firmin v. Firmin, 9 Hun 571.
Ohio. Lake Shore etc. R. Co. v. Hutchins 32 O. St. 571, 30 Am. Dec. 629; Hulett v. Fairbanks, 1 O. Cir. Ct. 155, 1 O. Cir. Dec. 89.
Ore. Oregon & California R. R. v. Jackson, 21 Ore. 360, 28 Pac. 74.
Pa. Coxe v. England, 65 Pa. St. 212 (1870); Herdie v. Young 55 Pa. St. 176; Forsyth v. Wells, 41 Pa. St. 291, 80 Am. Dec. 617. Cf. Sanderson v. Haverstick, 8 Pa. St. 294; See Dunbar Furnace Co. v. Fairchild, 121 Pa. St. 563, 15 Atl. 656.
S. C. Lewis v. Virginia-Carolina Chem. Co. 69 S. C. 364, 48 S. E. 280.
Tenn. Holt v. Hayes, 110 Tenn. 42, 73 S. W. 11; Ross v. Scott 83 Tenn. (15 Lea) 479; See Dougherty v. Chestnutt 86 Tenn. 1, 5 S. W. 444 (Marble in situ).
Tex. Louis Werner Stave Co. v. Pickering (Tex. Cir. App. 1909) 119 S. W. 333; Callen v. Collins (Tex. Civ. App. 1909) 120 S. W. 546; Pettit v. Froth-

(Footnote 1 continued on next page)

In a still larger number of jurisdictions it has been held that the measure of damages in a case of innocent timber trespass, in which there is no damage to the land beyond the cutting of the trees, is the value of the severed trees at the time and place of the felling. [1]

(Footnote 1 concluded from preceding page)

ingham 48 Tex. Civ. App. 105, 106 S. W. 907; Young v. Lumber Co (Tex. Civ. App.) 100 S. W. 874; Messer v. Walton 42 Tex. Civ. App. 488, 92 S. W. 1037; Tex. & N. O. R. Co. v. Jones 34 Tex. Civ. App. 94; 77 S. W. 955; Texas etc. R. Co. v. White, 25 Tex. Civ. App. 278 (Sand).

Vt. Whiting v. Adams 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598 (wilful, but indicates stumpage for innocent trespass); See Tilden v. Johnson 52 Vt. 628, 36 Am. Rep. 769 (Severed value, in trover for logs.)

Wash. Chappell v. Puget Sound Reduction Co., 27 Wash. 63, 67 Pac. 391.

W. Va. Darnell v. Wilmoth 72 S. E. 1023 (1911).

U. S. Morgan v. U. S. 169 Fed. 242; Dartmouth College v. Int'l Paper Co. 132 Fed. 92; U. S. v. Homestake Min. Co. 117 Fed. 481; U. S. v. Van Winkle, 113 Fed. 903, 53 C. C. A. 533; U. S. v. Eccles 111 Fed. 490; (and see dicta in U. S. v. Baxter 46 Fed. 350, 353, and U. S. v. Williams, 18 Fed. 475, indicating stumpage value for innocent trespass). All of the Federal decisions here given were rendered subsequent to Woodenware Co. v. U. S. 106 U. S. 432, 1 S. Ct. 398, 27 L. Ed. 230, (Oct. 1882) See G.L.O. Regulations, March 1, 1883; 1 L. D. 695.

Eng. See Eardley v. Granville, 3 Ch. D. 826, 45 L. J. Ch. 669, 34 L. T. Rep. N. S 609, 24 Wkly. Rep. 528; Fleming v. Simpson, 6 L. J. K. B. O. S. 207, 2 M. & R. 169; Hedley v. Scissons, 33 U. C. Q. B. 215; Martin v. Porter, 5 M. & W. 351; Morgan v. Powell, 3 Q. B. 278; Wood v. Morewood, 3 Q. B., 440; Hilton v. Woods, L. R. 4 Eq. 432; Jegon v. Vivian, L. R. 6 Ch. App. 742.

Text Writers: Sedgwick on Damages, 9th. Ed. Pub. Baker, Voorhis & Co. N. Y., 1912, Vol. 3 p. 1927, (Stumpage value).

Sutherland on Damages, 3d Ed. Pub. Callaghan & Co. Chicago, 1904, Vol. 4, p. 3293, (Severed value).

1. Ala. Zimmerman Mfg. Co. v. Dunn, 151 Ala. 435, 44 So. 533; Ivy Co. v. Alabama Co., 135 Ala. 579, 33 So. 547, 93 Am. St. Rep. 46; White v. Yawkey, 108 Ala. 270, 19 So. 360, 54 Am. St. Rep. 159, 32 L. R. A. 199; Ivey v. McQueen, 17 Ala. 408.

Cal. Sampson v. Hammond, 4 Cal. 184.

Conn. Eldridge v. Gorman, 77 Conn. 699, 60 Atl. 643; See Baldwin v. Porter, 12 Conn. 484.

Fla. Peacock v. Feaster, 40 So. 74; Wright v. Skinner, 34 Fla. 453, 16 So. 335.

Ga. Coody v. Gress Lbr. Co. 82 Ga. 793, 10 S. E. 218; Smith v. Gonder, 22 Ga. 353 (Specifically stated.)

Ind. Ellis v. Wire, 33 Ind. 127, 5 Am. Rep. 189 (Corn).

Kan. Arn. v. Matthews, 39 Kan. 272, 18 Pac. 65 (Value where cut or at nearest market.)

Ky. See Dennis v. Strunk, 108 S. W. 957, 32 Ky. L. Rep. 1230.

La. Ball Lbr. Co. v. Simms Lbr. Co., 121 La. 627, 46 So. 674, 18 L. R. A. N. S. 244; St. Paul v. Louisiana Cypress Lbr. Co., 116 La. 585, 40 So. 906; Guarantee Trust etc. Co. v. Drew Inv. Co., 107 La. 251, 31 So. 736; Gardere v. Blanton, 35 La. Ann. 811; Schlater v. Gay, 28 La. Ann. 340; Yarborough v. Nettles, 7 La. Ann. 116; Eastman v. Harris, 4 La. Ann. 193; Shepard v. Young, 2 La. Ann. 238; Watterson v. Jetche, 7 Rob. 20.

Me. Moody v. Whitney, 38 Me. 174, 61 Am. Dec. 239; Cushing v. Longfellow, 26 Me. 306.

Md. Peters v. Tilghman, 111 Md. 227, 73 Atl. 726; Blaen Co. v. McCullough, 59 Md. 403, 43 Am. Rep. 560; Franklin Coal Co. v. McMillan, 49 Md. 549, 33 Am. Rep. 280.

Mass. Cutts v. Spring, 15 Mass. 135 ("Value of trees," indefinite).

Miss. Bond v. Griffin, 74 Miss. 599, 22 So. 187; Illinois C. R. Co. v. Le Blanc, 74

(Footnote 1 continued on next page)

Even these numerous decisions along the same line have failed to definitely establish a standard as to the precise condition into which the trees must be brought before the rule as to the severed value is to be applied. It would seem that the change from realty to personalty should be considered effected as soon as the trees are severed and before they are cut into logs or cordwood or otherwise improved, but it is probable that wherever such transformation was concurrent with and formed an essential part of the operation of felling the trespasser would not be held entitled in most juridsictions to an allowance therefor, while if such transformation were performed at a subsequent time and as a distinct operation from the felling an allowance might be made. There seems to be no sound reason why the owner of the trees should gain through expenditures by one who is guilty of no bad faith in severing them, and on the other hand, as stated above, the standing value does not afford full compensation for the injury. Though the cost of severance may not afford a logical or accurate measure of the additional damage suffered, the application of this rule would naturally have a salutary effect in restraining one from negligence in the matter of cutting trees belonging to another and at the same time satisfy the technical requirements of the theory of the law as to the character of property subject to conversion.

It will be noted that the holdings of the Federal courts

(Footnote 1 concluded from preceding page)
Miss. 626; Heard v. James, 49 Miss. 236. (Cases considered together indicate severed value.)

Neb. See, Carpenter v. Lingenfelter, 42 Neb. 728 (Grass.)

N. H. Beede v. Lamprey, 64 N. H. 510, 15 Atl. 133, 10 Am. St. Rep. 426; Hitchcock v. Libby, 70 N. H. 399, 47 Atl. 269 (Loosely stated); But see Foote v. Merrill, 54 N. H. 490, 20 Am. Rep, 151, and Cf. Adams v. Blodgett 47 N. H. 219 (Hemlock bark stripped.)

N. J. Dawson v. Amey (Ch. 1888), 13 Atl. 667.

N. Y. Firmin v. Firmin, 9 Hun 571.

N. C. Gaskins v. Davis, 115 N. C. 85, 20 S. E. 188, 44 Am. St. Rep. 439, 25 L. R. A. 813; Bennett v. Thompson 35 N. C. (13 Ired.) 146.

Wis. Tuttle v. Wilson, 52 Wis. 643, 9 N. W. 822; Wright v. Bolles Woodenware Co., 50 Wisc. 167, 6 N. W. 508; Single v. Schneider, 30 Wis. 574; Tyson v. McGuinness 25 Wis. 656.

U. S. United States v. St. Anthony R. R. Co., 192 U. S. 524; 24 S. Ct. 333, (Aff'g 114 Fed. 722, which, however, awarded standing value, the severed value not having been shown.) Pine River Logging Co. v. United States, 186 U. S. 279; Cf. same case, 89 Fed. 919. See, Bolles v. Woodenware Co., v. U. S. 106 U. S. 432; Fisher v. Brown, 70 Fed. 570, 37 U. S. App. 407.

Can. Morton v. McDowell, 7 U. C. Q. B. 338.

of the United States have not been consistent. The variance of the Federal decisions from what appears to be the better holding evidently arose chiefly from a lack of clear expression in the general discussion of the rule of damages against an innocent trespasser presented in the case of the Bolles Woodenware Company v. the United States, which came before the United States Supreme Court at the October term of 1882.

In instructions of the General Land Office to its field agents, which were dated March 1, 1883 (1 L. D. 695), and issued directly after the publication of the supreme court decision in the Woodenware case, the Department of the Interior officially interpreted the dictum in that decision regarding innocent trespass as holding that the measure of damages in unintentional trespass was the value of the timber as it stood in the tree before being cut. This interpretation necessarily ignored the significant fact that the only measure of damages specificaily discussed as applicable to the case then before the court, provided the evidence had not shown the trespass to be a wilful one, was the value of the trees after they were cut and at the place of cutting. Nevertheless, the interpretation placed upon this decision by the Department of the Interior was either followed, or independently adopted, by the Departmet of Justice, the Federal courts and many of the state courts. The stumpage value has been held to be the measure of damages in many decisions besides those given under note 1, page 86 above. [1]

In recent years the executive departments and the Federal courts have shown a disposition to interpret the dictum in the Woodenware case as holding that the value of the trees after severance should be the measure of damages for innocent trespass, especially in view of what the

1. U. S. v. Northern Pac. R. Co., 67 Fed. 890 (1895); Gentry v. U. S., 101 Fed. 51 41 C. C. A. 185 (1900); U. S. v. Teller, 106 Fed. 447, 45 C. C. A. 416 (1901); U. S. v. Powers, 119 Fed. 562, 56 C. C. A. 128 (1903) Holding not clear; U. S. v. McKee 128 Fed. 1002 (1904), Value of bark while on the trees.
See American Union Tel. Co. v. Middleton, 80 N. Y. 408.

same court said in the later case of the United States v. the Saint Anthony Railroad Company. [1]

The double meaning in which the word "stumpage" has been used as designating either the value of timber while standing or its value directly after severance has also resulted in a diversity of holdings even where one court intended to follow the principles announced in an earlier case.[2]

It is well settled that whether an action be brought for damages to the land or for the value of the trees themselves, the measure of damages, in cases of innocent trespass, will not be the value of the severed logs at some place to which they have been transported away from the land on which they were cut. [3]

§80. The Rule in Wisconsin Regarding Innocent Timber Trespass. The early Wisconsin decisions held that the measure of damages in cases of innocent trespass was the value of the severed trees at the time and place of the cutting. [4] A later case held that this was the rule even though the cutting and carrying away were done knowingly and wilfully. [5] At the first session of the Wisconsin legislature following the announcement of this doctrine, an act [6] was passed providing that where trees were unlawfully cut the

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1. (*a*) *See* United States decisions cited under Note 1, page 87.
   Bunker Hill & Sullivan Min. & Con. Co., 226 U. S. 548, affm. 178 Fed. 914 (Case as reported does not show finding of jury, but court specifically instructed jury that measure of damages for innocent trespass was value of trees after they were cut down.)
   (*b*) John W. Henderson case, 40 L. D. 518 (decided April 1, 1912). This decision was recalled and vacated on February 16, 1914, 43 L. D. 106, and new instructions given field agents on Feb. 25, 1914, to demand the value of standing trees; but on June 22, 1915, 44 L. D. p. 112, chiefs of field divisions of the General Land Office were again directed to demand the severed value in cases of innocent trespass, in instructions which indicated that both the Solicitor of the Treasury and the Attorney General considered the value of the severed trees the true measure of damages in cases of innocent trespass.
   (*c*) Opin. Sol. Dep. Agr., Vol. 1, p. 298. The abandonment of this position in instructions effective October 1, 1915 (p. 7, Trespass Division, National Forest Manual) is not in accord with the latest holdings of the other Executive Departments.
2. *See* notes 9 and 10 of page 18.
3. Cf. Wright v. Skinner, 34 Fla. 453, 16 So. 335; Cushing v. Longfellow, 26 Me. 306; Ayres v. Hubbard, 57 Mich. 322, 23 N. W. 829, 58 Am. Rep. 361; Gaskins v. Davis, 115 N C. 85, 20 S. E. 188, 44 Am. St. Rep. 439, 25 L. R. A. 813; Coxe v. England, 65 Pa. St. 212; Weymouth v. Chicago & N. W. R. Co., 17 Wis. 550, 84 Am. Dec. 763.
4. Weymouth v. Chicago and N. W. R. Co., 17 Wis. 550, 84 Am. Dec. 763; Single v. Schneider, 24 Wis. 299; Hungerford v. Redford, 29 Wis. 345.
5. Single v. Schneider, 30 Wis. 570 (decided in 1872).
6. Chap. 263, Laws of 1873, Wis. St. (1898) Sec. 4269.

owner might recover the highest market value which they had had between the cutting and the trial in whatever form they might have been put by the defendant, or by a purchaser from him with notice of the unlawful cutting.[1] except where the defendant should file an affidavit, in accordance with provisions of the statute, as to mistake, and support the affidavit by other satisfactory evidence[2] The act does not apply where the cutting was done under a bona fide claim of title.[3] It has been held that a conversion was not made in good faith where the defendant knew all the facts but believed that in view of such facts he had a right to take the timber.[4] The statute applies where the cutting was done by an agent, if the defendant upon the discovery of the facts, declines to restore the logs to the owner,[5] and also where the timber cut was not within the terms of a contract held by the defendant for the removal of timber.[6] The statute does not apply to an innocent purchaser who takes from a trespasser,[7] and notice on the part of the purchaser will not be presumed but must be proven by the plaintiff.[8] It does not apply in actions against the personal representative of the trespasser, or a purchaser from him, from whom only the value of the severed trees can be collected.[9] Thus the Wisconsin courts hold the statute to be punitive in character and applicable only to cases of wilful trespass, and follow what they conceive to be the common law rule in cases of innocent trespass.

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1. McNaughton v. Borth, 136 Wis. 543, 117 N. W. 1031; Smith v. Morgan, 73 Wis. 375, 41 N. W. 532; Arpin v. Burch, 68 Wis. 619, 32 N. W. 681; Schweitzer v. Connor, 57 Wis. 177, 14 N. W. 922; Tuttle v. Wilson, 52 Wis. 643, 9 N. W. 822; Haseltine v. Mosher, 51 Wis. 443, 8 N. W. 273; See, Webster v. Moe, 35 Wis. 75.
2. Everett v. Gores, 89 Wis. 421, 62 N. W. 82; Smith v. Morgan, 68 Wis. 358, 32 N. W. 135; Webber v. Quaw, 46 Wis. 118, 49 N. W. 830; Brown v. Bosworth, 58 Wis. 379, 17 N. W. 241; Cf. Cohen v. Neeves, 40 Wis. 393.
3. Befay v. Wheeler, 84 Wis. 135, 53 N. W. 1121; Fleming v. Sherry, 72 Wis. 503, 40 N. W. 375.
4. Warren v. Putnam, 68 Wis. 481, 32 N. W. 533; Cook Land etc. Co, v. Oconto Co., 134 Wis. 426, 114 N. W. 823; Smith v. Morgan, 68 Wis. 358, 32 N. W. 135; Fleming v. Sherry, 72 Wis. 503, 40 N. W. 375; St. Croix Land etc. Co. v. Ritchie, 78 Wis. 492, 47 N. W. 657; See, Smith v. Sherry, 54 Wis. 114, 11 N. W. 465.
5. Lee v. Lord, 76 Wis. 582, 45 N. W. 601.
6. Everett v. Gores, 89 Wis. 421, 62 N. W. 82.
7. Tuttle v. Wilson, 52 Wis. 643, 9 N. W. 822; Wright v. Bolles Woodenware Co., 50 Wis. 167, 6 N. W. 508.
8. Tucker v. Cole, 54 Wis. 539, 11 N. W. 703; Tuttle v. Wilson, 52 Wis. 643; Cf. Joseph Dessert Lbr. Co. v. Wadleigh, 103 Wis. 318, 79 N. W. 237. (Constr. St. re notice.)
9. Cotter v. Plummer, 72 Wis. 476, 40 N. W. 379.

§81 The Rule in Michigan Regarding Innocent Timber Trespass. Although the language in some decisions in that state has indicated that the measure of damages in Michigan would be the value of the trees while standing, [1] the rule there undoubtedly is their value standing plus a reasonable profit. [2] If the formal requirement of the common law, that things attached to realty must be severed before they can be converted, is ignored and an attempt is made to arrive at the compensation to which the plaintiff is justly entitled for the wrongful taking on the ground that he had a right to cut and market his own trees, the Michigan rule is apparently the most satisfactory one. It involves the difficult task of determining the profit realized by the trespasser, or what a reasonable profit would be; and yet this profit would ordinarily be proved by the same kind of evidence as the value of the trees while standing and would be as susceptible to a reasonable certainty of determination.

§82. The Liability of an Innocent Purchaser from an Unintentional Trespasser. If growing trees are cut by an unintentional trespasser, or under a bona fide claim of right, the innocent purchaser of the logs or other products manufactured from the trees will be liable only for the value at the time of the original wrongful taking. [3] Such purchaser takes the property subject to the identical claims which could have been enforced against the trespasser. He will be liable to the same extent as his vendor. Thus in jurisdictions where the measure of damages recoverable

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1. Michigan Land etc. Co. v. Deer Lake Co., 60 Mich. 143, 27 N. W. 10, 1 Am. St. Rep. 491; Wood v. Elliott, 51 Mich. 320, 16 N. W. 666.
2. Anderson v. Besser, 131 Mich. 481, 91 N. W. 737; Ayres v. Hubbard, 71 Mich. 594, 40 N. W. 10; 57 Mich. 322, 23 N. W. 829, 58 Am. Rep. 361; Skeels v. Starrett, 57 Mich. 350, 24 N. W. 98; Winchester v. Craig, 33 Mich. 205; Greeley v. Stilson, 27 Mich, 152; See, Busch v. Fisher, 89 Mich. 200; Gates v. Rifle Boom Co., 70 Mich. 309, 38 N. W. 245, Cf. Eaton v. Langley, 65 Ark. 448.
3. Birmingham Mineral R. Co. v. Tenn. Coal Co., 127 Ala. 137, 28 So. 679; White v. Yawkey, 108 Ala. 270, 19 So. 360; Lake Shore etc. R. Co. v. Hutchins, 37 Ohio St. 282; Texas etc. R. Co. v. Jones, 34 Tex. Civ. App. 94, 77 S. W. 955; Bolles Woodenware Co. v. United States, 106 U. S. 432; See, Barnes v. Weikel Chair Co., 89 S. W. 222, 28 Ky. L. Rep. 315.
   Stone v. U. S., 167 U. S. 178, 17 S. Ct. 778, 42 L. Ed. 127 (Aff'g 64 Fed. 667, 12 C. C. A. 451); Anderson v. U. S., 152 Fed. 87, 81 C. C. A., 311; U. S. v. Norris 41 Fed. 424. Cf. U. S. v. Price, 109 Fed. 239, 48 C. C. A. 331. (Title of U. S. not divested by sale, subsequent to demand by U. S. Agent, to a R. R. Co. which could have taken the timber standing.

from the innocent trespasser is the value of the trees while standing, the innocent purchaser will be held for such value; and in jurisdictions where the measure of damages is the value of the trees immediately after severance, or some different standard, the innocent purchaser must respond in damages in the amount there allowed against the one who severs growing trees accidentally or under claim of title.

§83. The Liability of a Wilful Trespasser or of his Vendee with Notice. If trees are cut wilfully, i. e., with a knowledge that the cutting was unlawful or with gross negligence or wanton recklessness, the measure of damages in an action for conversion, in nearly all jurisdictions, will be the value at the time of demand or the bringing of the suit, if the product of the trees is in the hands of the original trespasser or one who has purchased from him with notice of the unlawful cutting of the trees. The original trespasser or the purchaser with notice will be entitled to no allowance for what has been expended upon such product. [1]

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1. Ark. Nicklase v. Morrison, 56 Ark. 553, 20 S. W. 414.
Colo. Omaha & G. S. & R. Co. v. Tabor, 13 Colo. 41.
Ga. Parker v. Waycross etc. R. Co., 81 Ga. 387.
Ind. Ellis v. Wire, 33 Ind. 127, 5 Am. Rep. 189; *See* Emerson v. Seller, 105 Ind. 266, 4 N. E. 854; Ayers v. Hobbs, 41 Ind. App. 576, 84 N. E. 554.
Iowa. Stuart v. Phelps, 39 Ia. 14, 18 Am. Rep. 39 (Growing crop).
Ky. Kentucky Stave Co. v. Page (Ky. 1910), 125 S. W. 170 (Act of Agent.); Jones Lbr. Co. v. Gatliff, 82 S. W. 295, 26 Ky. L. Rep. 616; Bergen v. Sears 67 S. W. 1002, 24 Ky. L. Rep. 80.
La. Guarantee Trust & Safe Dep. Co. v. Drew Inv. Co., 107 La. 250 (1902) (Mistake as to law). Guarantee T. & S. D. Co. v. Holsell, 107 La. 745, 31 So. 999.
Mich. Moret v. Mason, 106 Mich. 340, 64 N. W. 193; Empire Mfg. Co. v. Stuart, 46 Mich. 485; Grant v. Smith, 26 Mich. 201; Final v. Backus, 18 Mich. 218; Symes v. Oliver, 13 Mich. 9.
Minn. Hastay v. Bonness, 84 Minn. 120, 86 N. W. 896; Mississippi River Logging Co. v. Page, 68 Minn. 269, 71 N. W. 4; Shepard v. Pettit, 30 Minn. 481.
Miss. Heard v. James, 49 Miss. 236.
Mo. Sligo Furnace Co. v. Holart-Lee Tie Co., 134 S. W. 585 (Mo. App.)
N. Y. Stanton v. Pritchard, 4 Hun 266; Rice v. Hollenbeck, 19 Barb. 664; Baker v. Wheeler, 8 Wend. 505, 24 Am. Dec. 66; Brown v. Sax, 7 Cow. 95.
Nev. Ward v. Carson River Wood Co., 13 Nev. 44.
Tenn. Holt v. Hayes, 110 Tenn. 42, 73 S. W. 111.
Tex. Bayle v. Norris, (Tex. Civ. App.) 134 S. W. 767; Emporia Lbr. Co. v. League (Tex Civ. App.) 105 S. W. 1167; Ripy v. Less, 55 Tex. Civ. App. 492, 118 S. W. 1084; Cummings v. Masterton, 42 Tex. Civ. App. 549, 93 S. W. 500. Brown v. Pope, 27 Tex. Civ. App. 225, 65 S. W. 42; Ry. Co. v. Starr, 22 Tex. Civ. App. 353, 55 S. W. 393.
Vt. Whiting v. Adams, 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598 (1894).
Wis. Underwood v. Paine Lbr. Co., 79 Wis. 592, 48 N. W. 673; Brown v. Bosworth, 58 Wis. 379, 17 N. W. 241.
U. S. Pine River Logging Co. v. U. S., 186 U. S. 279, 22 S. Ct. 920, 40 L. Ed.

(Footnote 1 continued on next page)

It has been held that if the negligence which led to the trespass was not such as to indicate wantonness or recklenssss, the defendant should be given an allowance for expenditures upon the trees after their severance. [1]

§84. The Liability of an Innocent Purchaser from a Wilful Trespasser. If the product of the trees has come into the hands of an innocent purchaser the measure of damages against such person in most jurisdictions will be the value at the time that he converted the product to his use, and this will ordinarily be the price which he paid. [2] Some of the earlier cases held that the plaintiff was entitled to the value of the products where found even though they were in the hands of an innocent purchaser, [3] but this is not in accord with the weight of authority.

§85. Exemplary Damages May be Allowed in Cases of Wilful Trespass. Where it is alleged that a trespass is wilful evidence as to the motive of the trespasser is admissi-

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(Footnote 1 concluded from preceding page)
1164; Cf. same case, 89 Fed. 907, 919; Bolles Woodenware Co. v. U. S., 106 U. S. 432, 1 S. Ct. 398, 27 L. Ed. 230; Cunningham v. Metropolitan Lbr. Co. 110 Fed. 332, 49 C. C. A. 72; U. S. v. Baxter, 46 Fed. 350; U. S. v. Ordway, 30 Fed. 30; U. S. v. Williams, 18 Fed. 475, 9 Sawy. 374; U. S. v. Mills, 9 Fed. 684: *See* Fisher v. Brown, 70 Fed. 570, 37 U. S. App. 407, and Bunker Hill & Sullivan Min. & Con. Co. v. U. S. 226 U. S. 548, affm. 178 Fed. 914.

Can. Union Bank v. Rideau Lbr. Co., 4 Ont. L. Rep. 721; Cf. 3 Ont. L. Rep. 269; Smith v. Baechler, 18 Ont. 293.

1. Trustees Dartmouth College v. Int'l Paper Co. 132 Fed. 99.

2. Ark. Central Coal and Coke Co. v. John Henry Shoe Co., 69 Ark. 302, 63 S. W. 49.

Ga. Milltown Lbr. Co. v. Carter, 5 Ga. App. 344, 63 S. E. 270.

Ky. Moss Tie Co. v. Myers (1909 Ky.) 116 S. W. 255; Jones Lbr. Co. v. Gatliff, 82 S. W. 295, 26 Ky. L. Rep. 616.

Mass. Glaspy v. Cabot, 135 Mass. 435.

Me. Powers v. Tilley, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304; See, Wing v. Milliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238.

Mich. Tuttle v. White, 46 Mich. 485, 9 N. W. 528, 41 Am. Rep. 175; Saltmarsh v. Chi. & G. T. Ry. 122 Mich. 103, 80 N. W. 981.

Minn. Hoxsie v. Empire Lbr. Co., 41 Minn. 548, 43 N. W. 476; Nesbitt v. St. Paul Lbr. Co., 21 Minn. 491.

Nev. See Ward v. Carson River Wood Co., 13 Nev. 44.

N. Y. Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307; Cf. Wallingford v. Kiser, 191 N. Y. 392, 84 N. E. 295, 123 Am. St. Rep. 600, 55 L. R. A. N. S. 1126 (Aff'm'd 110 N. Y. App. Div. 503, 96 N. Y. Suppl. 981).

Tenn, Godwin v. Taenzer, 122 Tenn. 101, 119, S. W. 1132; See McGill v. Chilhouse Lbr. Co., 111 Tenn. 552, 82 S. W. 210.

Tex. Missouri Kan. & Tex. Ry. Co. v. Starr (Tex. Civ. App) 55 S. W. 393.

Vt. Hassam v. Safford Lbr. Co., 82 Vt. 444, 74 Atl. 197.

U. S. Bolles Wooden Ware Co. v. U. S., 106 U. S. 432, 27 L. Ed. 230; Potter v. U. S., 122 Fed. 49, 58 C. C. A. 231; Stone v. U. S., 64 Fed. 667; U. S. v. Perkins et al, 44 Fed. 670.

See 47 Cent. Dig. Tit. "Trover and Conv., Sec. 270.

3. Bly v. United States, 4 Dillon 464 (C. C. 8th Dist.)

ble.[1] The character of evidence necessary to indicate wantonness on the part of the trespasser has been defined,[2] and it has been held that the taking of timber from lands of the United States was in itself prima *prima facie* evidence that the trespass was wilful.[3] If the trespass is proven or admitted, the burden of proof is upon the defendant to show that it was not wilful,[4] and the courts will generally allow exemplary damages in civil actions where the wrongful cutting of timber was deliberately done with a knowledge of its unlawfulness,[5] or when the conduct of the trespasser was grossly negligent,[6] reckless,[7] wanton,[8] malicious,[9] or fraudulent.[10] It has been held that exemplary damages may be given even when the plaintiff does not recover substantial actual damages;[11] but they will not be given if the cutting was done under a *bona fide* claim of right[12] and with no fruadulent purpose or intentional wrong,[13] except where there are aggravating circumstances.[14] The higher courts will not ordinarily disturb the verdict rendered in a lower court for the unlawful cutting of trees if there was no error in the instructions to the jury, but if the damages allowed below are clearly excessive the verdict will be set aside.[15]

1. Kentucky Stave Co. v. Page (Ky. 1910), 125 S. W. 170.
2. Faris v. Amer. Tel. etc. Co., 84 S. C. 102, 65 S. E. 1017.
3. U. S. v. Homestake Min. Co., 117 Fed. 481, 54 C. C. A. 303; Cf. U. S. v. Gentry, 119 Fed. 70, 55 C. C. A. 658.
4. Miss. River Logging Co. v. Page, 68 Minn. 269, 71 N. W. 4; Trustees Dartmouth College v. Int'l Paper Co. 132 Fed. 99.
5. Bentley v. Fisher Lbr. etc. Co., 51 La. Ann. 451, 25 So. 262; Tissot v. Great So. Tel. & Tel. Co., 39 La. Ann. 996; Ward v. Ward, 41 Iowa 686; Smith v. Thompson, 55 Md. 5, 39 Am. Rep. 409; Boetcher v. Staples, 27 Minn. 308, 38 Am. Rep. 295; Storm v. Green, 51 Miss. 103; Ensley v. Nashville, 58 Tenn. 144; Boardman v. Goldsmith, 48 Vt. 403; Day v. Woodworth, 13 How. 362, 371; U. S. v. Taylor, 35 Fed. 484; Willis v. Miller et al., 29 Fed. 238; Barry v. Edmunds 116 U. S. 550; Berry v. Fletcher, 1 Dill. 67; Refused in N. J. where no peculiar injury, Hollister v. Ruddy 48 Atl. 520. See Note 12 infra.
6. Emporia Lumber Co. v. League (Tex. Civ. App. 1907), 105 S. W. 1167; Kolb v. Bankhead, 18 Tex. 228.
7. Berry v. Fletcher, 3 Fed. Cas. No. 1357, 1 Dill. 67.
8. Jones Lbr. Co. v. Gatliff, 82 S. W. 295, 29 Ky. L. Rep. 616.
9. Berry v. Fletcher, 3 Fed. Cas. No. 1357, 1 Dill. 67; Cosgriff v. Miller, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977.
10. Kentucky Stave Co. v. Page, (Ky. 1910) 125 S. W. 170; Cumberland Tel. etc. Co. v. Cassedy, 78 Miss. 666, 29 So. 762.
11. Rothschild v. Bay City Lumber Co., 139 Ala. 571, 36 So. 785.
12. Hollister v. Ruddy, 66 N. J. L. 68, 48 Atl. 520.
13. Keystone Lumber Co. v. McGrath (Miss. 1897), 21 So. 301; Gwaltney v. Scottish Carolina Timber etc. Co., 115 N. C. 579, 20 S. E. 465.
14. Cumberland Tel. etc. Co. v. Cassedy, 78 Miss. 666, 29 So. 762.
15. Cumberland Tel. etc. Co. v. Cassedy, 78 Miss. 666, 29 So. 762.
See Watterson v. Jetche, 7 Rob. (La.) 20 (1844); Tissot v. Great S. T & T. Co. 39 La. Ann. 996, 3 So. 261; Ferguson v. Buckell, 101 App. Div. 213, 91 N. Y. Suppl. 724.

CHAPTER VIII

STATUTORY CIVIL LIABILITY FOR TIMBER TRESPASS

§86. The Development of Timber Trespass Legislation in America. Quite contrary to the common belief the first legislation in America making the cutting of timber unlawful was directed not to the prevention of harm to private property but to the protection of the public lands, generally described in colonial laws and documents as the "commons." By order of March 29, 1626,[1] the exportation of timber without the consent of the governor and council was forbidden in the colony that had been founded at Plymouth in December, 1620. On November 7, 1632, [2] the general court at Boston forbade the cutting of paling from public ground except with the approval of the proper public official. Similar regulations as to the use of timber from common or public lands were early promulgated in other English colonies. [3] These enactments were soon followed by laws imposing liability for single or multiple damages or penalties for the cutting of timber from private lands without the consent of the owner. [4] In nearly every colony the civil liabilities imposed by the earlier acts proved insufficient to prevent trespass and later laws increased the exemplary damages or provided for imprisonment. [5]

Subsequent to the institution of a national government new timber trespass statutes were enacted in nearly all of the original states and as new states or territories were erected

1. Compact, Charter and Laws, Colony of New Plymouth, Boston, 1836, p 28.
2. Records of Mass. Bay Colony, Boston, 1853, Vol. 1, p. 101.
3. Rhode Island, 1638; Connecticut, 1639; New Hampshire, 1640; New Jersey, 1666; New York, 1699.
4. Rhode Island, 1647; New Jersey, 1681; Pennsylvania, 1683; Massachusetts, 1694; New Hampshire, 1697; New York' 1699; Maryland, 1704; Connecticut, 1718; Delaware, 1741.
5. For discussion of such laws see: Forest Legislation in America Prior to March 4, 1789, Kinney, (Published as Bulletin 370, Cornell University Agr. Exp. Sta., January, 1916), pp. 371-380.

laws of this character were made effective in each. While some statutes, like the early laws of Ohio, Indiana, Alabama and Mississippi, named the species of which the cutting was prohibited, the majority of the state statutes made one liable for the cutting of any tree upon the land of another without his consent. A few statutes made an offender liable for single damages only but most of them prescribed double or treble damages and a few prescribed quintuple damages where the circumstances of the trespass were aggravated. Other statutes provided a fixed penalty for each tree severed, or such a penalty for the cutting of trees of a certain species, quality or size and multiple damages for other trees or underwood.

In practically every state laws were early enacted making the cutting of the tree of another without his consent a misdemeanor and providing a fine and imprisonment for such offense in addition to liability for civil damages. The cutting of timber from state lands was also made a crime in most states. In nearly all states special statutes have been enacted making it a misdemeanor to cut or injure fruit, shade, or ornamental trees standing upon either private or public land.

Civil and criminal timber trespass laws have been so numerous in the different jurisdictions now comprised in the forty-eight states of the American Union that it is impracticable to attempt to trace at this time and place the development in each state, or even to cite the multitudinous enactments in the various states.

§87. Multiple Damages and Penalties under Statutes. In many states statutes provide for exemplary damages in the form of double or treble damages, or penalties, for the unlawful cutting of timber on the land of another or on public land.[1]

1. Ala. Civil Code, 1907, Sec. 6035-6038, Chap. 143 (Penalties).
Ark. Digest of Statutes, 1904, Sec. 7976 and 7978 (Double and treble).
Cal. Civil Code, Deering, 1915, Sec. 3346, p. 800, (Treble damages).
Col. Annotated Statutes, Mills, 1912, Sec. 2185 (Exemplary, not treble).
Conn. General Statutes, Revision of 1902, Sec. 1097 (Treble value for trees over 1 ft. diam.; $1.00 under 1 ft.)
Ga. Code of 1914, Sec. 4515 (Not treble, but rule for wilful and innocent trespass.)
Ida. Revised Statutes, 1908, Sec. 4531 (Treble damages).
(Footnote 1 continued on next page)

The multiple damages and penalties provided by these acts have been imposed in numerous decisions. [1] Many of

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(Footnote 1 concluded from preceding page)

Ill. Revised Statutes, Hurd, 1912, Chap. 136, Sec. 5, p. 2314 (Penalties).
Ind. Annotated Statutes, Burns, 1914, Sec. 2301, (Double damages.) See Sec. 2308.
Iowa Iowa. Code of 1897, Sec. 4306 (Treble damages).
Kan. General Statutes, Dassler, 1909. Sec. 9692 (Treble dam. and fine).
Me. Revised Statutes, 1903, Chap. 97, Sec. 9, p. 828 (damages).
Mass. Revised Laws, 1902, Chap. 185, Secs. 7 and 8, p. 1639, Vol. 2 (Treble damages).
Mich. Annotated Statutes, Howell, 1913, Sec. 13317 and 13318 Vol. 5 (Treble damages).
Minn. General Statutes, Tiffany, 1913, Secs. 7900, 8090 (Treble damages) Sec. 8819. (Same on State pine land).
Miss. Code of 1906, Sec. 4976, 4977 and 4978 (Penalties); 4983 (boxing pine).
Mo. Annotated Statutes, 1906, Sec. 4572 (Treble damages); 4575 (exception). Rev. Stat. 1909, Secs. 5448-5449.
Mont. Revised Code, 1907, Sec. 2096 (planted trees); Secs. 6078, 6867, 8610, 8773, last two refer to State land (treble damages).
Neb. Revised Statutes, 1913, Sec. 8247 (Treble damages); 8248 (exception).
Nev. Revised Laws. Civil, 1912, Sec. 5506-5507. (Treble damages).
N. H. Public Statutes, 1901, Chap. 244, Sec. 1, p. 758. (Treble or quintuple value or penalty).
N. J. Compiled Statutes, 1709-1910, Vol. 4, p. 5396, Sec. 1 (Penalties).
N. M Annotated Statutes, 1915, Sec. 1518. (Treble damages).
N. Y. Code of Civil Procedure, Bliss, 6th Ed. 1913, Sec. 1667-68, p. 3154 and 3155. (Treble damages).
N. C. Revised Laws, Pell, 1908 Sec. 3741. (State Lands, double damages).
N. D. Compiled Laws, 1913, Sec. 7176 (Treble damages).
Ohio. Annotated General Code, Page & Adams, 1912, Sec. 12458-12459 (Double damages).
Oreg. General Laws, Lord, 1910, Sec. 346 and 347 (Treble damages).
Pa. Digest of Laws, Purdon, 13 Ed., 1910, p. 4755 (Sec. 2; double damages for cutting; treble damages for converting.)
R. I. General Laws, 1909, Chap. 335, p. 1213 (double value for trees, treble value for wood and underwood.)
S. D. Revised Code, 1903, Sec. 2323 of Civil Code (Treble damages).
Utah Compiled Laws, 1907, Sec. 3508 (Treble damages); Sec. 1126 (planted trees, treble damages).
Vt. Public Statutes, Lord & Darling, Rev. 1906, Sec. 5701 (Treble damages).
Va. Code, Pollard, 1904, cf. Sec. 2775-2780 (treble damages, wanton cutting by tenant.)
Wash. Codes & Statutes, Remington & Ballinger, 1910, Sec. 939 and 940 (Treble damages).
W. Va. Code, Hogg, 1913, cf. Sec. 4125 (treble damages for wanton cutting by tenant).
Wis. Statutes, 1915, cf. Sec. 4269 (highest value after cutting).

1. Ala. Postal Tel. Co. v. Lenoir, 107 Ala. 640; Mitchell v. Billingsley, 17 Ala. 391; Givens v. Kendrick, 15 Ala. 648.
Cal. Daubenspeck v. Grear, 18 Cal. 443.
Ill. David v. Carrell, 74 Ill. App. 47; Behymer v. Odell, 31 Ill. App. 350.
Md. Coal Co. v. McCulloh, 59 Md. 400.
Mich. Clark v. Field, 42 Mich. 342; Osborn v. Lovell, 36 Mich. 246.
Miss. Keirn v. Worfield, 60 Miss. 799; Mhoon v. Greenfield, 52 Miss. 434; Heard v. James, 49 Miss. 236; Perkins v. Hackleman, 26 Miss. 41, 59 Am. Dec. 243.
Mo. Emerson v. Beavaus, 12 Mo. 511.
N. J. Winter v. Peterson, 24 N. J. L. 524, 61 Am. Dec. 678.
N. C. Bennett v. Thompson, 13 Ired L. (35 N. C.) 146.

(Footnote 1 continued on next page)

the statutes are so worded as to clearly indicate that the multiple damages or penalties are to be awarded only when the trespass is malicious, fraudulent, inexcusably negligent or otherwise aggravated; but even where the application of the statute is not expressly limited to trespasses of this character, the courts will generally construe it as not including unintentional trespasses and will allow only actual, or compensatory, damages where the trespass was accidental or done under a *bona fide* claim of ownership and color of title. [1] While in compensatory, or single, damages the intent of the trespasser is immaterial, [2] an intent to commit the unlawful act is necessary to the maintenance

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(Footnote 1 concluded from preceeding page)

Wis. Andrews v. Youmans, 78 Wis. 56; Lee v. Lord, 76 Wis. 582; Cotter v. Plumer, 72 Wis. 476.
Double damages allowed for timber trespass on state land: State v. Shevlin-Carpenter Co., 102 Minn. 470, 113 N. W. 634, 114 N. W. 738.
Recovery of enalties allowed as to state land: People v. Bennett, 56 Misc. (N. Y.) 160, 107 N. Y. Suppl. 406. (Aff'd in 125 N. Y. App. Div. 912, 109 N. Y. Suppl. 1140.)

1. Ala. Long v. Cummings, 156 Ala. 577, 47 So. 109; Bradford v. Boozer, 139 Ala. 502, 36 So. 716; Glenn v. Adams, 129 Ala. 189, 29 So. 836; White v. Farris, 124 Ala. 461, 27 So. 259; Williams v. Hendricks, 115 Ala. 277, 22 So. 439, 67 Am. St. Rep. 32, 41 L. R. A. 650; Postal Tel. Cable Co. v. Lenoir, 107 Ala. 640, 18 So. 266; Russel v. Irby, 13 Ala. 131; But see, Louisville, etc. R. Co. v. Hill, 115 Ala. 334, 22 So. 163.
Cal. Barnes v. Jones, 51 Cal. 303.
Ga. Yahoola River, etc. Co. v. Irby, 40 Ga. 479.
Ill. Cushman v. Oliver, 81 Ill. 444; Watkins v. Gale 13 Ill. 152; Whitecraft v. Vanderveer, 12 Ill. 235; See also, Satterfield v. Western Union Tel. Co., 23 Ill. App. 446; Belt v. Reid, 84 Ill. App. 501.
Iowa. Werner v. Flies, 91 Iowa 146, 59 N. W. 18.
Kan. Cf. Wright v. Brown, 5 Kan. 600.
Mich. Skeels v. Starrett, 57 Mich. 350, 24 N. W. 98; Clark v. Field, 42 Mich. 342; Osborn v. Lovell, 36 Mich. 246; Russell v. Myers, 32 Mich. 522; Wallace v. Finch, 24 Mich. 255.
Miss. Cumberland Tel. etc. Co. v. Martin, 93 Miss. 505, 46 So. 247; Lusby v. Kansas City etc. R. Co., 73 Miss. 360, 19 So. 239, 36 L. R. A. 510; McCleary v. Anthony, 54 Miss. 708.
Mo. Chilton v. Missouri Lumber Etc. Co., 144 Mo. App. 315, 127 S. W. 941; Missouri Lbr. Etc. Co. v. Zeitinger, 45 Mo. App. 114; Lindell v. Hannibal, etc. R. Co., 25 Mo. 550; Emerson v. Beavaus, 12 Mo. 511.
N. H. Batchelder v. Kelly, 10 N. H. 436, 34 Am. Dec. 174; See, Morrison v. Bedell, 22 N. H. 234.
N. Y. Smith v. Morse, 70 N. Y. App. Div. 318, 75 N. Y. Suppl. 126; Nixon v. Stillwell, 52 Hun. 353, 5 N. Y. Suppl. 248.
Ore. Loewenberg v. Rosenthal, 18 Ore. 178, 22 Pac. 601.
Pa. Shiffer v. Broadhead, 134 Pa. St. 539, 19 Atl. 688; Kramer v. Goodlander, 98 Pa. St. 353.
Vt. Davis v. Cotey, 70 Vt. 120, 39 Atl. 628; Brown v. Mead, 68 Vt. 215, 34 Atl. 950.
Wash. Gardner v. Lovegren, 27 Wash. 356, 67 Pac. 615.
Wis. Cohen v. Neeves, 40 Wis. 393.

2. Quillen v. Betts, 1 Pennew (Del.) 53, 39 Atl. 595; Miltown Lbr. Co. v. Carter, 5 Ga. App. 344, 33 S. E. 270; Mishler Lbr. Co. v. Craig, 112 Mo. App. 454, 87 S. W. 41; Chase v. Clearfield Lbr. Co., 209 Pa. St. 422, 58 Atl. 813; Cf. Guttner v. Pacific Steam Whaling Co., 96 Fed. 617.

of action under one of these punitive statutes. The act must be wilful, [1] or so negligent and careless as to be inexcusable.[2] Evil intent is unnecessary, but the act is wilful even though the trespasser did not know that the land upon which he trespassed belonged to the plaintiff. [3] Knowledge that the land was not his own is sufficient evidence of an improper purpose and intention to violate the provisions of the statute, [4] and even this knowledge is unnecessary under the Pennsylvania statute. [5] In any state a belief that is clearly not well founded would constitute no defense, [6] but in some jurisdictions if the belief as to right to cut is reasonably well-founded and is entertained in good faith it will constitute a defense against the recovery of multiple damages or a penalty even where the plaintiff forbade the doing of the act. [7]

§88. Conditions Necessary for Maintenance of Statutory Action. These statutes are generally regarded as not giving a distinct new cause of action but as merely augmenting the measure of damages allowable under the

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1. Ala. Long v. Cummings, 165 Ala. 342, 51 So. 743; Glenn v. Adams, 129 Ala. 189, 29 So. 836; White v. Harris, 124 Ala. 461, 27 So. 259; Postal Tel. Cable Co. v. Lenoir, 107 Ala. 640, 18 So. 266; Russell v. Irby, 13 Ala. 131.
   Cal. Stewart v. Sefton, 108 Cal. 197, 41 Pac. 293.
   Ill. Watkins v. Gale, 13 Ill. 52; Whitecraft v. Vandeveer, 12 Ill. 235; Belt v. Reid, 84 Ill. App. 501; David v. Correll, 74 Ill. App. 47.
   Iowa. Koonz v. Hempy, 142 Iowa 337, 120 N. W. 976.
   Me. *Contra*, Black v. Mace, 66 Me. 49.
   Mich. Michigan etc. Co. v. Deer Lake Co., 60 Mich. 143, 27 N. W. 10, 1 Am. St. Rep. 491.
   Miss. Cumberland Tel. etc. Co. v. Martin, 93 Miss. 505, 46 So. 247; Therrell v. Ellis, 83 Miss. 494, 35 So. 826; McCleary v. Anthony, 54 Miss. 708; Mhoon v. Greenfield, 52 Miss. 434; Perkins v. Hackleman, 26 Miss. 41, 59 Am. Dec. 243.
   Mont. McDonald v. Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616.
   N. H. Batchelder v. Kelly, 10 N. H. 436, 34 Am. Dec. 174.
2. Harrison Naval Stores Co. v. Johnson, 91 Miss. 747, 45 So. 465; Therrell v. Ellis, 83 Miss. 494, 35 So. 826; Keirn v. Warfield, 60 Miss. 799; McCleary v. Anthony, 54 Miss. 708; Mhoon v. Greenfield, 52 Miss. 434.
3. Givens v. Kendrick, 15 Ala. 648; Longyear v. Gregory, 110 Mich. 277, 68 N. W. 116; Emerson v. Beavaus, 12 Mo. 511; Perkins v. Hackleman, 26 Miss. 41, 59 Am. Dec. 243. Louisville & Nashville R. R. Co. v. Hill, 115 Ala. 334, 22 So. 163.
4. Walkins v. Gale, 13 Ill. 152.
5. McCloskey v. Powell, 123 Pa. St. 62, 16 Atl. 420, 10 Am. St. Rep. 512; Watson v. Rynd, 76 Pa. St. 59; O'Reilly v. Shadle, 33 Pa. St. 489.
6. Macey v. Carter, 76 Mo. App. 490; Rousey v. Wood, 57 Mo. App. 650.
7. Long v. Cummings, 165 Ala. 342, 51 So. 743; Belt v. Reid, 84 Ill. App. 501; Cox v. St. Louis etc. R. Co., 111 Mo. App. 394, 85 S. W. 989.

common law action of trespass, [1] and it is accordingly held that the statutory action can be brought only where the circumstances would sustain the common-law action. [2] Possession under color of title with claim of ownership has been held sufficient to support the statutory action, [3] but the general rule is that the action is available only to the owner of the fee whether the act provide for treble damages [4] or for a penalty [5] for the unauthorized cutting of timber. Thus the ownership of trees standing upon the land of another has been held insufficient to support the statutory action for a penalty, [6] unless the statute specifically provides that action shall be available to the owner of timber apart from the land. [7] Actual possession under claim of right and color of title raises a presumption of ownership. [8]

Recovery of multiple damages or the penalty provided may be given where the palintiff has title only without

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1. Eklund v. Lewis Lbr. Co., 13 Ida. 581, 92 Pac. 532; Sprague v. Irwin, 27 How. Pr. (N. Y.) 51; Hathaway v. Goslant, 77 Vt. 199, 59 Atl. 835; Davenport v. Newton, 71 Vt. 11, 42 Atl. 1087; Willey v. Laraway, 64 Vt. 559, 25 Atl. 436; Montgomery v. Edwards. 45 Vt. 75.
2. Yocum v. Zahner 162 Pa. St. 468, 29 Atl. 778; Guild v. Prentiss, 83 Vt. 212, 74 Atl. 1115; But See, Arnold v. Pfouts, 117 Pa. St. 103, 11 Atl. 871; Walton v. Pollock, 2 Pa. Dist. 607, 12 Pa. Co. Ct. 216.
3. Carpenter v. Savage, 93 Miss, 233, 46 So. 537; See Johnson v. Davis, 91 Miss. 708, 45 So. 979.
4. Newman v. Mountain Park Land Co., 85 Ark. 208, 107 S. W. 391, 122 Am. St. Rep. 27; Taylor v. State, 65 Ark. 595; 47 S. W. 1055; Arn v. Matthews, 39 Kan. 272, 18 Pac. 65, Achey v. Hull, 7 Mich. 423; Reynolds v. Maynard (Mich. 1904), 100 N. W. 174; Kellar v. Central Tel. etc. Co., 53 Misc. 523, 105 N. Y. Suppl. 63; Van Deusen v. Young, 29 N. Y. 9; Lewis v. Thompson, 3 N. Y. App. Div. 329, 38 N. Y. Suppl. 316.
5. Ala. Smythe Lbr. Co. v. Austin, 162 Ala. 110, 49 So. 875; Shelby Iron Co. v. Ridley, 135 Ala. 513, 33 So. 331; White v. Farris, 124 Ala. 461, 27 So. 259; Higdon v. Kennemer, 120 Ala. 193, 24 So. 439, 112 Ala. 351, 20 So. 470; Gravlee v. Williams, 112 Ala. 539, 20 So. 952; Turner Coal Co. v. Glover, 101 Ala. 289, 13 So. 478; Allison v. Little, 93 Ala. 150, 9 So. 388.
   Ill. Edwards v. Hill, 11 Ill. 22; Clay v. Boyer, 10 Ill. 506; Jarrott v. Vaughn, 7 Ill. 132; Whiteside v. Divers, 5 Ill. 336; Wright v. Bennett, 4 Ill. 258; David v. Correll, 68 Ill. App. 123; Behymer v. O'Dell, 45 Ill. App. 616, 31 Ill. App. 350; Abney v. Austin, 6 Ill. App. 49.
   Miss. McCleary v. Anthony, 54 Miss. 708; Dejarnett v. Haynes, 23 Miss. 600.
   Vt. Davenport v. Newton, 71 Vt. 11, 42 Atl. 1087.
6. Clifton Iron Co. v. Curry, 108 Ala. 581, 18 So. 554.
7. Brasher v. Shelby Iron Co., 144 Ala. 659, 40 So. 80; Harrison Naval Stores Co. v. Johnson, 91 Miss. 747, 45 So. 465.
8. Higdon v. Kennemer, 120 Ala. 193, 24 So. 439; Higdon v. Kennemer, 112 Ala. 351, 20 So. 470; Behymer v. O'dell, 45 Ill. App. 616; Abney v. Austin, 6 Ill. App. 49; Mason v. Park, 4 Ill. 532; Darrill v. Dodds, 78 Miss. 912, 30 So. 4; McCleary v. Anthony, 54 Miss. 708; Ware v. Collins, 35 Miss. 223, 72 Am. Dec. 122; Humes v. Proctor, 151 N. Y. 520, 45 N. E. 948.

actual possession.[1] It has been held that under these statutes recovery could be had even where the plaintiff had neither actual nor constructive possession;[2] but the better holding is that the common law rule is not changed by these statutes.[3]

Under most of these statutes the multiple damages or penalty prescribed may be imposed even where the trees cut have not been taken away,[4] and they embrace immature trees.[5]

One who orders or induces another to violate one of these statutes is liable for the damages or penalties prescribed,[6] and the employer is liable for the acts of his employee which are within the scope of his employment,[7] but not for acts committed without authority.[8] Likewise a partner is not liable for trespass by a copartner which is done without the knowledge and consent of the former.[9] If one who purchases for value timber cut in violation of such a statute had no part in the commission of the trespass, he will not be held liable for the multiple damages or penalties of the statute where he takes without notice[10] of the unlawful cutting, but there is conflict of authority as

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1. Long v. Cummings, 156 Ala. 577, 47 So. 109; White v. Farris, 124 Ala. 461, 27 So. 259; Gravlee v. Williams, 112 Ala. 539, 20 So. 952; Turner Coal Co. v. Glover, 101 Ala. 289, 13 So. 478; Allison v. Little, 93 Ala. 150, 9 So. 388; Arn v. Matthews, 39 Kans. 272, 18 Pac. 65; Sullivan v. Davis, 29 Kan. 28; Fitzpatrick v. Gebhart, 7 Kan. 35; Cramer v. Grosclose, 53 Mo. App. 648.
2. Coppage v. Griffith, 40 S. W. 908, 19 Ky. L. Rep. 459; Achey v. Hull, 7 Mich. 423.
3. Beatty v. Brown, 76 Ala. 267; Cf. Rogers v. Brooks, 99 Ala. 31, 11 So. 753; Newman v. Mountain Park Land Co., 85 Ark. 208, 107 S. W. 391, 122 Am. St. Rep. 27; Brown v. Hartzell, 87 Mo. 564; Holladay-Klotz Land etc. Co. v. Moss Tie Co., 79 Mo. App. 543; Avitt v. Farrell, 68 Mo. App. 665; Cf. Austin; v. Huntsville Coal etc. Co., 72 Mo. 535, 37 Am. Rep. 446; Halley v. Taylor, 77 Miss. 867, 28 So. 752; Gathings v. Miller, 76 Miss. 651, 24 So. 964; Ware v. Collins, 35 Miss. 223; Hubbel v. Rochester, 8 Cowen (N. Y.) 115 (1828, under statute Apr. 9, 1805 S. L. Ch. 94).
4. Givens v. Kendrick, 15 Ala. 648; Keystone Lbr. etc. Co. v. McGrath (Miss. 1897), 21 So. 301; Cf. Batchelder v. Kelly, 10 N. H. 436, 34 Am. Dec. 174, (cut by mistake).
5. Clay v. Postal Tel. Cable Co., 70 Miss. 406, 11 So. 658.
6. McCloskey v. Powell. 138 Pa. St. 383, 21 Atl. 148. (Aff'm in 123 Pa. St. 62, 16 Atl. 420, 10 Am. St. Rep. 512).
7. Van Siclen v. Jamaica Electric Light Co., 45 N. Y. App. Div. 1, 61 N. Y. Suppl. 210, (Aff'm'd in 168 N. Y. 650, 61 N. E. 1135). Postal Tel. Co. v. Brantley 107 Ala. 683, 18 So. 321; See 115 Ala. 286, 22 So. 439.
8. Therrell v. Ellis, 83 Miss. 494, 35 So. 826; McCleary v. Anthony, 54 Miss. 708; Batchelder v. Kelly, 10 N. H. 436, 34 Am. Dec. 174; But see, Gates v. Comstock, 113 Mich. 127, 71 N. W. 515; Crisler v. Ott, 72 Miss. 166, 16 So. 416.
9. Williams v. Hendricks, 115 Ala. 277, 22 So. 439, 67 Am. St. Rep. 32, 41 L. R. A. 650.
10. O'Reilly v. Shadle, 33 Pa. St. 489.

to whether such purchaser will be liable if he takes with notice of the unlawful cutting. [1]

§89. **Defenses to Statutory Damages.** If the cutting is done with the consent of the owner, [2] is within one of the exceptions of the statute, [3] or is done with authority of law, [4] the trespasser will not be liable to the multiple damages or penalties. Possession without title under a contract of purchase, [5] proof that the cutting benefited the land, [6] or evidence that the cutting was necessary to protect defendant's adjoining land [7] do not constitute defenses to an action under one of these statutes, and payment for damage to one tenant in common does not discharge the liability to another. [8]

While the burden of proof is on the plaintiff to show that a trespass has actually been committed on land to which he has title, [9] and that it was wilful [10] and done without consent or license; [11] when these facts are established the burden of justification of the act falls upon the defendant. [12] Thus the denfedant may be required to show that the trespass was committed by mistake, [13] that he used reasonable care, [14] that he had probable cause for

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1. *Not Liable*—Alabama State Land Co. v. Reed, 99 Ala. 19, 10 So. 238.
   Liable—Caris v. Nimmons, 92 Mo. App. 66; Holladay-Klotz Land etc. Co. v. Moss Tie Co., 79 Mo. App. 543.
2. Jernigan v. Clark, 134 Ala. 313, 32 So. 686; Werner v. Flies, 91 Iowa 146, 59 N. W. 18.
3. Clark v. Field, 42 Mich. 342, 4 N. W. 19; Russell v. Myers, 32 Mich. 520; Wallace v. Finch, 24 Mich. 255; Courtney v. Smylie, Walk. Miss. 497; Pitt v. Daniel, 82 Mo. App. 168; Cramer v. Groseclose, 53 Mo. App. 648.
4. Farrow v. Nashville, etc. R. Co., 109 Ala. 448, 20 So. 303; Cox v. St. Louis etc. R. Co., 111 Mo. App. 394, 85 S. W. 989; Van Siclen v. Jamaica Electric Light Co., 45 N. Y. App. Div. 1, 61 N. Y. Suppl. 210 (Aff'd in 168 N. Y. 650, 61 N. E. 1135).
5. Van Deusen v. Young, 29 Barb. (N. Y.) 9; But see, Taylor v. Lyon Lbr. Co., 13 Pa. Co. Ct. 235.
6. Van Deusen v. Young, 29 Barb. (N. Y.) 9 (Reversed on other grounds in 29 N. Y. 9).
7. Walker v. Davis, 83 Mo. App. 374.
8. Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433.
9. Brasher v. Shelby Iron Co., 144 Ala. 629, 40 So. 80.
10. Shelby Iron Co. v. Ridley, 135 Ala. 513, 33 So. 331; Wilson v. Gunning, 80 Iowa 331, 45 N. W. 920.
11. Davis v. Arnold 143 Ala. 228, 39 So. 141; Farrow v. Nashville etc. R. Co., 109 Ala. 448, 20 So. 303; Rogers v. Brooks, 105 Ala. 549, 17 So. 97; Padman v. Rhodes, 126 Mich. 434, 85 N. W. 1130.
12. Ladd v. Shattock, 90 Ala. 134, 7 So. 764; Chilton v. Missouri Lbr. etc. Co., 144 Mo. App. 315, 127 S. W. 941; Farrow v. Nashville etc. R. Co., 109 Ala. 448,20 So. 303.
13. Davis v. Cotey, 70 Vt. 120, 39 Atl. 628.
14. Keirn v. Warfield, 60 Miss. 799.

believing that the cutting was under one of the exceptions of the statute, [1] that the cutting was accidental or casual, [2] that he acted under a *bona fide* claim of right, [3] or that it was done with the consent of the plaintiff. [4]

§90. Determination of Amount Allowable as Multiple Damages. Under different statutes the basis of the multiple damages has been held to be either the difference in the value of the land before and after the cutting of the trees, [5] or the market value of the trees cut [6] according to the language of the statute and the circumstances of the trespass. Accessory or consequential damages not embraced by the statute will not be considered in the unit basis of multiple damages. [7] To establish the value of trees severed the plaintiff may show either value of the trees on the land, [8] or at the nearest market. [9] Ordinarily the additional value given the severed article by the labor and expense of the trespasser cannot be trebled. [10] If the plaintiff proves the wrongful cutting but does not establish a case within the terms of the statute providing for multiple damages or a penalty, he will be entitled to single damages. [11]

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1. Clark v. Field, 42 Mich. 342, 4 N. W. 19; Henry v. Lowe, 73 Mo. 96; Walther v. Warner, 26 Mo. 143; Avitt v. Farrell, 68 Mo. App. 665; Humes v. Proctor, 151 N. Y. 520, 45 N. E. 948.
2. Hart v. Doyle, 128 Mi h. 257, 87 N. W. 219; Michigan Land etc. Co. v. Deer Lake Co., 60 Mich. 143, 27 N. W. 10, 1 Am. St. Rep. 491; Van Sicien v. Jamaica Electric Light Co., 45 N. Y. App. Div. 1, 61 N. Y. Suppl. 210 (Aff'd in 168 N. Y. 650, 61 N. E. 1135).
3. Pitt v. Daniel, 82 Mo. App. 168; Brown v. Carter, 52 Mo. 46; Davis v. Cotey, 70 Vt. 120, 39 Atl. 628; Cf. Louisville etc. R. Co. v. Hill, 115 Ala. 334, 22 So. 163; Rogers v. Brooks, 105 Ala. 549, 17 So. 97.
4. Werner v. Flies, 91 Iowa 146, 59 N. W. 18; Rogers v. Brooks, 105 Ala. 549, 17 So. 97.
5. Skeels v. Starrett, 57 Mich. 350, 24 N. W. 98; Achey v. Hull, 7 Mich. 423; McCrudden v. Rochester R. Co., 5 Misc. (N. Y.) 59, 25 N. Y. Suppl. 114 [Aff'd in 77 Hun. 609, 28 N. Y. Suppl. 1135 (Aff'd in 151 N. Y. 623, 45 N. E. 1123);] King v. Havens, 25 Wend (N. Y.) 420.
6. Arn v. Matthews, 39 Kan. 272, 18 Pac. 65; Michigan Land etc. Co. v. Deer Lake Co., 60 Mich. 143, 27 N. W. 10, 1 Am. St. Rep. 491; Herron v. Hornback, 24 Mo. 492; Labeaunie v. Woolfolk, 18 Mo. 514.
7. Atchison etc. R. Co. v. Grant, 75 Kan. 344, 89 Pac. 658, (Gravel); Thayer v. Sherlock, 4 Mich. 173; Van Deusen v. Young, 29 Barb. (N. Y.) 9.
8. Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433.
9. Davis v. Cotey, 70 Vt. 120, 39 Atl. 628; Skeels v. Starrett, 57 Mich. 350, 24 N. W. 98; But See, Hathaway,v. Goslant, 77 Vt. 199, 59 Atl. 835.
10. Oregon etc. R. Co. v. Jackson, 21 Ore. 360, 28 Pac. 74.
11. Clark v. Field, 42 Mich. 342, 4 N. W. 19; Holliday v. Jackson, 21 Mo. App. 660; Dubois v. Beaver, 25 N. Y. 123, 82 Am. Rep. 326; Starkweather v. Quigley, 7 Hun. (N. Y.) 26; Van Hoffman v. Kendall, 17 N. Y. Suppl. 713; Gardner v Lovegren, 27 Wash. 356, 67 Pac. 615; Cohn v. Neeves, 40 Wis. 393.

In most jurisdictions the jury find single damages [1] and if they fail to declare in the verdict that they consider the plaintiff entitled to compensatory damages only, the court must award the multiple damages provided in the statute. [2] In Kansas it is the province of the jury to assess the multiple damages, [3] while in Missouri the jury find the fact of trespass only and the court determines whether the evidence establishes a case within the terms of the statute. [4]

§91. Interest on Damages. Whenever damages are recovered for trespass or conversion in connection with the unlawful cutting of growing timber, interest may be allowed from the date of the trespass or the time when the conversion was complete until the date when judment is entered. [5] In some jurisdictions interest will not be allowed or treble damages. [6] but there are holdings to the contrary [7] and the allowance of treble interest on single damages has been refused. [8]

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1. Black v. Mace, 66 Me. 49; George v. Rook, 7 Mo. 149; Withington v. Hilderbrand, 1 Mo. 280; Nixon v. Stillwell, 52 Hun. (N. Y.) 353, 5 N. Y. Suppl. 248; Starkweather v. Quigley, 7 Hun. (N, Y.) 26; Marchand v. Haber, 16 Misc. (N. Y.) 322, 37 N. Y. Suppl. 952; Loewenbery v. Rosenthal, 18 Ore. 178, 22 Pac. 601; Cf. Snelling v. Garfield, 114 Mass. 443; Robbins v. Farwell, 193 Pa. 37, 44 Atl. 260; Clark v. Sargeant, 112 Pa. St. 16, 5 Atl. 44; Hughes v. Stevens, 36 Pa. St. 320; Welsh v.Anthony, 16 Pa. St. 254; Henning v. Keiper, 37 Pa. Sup. Ct. 488. See King v.Havens, 25 Wend. 419 (1841), shade tree; Newcomb, Super'r v. Butterfield, 8 Johnson 342 (1811).
2. Yeamans v. Nichols, 81 N. Y. Suppl. 500; Humes v. Proctor, 73 Hun. (N. Y.) 265, 26 N. Y. Suppl. 315 (Aff'd in 151 N. Y. 520, 45 N. E. 948); King v. Havens, 25 Wend. (N. Y.) 420; But See, Tait v. Thomas, 22 Minn. 537; Livingston v. Platner, 1 Cow. (N. Y.) 175; Kulp v. Bird, 5 Pa. Cas. 541, 8 Atl. 618.
3. Chicago etc. R. Co. v. Watkins, 43 Kan. 50, 22 Pac. 985; Cf. Byrne v. Haines, Minor (Ala.) 286; Agnew v. Albert Lewis Lbr. Co., 218 Pa. St. 505, 67 Atl. 779.
4. Wood v. St. Louis etc. R. Co., 58 Mo. 109; Walther v. Warner, 26 Mo. 143; Chilton v. Missouri Lbr. etc. Co., 144 Mo. App. 315, 127 S. W. 941; Pitt v. Daniel, 82 Mo. App. 168; Roucey v. Wood, 57 Mo. App. 650.
5. Ala. Lowery v. Rowland, 104 Ala. 420, 16 So. 88.
   Ark. Central Coal and Coke Co. v. John Henry Stove Co., 69 Ark. 302, 63 S. W. 49.
   Me. Longfellow v. Quimby, 33 Me. 457; Cf. Longfellow v. Quimby, 29 Me. 196, 48 Am. Dec. 525.
   Mich. Winchester v. Craig, 33 Mich. 205.
   Minn. State v. Shevlin-Carpenter Co., 62 Minn. 99.
   Pa. Dunbar Furnace Co. v. Fairchild et al., 121 Pa. St. 563.
   Wis. Weymouth v. Chi. & N. W. R. Co., 17 Wis. 550.
   U. S. Pine River Logging Co. v. U. S., 186 U. S. 279, 22 S. Ct. 920, 40 L. Ed. 1164.
6. McCloskey v. Powell, 138 Pa. St. 383, 21 Atl. 148; McCloskey v. Powell, 8 Pa. Co. Ct. 22.
7. Gates v. Comstock, 113 Mich. 127, 71 N. W. 515.
8. Dunbar Furnace Co. v. Fairchild, 121 Pa. St. 563, 15 Atl. 656.

§92. Timber cut from Federal and State Lands. The title to timber that is cut in violation of statute from public lands of the United States remains in the United States, [1] and the title to timber unlawfully cut from the public lands of a state remains in the state [2] after severance. One who purchases such timber which has been cut wilfully, either with or without notice of the wrongful cutting, acquires no better title than his vendor. [3] Timber cut wilfully can be pursued so long as it can be identified, and recovered in replevin wherever taken, whether in the hands of the original trespasser or of a purchaser from him. [4] Although there have been decisions to the effect that the United States was dependent upon the action of replevin for the specific recovery of timber unlawfully cut from public lands, [5] the weight of judicial authority seems to sustain the right of the United States to seize timber unlawfully cut wherever it can be found, if capable of identification. [6] For many years this has been the practice of the timber agents employed in the General Land Office under specific direction of the Department of the Interior, [7]

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1. Northern Pac. R. Co. v. Lewis, 162 U. S. 366, 16 S. Ct. 831, 40 L. Ed. 1002 (Revs'g 51 Fed. 658, 2 C. C. A. 446); Northern Pac. R. v. Paine, 119 U. S. 561, 30 L. Ed. 513; Woodenware Co. v. U. S. 106 U. S. 432, 27 L. Ed. 230; U. S. v. Cook, 19 Wall (U. S.) 591, 22 L. Ed. 210; U. S. v. Bitter Root Dev. Co., 133 Fed. 274 (Aff'd in 200 U. S. 451); English v. U.S. 116 Fed. 625, 54 C. C. A. 81 (Affm'g 107 Fed. 867); U. S. v. Price, 109 Fed. 239, 48 C. C. A. 331; U. S. v. Pine River Logging Co. 78 Fed, 319, 24 C. C. A. 101; U. S. v. Steenerson, 50 Fed. 504, 1 C. C. A. 552; U. S. v. Perkins, 44 Fed. 670; Norris v. U. S. 44 Fed. 735; Bly v. U. S. 3 Fed. Cas. No. 1,581, 4 Dill 464; Spencer v. U. S., 10 Ct. Cl. 255.;
   But *see* U. S. v. Loughrey, 1 2 U. S. 206, 19 S. Ct. 153, 43 L. Ed. 420 (Affm'g 71 Fed. 921, 18 C. C. A. 391); Teller v. U. S., 117 Fed. 577, 54 C. C. A. 349; U. S. v. Teller, 106 Fed. 447, 45 C. C. A. 416; U. S. v. Scott, 38 Fed. 393.
2. Hutchins v. King, 68 U. S. 53; 17 L. Ed. 544; Schulenberg v. Harriman, 21 Wall (U. S.) 44, 22 L. Ed. 551 (Affm'g 21 Fed. Cas. No. 12,486, 2 Dill. 398; Raber v. Hyde, 138 Mich. 101, 101 N. W. 61; Russell v. Myers 32 Mich. 522.
   See also State v. Rat. Portage Lbr. Co. (Minn. 1908) 115 N. W. 162; Rogers v. Bates, 1 Mich. N. P. 93; State v. School etc. Land Com'r's, 19 Wis. 237.
3. Anderson v. U. S., 152 Fed. 87, 81 C. C. A. 311; Pine River Logging Co. v. U. S., 186 U. S. 279; Cf. 89 Fed 919; Woodenware Co. v. U. S. 106 Fed. 432; U. S. v. Norris, 41 Fed. 424. But *see* Stone v. U. S., 167 U. S. 178, 17 S. Ct. 778, 42 L. Ed. 127 (Affm'g 64 Fed. 667, 12 C. C. A. 451; U. S. v. Williams, 18 Fed. 478; The Timber Cases, 11 Fed. 81.
4. Pine River Logging Co. v. U. S., 186 U. S., 279; Schulenberg v. Harriman, 21 Wall (U. S.) 44, 22 L. Ed. 551; B llou v. O'Brien, 20 Mich. 304; State v. Torinus, 24 Minn. 332.
5. Handford v. U. S., 92 Fed. 881, 35 C. C. A. 75; *See* Bly v. U. S., 3 Fed. Cas. No. 1,-581, 4 Dill. 464.
6. Wells v. Nickles, 104 U. S. 447; U. S. v. Cook 19 Wall. 591; Norris v. U. S. 44 Fed. 735; Ballou v. O'Brien, 20 Mich. 304; Stephenson v. Little 10 Mich. 433; *See* Cotton v. U. S., 11 How. 229.
7. Letter of Sec'y Interior to Sec'y Treasury, Nov. 15, 1886 (5 L. D. 240); See explicit legislative sanction in Act April 30, 1878, (20 Stat. L. 46), Sec. 2.

the expressed approval of the Department of Justice, [1] the apparent sanction of the Federal courts and the full knowledge of the Federal legislature. There would seem to be little question that the right of seizure will be fully sustained if brought directly before the Supreme Court. One who takes timber from public lands will be held a wilful trespasser unless he can show a right or license. [2] The United States or a state may maintain either an action of trespass [3] for the damage done in the cutting or removal of timber, or one in trover [4] for the value of the timber cut and removed, irrespective of whether the operations of the trespasser have been profitable or not; [5] but the government must depend upon a recovery of such value and cannot enforce an accounting in equity for the gains and profit realized by the trespasser. [6] An action will lie against a partner individually for a trespass by the firm to which he belonged. [7] The recovery of multiple damages [8] and penalties [9] has been allowed under statutes providing for the protection of timber belonging to states.

1. Opin. Atty. Gen'l. Aug. 23, 1886, Vol. 18 Op. Atty. Gen. p. 434.
2. Nor hern Pac. R. Co. v. Lewis, 162 U. S., 366, 16 S. Ct. 831, 40 L. Ed. 1002 (Revers'g 51 Fed. 658, 2 C. C. A. 446); U. S. v. Cook, 19 Wall. (U. S.) 591; Anderson v. U. S. 152 Fed. 87, 81 C. C. A. 311; Grubbs v. U. S. 105 Fed. 314, 44 C. C. A. 513; U. S. v. Baxter, 46 Fed. 350; U. S. v. Taylor, 35 Fed. 484. But *see* In re Whitmore, Myr. Prob. (Calif.) 103.
3. Cotton v. U. S., 11 Howard 229; U. S. v. Bitter Root Dev. Co. 133 Fed. 274, 66 C. C. A. 652 Aff'd in 200 U. S. 451, 26 S. Ct. 318, 50 L. Ed. 550); U. S. v. Taylor, 35 Fed. 844; U. S. v. Smith 11 Fed. 487, 8 Sawy. 100; State v. Mullen, 97 Me. 331, 54 Atl. 841; State v. Cutler, 16 Me. 348; Newcomb v. Butterfield, 8 Johns. (N. Y.) 342; Graham v. Moore, 4 Serg. & R. (Pa.) 467; Nichelson v. Cameron Lbr. Co., 39 Wash. 569, 81 Pac. 1059.
4. U. S. v. Montana Lbr. Co., 196 U S. 573, 25 S. Ct. 367, 49 L. Ed. 604; Camfield v. U. S., 167 U. S. 518, 17 S. Ct. 864, 42 L. Ed. 260; Woodenware Co. v. U. S. 106 U. S. 432, 1 S. Ct. 864. 27 L. Ed. 230; U. S. v. Cook, 19 Wall. (U. S.) 591; U. S. v. Birdseye, 137 Fed. 516, 70 C. C. A. 100; Powers v. U. S. 119 Fed. 562, 56 C. C. A. 128; English v. U. S. 116 Fed. 625, 54 C. C. A. 811 (Affm'g 107 Fed. 867); Gentry v. U. S., 101 Fed. 51, 41 C. C. A. 185; U. S. v. Eureka etc. R. Co., 40 Fed. 419; U. S. v. Scott, 39 Fed. 900; U. S. v. Taylor, 35 Fed. 484; Bly v. U. S. 3 Fed. Cas. 1,581, 4 Dill. 464; U. S. v. Nelson, 27 Fed. Cas. No. 15,864, 5 Sawy. 68; U. S. v. Williams, 8 Mont. 85, 19 Pac. 288.
   But *see* U. S. v. Losekamp, 127 Fed. 959, 62 C. C. A. 591; U. S. v. Mullen Fuel Co., 118 Fed. 663; U. S. v. Loughrey, 71 Fed. 921, 18 C. C. A. 391 (Aff'd in 172 U. S. 206, 19 S. Ct. 153, 43 L. Ed. 420.
5. U. S. v. Humphries, 149 U. S. 277, 13 S. Ct. 850, 37 L. Ed. 734.
6. U. S. v. Bitter Root Dev. Co., 133 Fed. 274, 66 C. C. A. 652 (Aff'd in 200 U. S. 451, 26 S. Ct. 318, 50 L. Ed. 550; U. S. v. Van Winkle, 113 Fed. 903, 51 C. C. A. 533; U. S. v. Northern Pac. R. Co., 6 Mont. 351, 12 Pac. 769.
7. U. S. v. Gumm, 9 N. M. 611, 58 Pac. 398.
8. State v. Shevlin-Carpenter Co., 102 Minn. 470, 113 N. W. 634, 114 N. W. 738.
9. People v. Bennett, 56 Misc. (N. Y.) 160, 107 N. Y. Suppl. 406 (Aff'd in 125 N. Y. App. Div. 912, 109 N. Y. Suppl. 1140); People v. McFadden, 13 Wend. (N. Y.) 396. *See* also People v. Holmes, 166 N. Y. 540, 60 N. E. 249 (Affm. 53 N. Y. App. Div. 626, 65 N. Y. Suppl. 1142); and People v. Turner, 49 Hun (N.Y.) 466, 2 N. Y. Suppl. 253 (Aff'd in 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498.)

Although the United States government has granted the free use of timber on public lands to citizens and residents for certain specific purposes under executive regulations, and has allowed very wide latitude in the appropriation of such timber for personal use, there is no law or custom which can be construed as implying a general license to anyone to cut timber from public lands for purposes of sale. [1] and if a defendant relies upon a statutory license in justification of the cutting, he must set out in his pleadings all the facts necessary to establish such license. [2] When the United States has shown the cutting and carrying away of timber from public lands and the possession of such severed timber by the defendant, [3] the burden of proof is shifted upon the defendant to justify such cutting and asportation, [4] or to show that the trespass was not wilful. [5]

The government is entitled to nominal damages for a trespass even where no substantial damages are shown, and is entitled to every reasonable inference which may be drawn by the jury from the testimony of its witnesses as to the amount of timber cut, [6] and to exemplary damages if the circumstances of the trespass show reckless indifference to the rights of the government or a deliberate purpose to commit the unlawful act. [7] However, the defendant is

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1. U. S. v. Mock, 149 U. S. 273, 13 S. Ct. 848, 37 L. Ed. 732; U. S. v. Humphries, 149 U. S. 277, 13 S. Ct. 850, 37 L. Ed. 734. Teller v. U. S., 117 Fed. 577, 54 C. C. A. 349.
2. U. S. v. Mullan Fuel Co., 118 Fed. 663; U. S. v. Ordway, 30 Fed. 30. *See* U. S. v. Williams, 6 Mont. 379, 12 Pac. 851.
3. U S. v. Denver etc. R. Co., 191 U. S. 84, 24 S. Ct. 33, 48 L. Ed. 106 (Rev'sg 9 N. M. 382, 55 Pac. 241, 11 N. M. 145, 66 Pac. 550); Norris v. U. S. 44 Fed. 739; U. S. v. Denver etc. R. Co., 31 Fed. 886; U. S. v. Williams, 8 Mont. 85, 19 Pac. 288. Cf. U. S. v. Saucier, 5 N. M., 569, 25 Pac. 791.
4. U. S. Basic Co., 121 Fed. 504, 57 C. C. A. 624; U. S. v. Eccles, 111 Fed. 490; Stubbs v. U. S., 111 Fed. 366, 104 Fed. 988, 44 C. C. A. 292; U. S. v. Price Trading Co., 109 Fed. 239, 48 C. C. A. 331; Stone v. U. S., 64 Fed. 667, 12 C. C. A., 451 (Aff'd in 167 U. S. 178, 17 S. Ct. 778, 42 L. Ed. 127); U.S. v. Denver etc. R. Co., 31 Fed. 886; U. S. v. Gumm, 9 N. M. 611, 58 Pac. 398.
5. U. S. v. Baxter, 46 Fed. 350.
   An acquittal under an indictment for unlawfully and feloniously removing timber from public lands is not a bar to a civil action for the value of the timber removed. Stone v. U. S., 64 Fed. 667 12 C. C. A. 451 (Aff'd 167 U. S. 178, 17 S. Ct. 778, 42 L. Ed. 127). *See* Cotton v. U. S., 11 How. 229. Morgan v. U. S., 148 Fed. 189, 78 C. C. A. 323; U. S. v. Scott, 39 Fed. 900; Cox v. Cameron Lbr. Co., 39 Wash. 562, 82 Pac. 116. See U. S. v. Murray, 27 Fed. Cas. No. 15843, 5 McLean 207. Bly v. U. S., 4 Dill. 464.
6. U. S. v. Mock, 149 U. S. 273. 13 S. Ct. 848, 37 L. Ed. 732; Santry v. U. S., 117 Fed. 132, 55 C. C. A. 148. *See* Woodenware Co. v. U. S., 106 Fed. 432; U. S. v. Perkins, 44 Fed. 670; U. S. v. Heilner, 26 Fed. 80; U. S. v. Kelly, 3 Wash. Ter. 421, 17 Pac. 878. U. S. v. Flint Lumber Co. (Ark. 1908) 112 S. W. 217.
7. U. S. v. Mullan Fuel Co., 118 Fed. 663; U. S. v. Taylor, 35 Fed. 484.

entitled to have the question of his good faith submitted to the jury, [1] and in support of hi splea of good faith and to avoid exemplary damages he may show that he acted under the advice of legal counsel. [2]

§93 Civil Damages for the Burning of the Woods. Although many of the statutes imposing penalties for the firing of the woods intentionally or negligently specifically declare that the offender shall also be liable in a civil action for all damages suffered, [3] or even for multiple or exemplary damages, [4] it is undoubtedly the general rule of law that such an offender will be liable in a civil action for single damages where no such provision is contained in the statute, [5] unless he be able to establish that the firing was done lawfully and without intentional or negligent fault on his part. [6] Moreover, many of these statutes make the

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1. Gentry v. U. S. 101 Fed. 51; 41 C. C. A. 185; See U. S. v. Teller, 106 Fed. 447, 45 C. C. A. 416.
2. U. S. v. Mullen Fuel Co., 118 Fed. 663. *See* Fallen v. Collins, (Tex. Civ. App.) 120 S. W. 546 (1909).
3. Colo. Spencer v. Murphy, 6 Colo. App. 453, 41 Pac. 841.
   Iowa Brunell v. Hopkins, 42 Iowa 429 (Holding a cultivated field not within statute as to prairie or timber.)
   Kan. Interstate Galloway Cattle Co. v. Kline, 51 Kan. 23, 32 Pac. 628.
   Mo. Waters v. Brown, 44 Mo. 302.
4. Cal. Garnier v. Porter, 90 Cal. 105, 27 Pac. 55.
   Mich. Boyd v. Rice, 38 Mich. 599.
   Mo. Rev. Stat. 1879, Sec. 2129. Russell v. Regan, 34 Mo. App. 242; Kahle v. Hobein, 30 Mo. App. 472.
5. Ark Bizzell v. Booker, 16 Ark. 308.
   Colo. Spencer v. Murphy, 6 Colo. App. 453, 41 Pac. 841.
   Conn. Grannis v. Cummings, 15 Conn. 165. *See* also Ayer v. Starkey, 30 Conn. 304.
   Fla. Saussy v. South Fla. R. Co., 22 Fla. 327.
   Ill. Armstrong v. Cooley, 10 Ill. 509; Johnson v. Barber, 10 Ill. 425, 50 Am. Dec. 516.
   Ia. Lewis v. Schultz, 98 Ia. 341, 67 N. W. 266; Brunell v. Hopkins, 42 Ia. 429.
   Kan. Interstate Galloway Cattle Co. v. Kline, 51 Kan. 23, 32 Pac. 628; Jarratt v. Apple, 31 Kan. 693, 3 Pac. 571; Hunt v. Haines, 25 Kan. 210.
   Mo. Waters v. Brown, 44 Mo. 302; Finley v. Langston, 12 Mo. 120; Kahle v. Hobein, 30 Mo. App. 472.
   N. C. Lamb v. Sloan, 94 N. C. 534; Robertson v. Morgan, 118 N. C. 991, 24 S. E. 667.
   Wis. Rolke v. Chicago & N. W. R. R. Co., 26 Wis. 537; Kellog v. Chicago & N. W. R. R. Co., 26 Wis. 223 (1870).
6. Ark. Bizzell v. Booker, 16 Ark. 308.
   Cal. Garnier v. Porter, 90 Cal. 105, 27 Pac. 55. (stubble).
   Ia. Brunnell v. Hopkins, 42 Ia. 429; Jacobs v. Andrews, 4 Iowa 506; DeFrance v. Spencer, 2 G. Greene 462.
   Me. Sturgis v. Robbins, 62 Me. 289.
   Mich. Boyd v. Rice, 38 Mich. 599.
   Mo. Russell v. Reagen, 34 Mo. App. 242; Kahle v. Hobein, 30 Mo. App. 472; Finley v. Langston, 12 Mo. App. 120; Miller v. Martin, 16 Mo. 508.
   Neb. Vansyoc v. Freewater Cemetery Assoc., 63 Neb. 143, 88 N. W. 162.

(Footnote 6 continued on next page)

offender liable for single or multiple damages irrespective of the question of prudence in setting the fire or diligence in his efforts to control it, [1] especially if the fire is set within a certain closed season or without the sanction of a permit from the proper official. [2] Under statutes requiring notice before the burning a showing by the defendant that the fire was set by necessity [3] or that the plaintiff waived the notice is a good defense to an action for statutory civil damages, [4] and if the plaintiff had notice he can derive no advantage from the failure of the defendant to give the required notice to other adjoining owners. [5] Whether the statute requires notice or not, it is no defense to show that the property destroyed was insured [6] or that the plaintiff has been indemnified for the loss by the insurer. [7] The statutory action must be brought either by or in the name of the party who owned the property injured [8] and will not lie if the act complained of is not clearly comprehended by the statute. [9] The burning of pasture or cultivated land by a farmer has been held not to be embraced within a statute prohibiting the firing of the woods, [10] nor are bonfires in a backyard within the terms of such a statute. [11] The jury will ordinarily be

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(Footnote 6 concluded from preceding page)

N. Y. Stuart v. Hawley, 22 Barb. 619; Clark v. Frost, 8 Johns 421.
But *see* Webb v. Rome Etc. R. R. Co., 49 N. Y. 420, 10 Am. Rep. 389 (Affm'g 3 Lans. 453, and construing 6 Anne. Chap. 31, sec. 67, as amended by 14 Geo. III, Chap. 78, Sec. 76.

Wis. Fahn v. Reichert, 8 Wis. 255, 76 Am. Dec. 237.

1. Conn v. May, 36 Iowa 241; cf. Brunell v. Hopkins, 42 Iowa 429. Lamb v. Sloan, 94 N. C. 534.
See Burroughs v. Housatonic R. R. Co., 15 Conn. 124, 38 Am. Dec. 64 (1842), and especially pages 70 to 79 of 38 Am. Dec.
2. Dunleavy v. Stockwell, 45 Ill. App. 230; Burton v. McClellan, 3 Ill. 434; Thoburn v. Campbell, 80 Ia. 338, 45 N. W. 759; Conn. v. May, 36 Ia. 241.
See Jarratt v. Apple, 31 Kan. 693, 3 Pac. 571; Hunt v. Haines, 25 Kan. 210; Emerson v. Gardiner, 8 Kan. 452.
3. Lamb v. Sloan, 94 N. C. 534; Tyson v. Rasberry, 8 N. C. 60; Tiller v. Wilson, 1 Lea, (Tenn.) 392.
4. Lamb v. Sloan, 94 N. C. 534; Roberson v. Kirby, 52 N. C. 477.
5. Saussy v. South Fla. R. Co., 22 Fla. 327.
6. Dunleavy v. Stockwell, 45 Ill. App. 230.
7. Hayward v. Cain, 105 Mass. 213.
8. Rockingham Mut. F. Ins. Co. v. Bosher, 39 Me. 253, 63 Am. Dec. 618. *See* also Armstrong v. Colley, 10 Ill. 509.
9. Grannis v. Cummings, 25 Conn. 165 (1856). Def. had license to occupy plaintiff's land.
10. Acree v. The State, 122 Ga. 144, 50 S. E. 180; Brunell v. Hopkins, 42 Iowa 429; Emerson v. Gardiner, 8 Kan. 452 (Act. Fed. 16, 1860). But *see* Nall v. Taylor, 247 Ill. 580 (1910).
11. McNemar v. Cohn, 115 Ill. App. 31 (1904).

required to determine whether the act of the defendant was the proximate cause of the loss suffered by the plaintiff. [1]

§94. Statutory Liability of Railroad Operators for the Setting of Fires. In many states there are special laws placing upon railroad operators the burden of proving due care by making the setting of a fire by a locomotive *prima facie* evidence of negligence [2] and in a number of states the law makes the railroad operators absolutely liable for damages resulting from fires caused by locomotives. [3] However, courts will construe such statutes as making the railroad operator liable only when there is not satisfactory proof of due care, if the language of the law is capable of such construction. [4] It has been held in North Dakota that the presumption of negligence on the part of the railroad as fixed in the statute is one of law, and that the determination of whether it has been overcome by evidence submitted by the defendant lies within the province of the court and

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1. Ayer v. Starkey, 30 Conn. 304 (1861); Nall v. Taylor, 247 Ill. 5 0 (1910); Annapolis Etc. R. R. v. Gantt, 39 Md. 115 (1873). Burlington & Mo. R. R. v. Westover, 4 Neb. 268.
2. See citations in railroad cases under notes: 7 p. 74; 2 p. 75; 3 p. 75 and 7 p. 77 of this chapter, and also the following cases.:
   - Colo. N. P. Ry. Co. v. DeBush, 12 Colo. 294; D. & R. G. R. R. v. Haley, 10 Colo. 4; D. & R. G. R. R. v. Henderson, 10 Colo. 2.
   - Conn. Burroughs v. Housatonic R. R. Co., 15 Conn. 124, 38 Am. Dec. 70 (1842). On pages 70 to 79 of Vol. 38, American Decisions, will be found a full discussion of this subject.
   - Ill. Ry. v. Funk, 85 Ill. 460; Rwy. Co. v. Muthersbaugh, 71 Ill. 572.
   - Kan. Ry. v. Eddy, 2 Kan. App. 291; Ry. v. Huitt, 1 Kan. App. 781; Ry. v. Tubbs, 47 Kan. 630; Ry. v. Richardson, 47 Kan. 517; Ry. Co. v. Merrill, 40 Kan. 404. See Mo. Etc. Ry. v. Mackey, 127 U. S. 205.
   - Me. Pratt v. Ry., 42 Me. 579; cf. Chapman v. Ry. 37 Me. 92.
   - Mich. Fisk v. Wabash Ry., 114 Mich. 248; See Osborn v. Ry. Co., 111 Mich 15.
   - Minn. Hayes v. M. & S. P. Ry. Co., 45 Minn. 17; Mahoney v. St Paul Etc. Ry. Co., 35 Minn. 361, 29 N. W. 6; Karsen v. Mil. Etc. Ry. Co., 29 Minn. 12; 11 N. W. 122.
   - Mo. Campbell v. Ry. Co., 121 Mo. 340; Coale v. Hannibal Etc. R. Co., 60 Mo. 227 (1875).
   - N. D. Smith v. N. P. Ry. Co., 3 N. D. 17, 53 N. W. 173.
   - Ohio Martz v. Ry. Co., 12 O. C. Ct. 144; Trust Co. v. Ry., 89 Feb 637, 12 O. F. D. 184.
   - S. C. See Lipfield v. Ry. Co., 41 S. C. 185.
   - U. S. Niskern v. Ry. Co., 22 Fed. 811.
3. Ingersoll v. Stockbridge & P. R. R. Co., 8 Allen (Mass.) 438 (1864); Matthews v. Ry. Co., 121 Mo. 298; Rowell v. Railroad, 57 N. H. 132 (1876).
   See Greenfield v. R. R. Co., 49 N. W. 95 (Under Iowa Code 1873, Sec. 1289.)
4. Iowa Babcock v. Ry. Co., 62 Ia. 593; Libby v. Rwy. 52 Ia. 92; Slooson v. Rwy., 51 Ia. 294; Small v. C. R. I. & P. R. R. Co., 50 Ia. 338 Dec 1879, sec. 1286, code 2873.)
   - Kan. A. T. & S. F. Ry. v. Dennis, 38 Kan. 424 (1888),
   - N. J. Hoff v. Ry., 16 Vroom 201.
   - Ohio Railway v. Wahlers, 1 O. C. C (N. S.) 139, 14 O. C. D. 310.

not of the jury. [1] Negligence on the part of the railroad company will ordinarily render it liable irrespective of whether the one injured has been negligent. [2]

Statutes of this character are not repugnant to the Constitution of the United States as denying the equal protection of the law, as taking property without due consideration, or as impairing the obligation of a contract. [3] The words "other property" in such a statute have been held to comprehend growing timber, [4] and a statute which made "every railroad corporation" liable has been held applicable to an unincorporated owner. [5] A railway company is not liable for fires started by a stranger within its right of way. [6] Such statutes do not relieve railroad companies from the common law liability for the injury of property, but merely afford an additional remedy. [7] Although a railroad may be required to have proper appliances, it is not required to have the best possible appliances. [8]

1. Smith v. N. P. Ry. Co., 3 N. D. 17, 53 N. W. 173 (1892). Cf. Carter v. Ry. Co. (Iowa) 21 N. W. 607; Davidson v. Ry. 34 Minn. 51, 24 N. W. 324; Burlington & Missouri R. R. v. Westover, 4 Neb. 268.
2. West v. Ry., 77 Ia. 654; Burlington & Missouri R. R. v. Westover, 4 Neb. 268.
3. Colo. U. P. Ry. v. De Busk, 12 Colo. 294; D. & R. G. Ry. v. Henderson, 10 Colo. 2.
   Kan. Missouri Etc. Ry. v. Merrill, 40 Kan. 404; *See* Missouri Etc. Ry. v. Mackey, 127 U. S. 205.
   Mo. Campbell v. Ry., 121 Mo. 340; Matthews v. Ry., 121 Mo. 298.
   U. S. St. Louis Etc. Ry. v. Matthews, 165 U. S. 1, 17 Sup. Ct. 243.
4. Pratt v. Ry. Co., 42 Me. 579. But see Chapman v. Ry. Co. 37 Me. 92, holding statute did not cover wood piled temporarily beside the track.
5. U. P. Ry. Co. v. De Busk, 12 Colo. 294.
6. Railway v. Kelley, 10 O. C. C. 322, 6 O. C. D. 555 (Affd. in Railroad v. Kelley, 37 Bull. 392.
7. D. & R. G. Ry. v. Henderson, 10 Colo. 2; Fisk v. Wabash Ry. 114 Mich. 248; Mahoney v. St. Paul Etc. Ry. Co., 35 Minn. 361.
8. Osborn v. Ry., 111 Mich. 15; Lipfield v. Ry. Co. 41 S. C. 285. But see Balsley v. R. R. (Ill.) 8 N. E. 859 (Holding lessor liable for action of lessee.

CHAPTER IX

INJURY TO GROWING TREES AS A CRIMINAL OFFENSE

§95. The Cutting of Growing Timber, State Statutes. In nearly every American state the cutting of growing trees on land belonging to another or upon public lands is made a criminal offense by statute. [1]

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1. Ala. Criminal Code, 1907, Sec. 7828 (knowingly.) See also Secs. 7833, 7834, 7837.
Ariz. Revised Statutes, 1913, Secs. 611 and 612 of Penal Code (wilfully).
Ark. Digest of Statutes, 1904, Sec. 1901-1907; See Sec. 1932, (wilfully).
Cal. Penal Code, Deering, 1915, Sec. 602, Page, 275 (wilfully).
Col. Annotated Statutes, Mills, 1912, Sec. 2010 (wilfully, and maliciously; shade and fruit). cf. Sec. 2016.
Conn. General Statutes, Revision of 1902, Sec. 1237 (wilfully).
Del. Revised Statutes of 1852, as amended to 1893, p. 938, (wilfully and unlawfully); Revised Laws, 1915, Secs. 4742, 4747, and 4748, (4747 by telephone Co. 4748 refers to ornamental).
Fla. Compiled Laws, 1914, Sec. 3409, 3412- 3414, 3417 (wilfully).
Ga. Code of 1914. Sec. 226 (unless deed of land on record).
Ida. Revised Statutes, 1908, Sec. 7158 (wilfully).
Ill. Revised Statutes, Hurd, 1912. Chap. 38, Sec. 269. (knowingly and wilfully.
Ind. Annotated Statutes, Burns, 1914, Sec. 2308 (without license, private, state or U. S.); 2310; 2316 (highway).
Iowa. Code of 1897, Sec. 4829 (wilfully).
Kan. General Statutes, Dassler, 1909, Sec. 9692 (in which he has no interest); cf. 9687-88.
Ky. Statutes, Carroll, 1915, Sec. 1201 (feloniously); 1244; 1257 (fruit and shade).
La. Revised Laws, Wolff, 1904, Sec. 817, p. 339 (without consent of owner); p. 340, 341, (wilfully and feloniously); 343, Sec. 819, (school lands.)
Me. Revised Statutes, 1903, Chap. 128, Sec. 18, p. 947 (wilfully).
Md. Annot. Code, Bagby, (1914) Vol. 3, p. 335, Sec. 83 (wilfully or maliciously). Cf. Vol. 1 (1911) p. 694, Sec. 366, (by telephone Co.)
Mass. Revised Laws, 1902, Chap. 208, Secs. 99, 100, p. 1764, (wilfully) Vol. 2; See amendment Ch. 444, Sec. 1, Law 1904, p. 1426, Sup. Rev. L. 1902-1908.
Mich. Annotated Statutes, Howell, 1913, Sec. 14652 and 14653, (wilfully).
Minn. General Statutes, Tiffany, 1913, Sec. 8934 (wilfully); Sec. 8819 (pine on state lands).
Miss. Code of 1906, Sec. 1378 and 1379 (without permission); Sec. 1391 (boxing pine).
Mo. Annotated Statutes, 1906, Sec. 4574 (in which he has no interest).
Rev. Stat. 1909, Sec. 4600.
Mont. Revised Code, 1907, Secs. 8610, 8750 (wilfully). In city, 8765.
Neb. Compiled Statutes, Brown & Wheeler, 1911, Sec. 7745 and 7746, Revised Statutes, 1913; Secs. 8679 to 8683 (wilfully and maliciously).
Nev. Compiled Laws, 1861-1900, Cutting; Secs. 328-331 (without fee simple title). Revised Laws, 1912, Sec. 2114-2116. (Same).
N. H. Public Statutes, 1901, Chap. 266, Sec. 19, p. 809 (maliciously).
N. J. Compiled Statutes, 1709-1910, Vol. 2, p. 1788, Sec. 138 (unlawfully).
(Footnote 1 continued on next page)

While in a few states the general provisions of such statutes have remained practically unchanged from the earliest days of statehood, in the great majority of the states there have been many changes. There is a striking similarity in the provisions regarding the cutting of trees as malicious mischief, but a great diversity in the definition of the offense and in the character of the penalty prescribed for the misdemeanor or felony of cutting timber for profit from land owned by another. In a large number of states the general statute making it unlawful for one to cut timber upon the land of another without permission is applicable also to lands of the state or of the United States, but in many states there are special statutes regarding timber trespasss on public lands. In a few states the laws of this character are of peculiar form. [1] The application of crimi-

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(Footnote 1 concluded from preceding page)

N. M. Compiled Laws, 1897, Sec. 1137 (wilfully, maliciously and wantonly.) Annotated Stat. 1915, Sec. 1575. (Same).

N. Y. Consolidated Laws, Birdseye, Cumming & Gilbert, 1909, Sec. 1425 of Penal Law, par. 1, 2 and 6, p. 3994 (wilfully).

N. C. Revised Laws, Pell, 1908, Secs. 3511, 3687, 3741 (knowingly and wilfully).

N. D. Compiled Laws, 1913, Sec. 10064 (maliciously); 10068 (fruit trees).

Ohio Annotated General Code, Page & Adams, 1912, Secs. 12455-12457 (wilful trespass); 12490 (malicious injury); 12498 (public land.)

Okla. Compiled Laws, 1909, Sec. 2704 (wilfully); 2705 (maliciously); 2709 (fruit).

Ore. General Laws, Lord, 1910, Sec. 1979 (maliciously); 1984 (wilfully).

Pa. Digest of Laws, Purdon, 13th Ed. 1910, p. 4754, Sec. 1 (knowingly).

R. I. General Laws, 1909, Chap. 345, Sec. 23, p. 1263 (without consent of owner).

S. C. Code of 1912, Sec. 223 of Criminal Code (wilfully, unlawfully and maliciously.)

S. D. Revised Code, 1903, Sec. 724 of Penal Code (wilfully); Sec. 725 (maliciously); 539 (public lands).

Tenn. Code, Shannon, 1896, Sec. 6496, par. 8; See par. 6 (knowingly, wilfully and wantonly); Sec. 6524 (ornamental trees). Ch. 106, Laws of 1897, amended Ch. 381, 1899, makes wilful trespass a felony.

Tex. Penal Code, White, Rev. Ed. 1911, Art. 825, 826, 829 (knowingly).

Utah Compiled Laws, 1910, Secs. 1142; 4430 (wilfully and maliciously); 4446; 4476, and 4477.

Vt. Public Statutes, Lord & Darling, Rev. 1906; 5686-87; 5697-99; 5708 (shade, ornamental and fruit).

Va. Annot. Code, Pollard, 1904, Sec. 3857 (Shade tree.)

Wash. Codes and Statutes, Remington & Ballinger, 1910, Sec. 2659, Crim. Code (wilfully).

W. Va. Code of 1913, Hogg, Sec. 3513 (Fish and Game Law).

Wis. Statutes, 1915, Sec. 4415 b. (larceny, standing trees); 4442; 4447; 4449 (public land).

Wyo. Compiled Statutes, Mullen, 1910, Sec. 5857 (malicious injury to property, including trees); 5866 (shade and fruit trees).

Cf. Federal Law: Act June 25, 1910 (36 Stat. 855, 857) Sec. 6; Act Mar. 4, 1909. (35 Stat. 1098) Secs. 49 and 51. See pages 124 and 125 of this work.

1. Ark. Digest of Statutes, Ark. 1904, Kirby, sec. 1988-1989, making the cutting of timber from unsurveyed land an offense against the state. (An unofficial survey may protect from the penalty of this statute. Sawyer Etc. Lbr. Co. v. State, 75 Ark. 309, 87 S. W. 431.

Ga. Criminal Code, Ga., 1911, sec. 226, declaring it a misdemeanor for anyone

(Footnote 1 continued on next page)

nal trespass statutes is usually limited specifically to those cases in which the unlawful cutting is done "knowingly," "wilfully," "maliciously," or "wantonly"; and such statutes frequently contain two or more of these words connected by the word "and" or the word "or." Wherever any one or more of these words are used in the statute there can be no conviction if the defendant succeeds in establishing that the act was not done with the specific intent required by the statute. [1] The word "wilfully" as used in an indictment has been held equivalent to "knowingly," [2] but the weight of opinion undoubtedly is that it implies something more than a voluntary and intentional act. It is an "act" in-

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(Footnote 1 concluded from preceding page)
to cut timber from uninclosed land unless he has a deed of conveyance on record in the county where the land is situated, or a written contract from another who holds a recorded deed.
But see: Shaw v. Fender et al. 138 Ga. 48, 74 S. E. 792 (Defendant had made full payment and Plaintiff had no interest).
N. C. Revised Laws N. C. 1908, Pell, Sec. 3741, misdemeanor and double damages to cut from public lands before title is complete.)

1. Ala. Pippen v. State, 77 Ala. 81; Johnson v. State, 61 Ala. 9; See, Williams v. Hendricks, 115 Ala. 277, 67 Am. St. Rep. 32; Southern Bell Tel. Co. v. Allen, 109 Ala. 224, 19 So. 1. Davis v. Arnold, 143 Ala. 228, 39 So. 141.
Conn. State v. Foote, 71 Conn. 737, 43 Atl. 488.
Fla. Preston v. State, 41 Fla. 627, 26 So. 736; Boykin v. State, 40 Fla. 484, 24 So. 141.
Ga. Hateley v. State, 118 Ga. 79, 44 S. E. 852; Murphey v. State, 115 Ga. 201, 41 S. E. 685; Harvey v. State, 6 Ga. App. 241, 64 S. E. 669; Black v. State, 3 Ga. App. 297, 59 S E. 823. *See* Lbr. Co. v. Carter, 5 Ga. App. 344, 63 S. E. 270.
Ill. Mettler v. People, 135 Ill. 410, 25 N. E. 748.
Ind. State v. Cole, 90 Ind. 112; Lossen v. State, 62 Ind. 437; Dawson v. State, 52 Ind. 478; Palmer v. State, 45 Ind. 388.
La. State v. Gainey, 135 La. 459, 65 So. 609. (Proof and variance).
Mass. Commonwealth v. Williams, 110 Mass. 401; See Commonwealth v. Wilder, 127 Mass. 1.
Minn. Price v. Dennison, 95 Minn. 106, 103 N. W. 728.
Mo. Cookman v. Mill, 81 Mo. App. 297; State v. Newkirk, 49 Mo. 84. State v. Kempf. 11 Mo. App. 88.
N. J. Lott v. Loventhal, 80 N. J. L. 216, 76 Atl. 328; Folwell v. State, 49 N. J. L. 31, 6 Atl. 619.
N. Y. Hewitt v. Newburger, 141 N. Y. 538, 36 N. E. 593; McMorris v. Howell, 89 N. Y. App. Div. 272, 85 N. Y. Suppl. 1018.
N. C. State v. McCracken, 118 N. C. 1240, 24 S. E. 530; State v. Roseman, 70 N. C. 235. *Cf.* Davis v. Frazier, 150 N. C. 447, 64 S. E. 200.
Tex. Allsup v. State (Tex. Cr. App. 1901), 62 S. W. 1062; Yarbrough v. State 28 Tex. App. 481, 13 S. W. 775; Lackey v. State, 14 Tex. App. 164: McAnley v. State 43 Tex. 374. State v. Warren, 13 Tex. 45.
Va. Wise v. Com., 98 Va. 837, 36 S. W. 479; Dye v. Com., 7 Gratt. 662; Ratcliffe v. Com., 5 Gratt. 657.
Wis. See Werner v. State, 93 Wis. 266, 272, 67 N. W. 417. Golonbieski v. State, 101 Wis. 333, 77 N. W. 189.
Can. Exp. Donovan, 15 N. Brunsw. 389; Reg. v. McDonald, 12 Ont. 381; Reg. v. Davidson, 45 U. C. Q. B. 91.

2. Wong v. Astoria, 13 Ore. 538; See People v. Sheldon, 68 Calif. 434; Welsh v. State, 11 Tex. 374.

tentionally done with a wrongful purpose," [1] although not necessarily with an evil intent to do wrong to some particular person. The legal malice required to constitute the crime may be inferred under certain circumstances. [2]

§96. The Establishment of Criminal Intent is Essential to Conviction. It is ordinarily held that criminal intent must be shown to support a conviction under one of these statutes even where the statute does not restrict its application in the matter of intent, and trespass committed under a *bona fide* claim of title, [3] or through accident, [4] or a misunderstanding [5] will not render one liable to the penalties of such acts. However, the claim of title must rest upon a reasonable basis [6] and a mere belief in the right will not exempt a trespasser from the penalties of an act. Ignorance of the law will not constitute a defense, [7] and it has been held that criminal intent was not essential under a Federal statute. [8] Failure to observe the directions of the statute has been held to establish the criminal intent, [9] and the doing of the forbidden act in it-

1. McMorris v. Howell, 89 N. Y. App. Div. 272, 85 N. Y. Suppl. 1018; See, Hewitt v. Newburger, 141 N. Y. 538, 36 N. E. 593; Parker v. Parker, 102 Iowa 500, 506, 71 N. W. 421; State v. Dahlstrom, 90 Minn. 72, 95 N. W. 580; Anderson v. How, 116 N. Y. 336, 22 N. E. 695; State v. Yellowday, 152 N. C. 793, 67 S. E. 480; State v. Sneed, 121 N. C. 614, 28 S. E. 365.
2. Langston's Case, 96 Ala. 44, 11 So. 344; McCord's Case, 79 Ala. 269; Pippen's Case, 77 Ala. 81; Johnson's Case, 61 Ala 9. See Com. v. Dougherty, 6 Gray (Mass.) 349; Ex. p. Eads 17 Neb. 145, 22 N. W. 352.
3. Hateley v. State, 118 Ga. 79, 44 S. E. 852; Mettler v. People, 135 Ill. 410, 25 N. E. 748; Wagstaff v. Schippel, 27 Kan. 450; State v. Prince, 42 La. Ann. 817, 8 So. 591; Baker v. Hannibal etc. R. Co., 36 Mo. 543; State v. Luther, 8 R. I. 151; Allsop v. State (Cr. App. Tex. 1901), 62 S. W. 1062; Lackay v. State, 14 Tex. App. 164; Ex. p. Donovan, 15 N. Brunsw. 389.
4. U. S. v. Darton, (U. S. C. C.) 6 McLean 46; See State v. Parker, 81 N. C. 548; State v. Simpson, 73 N. C. 269 (Injury to animals); State v. Lewis, 10 Rich. (S. C.) 20 (Negligently firing the woods.)
5. State v. Hause, 71 N. C. 518.
   Sawyer etc. Lumber Co. v. State, 75 Ark. 309, 87 S. W. 431. But *see* People v. Christian, 144 Mich. 247, 107 N. W. 919; State v. Shevlin-Carpenter Co., 99 Minn. 158, 108 N. W. 935; State v. Dorman, 9 S. D. 528, 70 N. W. 848. (Holding criminal liability under the statutes not dependent on intention); State v. West, 10 Tex. 554.
6. State v. Wells, 142 N. C. 590, 55 S. E. 210; State v. Durham, 121 N. C. 546, 28 S. E. 22; State v. Calloway, 119 N. C. 864, 26 S. E. 46; State v. Glenn, 118 N. C. 1194, 23 S. E. 1004; State v. Fisher, 109 N. C. 817, 13 S. E. 878; State v. Crawley, 103 N. C. 353, 9 S. E. 409; State v. Bryson, 81 N. C. 595; See, People v. Stevens, 109 N. Y. 159, 16 N. E. 53; State v. Mallard, 143 N. C. 666, 57 S. E. 351; Boykin v. State, 40 Fla. 484, 24 So. 141; Lindley v. State, (Tex. Cr. App. 1898), 44 S. W. 165.
7. United States v. Murphy, 32 Fed. 376.
8. United States v. Murphy, 32 Fed. 376. U. S. v. Reder, 69 Fed. 965.
9. Derixson v. State, 65 Ind. 385; Deaderick v. State, 122 Tenn. 222, 122 S. W. 975 (overruling Dotson v. State, 6 Coldw. (Tenn.) 545); Cf., State v. Turner, 60 Conn. 222, 22 Atl. 542.

self constitutes evidence of criminal intent. [1] A license to cut trees has been held no defense to a wanton cutting of ornamental trees. [2] It has been held under a Texas statute that the plaintiff must show that the trees cut did not belong to the defendant. [3] One is not liable under such a statute because of the cutting of timber by an employee through mistake where the employer had no knowledge of the unlawful cutting, [4] nor is he liable if the employee cut the trees contrary to the employer's orders. [5]

§97. Criminal Timber Trespass Statutes are Construed Strictly. Under statutes making the unauthorized cutting of timber on the land of another a specific offense, actual severance is necessary, [6] and the injury must be substantial. [7] Such statutes are invariably strictly construed because of their penal nature. If the statute imposes a given penalty for each tree cut or carried away, the product of the unit fine and the number of trees severed or taken may be recovered; [8] but if the statute merely provides a penalty for the offense of cutting or carrying away trees or timber, the severance or asportation of a number of trees at one time, even though they be taken from noncontiguous tracts, will constitute but a single offense. [9] Some statutes make either the cutting or the asportation of the trees an offense, [10] but even under such a statute there is but a single offense committed if the cutting and carrying away are simultaneous or comprise a single transaction; [11] and if the statute simply prohibits a cutting the offense will be complete without an asportation. [12] It has been held

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1. Knight v. State, 64 Miss. 802, 2 So. 252; State v. Green, 35 S. C. 266, 14 S. E. 619; U. S. v. Stone, 49 Fed. 848; U. S. v. Darton, 6 McLean 46; U. S. v. Thompson, 6 McLean 56; U. S. v. Redy, 5 McLean 358.
2. Com. v. Clark, 3 Pa. Super. Ct. 141.
3. White v. Texas, 14 Tex. App. 449.
4. Boarman v. State, 66 Ark., 65, 48 S. W. 899.
5. Fairchild v. New Orleans Etc. R. Co., 60 Miss, 931, 45 Am. St. Rep. 427; See also New Orleans Etc. R. Co., v. Reese, 61 Miss. 581.
6. Com. v. Bechtel, 4 Pa. L. J. Rep. 306; Maskill v. State, 8 Blackf. (Ind.) 299 ("cut down").
7. State v. Towle, 62 N. H. 373.
8. People v. McFadden, 13 Wend. (N. Y.) 396 (1835).
9. State v. Moultrieville, 1 Rice (S. C.) 158 (1839). State v. Paul, 81 Iowa, 596, 77 N. W. 773 (1891).
10. State v. McConkey, 20 Iowa 574.
11. State v. Paul, 81 Iowa 596, 47 N. W. 773; Com. v. Searls, 3 Ky. L. Rep. 394.
12. Johnson v. State, 61 Ala. 9.

that the offense may be established even where the entry upon the land was lawful. [1] Some statutes of this character have been construed as comprehending all kinds of growing trees, [2] but others have been considered to comprise only trees of the accepted timber species. [3] The United States is entitled to the protection of a state statute making it an offense to cut timber from the lands of another within the state. [4] The special acts regarding timber trespass on state lands have been rigorously enforced, [5] and the common law has also been held to protect public lands. [6]

§98. Firing the Woods, State Statutes. In every American state there are now laws imposing penalties for the careless or intentional firing of the woods or the burning of timber products. [7] In statutes making it a crime to set out

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1. Tufts v. State, 41 Fla. 663, 27 So. 218.
2. Brown v. State, 100 Ala. 92, 14 So. 761; U. S. v. Briggs, 9 Howard 351; Forsyth v. U. S., 9 Howard 571; U. S. v. Soto, 7 Ariz. 236, 64 Pac. 419; U. S. v. Stores et al., 14 Fed. 824; See U. S. v. Redy, 5 McLean 358; 19 Opin. Atty. Gen. 381.
3. Wilson v. State, 17 Tex. App. 393.
4. State v. Herold, 9 Kan. 194. But *see* State v. Howard, 21 Tex. 416 (Holding such statute not applicable to state lands).
5. People v. Christian, 144 Mich. 247, 107 N. W. 919; State v. Shevlin-Carpenter Co., 99 Minn. 158, 108 N. W. 935; People v. McFadden, 13 Wend. (N. Y.) 396; People v. Turner, 49 Hun. (N, Y.) 466, 2 N. Y. Suppl. 253 (aff'd in 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498); People v. Holmes, 166 N. Y. 540, 60 N. E. 249 (Affm. 53 N. Y. App. Div. 626, 65 N. Y. Suppl. 1142.); Com. v. LaBar 32 Pa. Super. Ct. 228; State v. Dorman, 9 S. D. 528, 70 N. W. 848.
6. Com. v. Eckert, 2 Browne (Pa.) 249. (Dec. 1812).
7. Ala. Criminal Code, 1907, Sec. 6304, 6906, General; 6907, 6908, burning turpentine trees. Act Nov. 30, 1907, S. L. p. 192, Sec. 10.
   Ariz. Rev. Statutes, 1913, Penal Code, Sec. 609.
   Ark. Digest of Statutes, 1904, Secs. 1698 and 1699. Firing own lands to injury of another, Sec. 7978.
   Cal. Penal Code, Deering, 1915, Sec. 384, p. 179, misdemeanor.
   Colo. Annotated Statutes, Mills, 1912, Crim. Code, Secs. 2011-2014; 2011, wilfully or carelessly; 2012, public land; 2013, wilfully and maliciously, or neglecting fire on own land; 2014, neglecting camp fire.
   Conn. General statutes, 1902, Secs. 1218 to 1222.
   Del. Statutes of Del., Revised 1893, p. 946; Revised Stat. 1915, Secs. 722-25 and 3446-50, p. 1594 (Carelessly or out of season).
   Fla. Compiled Laws, 1914, Sec. 3277, 3426.
   Ga. Criminal Code of 1914, Secs. 227, 229 and 230.
   Ida. Penal Code, 1908, Sec. 6921, (Misdemeanor). Includes Ry. (1901, Sec. 4760).
   Ill. Annotated Statutes, 1913, par. 3500, p. 1972.
   Ind. Annotated Statutes, 1914, Vol. 1, Sec. 2260-2263; maliciously and wantonly.
   Iowa Criminal Code of 1897, Secs. 4785 and 4786.
   Kan. General Statutes, 1905, Dassler, Sec. 8741 to 8743 (wantonly and wilfully.) Gen'l St. 1909, Sec. 3822-3823 (Same).
   Ky. Statutes, Carroll, 1915, Sec. 1254, unlawfully; 1255. intentionally or negligently.
   La. Act July 7, 1910, S. L. No. 261, p. 446, Sec. 5.
   Me. Revised Statutes, 1903, p. 916, Sec. 5.
   Md. Act April 5, 1906, S. L. Ch. 294, p. 532, Sec. 10.

(Footnote 7 continued on next page)

a fire in the woods or a prairie, or to allow one to escape into either the open or enclosed land of another, the word "wilfully" is generally construed as involving evil intent, gross negligence, or reckless indifference. [1] However, the mere setting out of the fire is in itself evidence of an unlawful intent [2] which is sufficient to sustain a conviction unless justification can be shown by the defendant. [3] Acts of this character were punishable at common law. [4] The statutory offense of burning the woods or the property of another is ordinarily a misdemeanor [5] but under some statutes and

(Footnote 7 concluded from preceding page)

Mass. Revised Laws, 1902, Chap. 208, Sec. 5, p. 1747 of Vol. 2.
Mich. Annotated Statutes, Howell, 1914, Sec. 14588, p. 5638, Vol. 5, wilfully and maliciously.
Minn. General Statutes, Tiffany, 1913, Sec. 8927.
Miss. Code of 1906, Sec. 4988.
Mo. Annotated Statutes, 1906. Sec. 1980, wilfully, negligently or carelessly; Revised Laws, 1909 Sec. 4621.
Mont. Revised Code, 1907, Sec. 8768 and 8769.
Neb. Revised Statutes, 1913, Sec. 8624 and 8625. Cf. 8626
Nev. Revised Laws, 1912, Sec. 6579, wilfully or negligently; 6580, engine; 6632-33, leaving camp, etc.
N. H. Public Statutes, 1901, Chap. 277, Sec. 3, 5 and 6, p. 830.
N. J. Compiled Statutes of 1910, p. 2335, Sec. 49.
N. M. Compiled Laws, 1897, Sec. 3221, 3222. Annot. St. 1915, Sec. 1516-7.
N. Y. Consolidated Laws, Birdseye, Cum. & Gil. 1909, Sec. 1421, p. 3992.
N. C. Revised Laws, Pell, 1908, Sec. 3346; setting fire: Sec. 3347, camp fire.
N. Dak. Compiled Laws, 1913, Sec. 2797, Secs. 9774 and 9775.
Ohio Annotated Gen'l Code, Page & Adams, 1910, Secs. 7496-98, 8966-8971, R. R. fires; 12436, maliciously or negligently.
Okla. Compiled Laws, Snyder, 1909, Sec. 59 to 66, p. 184.
Ore. Laws, Lord, 1910, Sec. 1937, 1938, 5512-5518.
Pa. Purdon's Digest, Stewart, 1903, p. 1745-1747, Sec. 41-48.
R. I. General Statutes, 1909, p. 1259, Sec. 6, Chap. 345. (Cf. p. 1258, Sec. 3, wood).
S. C. Criminal Code, 1912, Sec. 189 (Turpentine farm); 215; woods in general; 216 carrying a torch.
S. Dak. Rev. Codes, 1903, Sec. 472-473 of Penal Code, wilfully and carelessly.
Tenn. Annotated Code, Shannon, 1896, Sec. 3017-3018. Cf. Sec. 6496 Par. 11.
Tex. Penal Code, White, 1911, Art. 774, p. 1185 (wilfully or negligently).
Utah Compiled Laws, 1907, Sec. 4429, 4435, 4478 (negligently or wilfully).
Vt. Public Statutes, 1906, Sec. 5750 (wilfully and maliciously).
Va. Code 1904, Sec. 3701 and 3702; (woodpile, 3698).
Wash. Annotated Codes & Statutes, Rem. & Ballinger, 1910, Sec. 5141-5149.
W. Va. Code, Hogg, 1913, Sec. 5199, 5200 (Chap. 148, Act. 1882).
Wis. General Statutes, 1915, Sec. 4405a, 4406.
Wy. Compiled Statutes, Mullen, 1910, Sec. 5817-5818.

1. State v. Lewis, 10 Rich (S. C.) 20; *see* Johnson v. Barber, 10 Ill. 425, 50 Am. Dec. 416; Nall v. Taylor, 247 Ill. 580 (whether fire proximate cause, for jury).
2. Galvin v. Gualala Mill Co., 98 Calif. 268, 33 Pac. 93.
3. *See* Pipe v. State, 3 Tex. App. 56. Cf. State v. Williams, 68 S. C. 119, 43 S. E. 769 (tracks and offer to compromise as circumstantial evidence).
4. Black v. State, 2 Md. 376; Phillips v. State, 19 Tex. 158.
5. Galvin v. Gualala Mill Co., 98 Calif. 268, 33 Pac. 93; Boyd v. Rice, 38 Mich. 599; Black v. State, 2 Md. 376 (Hay); Com. v. Macomber, 3 Mass. 254; State v. Huskins, 126 N. C. 1070; 35 S. E. 608; State v. Avery, 109 N. C. 798, 13 S. E. 931 burning cotton); State v. Simpson, 9 N. C. 460 (burning tar); State v. Lewis, 10 Rich (S. C.) 20; State v. White, 41 Tex. 64; Phillips v. State, 19 Tex. 158, Earheart v. Com., 9 Leigh (Va.) 671.

special circumstances the offense may be a felony, [1] and in some states the burning of the growing timber owned by another, with an evil purpose, has been specifically declared to constitute arson. [2] In several states the firing of one's own woods or grassland for a legitimate purpose in such manner that the fire escapes to the land of another is a misdemeanor, unless the notice required by the statute is given. [3] Under these statutes one can avoid conviction by showing that the firing was necessary for his own protection, [4] or that the escape of it was accidental and unavoidable. [5] However, a defendant cannot escape conviction on the defense that the adjoining landowner waived the required notice. [6] The word "woods," as used in the North Carolina statute, has been held to mean an actual forest, [7] and a neglected field surrounded by an old fence was held not to be a "woods" within the meaning of the statute [8] However, an abandoned field surrounded by forest land and not separated from the same by a fence was held a "woods" within the purview of the statute. [9]

§99. Special State Statutes Requiring Fire Precautions by Railroads. During the last two decades of the nineteenth century, and more especially in the early years of the twentieth century, there has been a general movement in the line of legislation which shall require those operating railroads to provide proper appliances to prevent the setting of fires by locomotives, and to keep the right of way clear of material that is particularly inflammable. The first legislation of this character was enacted in western states as a protection against grass fires, but in recent years the

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1. Creed v. People, 81 Ill. 565 (burning hay); State v. Harvey, 131 Mo. 339, 32 S. W. 1110; 141 Mo. 343, 42 S. W. 938.
2. Revised Stat. Ind. 1888, sec. 1927, from S. L. 1881, p. 174; Rev. L. Minn. 1905 Sec. 5038; State v. McMahon, 17 Nev. 365, 30 Pac. 1000 (cordwood). Cf. Searles v. State, 6 Ohio C. C. 331, 3 O. C. C. D. 478 (Building); Laws of N. Y. 1817, p. 118, 1827, p. 244; Rev. St. 1846, Vol. 2, p. 755; Rev. St. Wis., 1878, Sec. 4406, p. 1045.
3. Lamb v. Sloan, 94 N. C. 534.
   See Averitt v. Murrell, 49 N. C. 322; Wright v. Yarborough, 4 N. C. 687.
4. Tyson v. Rasberry, 8 N. C. 60; Tiller v. Wilson, 1 Lea (Tenn.) 392.
5. Finley v. Langston, 12 Mo. 120.
6. Lamb v. Sloan, 94 N. C. 534; Robertson v. Kirby, 52 N. C. 477; Wright v. Yarborough, 4 N. C. 687.
7. Averitt v. Murrell, 49 N. C. 322.
8. Achenback v. Johnston, 84 N. C. 264.
9. Hall v. Cranford, 50 N. C. 3.

removal of timber, brush, and other combustible material, has been required in a large number of states under penalty [1] While a state undoubtedly possesses extensive

1. Ala. Act Nov. 30, 1907, S. L. No. 90 (appliances).
Ark. Cf. Act Apr. 2, 1907, S. L. No. 141 (absolute liability of railroads.) p. 336.
Cal. Act Mar. 18, 1905, S. L. ch. 264, p. 235 (clear right of way).
Col. Act Apr. 10, 1901, S. L. ch. 83, sec. 14 (clear right of way); Cf. earlier acts Jan. 13, 1874, S. L. p. 224; Act Feb. 11, 1879, S. L. p. 73; act Feb. 27, 1883, p. 198 (plowing strip).
Conn. Act May 20, 1915, S. L., ch. 322 (appliances only).
Del. Cf. Act Apr. 5, 1881, S. L. ch. 380; Act Apr. 19, 1909, S. L., ch. 71, sec. 12 (appliances).
Ida. Act Feb. 15, 1907, S. L., p. 18, sec. 4 (appliances), sec. 7 (clear right of way); act Mar. 15, 1909, S. L. p. 227, sec. 4 and 6; act Feb. 14, 1911, S. L. ch. 98, p. 341.
Ill. Cf. Annot. St., 1913, par. 8812 (clear right of way) same Rev. St. 1913, Hurd, ch. 114, sec. 63.
Ind. Cf. Act March 3, 1911, ch. 107 (liable for damages and insurable interest).
Ky. Act Mar. 19, 1912, S. L. ch. 133, sec. 25-26 (appliances only).
La. Act July 4, 1904, S. L. No. 113, sec. 15, p. 248; act July 4, 1910, S. L. No. 261, p. 446; act July 9, 1912, S. L. No. 127.
Me. Act Mar. 25, 1891, S. L. ch. 100, p. 90; act. Mar. 24, 1915, S. L. ch. 196, p. 165; cf. Act. Mar. 15, 1911, S. L. ch. 35, p. 30, and Act Mar. 11, 1915, S. L. ch. 68, p. 46 (both requiring patrol).
Md. Act Apr. 5, 1906, S. L. ch. 294, sec. 12 (appliances only) (Art. 39 A, Sec. 12-13, Pub. Civ. Laws 1911).
Mass. Act May 17, 1907, S. L. ch. 431, p. 376; act Feb. 25, 1914, S. L. ch. 101, p. 72.
Mich. Act June 18, 1903, S. L. No. 249, sec. 12.
Minn. Act Apr. 18, 1895, S. L. ch. 196, p. 472; act Apr. 21, 1903, S. L. ch. 363, sec. 12; Act. Apr. 13, 1909, ch. 182, p. 204; Act Apr. 12, 1911, ch. 125, sec. 14; Act Apr. 2, 1913, ch. 159, sec. 3. Cf. Act April 22, 1909, S. L. 378 (railroads given insurable interest).
Mo. Act. Mar. 31, 1887, S. L. p. 101 (insurable interest); Act May 7, 1909, p. 359 (penalty double cost of clearing).
Mont. Civil Code 1895, sec. 952; act Mar. 18, 1901, S. L. p. 163 (plow and burn); Act Mar. 5, 1903, S. L. ch. 63 (plow and burn) (penalty of both acts double cost).
Neb. Act effective July 10, 1897, S. L. ch. 17 (mowing right of way) Comp. St. 1911, sec. 46902.
N. H. Act May 7, 1913, ch. 125 (right to take adjoining land); Act May 21, 1913, S. L. ch. 155 (required to clear adjoining land); Act Apr. 7, 1915, S. L., ch. 100 (Distance increased).
N. J. Act. Apr. 12, 1909, S. L. ch. 74, p. 102; (fire lines required); Cf. act Mar. 30, 1915, S. L. ch. 109 (requiring patrol).
N. M. Act Apr. 1, 1884, S. L. ch. 34 (plow and burn).
N. Y. Act May 15, 1885, S. L. ch. 283, sec. 25, p. 482; Act May 3, 1904, S. L. ch. 590, sec. 228 (appliances and clearing) 224a, (inspection); (224b, free rides).
N. C. Cf. Act Mar. 9, 1915, S. L. ch. 243, Sec. 10 (Carei n burning right of way).
Ohio Act Apr. 9, 1885, S. L. p. 118 (appliances): act Mar. 24, 1890, S. L. p. 99 (clear right of way).
Oreg. Act Feb. 23, 1907, S. L. Ch. 131, Sec. 8, p. 241; Act. Feb. 24, 1911, S. L. Ch. 278, Sec. 10-11 (appliances and clear right of way).
Pa. Act June 3, 1915, S. L. No. 353, art. 8 (no definite requirement).
R. I. Act. Apr. 23, 1909, S. L. Ch. 395, sec 14.
S. D. Laws 1893, Ch. 90; Civil Code 1903, Sec. 516 (making guard outside right of way).
Va. Act Jan. 18, 1904, S. L. p. 985, Sec. 18 (appliances); Sec. 55 (right of way); Mar. 13, 1908, S. L. Ch. 269, p. 388 (absolute liability); Mar. 14, 1908, S. L. Ch. 392, p. 679 (insurable int.) Cf. S. L. 1914. Ch. 195, S. 23-26.

(Footnote 1 continued on next page)

powers as to requiring reasonable precautionary efforts against fire on the part of railroad operators, the legislature, in imposing such duties upon railroad companies, must maintain a due regard for private property rights. Although several statutes have authorized the removal of inflammable material from private lands adjacent to railroads, the New Jersey act of April 12, 1909, requiring the construction of fire lines adjacent to all railroads and providing no compensation to ndjoining owners for the cutting of timber or the digging of the soil adjacent to the right of way was declared unconstitutional in 1913. [1]

§100. Federal Trespass Statutes and the Interpretation of them by the Courts. A Federal statute of March 2, 1831 (4 Stat. 472) imposed a penalty of not less than triple value and imprisonment for not over twelve months for the offense of unlawfully cutting, removing, or wantonly destroying live oak, red cedar, or other timber on lands of the United States reserved for naval purposes, or for cutting or removing timber from other lands of the United States with intent to export it or use it for any purpose other than for the United States navy. [2] An act of March 3, 1859, (11 Stat. 408) imposed a penalty of not over $500 and imprisonment for not over twelve months for the unlawful cutting and destroying of any timber standing upon land reserved or purchased by the United States for military or other purposes. An act of March 3, 1875 (18 Stat. 481.) imposed a fine of not over $500 or imprisonment for not over twelve months for the cutting or injuring of ornamental or other trees on lands reserved or purchased for public uses by the United States. The acts of 1859 and 1875 were held not to apply to the

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(Footnote 1 concluded from preceding page)

Wash. Act. Mar. 16, 1903, S. L. Ch. 114 (appliances); Suppl. 1913 to Code of 1910, sec. 5277-14 to 5277-18. Amdts. S. L. 1911, ch. 125, sec. 14-18.

W. Va. Act Mar. 1, 1909, S. L. ch. 60, p. 470; code 1915, ch. 62, sec. 54, 54a (appliances and clearing right of way).

Wis. Act. Apr. 17, 1895, S. L. ch. 266, p. 522; act May 25, 1905, ch. 264, sec. 17. Act May 13, 1909 ch. 119. (patrol inspection); act June 30, 1911, ch. 494 (insp., adds traction & portable) S. L. 1911, ch. 664, sec. 100, 107 (cor.)

Wyo. Act Mar. 8, 1886, S. L. ch. 50, p. 106 (plowing); act Jan. 8, 1891, S. L. ch. 34, p. 156 (burning right of way).

1. Vreeland v. Forest Commission, 12 Buchanan 349. Cf. C. C. C. & St. L. R. R. v. Hamilton, 200 Ill. 633; Checkley v. Ill. Cent. R. R., 257 Ill., 491 (requirement to clear right of way constitutional).

2. Cf. Act March 1, 1817, (3 Stat. L. 347).

public lands of the United States in general, but only to lands reserved or purchased for particular purposes. In the United States Revised Statutes of 1878 the penalty provisions of the act of March 2, 1831, were incorporated as sections 2461 and 2462, and the provisions of the act of March 3, 1859, were reenacted as section 5388.

The so-called Timber and Stone Act of June 3, 1878, (20 Stat. 89) authorizing the sale of certain public timberlands in areas not exceeding 160 acres to any one person or association of persons, provided in section four for the imposition of a fine of not less than $100 nor more than $1000 for the cutting of timber from public lands in the states of California, Oregon and Nevada, and the territory of Washington, except where the timber was to be used for agriculture, mining or for the benefit of the United States. Section five of this act provided that persons prosecuted under section 2461 of the Revised Statutes of 1878 might be relieved from further criminal prosecution through the payment of the sum of $2.50 per acre for all lands upon which unlawful cutting had been done, provided the timber had not been cut for exportation. [1] The provisions of this act were extended to all public land states by an act of August 4, 1892 (27 Stat. L. 348). The payment of the $2.50 per acre did not operate to relieve the offender from civil liability for the timber unlawfully cut; [2] nor is such payment conclusive evidence of guilt under the penal statute. [3]

In an act of June 3, 1878, (20 Stat. 88) authorizing the free use of timber standing on mineral lands within the states of Colorado and Nevada, and the territories of Arizona, Dakota, Idaho, Montana, New Mexico, Utah and Wyoming, and in all other mineral districts of the United States, for building, agricultural, mining or other domestic purposes, under regulations prescribed by the Secretary of the Interior, it was provided that any violation of the act or regulations made there under should constitute a misdemeanor punishable by a fine of not over $500, to which might be added imprisonment for not over six months.

1. Shiver v. U. S. 159 U. S., 591; U. S. v. Smith, 11 Fed. 487; 16 Op. At. Gen. 189
2. U. S. v. Scott et al. 39 Fed. 900; Morgan v. U. S. 148 Fed. 189, 78 C. C. A. 323. Cf Stone v. U. S. 64 Fed. 667, 12 C. C. A. 451 (Aff'd 167 U. S. 178, 17 S. Ct. 778, 42 L. ed. 127).
3. Cox v. Cameron Lumber Co. 39 Wash. 562. 82 Pac. 116.

On June 4, 1888 (25 Stat. 166) section 5388 of the Revised Statutes was amended so as to specifically apply to timber on Indian reservations and to provide for alternative or combined fine and imprisonment. On September 21, 1888, the Attorney General held that section 5388, as amended, did not apply to individual Indian allotments. [1]

Because of a conflict in court decisions as to the applicability of sections 2461 or 5388 of the revised statutes to the boxing of trees on public lands for the purpose of making turpentine and other products, [2] it was found difficult to protect the timber on public lands from injuries of this character. An act of June 4, 1906 (34 Stat. 208) cured the defect by declaring the chipping or boxing of a tree upon public lands for any such purpose to be a misdemeanor punishable by a fine of not over $500, or imprisonment for not over twelve months, or by both such fine and imprisonment.

In an act of March 4, 1909, (35 Stat. 1088) entitled "An act to codify, revise and amend the penal laws of the United States," the provisions of previous acts were combined and amended in sections 49, 50 and 51 (35 Stat. 1098). Section 49 reenacted with certain modifications the provisions of section 2461 of the Revised Statutes of 1878 and section 4 of the act of June 3, 1878 (20 Stat. 89). This section provides a fine of not over $1000 or imprisonment for not over one year, or both; but excepts ordinary uses by miners and agriculturists and all other privileges under existing laws. Section 50 was a reenactment of section 5388 of the Revised Statutes of 1878, as amended by the act of June 4, 1888 (25 Stat. 166). Section 51 was substantially a reenactment of the act of June 4, 1906 (34 Stat. 208) regarding the boxing of timber for turpentine purposes.

Section 6 of an act of June 25, 1910, (36 Stat. 855) amended section 50 of the act of March 4, 1909, so as to make it a criminal offense to cut timber from Indian allotments during the time that they are held under trust patents or under patents containing restrictions against alienation, with the same penalties as for an unlawful cutting from

1. 19 Op. Atty. Gen'l 183.
2. *Held not applicable.* Bryant v. U. S. 105 Fed. 941, 45 C. C. A. 145 (1901); U. S. v. Garretson 42 Fed. 22 (1890); Leatherbury v. U. S. 32 Fed. 780 (1887).
Held applicable. U. S. v. Taylor 35 Fed. 484 (1888). See 4 L. D. 1. See Davis v. State, 80 Miss. 376, 31 So. 742 (Under Miss. act making boxing an offense).

other lands reserved or purchased for the use of the United States.

An act of June 4, 1897, (30 Stat. 11) which constitutes the fundamental law for the administration of the National Forests provided that any violation of the act or of the administrative regulations which should be made in compliance therewith should be punished under section 5388 of the Revised Statutes as amended by the act of June 4, 1888 (25 Stat. 166).

None of the Federal acts contains the words "knowingly," "wilfully" or "maliciously," as applicable to the cutting and removal of timber from public lands. The word "knowingly" was used in the act of March 2, 1831, section 2461 of the Revised Statutes, the act of June 3, 1878, (20 Stat. 89) and in section 49 of the act of March 4, 1909 (35 Stat. 1098) in the provisions imposing penalties for the transportation, on vessels or railroads, of timber unlawfully cut from public lands; and the word "wantonly" was used in the act of 1831, the act of March 3, 1859 (11 Stat. 408) sections 2461 and 5388 of the Revised Statutes, sections 49 and 50 of the act of March 4, 1909, (35 Stat. 1098) and section 6 of the act of June 25, 1910 (36 Stat. 857) in the clauses of these acts which prohibited a destruction of trees. The word "knowingly" was also used in the act of June 4, 1906 (34 Stat. 208) and section 51 of the act of March 4, 1909 (35 Stat. 1098) in defining the liability of one who should encourage or aid in the boxing of trees or the disposition of the product of such unlawful boxing.

It is because of the omission of qualifying words requiring a specific intent to violate the statute that the Federal law appears not to have been enforced as strictly as state statutes. No intent to violate the statutes need be shown in a prosecution for the cutting of timber under those clauses of the statutes which make no mention of intent; [1] but the provisions in the statutes regarding the cutting or removing of timber for exportation or disposal have been limited by words requiring a specific intent. Where the prosecution is for an act involving an intent to export or otherwise dis-

1. U. S. v. Reder, 69 Fed. 965; U. S. v. Murphy, 32 Fed. 376.
But see U. S. v. Darton 25 Fed. Cas. No. 14, 919, 6 McLean 46 (where there was an honest mistake as to the land).

pose of the timber, the indictment or information must allege and the government must prove the intent necessary to the establishment of the unlawful act. [1] The only intent which must be proven under these acts is the intent to export or dispose of the timber contrary to the statute. [2] Although the act of March 2, 1831, which formed the basis of section 2461 of the Revised Statutes of 1878 afforded a special protection to live oak and red cedar on lands reserved by the United States for naval purposes, it also imposed penalties for the cutting and removal of other species from either the naval reserves or other public lands. [3] The offenses of cutting and of removal have been held distinct. [4] A criminal liability arising under such an act may be compromised by the Secretary of the Treasury upon the recommendation of the Solicitor of the Treasury. [5]

In an indictment charging the defendant with a violation of the Federal statute prohibiting the unlawful cutting or removal of timber from public lands of the United States, it is not necessary to recite that the defendant committed the act "knowingly" [6] or "unlawfully," [7] to describe particularly each kind of timber cut, [8] to show the use made of the timber, [9] or to allege that the cutting was not justified under any law of the United States [10] However, an indictment must allege a cutting upon lands of the United States, describe the lands on which the alleged cutting was done by

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1. U. S. v. Hacker, 73 Fed. 292 (1896) under sec. 4, Act of June 3, 1878; U. S. v. Garretson, 42 Fed. 22 (1890). Under sec. 5388, U. S. R. S. (Boxing trees.) U. S. v. Leatherbury, 32 Fed. 780 (1887). Under sec. 2461, U. S. R. S. (Boxing trees).
2. U. S., v. Teller 113 Fed. 273, 51 C. C. A. 230.
3. U. S., v. Shiver 159 U. S. 491, 16 S. Ct. 54, 40 L. Ed. 231.
   U. S. v. Briggs, 9 Howard (U. S.) 351, 13 L. Ed. 170.
   Teller v. U. S., 113 Fed. 273, 51 C. C. A. 230; U. S. v. Stone, 49 Fed. 848.
   U. S. v. Stores, 14 Fed. 824, 4 Woods 641; U. S. v. Smith, 11 Fed. 487, 8 Sawy. 100.
   U. S. v. Schuler, 27 Fed. Cas. No. 16234, 6 McLean 28.
   U. S. v. Redy, 27 Fed. Cas. No. 16133, 5 McLean 358.
   Bly v. U. S., 3 Fed. Cas. N . 1581, 4 Dill 464.
   U. S. v. Soto, 7 Ariz. 230, 64 Pac. 419.
   19 Opin. Atty. Gen'l, 381.
4. U. S. v. Schuler, 27 Fed. Cas. No. 16234, 6 McLean 28.
5. Sec. 3469, U. S. Rev. St. 1878.
   But *see* letter Nov. 15, 1886, Sec'y Interior to Sec'y Treasury, 5 L. D. 240.
   And *see* Attorney General's instructions to U. S. Marshals, Attorneys, Clerks, and Commissi ners, issued June 1, 1916, paragraph 740.
6. U. S. v. Schuler 27 Fed. Cas. No. 16234, 6 McLean 28.
7. U. S. v. Thompson 28 Fed. Cas. No. 16,490, 6 McLean 56.
8. U. S. v. Redy 27 Fed. Cas. No. 16, 133, 5 McLean 358.
9. U. S. v. Stone 49 Fed. 848.
10. U. S. v. Stone 49 F d. 848.

township, range, section or quarter-section, [1] and specify the kind of timber [2] cut with sufficient precision to show clearly to the defendant the offense with which he is charged. Although it is sufficient to allege the cutting of a particular species and to allege the cutting of "other timber" in the words of the statute [3] provided the proof correspond; proof that one species was cut when the charge was limited to another species will not support a conviction. [4] An unlawful intention is essential to the commission of a crime, but from proof of an unlawful act an unlawful intention will be inferred. [5] Ignorance of the law will not constitute a defense, [6] but the defendant may avoid conviction under a criminal statute by showing ignorance or mistake as to the land on which the cutting was done, [7] and only a nominal fine should be imposed where full reparation is made and there is no proof of a fraudulent intention. [8] It has been held that if the defendant shows an entry of land under a law giving him a right to cut, the burden is upon the government to prove the cutting to be unlawful; [9] However, where a defendant alleged that the cutting of timber was done under a license, the United States Supreme Court has held the burden of proof to be upon him to show that the cutting was justified. [10] It has been held that an information drawn to conform to the requirements of one statute for the prosecution of a timber trespass case may be treated as if drawn under another statute, if it contains all averments necessary to the establishment of an offense under the latter statute. [11]

§101. Federal Statutes Regarding the Firing of Public Lands. The first Federal Act making it a specific offense to fire the woods was an act of February 24, 1897 (29 Stat. L. 594). This act imposed a fine of not over

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1. U. S. v. Thompson 28 Fed. Cas. No. 16490, 6 McLean 56.
   U. S. v. Schuler 27 Fed. Cas. No. 16234, 6 McLean 28.
2. U. S. v. Redy 27 Fed. Cas. No. 16133, 5 McLean 358.
3. U. S. v. Redy 27 Fed. Cas. No. 16133, 5 McLean 35 .
4. U. S. v. Darton 25 Fed. Cas. No. 14919, 6 McLean 46.
5. Ibid.; U. S. v. Niemeyer 94 Fed. 147; U. S. v. Teller 113 Fed. 273, 51 C. C. A. 230.
6. U. S. v. Murphy 32 Fed. 376.
7. U. S. v. Darton 25 Fed. Cas. No. 14919, 6 McLean 46.
8. U. S. v. Murray 27 Fed. Cas. No. 15843, 5 McLean 207.
9. U. S. v. Rou ledge 8 N. Mex. 385, 45 Pac. 883.
10. U. S. v. Denver Etc. R. Co. 191 U. S. 84, 48 L. Ed. 106. cf. U. S. v. Bitter Root Etc. Co. 200 U. S., 451, 50 L. Ed. 550.
11. Stubbs v. U. S. 111 Fed. 366, 49 C. C. A. 392, 104 Fed. 988, 44 C. C. A. 292.

$5,000, or imprisonment for not over two years, or both such fine and imprisonment, for the offense of wilfully and maliciously setting a fire or carelessly or negligently leaving one to burn unattended near any timber, underbrush, grass or other inflammable material upon the public domain of the United States. The act also fixed a fine of not over $1,000 or imprisonment for not over one year, or both fine and imprisonment, for the offense of building a camp fire or other fire in or near any forest, timber, or other inflammable material upon the public domain and failing to totally extinguish the same before leaving it. On May 5, 1900 (31 Stat. L., 169) this act was amended by omitting the words "carelessly or negligently" from section one and the specific reference to camp fires from section two. In the act of March 4, 1909 (35 Stat. L., 1088, 1098) codifying and amending the penal laws of the United States, the provisions of the act of May 5, 1900, were reenacted in sections 52 and 53, with the omission of the word "maliciously" from the first section. By section 6 of an act of June 25, 1910 (36 Stat. L., 855, 857), section 53 of the act of March 4, 1909, was amended so as to make its penalties applicable to the leaving of fires on Indian tribal lands or on Indian allotments while the same were held under restricted or trust patents.

Numerous successful prosecutions have been made under the Federal law, mostly in the United States District Courts; but few, if any, of these cases have been reported and thus citations to decisions are not available.

CHAPTER X

CONTRACTS REGARDING GROWING TIMBER

§102. The Fundamental Principles of the Law of Contracts. The essentials of every valid contract under the English system of jurisprudence are:

1. A definite offer and an unconditional acceptance.
2. Formal evidence of the agreement, such as a written agreement attested by a seal; or a consideration for the agreement, which may consist of some benefit to the promisor or some loss to the promisee.
3. Legal capacity of the parties to assume contractual obligations, such as the attainment of legal age and the possession of sound mind.
4. Freedom of the agreement from vitiating elements, such as mistake, misrepresentation, fraud, duress or undue influence.
5. The contemplation of a result that is not forbidden by the common law or by statute and is not contrary to the general policy of English law, or that does not seek the accomplishment of a legal purpose in an illegal manner.

An offer or its acceptance may be communicated either by words or by conduct, and the offer must be made with the intention of creating legal relations. An offer may be revoked by the one making it any time before acceptance by proper notice to the other party, and will be revoked by the death of either party, or by the lapse of a reasonable time where no limit for acceptance is set. Where an act or a benefit, in consideration of which a promise is made, is performed or made effective at the time of the promise, the agreement is known as an executed contract. Where a promise by one party is given in consideration of a promise

by the other party, the agreement is known as an executory contract.

A contract may be voidable because both parties were mistaken as to the subject matter of the contract (mutual mistake), or because one party had one subject matter in mind while the other had another. Misrepresentation may arise from innocent statement or the innocent withholding of facts by one party which has led the other party to a misunderstanding as to the subject matter of the contract.

If one party has intentionally misrepresented the facts with the purpose of deceiving the other party, a contract may be avoided on the ground of fraud, if the misrepresentations were material and the other party was actually misled by them. A contract may be avoided on the ground of duress, if the promise or act of one party was extorted from him by threatened personal violence. If one of the parties is not, in the view of the law, morally capable of entering into contract, from either a permanent or a temporary disability, a contract may be avoided on the ground of undue influence. A contract may be entirely void because its object is illegal.

A contract may be discharged by mutual agreement before performance is completed. It is discharged when fully performed by both parties. One or both parties may be relieved from full performance because conditions have become such as to make performance impossible, such as a state of war. A contract may be discharged by operation of law. If not relieved from performance because of any one of the four conditions enumerated, a party to a contract who fails to perform will be liable for damages in a legal action brought by the other party.

Contracts for the sale of timberland [1] and standing tim-

1. Ark. Klopple v. Wagonstock Co. 148 S. W. 75; Cf. Conway v. Coursey, 110 Ark. 557, 161 S. W. 1030 (rental of land for clearing does not give right to sell timber).
Colo. Lumber Co. v. Inv. Co., 55 Colo. 271, 133 Pac. 1112.
Ga. Gaskins v. Green, 141 Ga. 552, 81 S. E. 882; Pine Co. v. Stores Co., 140 Ga. 323, 78 S. E. 901.
Ky. Hicks v. Phillips, 148 Ky. 670, 147 S. W. 42.
La. R. R. Co. v. Lbr. Co. 59 So. 403; Rogers v. Lbr. Co. 129 La. 40, 55 So. 702.
Me. Blood v. Drummond, 67 Me. 476.
N. C. Warick v. Taylor, 163 N. C. 68, 79 S. E. 286.
Harring v. Lbr. Co., 163 N. C. 481, 79 S. E. 876.
Veneer Co. v. Anze, 165 N. C. 54, 80 S. E. 886.
(Footnote 1 continued on next page)

ber [1] are governed by the same rules of law as other sales of

(Footnote 1 concluded from the preceding page)

Mfg. Co. v. Thoma , 167 N. C. 109, 83 S. E. 174.
Gilbert v. Shingle Co., 167 N. C. 286, 83 S. E. 337.
Simmons v. Groom, 167 N. C. 271, 83 S. E. 471.
Finger v. Goode, 85 S. E. 137.
Banger v. Lbr. Co., 86 S. E. 516.
Taylor v. Munger, 86 S. E. 626.

N. Y. Hersey v. Fisher, 90 N. Y. 647.

Pa. Lacy v. Green, 84 Pa. St. 51 .

S. C. Lbr. Co. v. Hodges, 96 S. C. 140, 79 S. E. 1096. Timber Co. v. Prettyman, 97 S. C. 247, 81 S. E. 484. Keenan v. Matthews, 98 S. C. 226, 82 S. E. 431.
Glover v. Smith, 1 Dessaus. 433.

Va. Hartley v. Neaves, 84 S. E. 97. See Jolliffe Etc. v. Hite Etc., 1 Call 301 (cf. 1 Call 316, 5 Call 9; 6 Call 218; 2 Hen. & Munf. 173; 2 Rand. 67); Duvals v. Ross, 2 Munf. 290, 2 Hen. & Munf. 164; Hull v. Cunningham Exrs., 1 Munf. 330; Bierne v. Er kine, 5 Leigh 59, 64; Blessings Admn'rs v. Beatty, 1 Rob.

Wash Healey v. Tract Co., 78 Wash. 628, 139 Pac. 609.

W.Va. Pardee v. Crane, 74 W. Va. 359, 82 S. E. 340; Metalliurgical Co. v. Montgomery, 74 S. E. 994 (Lease of land with lumbering rights).

U. S. See Jennison v. Leonard, 21 Wall, 302, 22 L. Ed. 539; Gillen v. Powe, 219 Fed. 553; Rexford v. Woodland Co., 208 Fed. 295.

Eng. Hill v. Buckley, 17 Ves. 394, 401.

1. Ala. Shepard v. Lbr. Co., 68 So. 880; Lbr. Co. v. Shepard, 180 Ala. 148, 60 So. 825; Wheeler v. Cleveland, 54 So. 277; Ackley v. Lbr. Co., 166 Ala., 295, 51 So. 964; Stevenson v. Davis, 163 Ala. 562, 50 So. 1023; Davis v. Lbr. Co., 151 Ala. 580, 44 So. 629. *See* Cooperage Co. v. Carter, 2 Ala. App. 367, 57, So. 60.

Ark. Fleischer v. McGehee, 111 Ark. 626, 163 S. W. 169 (mutual mistake,) Lbr. Co. v. Sheppard 143 S. W. 100); Griffith v. Tie Co., 109 Ark. 223, 159 S. W. 218; Wallace v. Meeks, 138 S. W. 638; Davis v. Spann, 92 Ark. 213, 122 S. W. 495; Sidle v. Mfg. Co., 91 Ark. 299, 121 S. W. 349; Wood v. Kelsey, 90 Ark. 272, 119 S. W. 258; Lbr. Co. v. Pretorius, 82 Ark. 347, 101 . W. 733.

Cal. Ciapusci v. Clark, 12 Cal. App. 44, 106 Pac. 436.

Fla. Land Co. v. Parker, 64 Fla. 371, 59 So. 962; Stores Co. v. Houck, 64 Fla. 242, 59 So. 962; Florida Assoc. v. Stevens, 61 Fla. 598, 55 So. 981; Land Co. v. Adams, 54 Fla. 550, 45 So. 492; Richbourg v. Rose, 53 Fla. 173, 44 So. 69. *See* Fletcher v. Moriarity 62 Fla. 482, 56 So. 437.

Ga. Jones v. Graham, 141 Ga. 60, 80 S. E. 7; Shaw v. Lbr. Co., 141 Ga. 47, 80 S. E. 322; Walters v. Hertz, 135 Ga. 814, 70 S. E. 343; King v. Turpentine Co., 134 Ga. 496, 68 S. E. 73.

Ida. Page v. Bradford-Kennedy Co., 19 Ida. 685, 115 Pac. 694.

Ill. Walker v. Johnstone, 116 Ill. App. 145.

Iowa Baker v. Kenney, 145 Ia. 638, 124 N. W. 901.

Ky. Murray v. Voyd, 165 Ky. 625, 177 S. W. 468; Veneer Co. v. Arnold, 161 Ky. 736, 171 S. W. 403; Prowse v. Henderson, 155 Ky. 317, 159 S. W. 808; Bach v. Little, 140 Ky. 396, 131 S. W. 172; Risner v. Dunn, 122 S. W. 203; Rowe v. Charles, 121 S. W. 697; Mills v. Stillwell, 89 S. W. 112, 28 Ky. L. Rep. 204.

La. Stave Co. v. Lbr. Co., 135 La. 232, 65 So. 226; Planting Co. v. Cypress Co., 134 La. 682, 64 So. 677; Banks v. Lbr. Co., 133 La. 282, 62 So. 907; Lbr. Co. v. Lbr. Co., 135 La. 421, 65 So. 596; Blanks v. Lephiew, 132 La. 545, 61 So. 615; Smith v. Lbr. Co., 55 So. 698; Hyde v. Barron, 125 La. 227, 51 So. 126; Smith v. Lbr. Co. 123 La. 959, 49 So. 655; Sanders v. Schilling, 123 La. 1009, 49 So. 689; Shepard v. Lbr. Co., 121 La. 1011, 46 So. 999; Blackshear v. Hood, 120 La. 966, 45 So. 957. *See* D'Estrampes v. Lbr. Co 130 La. 926, 58 So. 817.

Me. Brown v. Bishop, 105 Me. 272, 74 Atl. 724; Blood v. Drummond, 67 Me. 476.

(Footnote 1 continued on next page)

chattels or of interests in land, but such contracts will be construed with due regard for special customs obtaining in contracts for property of this character.

§103. Misrepresentations at the time of Sale of Timber or Timberland. Any material false representation as to the amount of land included in a tract or as to the amount and quality of the timber will, if relied upon by the purchaser, support a rescission of the contract by him whether the representations were made fraudulently or with

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(Footnote 1 concluded from preceding page)

Mich. Iron Co. v. Nester, 147 Mich. 599, 111 N. W. 177; Balderson v. Seeley, 160 Mich. 186, 125 N. W. 37.

Minn. Lbr. Co. v. Land Co., 126 Minn. 176, 148 N. W. 43.

Miss. Lbr. Co. v. Britton, 105 Miss. 592, 62 So. 648; McVeay v. Rich, 102 Miss. 552, 59 So. 842; Bomer v. Canaday, 79 Miss. 222. *See* Davis v. Bellows, 99 Miss. 838, 56 So. 817.

Mo. Moss v. Hunter, 188 Mo. App. 391, 174 S. W. 212; Teachout v. Clough, 143 Mo. App. 474, 127 S. W. 672.

N. H. Paper Co. v. Miles, 75 N. H. 150, 71 Atl. 626.

N. Y. Arnold v. Spring, 135 N. Y. Suppl. 314; P. v. Cooperage Co. 147 App. Div. 267,131 N. Y. Suppl. 952; Bryant v. Turner, 126 N. Y. App. Div. 598, 110 N. Y. Suppl. 594; Turner v. Bissell, 69 Misc. 167, 126 N. Y. Suppl. 234; Hersey v. Fisher, 90 N. Y. 647.

N. C. Timber Co. v. Lbr. Co., 168 N. C. 454, 84 S. E. 765; Shammonhouse v. McMullan, 168 N. C. 239, 84 S. E. 259; Williams v. Parsons, 167 N. C. 529, 83 S. E. 914; Ward v. Albertson, 165 N. C. 218, 81 S. E. 68; Lbr. Co. v. Riley, 163 N. C. 254, 79 S. E. 605; Byrd v. Sexton, 161 N. C. 569, 77 S. E. 697; Dameron v. Lbr. Co., 161 N. C. 495, 77 S. E. 694; Pitts v. Curtis, 152 N. C. 615, 68 S. E. 189; Woodbury v. King, 152 N. C. 676, 68 S. E. 221; Timber Co. v. Wilson, 151 N. C. 154, 65 S. E. 932; Paddock v. Davenport, 106 N. C. 710, 12 S. E. 464. See Daniels v. R. Co. 158 N. C. 418, 74 S. E. 331; Burwell v. Chapman, 74 S. E. 635.

Ore. Roots v. Lbr. Co., 50 Ore. 298, 92 Pac. 811, 94 Pac. 182; Lbr. Co. v. Roots, 49 Ore. 569, 90 Pac. 487.

Pa. Lacy v. Green, 84 Pa. St. 514.

S. C. Ellerbee v. Lbr. Co., 99 S. C. 158, 82 S. E. 1049; Rush v. Hilton, 83 S. C. 444, 65 S. E. 525; Crawford v. Lbr. Co., 79 S. C. 166, 60 S. E. 445.

Tex. Lbr. Co. v. Ball (Civ. App.) 177 S. W. 226; Bank v. Warner (Civ. App.) 176 S. W. 863; Waugh v. Henderson (Civ. App.) 159 S. W. 893; Lbr.Co. v. Fall (Civ. App.) 157 S. W. 209; Adams v. Hughes, C. Ap. 140 S. W. 1163.

Vt. *See* McLean v. Light, etc., Co. 81 Atl. 613.

Va. Mfg. Co. v. Allen, 85 S. E. 568; Smith v. Ramsey, 116 Va. 530, 82 S. E. 189; Furniture Co. v. Rhea, 114 Va. 271, 76 S. E. 330; Briggs v. Watkins, 70 S. E. 55 (Mutual mistake).

Wash. Miller v. Hamberg, 79 Wash. 144, 139 Pac. 1085; Heybrook v. Beard, 75 Wash. 646, 135 Pac. 626; Tacoma Mill Co. v. Perry, 40 Wash. 44, 82 Pac. 140.

W. Va. Coal Etc. Co. v. Harrison, 71 W. Va. 217, 76 S. E. 346, 47 L. R. A. N. S. 870.

Wis. Bunn v. Lbr. Co. 51 Wis. 376, 8 N. W. 232.

U. S. Wilson v. Seybolt, 216 Fed. 975; Trust Co. v. Lbr. Co., 212 Fed. 229; Lbr. Co. v. Long. 182 Fed. 82; Chapman v. Lbr. Co., 169 Fed. 81, 94 C. C. A. 452; Lbr. Co. v. O'Neal, 160 Fed. 596.

Can. Paper Co. v. Baptist, 41 Can. S. Ct. 105.

Eng. Leigh v. Heald, 1 B. and Ad. 622, 9 L. J. Q. B. O. S. 98, 20 E. C. L. 622 109, Eng. Rep. 918

out any purpose to deceive. [1] If the purchaser examined the tract himself or relied upon information obtained from third persons rather than upon representations of the vendor, he cannot ordinarily rescind the contract; [2] but rescission was allowed in a Pennsylvania case, involving the purchase of a thousand-acre tract, in which the vendee had himself examined the land, where it was shown that in such examination he had relied upon the guidance of an agent of the vendor who had been instructed to show the vendee only the best of the timber. [3] The right to set up misrepresentation as ground for avoidance of a contract may be waived by dealings with the other party subsequent to a knowledge of the misrepresentation. [4] Only when the representation as to the amount of timber on the land is clear and explicit will it be construed as a warranty, [5] but if the warranty is established, timber on the tract so situated that it cannot be logged will not be considered in the enforcement of the warranty.[6] Warranty of title or quality will not be implied.[7]

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1. Ark. *See* Fleischer v. McGehee, 111 Ark. 626, 163 S. W. 169.
   Ga. Martin v. Peddy, 120 Ga. 1079, 48 S. E. 420 (Deficiency in acreage apportioned in price under Ga. Civ. Code); Harwell v. Martin, 115 Ga. 156, 41 S. E. 686; Lbr. Co. v. Cowart, 136 Ga. 739, 72 S. E. 37 (deficiency in acreage, plea of fraud).
   Ky. Barnes v. Ewell, 155 Ky. 393, 169 S. W. 953; Chess Etc. Co. v. Simpson, 82 S. W. 601, 26 Ky. L. Rep. 893.
   La. Ash v. Hale, 68 So. 389; See Rogers v. Lbr. Co., 55 So. 702; Moore v. OBannon, 126 La. 161, 52 So. 253.
   Me. Hammatt v. Emerson, 27 Me. 308, 46 Am. Dec. 598.
   Mass. Prescott v. Wright 4 Gray 461.
   Mich. Jones v. Wing,..Harr. 301.
   Ore. Copeland v. Tweedle, 122 Pac.. 302.
   Pa. Blygh v. Samson, 137 Pa. 363, 28 Atl. 996, 27 W. N. N. C 390.
   S. C. *See* Marthinson v. McCutcheon, 84 S. C. 256, 66 S. E. 120.
   Tex. Warner v. Munsheimer, 2 Tex. Civ. App., Sec. 393.
   Va. Shoemaker v. Cake, 83 Va. 1, 1 S. E. 387.
   Wis. Danforth v. Wharton 41 Wis. 191; Miner v. Medbury, 6 Wis. 295.
   U. S. Trust Co. v. Lbr. Co., 212 Fed. 229; Daniel v. Mitchell, 6 Fed. Cas. No. 3,562, 1 Story 172.
   Can. Woodward v. Lants, 44 N. S. 221.
2. Ga. Harwell v. Martin, 115 Ga. 156, 41 S. E. 686.
   La. Ash v. Hale, 68 So. 389.
   Tex. Huber v. Hill, 130 S. W. 219; Garrett v. Burleson, 25 Tex. Suppl. 41.
   U. S. *See* Trust Co. v. Lbr. Co., 212 Fed. 229.
   Can. Woodward v. Lants, 44 N. S. 221.
3. Brotherton v. Reynolds, 164 Pa. St. 134, 30 Atl. 234.
4. Wylie v. Gamble, 95 Mich. 564, 55 N. W. 377; Waugh v. Hudson, (Tex. Civ. App.) 159 S. W. 893.
5. Mahaffey v. Ferguson, 156 Pa. St. 156, 27 Atl. 21; Hammatt v. Emerson, 27 Me. 308, 46 Am. Dec. 598. *See* Hardison v. Dunn, 159 N. C. 579, 75 S. E. 940.
6. Anderson v. Northern National Bank, 98 Mich. 543, 57 N. W. 808. Cf. Crawford v. Lbr. Co., 79 S. C. 166, 60 S. E. 445. *Contra* Swift v. David, 16 B. C. 275. *And see* Lbr. v. Middleby, 194 Fed. 817, 114 C. C. A. 521.
7. Ala. Johnson v. Curry, 134 Ga. 583, 68 S. E. 298.

(Footnote 7 continued on next page)

§104. Trees May be Constructively Severed. As has been before stated (*), standing or growing trees have universally been held to constitute a part of the land upon which they have grown. The presumption that trees which are physically connected with the soil through their roots are a part of the land and pass to the heir or with a conveyance of the title to the land [1] is not conclusive; and growing trees may in law be constructively severed from the land so that the legal transfer of the title to the land will not operate as a transfer of the title to the trees standing upon the land. [2] This separation of the ownership of the growing trees from the ownership of the soil which supports and nourishes them may be effected through a grant of the trees separate from the land [3] or through a sale of the land with a reservation of the trees. [4] A deed with covenants of war-

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(Footnote 7 concluded from preceding page)

Ind. Hege v. New on, 96 Ind. 426.
Miss. Plantation Co. v. Heading Co., 104 Miss. 131, 61 So. 166 (express warranty of title.)
N. J. Slocum v. Seymour, 36 N. J. L. 138, 13 Am. Rep. 432.
N. C. Zimmerman v. Lynch, 130 N. C. 61, 40 S. E. 841.
Tex. Cf. Richburg v. Patten, 46 Tex. Civ. App. 83, 101 S. W. 836 (no title in seller.)
Wis. Van Doren v. Fenton, 125 Wis. 147, 103 N. W. 228.
U. S. Land Co. v. Wheeler, 189 Fed. 321 (express warranty).

*See citations, Note 5, page 20.

1. Kittredge v. Woods, 3 N. H. 503; Nursery Trees: Maples v. Milton, 31 Conn. 598; Smith v. Price, 39 Ill. 28, 89 Am. Dec. 284; Adams v. Beadle, 47 Iowa 439, 29 Am. Rep. 487; Liford's Case, 11 Coke 48; Billingsby v. Hercy, Moore, K. B. 831.
2. Warren v. Leland, 2 Barb. (N. Y.) 613; Nelson v. Nelson, 6 Gray (Mass.) 385 (1856); New York etc. Iron Co. v. Green County Iron Co., 11 Heisk. (Tenn.) 434; Haskell v. Ayres, 35 Mich. 89; Kingsley v. Holbrook, 45 N. H. 313, 86 Am. Dec. 173; White v. Foster, 102 Mass. 375; Donworth v. Sawyer, 94 Me. 242. Kendall v. Lumber Co. (Ark.) 64 S. W. 220. (Recording constructive notice to all).
3. White v. Foster, 102 Mass. 375; Clap v. Drape', 4 Mas. 266, 3 Am. Dec. 215; Hays v. McLin, 115 Ky. 39, 72 S. W. 339, 24 Ky. L. Rep. 1827; Irons v. Webb, 41 N. J. L. 203, 32 Am. Rep. 193; Hoit v. Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119; Peterson v. Gibbs, 147 Cal. 1, 81 Pac. 121, 109 Am. St. Rep. 107; Haskell v. Ayres, 35 Mich. 89; McCoy v. Herbert, 9 Leigh (Va.) 548.
   A sale of standing timber to be cut and removed at a specified rate per cord or thousand feet vests in the purchaser the exclusive title to the timber.
   Dexter v. Lothrop 136 Pa. St. 565, 20 Atl. 545; Hays v. McLin 115 Ky. 39. cf. Wheeler v. Carpenter 107 Pa. St. 271.
4. Ala. Lumber Co. v. Austin, 162 Ala. 110, 49 So. 875; Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776.
   Me. Strout v. Harper, 72 Me. 270; Goodwin v. Hubbard, 47 Me. 595; Howard v. Lincoln, 13 Me. 122.
   Mass. Hill v. Cutting, 107 Mass. 596; Reed v. Merrifield, 10 Metc. 155; Putnam v. Tuttle, 10 Gray 48.
   Mich. Clifton v. Jackson Iron Co., 74 Mich. 183 (1889); Haskell v. Ayres, 35 Mich. 89.
   N C. Robinson v. Gee, 4 Ired L. (26 N. C.) 186; Bond v. Cashie etc. R. Co., 127 N. C. 125.

(Footnote 4 continued on next page)

ranty and a provision for removal within a certain time, which conveys an interest in land, [1] should be distinguished from a grant to one, his heirs and assigns of all standing timber on a certain tract with the right to remove it at any time, [2] or within a specified time. [3]

There is a disagreement in the decisions of American courts as to whether trees that have been constructively severed by a grant or a reservation in a deed become chattels personal [4] or still retain the character of realty with which they were invested while legally attached to the land. [5] If the contract does not designate the trees or make provision for the definite determination of what trees are meant the title to the trees will not pass, [6] but if it provides for the sale of a definite number of trees to be chosen by the purchaser the title passes at once and the trees are identified as soon as they are selected. [7] It has been held in different jurisdictions that the words "all merchantable timber" of certain species on a tract of land are definite enough to pass

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(Footnote 4 concluded from preceding page)

Pa. Wheeler v. Carpenter, 107 Pa. St. 271; Saltonstall v. Little, 90 Pa. St. 422, 35 Am. Rep. 683; McClintock's Appeal, 71 Pa. St. 365.
S. C. Knotts v. Hydrick, 12 Rich. L. 314.
Eng. Billingsby v. Butler, Hob. 173; Herlakenden's Case, 4 Co. 63b.
But right to timber may be lost after expiration of time named or reasonable time.
Ky. Morris v. Sanders (Ky. 1897) 43 S. W. Rep. 733.
Mass. Perkins v. Stockwell, 131 Mass. 529; Murray v. Norfolk Co., 149 Mass. 328.
Mich. Monroe v. Bowen, 26 Mich. 523; Richards v. Tozer, 27 Mich. 451.
N. Y. Inderlied v. Whaley, 65 Hun. 407; Cf. Gregg v. Birdsall, 53 Barb. 402.
Pa. Saltonstall v. Little, 90 Pa. St. 422, 35 Am. Rep. 683.
S. C. Knotts v. Hydrick, 12 Rich. L. (S. C.) 314.
Wis. Rich v. Zeilsdorff, 22 Wis. 544, 99 Am. Dec. 81; Martin v. Gilson, 37 Wis. 360.

1. White v. Foster, 102 Mass. 375.
2. Baker v. Kenney, 145 Iowa 638, 124 N. W. 901; Clap v. Draper, 4 Mass. 266, 3 Am. Dec. 215; See Goodyear v. Vosburgh, 57 Barb. (N. Y.) 243.
3. Carter v. Clark and Boice Lumber Co., 149 S. W. Rep. 278 (1913).
4. Harrell v. Mason, (Ala.) 54 So. 105; Lee v. Hotard, 122 La. 850, 48 So. 286. Kingsley v. Holbrook, 45 N. H. 313, 86 Am. Dec. 173; Sterling v. Baldwin, 42 Vt. 306; Archer Lumber Co. v. Cornett, 22 Ky. L. Rep. 569, 58 S. W. 438; Hays v. McLin, 115 Ky. 39; Baker v. Jordan, 3 Ohio St. 438; Haskell v. Ayres, 35 Mich. 89. See Bacon Abr. Executors (H) 3; 1 Wm's Ex'rs (9th Ed.) 620; Toller, Law of Ex'rs 194; Wentworth, Office of Ex'rs (14 Ed.) 148; Stukeley v. Butler, Hobart 173, 300.
5. Slocum v. Seymour, 36 N. J. L. 138; White v. Foster, 102 Mass. 375; See McClintock's Appeal, 71 Pa. St. 365; Liford's Case, 11 Co. Rep. 46b, 50a; Goodrich v. Hathaway, 1 Vt. 485.
6. Moss v. Meshew, 8 Bush. (Ky.) 190.
7. McCoy v. Herbert, 9 Leigh (Va.) 548.
See Clarke v. McNatt, 132 Ga. 610, 64 S. E. 795, 26 L. R. A. N. S. 585, (Title not to pass till severance, not a sale of interest in land).

title at once. [1] It is then only necessary to determine which trees were actually merchantable and parol evidence is admissible in the making of this determination.

§105. Fallen Trees Sometimes Pass with Land. In conformity with the rule in the law of fixtures that, where a thing has been so annexed to land as to become in law a part thereof, the accidental severance of the same does not change its legal character from realty to personalty, a Pennsylvania court held (in 1881) that trees severed from the soil by the elements do not become personalty until they are cut into logs or the owner of the land does some act which indicates an intention on his part to treat them as personalty.[2] However, an English case, decided subsequently (in 1885), [3] held that a tree severed from the soil by a storm was personalty. The English rule appears to be that if a tree still remains so connected with the soil that some new force would be necessary to effect a separation, it is still attached and therefore realty; but if the connection of all important roots with the soil is severed, the tree becomes personalty even though a part of the roots remain covered with earth or some small roots or filaments are unbroken.[4] In a Maine case it was held that hemlock timber trees which had been cut down by the owner of the land for the purpose of removing the bark, but from which the tops had not been removed, passed with a conveyance of the land even though it had been the intention of the owner to cut off the tops and haul the trees off as logs to be sawed into lumber during the ensuing winter.[5] The court expressed the opinion that the trees would have been personalty if they had been cut into logs or hewed into timber before the time of the conveyance of the land. This decision appears to have rested upon analogous early decisions regarding wind thrown trees or those holding that trees severed and im-

1. Lee Lbr. Co. v. Hotard, 122 La. 850, 48 So. 286.
   Haskell v. Ayres, 35 Mich. 89; Hays v. McLin, 115 Ky. 39; Dorris v. King et al. (Ch. Div. Tenn. 1899) 54 S. W. 683; See Ayer & Lord Tie Co. v. Davenport, 26 Ky. L. Rep. 115.
2. Leidy v. Proctor, 97 Pa. St. 486. Altemose v. Hufsmith 45 Pa. 121.
3. Re Ainslie, 30 Ch. D. 485 (overruling 28 Ch. 89, 92, D. (Dec. 1884).
4. Ewell's Fixtures, 2d Ed., Callaghan & Co., Chicago, 1905, p. 332.
5. Brackett v. Goddard, 54 Me. 309 (1866); See Kittredge v. Woods, 3 N. H. 503 and 2 Kent's Comm. 346. Maine Rev. St. 1903, p. 657 Sec. 1.

mediately removed by a trespasser could not form the subject matter of a prosecution for larceny.[1]

§106. Special Interests in Trees. A grant of the use of the timber on a certain tract of land does not convey the timber itself or the land,[2] nor does a conveyance of the timber on a certain tract with a right to remove it within a limited time afford the grantee an exclusive possession of the land.[3] An estate in inheritance in the timber upon land separate from the land itself may be created by deed,[4] and the owner of the estate in timber may maintain an action in trespass for the breaking of the close.[5] Trees may be leased separately from the land upon which they stand.[6] In states that consider a sale of standing timber one involving an interest in land, statutes requiring that mortgages and other conveyances of personal property shall be recorded, do not apply to contracts for the sale of growing timber.[7]

§107. Interests in Land Incident to Timber Ownership. The valid sale of standing trees apart from the land, or an effective reservation of them in a sale of the land, carries a right in the soil sufficient for the nourishment of the trees and the legal right of the purchaser, or the one holding the reservation, to enter upon the land and remove the

1. Reg. v. Harris, 11 Mod. 113; Altemose v. Hufsmith, 45 Pa. 121; Comfort v. Fulton, 39 Barb. (N. Y.) 56 (1861); Johnson v. State, 100 Ala. 55 (1893); Bonham v. State, 65 Ala. 456, (1880); State v. Thompson, 93 N. C. 537 (1885); State v. Fay, 82 N. C. 679 (1880). But See People v. Gaylord, 139 N. Y. App. Div. 814, 124 N. Y. Suppl. 517; Pashley v. Bennett, 108 N. Y. App. Div. 102, 95 N. Y. Suppl. 384; Harberger v. State, 4 Tex. App. 26, 30 Am. Rep. 157; Ex parte Wilke, 34 Tex. 155 (1871); Farris v. State, 69 S. W. 140, (Tex. Crim. App. 1902).
2. Clark v. Way, 11 Rich. (S. C.) 621.
3. Reed v. Merrifield, 10 Metc. (Mass.) 155.
4. Clap v. Draper, 4 Mass. 266; See Goodyear v. Vosburgh, 57 Barb. (N. Y.) 243.
5. Clap v. Draper, 4 Mass. 266; See Goodrich v. Hathaway, 1 Vt. 485; McCoy v. Herbert, 9 Leigh (Va.) 548.
   Camp v. Horton, 131 Ga. 793. 63 S. E. 351.
6. Perkins v. Peterson, 110 Ga. 24; Carter v. Williamson, 106 Ga. 280; See Lbr. Co. v. Beall, 5 Ga. App. 202, 62 S. E. 1056; Wefel v. Williams, 58 Fla. 538, 50 So. 679 (Deed with reservation of Turpentine Right).
7. Bent v. Hoxie, 90 Wis. 625, 64 N. W. 426; Lillie v. Dunbar, 62 Wis. 198, 22 N. W. 467. But See, Bunn v. Valley Lumber Co., 51 Wis. 376, 8 N. W. 232; Cadle v. McLean, 48 Wis. 630, 4 N. W. 755; See also, Mee v. Benedict, 98 Mich. 260. 57 N. W. 175, 39 Am. St. Rep. 543, 22 L. R. A. 641; Fish v. Capwell (R. I.) 29 Atl. 840, 25 L. R. A. 159; McRae v. Stillwell, 111 Ga. 65; *Contra*, Warren v. Leland, 2 Barb. (N. Y.) 613; See also, Bowerman v. Taylor, 127 Ky. 812, 106 S. W. 846, 32 Ky. L. Rep. 671; Burwell v. Chapman (N. C.) 74 S. E. 635; Childers v. Coleman, 122 Tenn. 109, 118 S. W. 1018; Lumber Co. v. Lowe, 110 Va. 950 (actual notice equivalent to recording.); Paper Co. v. Baptist, 41 Can. S. Ct. 105 (Quebec case); Barnes v Golding, 11 Ont. W. R. 261.

trees.[1] If the conveyance is made by deed this right will be in the nature of an irrevocable easement,[2] but if the sale be one by parol the privilege of entry is in most jurisdictions merely a revocable license.[3] The extent of the license or right will be dependent upon the existing conditions as well as the specific terms of the contract and may include the placing of a logging railroad[4] upon the land or the crossing of cleared lands[5] of the vendee with logging roads. Intentional licenses for the removal of timber and the privileges construed as licenses which result from ineffectual attempts to sell timber by parol, have been very common in American states.[6] Such licenses while unrevoked afford

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1. Ala. Yarbrough v. Stewart, 67 So. 989.
Lbr. Co. v. Eisely, 163 Ala. 290, 50 So. 225.
But see Christopher v. Lbr. Co., 57, Ala., 837.
Ark. Earl v. Harris, 137 S. W. 806, Sidle v. Mfg. Co. 91 Ark. 299, 121 S. W. 399. (Use of stream).
Fla. Cf. Lbr. Co. v. Woods, 67 Fla. 202, 64 So. 741. (Road to other timber.)
Ga. See Lbr. Co. v. Gates, 70 S. E. 672. (May destroy timber in roads.)Lbr. Co. v. Beall, 5 Ga. App. 202, 62 S. E. 1056.
Ind. Young v. Waggoner (Ind. App.) 98 N. E. 145.
Ky. Shepherd etc. Co. v. Templeman, 143 Ky. 334, 136 S. W. 648.
But see Bates v. Lbr. Co., 130 Ky. 608, 113 S. W. 820, 132 A. S. R. 407. (Not to injure land.)
Me. Goodwin v. Hubbard, 47 Me. 595.
Mass. Putnam v. Tuttle, 10 Gray 48.
Minn. Pinetree Lbr. Co. v. McKinley 86 N. W. 414 (Way over one tract to another).
N. C. Wilson v. Scarboro, 163 N. C. 380, 79 S. E. 811.
S. C. Rush v. Hilton, 83 S. C. 444, 65 S. E. 525.
Tex. See Davis v. Conn, (Civ. App.) 161 S. W. 39 .(Not liable acts 3d. parties.) Davidson v. Lbr. Co. (Civ. App.) 143 S. W. 700 (not liable for injuries to land if uses only means covered by contract).
Vt. Cilley v. Bacon, 88 Vt. 496, 93 Atl. 261. (Cut trees for roads etc.)
Wash. Brodack v. Morsbach, 38 Wash. 72, 80 Pac. 275.
U. S. Vosburg Co. v. Watts, 221 Fed. 402. (Not to injure timber reserved—appliances.) See Creek Co. v. Coal etc. Co. 166 Fed. 62, 91 C. C. A. 648. (Does not include right to sell liquor.)
Eng. Liford's Case, 11 Coke, 46 b.
2. Ky. Louisville Turnpike Co. v. Shadburne, 1 Ky. L. Rep. 325.
Mass. Worthern v. Garno, 82 Mass. 243, 65 N. E. 67; White v. Foster, 102 Mass. 375.
Mich. Wait v. Baldwin, 60 Mich. 622.
Minn. Pine Tree Lbr. Co. v. McKinley, 83 Minn. 419, 86 N. W. 414.
Tenn. Galloway-Pearse Co. v. Sabin, 130 Tenn. 575, 72 S. W. 292.
3. Armstrong v. Lawson, 73 Ind. 498.
4. Waters v. Greenleaf-Johnson Lumber Co., 115 N. C. 648, 20 S. E. 718.
5. Stephens v. Gordon, 19 Ont. App. 176.
If trees excepted under lease, landlord may enter to take; Brooks v. Rogers, 101 Ala. 111; Pomfret v. Ricroft, 1 Saund. 322b; But not if only underwood excepted, Leigh v. Heald, 1 B & Ad. 622.
6. Ill. Faith v. Yocum, 51 Ill. App. 620.
Ind. Spacy v. Evans, 152 Ind. 431, 52 N. E. 605; Watson v. Adams, 32 Ind. App. 281, 69 N. E. 696.
Iowa Garner v. Mahoney, 115 Iowa 356, 88 N. W. 828.
Me. Pierce v. Ganton, 98 Me. 553, 57 Atl. 889; Folsom v. Moore, 19 Me. 252.

(Footnote 6 continued on next page)

a defense against suit for trespass or conversion,[1] and in some states the revocation is actionable if done in violation of an agreement.[2]

§108. The Application of the Statute of Frauds to Timber Sales. One of the provisions of the fourth section of the Statute of Frauds[3] enacted in England in 1676, was to the effect that no action should be brought upon any contract or sale of an interest in land unless the agreement upon which the action was brought, or some note or memorandum thereof, was in writing and signed by the party to be charged. This statute or similar local statutes apply to such contracts and sales in every one of the United States. Since growing trees are considered a part of the land on which they stand we should expect all American courts to take the position that no agreement for the sale of standing trees would be enforceable unless it were evidenced by writing and duly signed by the party to be charged. As a matter of fact, this is the general rule in the United States:[4] and in those states

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(Footnote 6 concluded from preceding page)

Mass. Driscoll v. Marshall, 15 Gray 62; Whitmarsh v. Walker, 1 Metc. 313.

Mich. Spalding v. Archibald, 52 Mich. 365, 17 N. W. 940, 50 Am. Rep. 253; Williams v. Flood, 63 Mich. 487, 30 N. W. 93; Greeley v. Stilson, 27 Mich. 153.

Miss. Walton v. Lowrey, 74 Miss. 484, 21 So. 243.

N. H. Hodsdon v. Kennett, 73 N. H. 225, 60 Atl. 686; Houston v. Laffee, 46 N. H. 505; Woodbury v. Parshley, 7 N. H. 237, 26 Am. Dec. 739.

N. Y. Bennett v. Scutt, 18 Barb. 347.

Pa. Callen v. Hilty, 14 Pa. St. 286.

S.Dak. Polk v. Carney, 17 S. D. 436, 97 N. W. 360.

Wash Weldver v. Advance Shingle Co., 34 Wash. 331, 75 Pac. 863; Kleeb v. Bard, 7 Wash. 41, 34 Pac. 138.

Wis. Bruley v. Garvin, 105 Wis. 6. 5, 81 N. W. 1038, 48 L. R. A. 839; Keystone Lumber Co. v. Kolman, 94 Wis. 465, 69 N. W. 165, 59 Am. St. Rep. 905, 34 L. R. A. 821.

Eng. Hewitt v. Isham, 7 Exch. 77, 21, L. J. Exch. 35.

Can. Breckenridge v. Woolner, 8 N. Brunsw. 303; New Brunswick, etc. Land. Co. v. Kirk, 6 N. Brunsw. 443; Kerr v. Connell, 2 N. Brunsw. 133.

1. Whitmarsh v. Walker, 1 Metc. (Mass.) 313; Spalding v. Archibald, 52 Mich. 365; Woodbury v. Parshley, 7 N. H. 237.

2. Johnson v. Wilkinson, 139 Mass. 3, 29 N. E. 62, 52 Am. Rep. 698; Whitmarsh v. Walker, 1 Metc. (Mass.) 313. Cf. Davis v. Lbr. Co., 151 Ala. 580, 44 So. 629 (written license to cut not revocable.); Martin v. Johnson, 105 Me. 156, 73 Atl. 963 (Permittee not entitled to timber cut by trespasser.); Sinnot v. Scoble, 11 Can. S. Ct. 571. (Permit to cut on crown lands not an exclusive grant which would support action against a later permittee.)

3. 29 Car. II, Ch. 3, Sec. 4.

4. Ala. Gibbs v. Wright, (Ala. App.) 57 So. 258; Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776; Magnetic Ore Co. v. Marbury Lbr. Co., 104 Ala. 465, 53 Am. St. Rep. 73.

Ark. McLeod v. Dial, 63 Ark. 10; Cf. Crane v. Patton, 57 Ark. 340. Cf. Davis v. Spann, 92 Ark. 213, 122 S. W. 495.

Fla. Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19.

(Footnote 4 continued on next page)

which require that all conveyances of realty shall be under seal, it is necessary that a transfer of property in standing timber be effected by a sealed instrument.[1] It is also the

(Footnote 4 concluded from preceding page)

Ga. Coody v. Gress Lbr. Co., 82 Ga. 793.

Ind. Spacy v. Evans, 152 Ind. 431; Hostetter v. Auman, 119 Ind. 7; Cool v. Peters Box etc. Co., 87 Ind. 531; Armstrong v. Lawson, 73 Ind. 498; Owens v. Lewis, 46 Ind. 488, 15 Am. Rep. 295.

Iowa Garner v. Mahoney, 115 Iowa 356, 88 N. W. 828; Sanders v. Clark, 22 Iowa 275.

Kan. Powers v. Clarkson, 17 Kan. 218.

La. Kemper v. Lumber Co., 134 La. 816, 64 So. 760.

Mich. Williams v. Hyde, 98 Mich. 152; White v. King, 87 Mich. 107; 49 N. W. 518; See Clifton v. Jackson Iron Co., 74 Mich 183; Spalding v. Archibald, 52 Mich. 365, 50 Am. Rep. 253; Wetmore v. Neuberger, 44 Mich. 362; Johnson v. Moore, 28 Mich. 3; Greeley v. Stilson, 27 Mich. 153.

Minn. Kileen v. Kennedy, 90 Minn. 414, 97 N. W. 126; Kirkeby v. Erickson, 90 Minn. 299, 96 N. W. 705, 101 Am. St. Rep. 411; Herrick v. Newell, 49 Minn. 198.

Miss. Walton v. Lowrey, 74 Miss. 484, 21 So. 243; Harrell v. Miller, 35 Miss. 700, 72 Am. Dec. 154; But see, Lee v. Hawks, 68 Miss. 669, 9 So. 828, 13 L. R. A. 633.

Mo. Alt v. Grosclose, 61 Mo. App. 409; Cooley v. Kansas City etc. R. Co., 149 Mo. 487.

N. H. Reid v. McQuesten, 61 N. H. 421; Howe v. Batchelder, 49 N. H. 204; Kingsley v. Holbrook, 45 N. H. 313, 86 Am. Dec. 173; Ockington v. Richey, 41 N. H. 275; Olmstead v. Niles, 7 N. H. 522; Putney v. Day, 6 N. H. 430, 25 Am. Dec. 470.

N. J. Slocum v. Seymour, 36 N. J. Law 138, 13 Am. Rep. 432; See Hendrickson v. Ivins, Saxton 562.

N. Y. Thompson v. Poor, 57 Hun. 285; Boyce v. Washburn, 4 Hun. 792; Wood v. Shults, 4 Hun. 309, 6 Thomps. & C. 557; Goodyear v. Vosburgh, 57 Barb. 243; Vorebeck v. Roe, 50 Barb. 302; Bennett v. Scutt, 18 Barb. 347; Warren v. Leland, 2 Barb. 613; McGregor v. Brown, 6 Seld. (10 N. Y.) 114; Green v. Armstrong, 1 Denio 550; Mumford v. Whitney, 15 Wend. 380; Dubois v. Kelly, 10 Wend. 496; Pierrepont v. Barnard, 5 Wend. 364; Van Pelt v. McGraw, 4 N. Y. 110; Van Elstyne v. Wimple, 5 Cow. 162.

N. C. Drake v. Howell, 133 N. C. 162, 45 S. E. 539; Green v. North Carolina R. Co., 73 N. C. 524; Cf. Moring v. Ward, 5 Jones L. (50 N. C.) 252.

Ohio Hirth v. Graham, 50 Ohio St. 57, 33 N. E. 90, 40 Am. St. Rep. 641, 19 L. R. A. 721.

Tenn. Galloway & Pearse Co. v. Sabin, 130 Tenn. 575, 172 S. W. 292; Knox v. Haralson, 2 Tenn. Ch. 232.

Tex. Gulf etc. R. Co. v. Foster (Tex. Civ. App. 1898), 44 S. W. 198.

Vt. Buck v. Pickwell, 27 Vt. 158; But see, Sterling v. Baldwin, 42 Vt. 306; Yale v. Seely, 15 Vt. 221; Ellison v. Brigham, 38 Vt. 64.

Va. Smith v. Ramsey, 116 Va. 530, 82 S. E. 189; Stuart v. Pennis, 91 Va. 688.

Wis. Bruley v. Garvin, 105 Wis. 625; Lillie v. Dunbar, 62 Wis. 198; Daniels v. Bailey, 43 Wis. 566; Strasson v. Montgomery, 32 Wis. 52.

Can. Summers v. Cook, 28 Grant (Ont.) 179; MacDonnell v. McKay, 15 Grant (Ont.) 391; Kerr v. Connell, Berton, (N.Brunsw.) 151; Murray v. Gilbert, 1 Hannay (N. Brunsw.) 548; New Brunswick Land Co. v. Kirk, 1 Allen (N. Brunsw.) 443; Seegee v. Perley, 1 Kerr (N. Brunsw.)439; McCarty v. Oliver, 14 U. C. C. P. 290; But see, McIntosh v. McLeod, 18 Nova Scotia 128, 6 Can. L. T. 449.

Eng. Scorell v. Boxwell, 1 Y. & Jerv. 396; Teal v. Auty, 2 B. & B. 101; Hewitt v. Isham, 7 Exch. 77.

1. Turpentine Co. v. Armstrong, 10 Ga. App. 339, 73 G. E. 610; Emerson v. Shores, 95 Me. 237, 49 Atl. 1051, 85 Am. St. Rep. 404; White v. King, 87 Mich. 107, 49 N. W. 518; Potter v. Everett, 40 Mo. App. 152; Andrews v. Costican, 30 Mo. App. 29; Goodyear v. Vosburgh, 57 Barb. (N. Y.) 243; Vorebeck v. Roe, 50 Barb. (N. Y.) 302; McIntyre v. Barnard, 1 Sandf. Ch. (N. Y.) 52; See also, Fish v. Capwell (R. I.), 29 Atl. 840, 25 L. R. A. 159 Inst. not ack. or recorded; *Contra*, Warren v. Leland, 2 Barb. (N. Y.) 613.

general rule that a reservation of standing trees when the title to the land is transferred to another will be given legal effect in the courts only on condition that such reservation is in writing.[1] Some courts have given effect to a parol reservation of standing trees.[2]

§109 The English Doctrine as to the Statute of Frauds. In one of the leading English cases[3] there was a parol agreement for the sale of trees then standing, but the trees, which were sold at a certain rate per foot, were to be cut down by the vendor and two of the trees had already been severed at the time of the sale. This was held to be a sale of goods and chattels within the seventeenth section of the Statute of Frauds and not a sale of an interest in land under the fourth section of the statute. Some later cases in discussing this leading case laid great stress upon the fact that the severance there was to be made by the seller,[4] but it is now fairly well settled that the question as to whether or not a contract was intended to pass, or actually did pass, title will be determined upon other grounds and that the title may pass even though severance is to be made by the vendee.[5]

Although widely variant opinions have been expressed in different American jurisdictions as to the ground upon

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1. Ala. Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776.
   Kan. Cockrill v. Downey, 4 Kan. 426 (1868).
   Me. Howard v. Lincoln, 13 Me. 122.
   Mass. Clap v. Draper, 4 Mass. 266; White v. Foster, 102 Mass. 375; Spurr v. Andrew, 6 Allen, 420.
   Mich. Dodder v. Snyder, 110 Mich. 69, 67 N. W. 1101; Wait v. Baldwin, 60 Mich. 622.
   Mo. McIlvaine v. Harris, 20 Mo. 457, 64 Am. Dec. 196.
   N. H. Alcutt v. Lakin, 33 N. H. 507, 66 Am. Dec. 739.
   N. Y. Wintermute v. Light, 46 Barb. 278.
   N. C. Flynt v. Conrad, 61 N. C. 190, 93 Am. Dec. 588.
   Pa. McClintock's Appeal, 71 Pa. St. 365.
   Vt. Sterling v. Baldwin, 42 Vt. 306.
   Eng. Stanley v. White, 14 East. 338; Barrington's Case, 8 Coke 136b.
2. Helfreck Lumber etc. Co. v. Honaker, 76 S. W. 342, 25 Ky. L. Rep. 717; Kluse v. Sparks, 10 Ind. App. 444; Heavilon v. Heavilon, 29 Ind. 509; Baker v. Jordan, 3 Ohio St. 438; Backenstoss v. Stahler's Adm'rs, 33 Pa. St. 251, 75 Am. Dec. 592; See Sherman v. Willett, 42 N. Y. 146.
   But see Kimbrel v. Thomas, 139 Ga. 146, 76 S. E. 1024; Cullen v. Armstrong, 209 Fed. 704 (Transfer of right to cut timber.)
3. Smith v. Surman, 9 Barn. & C. 561, 7 L. J. K. B. O. S. 296, 4 M. & R. 455, 17 E. C. L. 253.
4. Earl of Falmouth v. Thomas, 1 C. & M. 105.
5. Marshall v. Green, 1 C. P. Div. 40, 45 L. J. C. P. 153, 33 L.T. Rep. N. S. 404, 24 Wkly. Rep. 175, 1 Wm. Saund. 395; Scovell v. Boxall, 1 Y. & Jerv. 396; Teal v. Auty, 2 B. & B. 101; See Ellis v. Grubb, 3 U. C. Q. B. (O. S.) 611.

which sales of standing timber should be considered either as sales of interests in land or of goods and chattels, this confusion appears to have resulted not from different theories as to the character of the property but from divergent views as to the interpretation to be placed upon the words and conduct of the parties as indicating their intention.

§110. The Rule in Massachusetts, Maine and Connecticut. Thus Massachusetts courts hold that if the intention of the parties was to transfer an immediate title to growing timber with the understanding that the trees are to remain on the land and derive nourishment therefrom, the contract is one for the sale of an interest in land and thus within the fourth section of the statute of frauds;[1] but unless a contrary intention clearly appears, the courts of that jurisdiction will construe a parol sale of standing timber as one which contemplates a transfer of the title after the trees have been severed. The rule of law in Massachusetts is that if the contract is not in proper form to convey an interest in land, it must be held to be a mere executory agreement for the sale of future goods, the title to which will pass only upon the severance of the trees from the soil.[2] The license which the purchaser has to take the trees may be revoked at any time,[3] but the title to all trees actually cut down before the revocation of the license will be vested in the vendee[4] and the revocation will constitute a breach of contract as to trees not yet severed for which the vendor must respond in an action for damages brought by the vendee.[5]

The Maine rule[6] is substantially the same as that of Massachusetts, and the Connecticut[7] courts seem to have adopted the same principles.

1. White v. Foster, 102 Mass. 375.
2. Drake v. Wells, 11 Allen (Mass.) 141 (1865); Douglas v. Shumway, 13 Gray (Mass.) 498; Claflin v. Carpenter, 4 Metc. (Mass.) 580, 88 Am. Dec. 381; Nettleton v. Sikes, 8 Metc. (Mass.) 34; Shakers United Society v. Brooks, 145 Mass. 410; Hill v. Hill, 113 Mass. 103, 105.
3. Giles v. Simonds, 15 Gray (Mass.) 441; Drake v. Wells, 11 Allen (Mass.) 141; Whitmarsh v. Walker, 1 Metc. 316.
4. Hill v. Cutting, 107 Mass. 596; Driscoll v. Marshall, 15 Gray 62; Douglas v. Shumway, 13 Gray (Mass.) 498.
5. Fletcher v. Livingston, 153 Mass. 388.
6. Brown v. Bishop 105 Me. 272, 74 Atl. 724; Emerson v. Shores, 95 Me. 237, 49 Atl. 1051, 85 Am. St. Rep. 404; Banton v. Shorey, 77 Me. 48; Erskine v. Plummer, 7 Me. 477, 22 Am. Dec. 216; Cutler v. Pope, 13 Me. 377.
7. Upson v. Holmes, 51 Conn. 500; Bostwick v. Leach, 3 Day (Conn.) 484.

§111. The Maryland Rule. The Maryland courts have taken the ground that where standing timber is specifically sold, whether it is to be severed by the vendor or the vendee, under a license to enter for that purpose, the intention of the parties will be construed to be that of a sale of goods and not of an interest in land. [1]

The theory adopted in Massachusetts, Maine, Connecticut and Maryland as to the interpretation to be placed upon parol contracts for the sale of growing timber substantially effects an evasion of the prohibition of the statute of frauds against the sale of an interest in land by parol.

§112. The Pennsylvania Rule. In Pennsylvania, if it is the intention of the parties that the timber is to remain upon the land for some time, drawing sustenance therefrom, and be taken at the pleasure of the vendee, the sale is held to be one of an interest in land [2] while if the intention is that it shall be removed at once and the trees are selected, marked or clearly designated, the sale effects a constructive severence and is one of chattels. [3] This doctrine is similar to that expressed in the English case of Marshall v. Green[4] and has been approved in other states. [5]

§113. The Kentucky Rule. In Kentucky, if a contrary intention does not appear, the courts will construe a parol contract as indicating an intention that the standing trees shall become personalty at the instant the sale is effected, and therefore not within the fourth section of the statute and will give legal effect to that intention. The Kentucky courts follow closely the English doctrine that as soon as the trees are identified either by actual marking or by such definite description as to afford certainty as to the trees to be taken under the contract, the contract is com-

1. Leonard v. Medford, 85 Md. 666, 37 Atl. 365, 37 L. R. A. 449; Purner v. Piercy, 40 Md. 212; Smith v. Bryan, 5 Md. 141, 59 Am. Dec. 104.
2. Pattison's Appeal, 61 Pa. St. 294, 100 Am. Dec. 637; Bowers v. Bowers, 95 Pa. St. 477; Yeakle v. Jacob, 33 Pa. St. 376; Miller v. Zufall, 113 Pa. St. 317, 6 Atl. 350.
3. McClintock's Appeal, 71 Pa. St. 365; Huff v. McCauley, 53 Pa. St. 206, 91 Am. Dec. 203; Robbins v. Farwell, 193 Pa. St. 37, 44 Atl. 260; Strause v. Berger, 220 Pa. St. 369, 69 Atl. 818.
4. 1 C. P. Div. 35, supra.
5. Wright v. Schneider, 14 Ind. 527; Leonard v. Medford, 85 Md. 666; Yale v. Seely, 15 Vt. 221; Ellison v. Brigham, 38 Vt. 64; Sterling v. Baldwin, 42 Vt. 306; Upson v. Holmes, 51 Conn. 500.

plete and must be enforced; but instead of enforcing such contracts as agreements for the sale of future goods, as is done in Massachusetts, Maine and Maryland, they give the purchaser relief upon the ground that in sales of timber in which a prompt separation of the trees from the soil is contemplated the constructive severance of the trees at the time of the sale vests the title to them in the vendee and the vendor is required to respond in damages for any action on his part, after the sale but before severance, which deprives the vendee of his property interests in the trees.[1] In Massachusetts the intention of the parties to a parol contract for the sale of standing trees that title shall pass at once is not given legal effect until the trees are severed, while in Kentucky the intention takes effect immediately and the trees sold become chattels while still standing. In Kentucky, if no definite time for removal is fixed in the agreement, there is a presumption of law that the trees are to be at once removed; but, if from all the circumstances connected with the sale it is clear that the parties intended that the trees should stand for a time upon the land and draw nourishment from the soil then a parol contract will not operate to transfer the title to the growing trees.[2] However, it should be noted that although in the leading Kentucky case[3] the trees sold by parol had actually been selected and marked by the vendee with the vendor's consent, yet the court held that if subsequent to that time the title to the land were acquired for a valuable consideration by an innocent purchaser without notice of the previous parol sale, such purchaser could hold the trees and the vendee of the trees must look to his vendor for damages for breach of contract. In Tennessee, as well as in Kentucky, a parol sale of standing timber will be enforced against a subsequent

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1. Campbell v. Phillips, 30 Ky. L. Rep. 567, 99 S. W. 277; Tilford v. Dotson, 106 Ky. 755, 21 Ky. L. Rep. 333, 51 S. W. 583; Byasse v. Reese, 4 Metc. (Ky.) 372, 83 Am. Dec. 481 (1863); Cain v. McGuire, 13 B. Mon. (Ky.) 340; Wiggins v. Jackson, 73 S. W. 779, 24 Ky. L. Rep. 2189; Cardwell v. Atwater, 15 Ky. L. Rep. 541, 570; Hunter v. Burchett, 5 Ky. L. Rep. 770; Sproule v. Hopkins, 4 Ky. L. Rep. 533; Lockeshan v. Miller, 16 Ky. L. Rep. 55; But See, Ayer & Lord Tie Co. etc. v. Davenport, 26 Ky. L. Rep. 115, 82 S. W. 177.
2. Bowerman v. Taylor, 127 Ky. 812, 106 S. W. 846, 32 Ky. L. Rep. 671; Bell County Land etc. Co. v. Moss, 17 S. W. 354, 30 Ky. L. Rep. 6; Asher Lumber Co. v Cornett, 63 S. W. 974, 23 Ky. L. Rep. 602, 56 L. R. A. 672.
3. Byasse v. Reese, 4 Metc. (Ky.) 372.

purchaser of the land with notice of the parol sale of the timber. [1]

§114. The Rule in the Majority of the States. In New Hampshire, New York, New Jersey, Indiana and the other states which hold that all enforceable sales of growing trees must be in writing, a parol sale of standing timber is construed as a mere license to enter and cut timber which may be revoked at any time before cutting; [2] but such trees as are cut down before the revocation of the license become personalty, belong to the licensee and may be carried away by him. [3] In such states the revocation of the license to cut does not give the licensee a right of action for breach of contract. In other words a parol contract which by the words used purports to convey title to the timber will be given the same legal effect as if it were a simple oral agreement on the part of the land owner to permit the other party to cut timber and pay its market value. The death of the owner of the land, or his conveyance of the land without a reservation of the growing trees acts as a revocation of the license to the same extent as an express revocation on his part. [4]

§115. The Sale of Severed Products. From the cases in which there is a conflict of opinion as to whether the sale is one of growing trees as realty or as constructively severed personalty should be carefully distinguished those cases in which the contract clearly contemplates the sale of severed trees, logs, ties or lumber; and it should be noted

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1. New York etc. Iron Co. v. Green County Iron Co., 11 Heisk. (Tenn.) 434.
2. Armstrong v. Lawson, 73 Ind. 498.
3. Fla. Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19.
   Me. Cf. Erskine v. Plummer, 7 Me. 447, 22 Am. Dec. 216.
   Mass. Cf. Drake v. Wells, 11 Allen 141; Giles v. Simonds, 15 Gray 441, 77 Am. Dec. 373; Nettleton v. Sikes, 8 Metc. 34.
   Mich. White v. King, 87 Mich. 107, 49 N. W. 518; Spalding v. Archibald, 52 Mich. 365, 17 N. W. 940, 50 Am. Rep. 253; Haskell v. Ayres, 35 Mich. 89.
   Minn. Wilson v. Fuller, 58 Minn. 149.
   Mo. McAllister v. Walker, 69 Mo. App. 496 (Dec. 1897).
   N. Y. Pierrepont v. Barnard, 6 N. Y. 279 (Reversing 5 Barb. 364); Bennett v. Scutt, 18 Barb. 347.
   S.Dak. Price etc. Co. v. Madison, 17 S. D. 247, 95 N. W. 933.
   Vt. Yale v. Seeley, 15 Vt. 221.
   W.Va. Fluharty v. Mills, 49 W. Va. 446, 38 S. E. 521.
4. Emerson v. Shores, 95 Me. 237, 49 Atl. 1051, 85 Am. St. Rep. 404; Bruley v. Garvin, 105 Wis. 625, 81 N. W. 1038.
   See Tremaine v. Williams, 144 N. C. 114, 56 S. E. 694. (possession under unrecorded or invalid deed not notice to later purchaser.)

that such contracts may contemplate a severance by the vendee as well as by the vendor. The English case of Smith v. Surnam (9 Barn. & C. 561) pointed the way to this line of cases and it seems strange that so much confusion has arisen in subsequent decisions. There have been numerous decisions holding oral sales to be valid where they clearly contemplated the cutting of the trees by the vendor and the delivery of logs or other products of the trees to the vendee;[1] and in contracts which provide that the cutting be done by the vendee it may be clearly the intention of the parties that the sale is one of the severed products as chattels. [2]

§116. The Period Allowed for Removal. Most contracts which contemplate a sale of trees separate from the land upon which they stand stipulate a period of time within which the vendee may enter and remove the trees. The limited time usually begins to run from the day the conveyance is made but the contract may provide otherwise. Thus it may be provided in the contract that the period allowed for removal shall begin to run at the time that cutting is begun, [3] but in such cases the cutting must be begun within a

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1. Mich. Yockey v. Norn, 101 Mich. 193.
   N. Y. Killmore v. Howlett, 48 N. Y. 569 (1872).
   S. C. Jones v. McMichael, 12 Rich. 176.
   Tenn. Dorris v. King et al. (Ch. App. Tenn. 1889), 54 S. W. 683.
2. Nash v. Rockford Veneer Co., 109 Mich. 269 (1896).
3. Ark. Attridge v. Smith, 105 Ark. 626, 152 S. W. 300. *See* Burbridge v. Lbr. Co. 178 S. W. 304 (Expeditiously as possible.) Newton v. Stock 173 S. W. 819 (Contract required diligence and penalty for failure in time named. *Held* continuous logging required.)
   Fla. Brown v. Beckwith, 60 Fla. 310, 53 So. 542.
   Ga. Lbr. Co. v. Harris, 8 Ga. App. 70, 68 S. E. 749 (effect of cutting by a third party.) Perkins v. Peterson, 110 Ga. 24, 35 S. E. 319; Baxter v. Mattox, 106 Ga. 344, 32 S. E. 94.
   Ky. Hounshell v. Muller, 153 Ky. 530. 155 S. W. 114 ; Begley v. Timber Co., 152 Ky. 455, 153 S. W. 734.
   La. See Yerger v. Simmons, 136 La. 280, 67 So. 3; Thompson v. Sawmill Co., 121 La. 318, 46 So. 341.
   Mo. Hanna v. Buford (Mo. App.) 177 S. W. 662
   Mont. Hollensteiner v. Lbr. Co. 37 Mont. 278, 96 Pac. 420.
   N. C. Rountree, v. Cohn-Bock Co., 158 N. C., 153, 73, S. E. 796; Powers v. Lbr. Co., 154 N. C. 405, 70 S. E. 629; See Davis v. Frazier, 150 N. C. 447, 64 S. E. 200.
   S. C. Timber Co., v. Prettyman, 97 S. C. 247, 81 S. E. 484; McClary Lbr. Corp. 90 S. C. 153; 72 S. E. 145; Lbr. Co. Litchfield 90 S. C. 363, 73 S. E. 182; Matthewson v. Lbr. Co., 95 S. E. 352, 78 S. E. 970; Flagler v. Lbr. Corp., 71 S. E. 849.
   Va. *See* Brown v. Lbr. Co. 75 S. E. 84.
   Wash. Heybrook v. Beard, 75 Wash. 646, 135 Pac. 626; Dew v. Pearson, 73 Wash. 602, 132 Pac. 412.
   U. S. Cf. U. S. v. Lbr. Co., 172 Fed. 714.

reasonable time. [1] And if the contract does not expressly indicate that there is to be no limit, [2] and yet fails to designate a limited time for removal, the courts will allow only a reasonable time for the removal. [3] The court will ordinarily leave to the jury the determination of what constitutes a

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1. Hawkins v. Goldsboro Lumber Co., 139 N. C. 160, 51 S. E. 852, 139 N. C. 167, 51 S. E. 855. Gay Mfg. Co. v. Hobbs. 128 N. C. 46, 38 S. E. 26, 83 Am. St. Rep. 661.
2. Fla. See Cawthorn v. Lbr. Co., 60 Fla. 313, 53 So. 738.
   Ga. North Ga. Co. v. Bebee, 128 Ga. 563, 57 S. E. 873; Baxter v. Mattox, 106 Ga. 344, 32 S. E. 94.
   Ky. McCoy v. Fraley, 113 S. W. 444.
   La. Lbr. Co. v. Hotard, 122 La. 850, 48 So. 286.
   Miss. Lbr. Co. v. Britton, 105 Miss. 592, 62 So. 648; Lbr. Co. v. Guy, 92 Miss. 361, 46 So. 78.
   Mont. Realty Co. v. Donlan, 149 Pac. 484.
   S. C. Orchard Co. v. Dennis, 220 Fed. 516 (unconditional conveyance, grantee has indefinite time to remove.)
   Tex. Jones v. Lbr. Co. (Civ. App.) 99 S. W. 736; Lbr. Co. v. Taylor, 100 Tex. 270, 98 S. W. 238; Lbr. Co. v. Taylor (Civ. App.) 99 S. W. 192.
   Va. Brown v. Lbr. Co. 75 S. E. 84; Young v. Mfg. Co., 110 Va. 678, 66 S. E. 843; See Carpenter v. Mfg. Co., 71 S. E. 559.
   Wash. Boom Co. v. Youmans, 116 Pac. 645.
3. Ala. Ward v. Moore, 180 Ala. 403, 61 So. 303; Goodson v. Stewart. 154 Ala. 660, 46 So. 239; Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776.
   Ark. Yelvington v. Short, 111 Ark. 253, 163 S. W. 522; Earl v. Harris, 137 S. W. 806; Fletcher v. Lyon, 93 Ark. 5, 123 S. W. 801; Liston v. Chapman Etc. Lbr. Co., (1905) 91 S. W. 27.
   Fla. Cawthorn v. Lbr. Co., 60 Fla. 313, 53 So. 738; Land Co. v. Adams, 54 Fla. 550, 45 S. E. 492.
   Ga. Howell v. Clements, 139 Ga. 441, 77 S. E. 564; Turpentine Co. v. Armstrong 10 Ga. App. 339, 73 S. E. 610; Lbr. Co. v. Gates, 70 S. E. 672; Johnson v. Truitt, 122 Ga. 327, 50 S. E. 135. See also McRae v. Stillwell, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; Goette v. Lane, 111 Ga. 400.
   See Brand v. Johnson, (Ga. App.) 71 S. E. 1123.
   Iowa Cf. Baker v. Kenney, 145 Ia. 638, 124 N. W. 901 (Perpetual right of entry.)
   Ky. Dev. Co. v. Lbr. Co., 154 Ky. 523, 157 S. W. 1109; Hicks v. Phillips, 146 Ky. 305, 142 S. W. 394; Oates v. Yeargin, 115 S. W. 794; Evans v. Dobbs, 112 S. W. 667; Timber Co v. Coal Co., 107 S. W. 733, 32 Ky. L. Rep. 1015; Bowerman v. Taylor, 127 Ky. 812, 106 S. W. 846, 32 Ky. L. Rep. 671; Cf. Siler v. Property Co., 107 S. W. 266, 32 Ky. L. Rep. 911.
   La. See Shepherd v. Lbr. Co. 121 La. 1011, 46 So. 999.
   Mich. St. James v. Erskine, 155 Mich. 606, 119 N. W. 897.
   Miss. Hall v. Eastman, 89 Miss. 588, 43 So. 2.
   N. H. Kidder v. Flanders, 73 N. H. 345, 61 Atl. 675; Hoit v. Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119.
   N. C. See Hornthal v. Howcott, 154 N. C. 228, 70 S. E. 171; Bunch v. Elizabeth City Lumber Co., 134 N. C. 116, 46 S. E. 24.
   Pa. Patterson v. Graham, 164 Pa. St. 234, 30 Atl. 247.
   S. C. Gray v. Lbr. Co., 86 S. E. 640; Minshaw v. Lbr. Corp., 98 S. C. 8, 81 S. E. 1027; Timber Co. v. Prettyman, 97 S. C. 247, 81 S. E. 484; Gresham v. Lbr. Corp., 96 S. C. 53, 79 S. E. 799.
   Tenn. Carson v. Three States Lbr. Co., 108 Tenn. 681, 69 S. W. 320, 91 S. W. 53.
   Tex. Oil Co. v. Hamilton (Civ. App.) 153 S. W. 1194; Oil Co. v. Boykin (Civ. App.) 153 S. W. 1176, Development Co. v. Lbr. Co. (Civ. App.) 139 S. W. 1015; Beauchamp v. Williams (Civ. App.) 115 S. W. 130.
   Vt. Lbr. Co. v. Lyman, 94 Atl. 837.
   Va. Carpenter v. Mfg. Co., 71 S. E. 559.
   W.Va. Metallurgical Co. v. Montgomery, 74 S. E. 994.
   Can. Dolan v. Baker, 10 Ont. L. Rep. 259.

reasonable time under the circumstances presented in each particular case, [1] and the facts as they existed at the time a deed was executed are the only ones to be considered in the determination of this question. [2] Even where the time within which removal is to be accomplished is fixed, a reasonable extension of the time for the removal will be allowed in some jurisdictions; but this extension subsequent to the expiration of the limited time, and the allowance of a reasonable time for the commencement and completion of operations, where the limited period does not begin to run until cutting commences, are likewise subject to limitations. In several cases in which contracts have provided for a certain cutting period after operations should begin, courts have held the periods claimed by the purchasers for removal to be unreasonable as a matter of law.[3] Where the time for the removal is not definitely fixed in the contract, the length of time which should be held reasonable may be affected by the conduct of the owner of the land. If the

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1. Ark. Earl v. Harris, 137 S. W. 806; Fletcher v. Lyon, 93 Ark. 5, 123 S. W. 801; Stave Co. v. Sims, 84 Ark. 603; 106 S. W. 959; Liston v. Lbr. Co., 91 S. W. 27.
   Fla. Land Co. v. Parker, 64 Fla. 371, 59 So. 959; Land Co. v. Adams, 54 Fla. 550, 45 So. 492.
   Ga. Branch v. Johnson, (Ga. App.) 71 S. E. 1123; Mills v. Ivey, 3 Ga. App. 557, 60 S. E. 299; Lbr. Co. v. Gates, 70 S. E. 672 (15 years not unreasonable as a matter of law); Warren v. Ash, 129 Ga. 329, 58 S. E. 558; McRae v. Stillwell, 111 Ga. 65, 36 S. E. 604.
   Ky. Evans v. Dobbs 112 S. W. 667 (hiatus in operations). *See* Mineral Etc. Co. v. Lbr. Co. 148 Ky. 82, 146 S. W. 438.
   La. Cf. Palmer v. Lbr. Co., 125 La. 31, 51 So. 58.
   Mass. Gilmore v. Wilbur, 12 Pick. (Mass.) 120; Hill v. Hill, 113 Mass. 103, 18 Am. Rep. 455.
   Mich. Oconto v. Lundquist, 119 Mich. 264; Wood v. Elliott, 51 Mich. 320.
   N. H. Hoit v. Stratton, Mills Lbr. Co., 54 N. H. 452.
   N. Y. Bennett v. Scutt, 18 Barb. (N. Y.) 347.
   N. C. Byrd v. Sexton, 161 N. C. 569, 77 S. E. 697.
   Pa. Boults v. Mitchell, 15 Pa. St. 364; Andrews v. Wade, 6 Atl. 48.
   S. C. Cf. Minshaw v. Lbr. Corp., 96 S. C. 8, 81 S. E. 1027; Lbr. Co. v. Alderman, 80 S. C. 106, 61 S. E. 217. *See also* McClary v. Lbr. Corp. 90 S. C. 153, 72 S. E. 145.
   Tenn. Carson v. Three States Lbr. Co., 108 Tenn. 681, 69 S. W. 320.
   Tex. Beauchamp v. Williams (Civ. App.) 115 S. W. 130.
   Vt. Lbr. Co. v. Lyman, 94 Atl. 837.
   Va. Young v. Mfg. Co., 110 Va. 678, 66 S. E. 843.
   U. S. Knox & Lewis v. Alwood, 228 Fed. 753 (Georgia case.)
2. Allison v. Wall, 121 Ga. 822, 49 S. E. 831.
3. Ky. Dev. Co. v. Lbr. Co., 154 Ky. 523, 157 S. W. 1109 (14 years).
   N. C. Bunch v. Lbr. Co., 134 N. C. 116, 46 S. E. 24 (13 years); Gay Mfg. Co. v. Hobbs, 128 N. C. 46, 38 S. E. 26, 83 Am. St. Rep. 661.
   Tex. Oil Co. v. Boykin (Civ. App.) 153 S. W. 1176 (11 years).
   Va. Carpenter v. Mfg. Co., 71 S. E. 559 (15 years not unreasonable).

land owner shows no intention to use the land [1] the courts will interpret the contract more liberally as to a reasonable time than they will if the leaving of the timber upon land interferes with the use of it, especially where the owner of the land gives proper notice to the purchaser of the timber that he desires an early removal. [2] In a Pennsylvania case in which the time for removal was not fixed, the purchaser entered within a reasonable time, cut all timber considered merchantable and moved away his mill; it was held that he could not enter again and cut timber eleven years subsequent to the completion of the first operation. [3] But in another case it has been held that cutting need not be continuous to comply with the terms of a contract which contained a limitation as to the number of years to be allowed for removal. [4] If no definite time for the removal of the timber is fixed in a written contract by the owner of land the covenant of title to the trees runs with the land. [5]

§117. The Effect of the Termination of the Time Limited for Removal. Many legal contests have arisen in cases where a valid contract required that all of the timber covered by the contract be removed within a given time or gave the vendee the right to enter during a specified time for the purpose of taking the timber. The general rule is that such a contract must be construed as one which contemplates the sale of only such timber as is actually cut and removed within the time limited. [6] Such a contract is

1. Haskell v. Ayres, 35 Mich. 89, (parol extension); Grange v. Palmer, 56 Hun (N. Y.) 481; Cf. Williams v. Flood, 63 Mich. 487; Ferguson v. Arthur (Mich.) 87 N. W. 259. But *see* Lbr. Co. v. Roots, 49 Ore. 569, 90 Pac. 487 (conditional extension; buyer must show compliance with condition. Purchaser may insist on contract right to use roads.)
2. Short v. Messenger 126 Pa. 637, 17 Atl. 881, 24 W. N. C. 244; Boults v. Mitchell, 15 Pa. St. 371; Minshaw v. Lbr. Corp. 98 S. C. 8, 81 S. E. 1027. See Davidson v. Moore, 37 S. W. 260, 18 Ky. L. Rep. 563; Brown v. Lbr. Co. (Va.) 75 S. E. 84.
3. Patterson v. Graham, 164 Pa. St. 234, 30 Atl. 247. See also, Moore v. Young, 162 Mich. 237, 127 N. W. 339; Turner v. Bissell, et al, 69 N. Y. Misc. 167, 126 N. Y. Suppl. 234; Davis v. Frazier, 150 N. C. 447, 64 S. E. 200.
4. Hardison v. Dennis Simmons Lumber Co., 136 N. C. 173, 48 S. E. 588.
5. Hogg v. Frazier, 70 S. W. 291, 24 Ky. L. Rep. 930. But *see* Emerson v. Shores 95 Me. 237, 49 Atl 1051, 85 Am. St. Rep. 404.
6. Ga. *See* Lbr. Co. v. Harris, 8 Ga. App. 70, 68 S. E. 749 (oral waiver effective.)
   Ind. *See* Veneer Etc. Co. v. Homaday (Ind. App.) 96 N. E. 784.
   Iowa. *See* Baker v. Kenney, 145 Ia. 638, 124 N. W. 901.
   Ky. Murray v. Boyd, 165 Ky. 625, 177 S. W. 468; Vincent v. Haycroft, 158 Ky. 845, 166 S. W. 613; Harrell v. Danks, 151 Ky. 71, 151 S. W. 13; Bach v. Little, 140 Ky. 396, 131 S. W. 172; Lbr. Etc. Co. v. Cress, 132 Ky. 317

(Footnote 6 continued on next page)

ordinarily held to give the vendee no right and afford him no protection in a removal subsequent to the expiration of the time named. [1] In many states it is held that the title to the timber not removed during the time specified or contemplated by the parties reverts to the owner of the land even though the reversion is not expressly stated in the con-

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(Footnote 6 concluded from preceding page)
116 S. W. 710; Jackson v. Hardin, 87 S. W. 1119, 27 Ky. L. Rep. 1110. *Cf.* Lbr. Co. v. Cornett, 146 Ky. 457, 142 S. W. 718; Hampton v. Cope 144 Ky. 720, 139 S. W. 937; McCoy v. Fraley, 113 S. W. 444. (Equitable interest of purchaser in timber where no time limit is stated.)

La. Cypress Co. v. Thibodaux, 120 La. 834, 45 So. 742.

Me. Webber v. Proctor, 89 Me. 404, 36 Atl. 631; Howard v. Lincoln, 13 Me. 122; Pease v. Gibson, 6 Me. 81.

Mich. Iron Etc. Co. v. Nester, 147 Mich. 599, 111 N. W. 177. *See* Scott v. Sullivan, 159 Mich. 297, 124 N. W. 29.

Minn. King v. Merriman, 38 Minn. 47, 35 N. W. 570.

Mont. Hollensteiner v. Lbr. Co., 37 Mont. 278, 96 Pac. 420.

N. H. *See* Nutting v. Stratton, 77 N. H. 79, 87 Atl. 251.

N. Y. Boisaubin v. Reed, 1 Abb. Dec. 161 (N. Y.), 2 Keyes 323; Kellam v. McKenstry, 6 Hun. (N. Y.) 381, Aff. in 69 N. Y. 264.

N. C. Fowle v. McLean, 168 N. C. 537, 84 S. E. 852; Williams v. Parsons, 167 N. C. 529, 83 S. E. 914; Lbr. Co. v. Whitley, 163 N. C. 47, 79 S. E. 268; Midyette v. Grubbs, 145 N. C. 85, 58 S. E. 795, 13 L. R. A. N. S. 278. Cf. Bateman v. Lbr. Co., 154 N. C. 248, 70 S. E. 474.

S. C. Hill v. Lbr. Co. 90 S. C. 176, 72 S. E. 1085.

Tenn. Bond v. Ungerecht, 129 Tenn. 631, 167 S. W. 1116.

Tex. Davis v. Conn. (Civ. App.) 161 S. W. 39; Lbr. Co. v. McWhorter, (Civ. App.) 156 S. W. 1152; Carter v. Lbr. Co. (Civ. App.) 149 S. W. 278.

Vt. Stevens v. Sayers, 82 Vt. 324, 73 Atl. 817; Strong v. Eddy, 40 Vt. 547.

Va. Hartley v. Neaves, 84 S. E. 97; Mfg. Co. v. Allen, 85 S. E. 568; Young v. Mfg. Co., 110 Va. 678, 683, 66 S. E. 843.

Wash. Mill Co. v. Vaughn, 57 Wash. 163, 106 Pac. 622.

W.Va. Kunst v. Mabie, 72 W. Va. 202, 77 S. E. 987; Brown v. Gray, 68 W. Va. 555, 70 S. E. 276.

Wis. Bretz v. Connor Co., 140 Wis. 269, 122 N. W. 717; Hicks v. Smith, 77 Wis. 146; 46 N. W. 133; Golden v. Glock, 57 Wis. 118, 15 N. W. 12, 46 Am. Rep. 32.

1. Ala. Lbr. Co. v. Shepard, 180 Ala. 148, 60 So. 825; Gibbs v. Wright (Ala. App.) 57 So. 258.

Ark. Cf. Mayes v. Watkins, 165 S. W. 633.

Ga. Dickey v. Lbr. Co., 127 Ga. 460, 56 S. E. 481; Allison v. Wall, 121 Ga. 822, 49 S. E. 831.

Ky. *See* Lbr. Co. v. Asher, 131 Ky. 796, 115 S. W. 790; Chestnut v. Green, 86 S. W. 1122, 27 Ky. L. Rep. 838.

Me. Noyes v. Goding, 104 Me. 453, 72 Atl. 181 (timber reserved in land sale.)

Mich. Haskell v. Ayers, 32 Mich. 93.

N. Y. McIntyre v. Barnard, 1 Sandf. ch. 52.

N. C. Davis v. Frazier, 150 N. C. 447, 64 S. E. 200; Powers v. Lbr. Co., 154 N. C. 405, 70 S. E. 629.

Ore. Anderson v. Lbr. Co., 116 Pac. 1056.

Tenn. Mengal Box Co. v. Moore, 114 Tenn., 596, 87 S. W. 415.

Tex. Brooks v. Moss (Civ. App.) 175 S. W. 791; Chavers v. Henderson (Civ. App.) 171 S. W. 798; Lancaster v. Roth (Civ. App.) 155 S. W. 597; Beauchamp v. Williams (Civ. App.) 115 S. W. 130.

Va. Smith v. Ramsay, 116 Va. 530, 82 S. E. 189.

Wash. Belcher v. Kleeb, 59 Wash. 166, 109 Pac. 798. *See* Lehtonen v. Power Co., 58 Wash. 86, 107 Pac. 878 (deed reserving right to remove.)

W.Va. Null v. Elliott, 52 W. Va. 229, 43 S. E. 173.

tract,[1] but other states hold that the title remains in the vendee of the timber, or his assignee, and that all that is lost by the expiration of the time is the right to enter and remove timber not yet taken. [2] If the contract is so worded in a particular case as to make the agreement to remove within a certain time a mere covenant, as a matter of law, the title to the timber will remain in the purchaser even after the ex-

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1. Ala. *Contra* West v. Maddox (Ala.) 69 So. 101.
   Ga. Branch v. Johnson (Ga. App.) 71 S. E. 1123; Lbr. Co. v. Gates, 70 S. E. 672; McRae v. Stillwell, 111 Ga. 65; Baxter v. Mattox, 106 Ga. 344.
   Ky. Bach v. Little, 140 Ky. 396, 131 S. W. 172; Bell County Land Co. v. Moss, 97 S. W. 354, 30 Ky. L. Rep. 6.
   Me. Cf. Brown v. Bishop, 105 Me. 272, 74 Atl. 724.
   Mass. Reed v. Merrifield, 10 Metc. 155; Kemble v. Dresser, 1 Metc. 271, 35 Am. Dec. 364.
   Mich. Iron Co. v. Nester, 147 Mich. 599, 111 N. W. 177; Macomber v. Detroit Etc. R. Co., 108 Mich. 491, 66 N. W. 376; 62 Am. St. Rep. 713, 32 L. R. A. 102; Gamble v. Gates, 97 Mich. 465, 56 N. W. 855; Green v. Bennett, 23 Mich. 464; Haskell v. Ayres, 32 Mich. 93, 35 Mich. 89; Utley v. Wilcox Lbr. Co., 59 Mich. 263; Kennedy v. Dawson, 96 Mich. 83.
   Mo. Hanna v. Buford (App.) 177 S. W. 662.
   N. Y. *See* Fox v. Fitzpatrick, 190 N. Y. 259; 82 N. E. 1103.
   N. C. Wiley v. Lbr. Co. 156 N. C. 210, 72. S. E. 305; Williams v. Lbr. Co., 154 N. C. 306, 70 S. E. 631, Hornthal v. Hawcott, 154 N. C. 228, 70 S. E. 171; Davis v. Frazier, 150 N. C. 447, 64 S. E. 200; Mining Co. v. Cotton Mills, 143 N. C. 307, 55 S. E. 700; Lumber Co. v. Corey, 140 N. C. 462, 53 S. E. 300; Hawkins v. Goldsboro Lbr. Co., 139 N. C. 160, 51 S. E. 852, 139 N. C. 167, 51 S. E. 855; Bunch Lbr. Co. v. Lumber Co., 134 N. C. 116, 46 S. E. 24.
   Pa. Bennett v. Vinton Lbr. Co., 28 Pa. Super. Ct. 495; Saltonstall v. Little, 90 Pa. St. 422.
   S. C. Minshew v. Lbr. Corp., 98 S. C. 8, 81 S. E. 1027; Hill v. Lbr. Co. 90 S. C. 176, 72 S. E. 1085.
   Va. Furniture Co. v. Rhea, 114 Va. 271, 76 S. E. 330.
   Wash. Lehtonen v. Water Etc. Co., 50 Wash. 359, 97 Pac. 292.
   W.Va. Lbr. Co. v. Sheets, 83 S. E. 81 (to grantee of owner.)
   Wis. Strasson v. Montgomery, 32 Wis. 52; Larson v. Cook, 85 Wis. 564.
   Can. Johnston v. Shortbreed, 12 Ont. 633; Steinhoff v. McRae, 13 Ont. 546.
2. Ala. Lbr. Co. v. Shepard, 67 So. 286; Wright v. Lbr. Co., 186 Ala. 251, 65 So. 353; Magnetic Ore Co. v. Marbury Lbr. Co., 104 Ala. 465, 16 So. 632, 53 Am. St. Rep. 73, 27 L. R. A. 434.
   Ark. Lbr. Co. v. Eldridge, 89 Ark. 361, 116 S. W. 1173; Lbr. Co. v. Worley (Ark.) 130 S. W. 1066.
   Ind. Halstead v. Jessup, 49 N. E. 821.
   Ky. Mineral Etc. Co. v. Lbr. Co. 148 Ky. 82, 146 S. W. 438; Timber Co. v. Coal Co., 107 S. W. 733, 32 Ky. L. Rep. 1015.
   See Lbr. Co. v. Cornett 146 Ky. 457, 142 S. W. 718; Hicks v. Phillips 146 Ky. 305, 142 S. W. 394. Both cases in which timber was reserved.
   Me. Davis v. Emery, 61 Me. 140 (apparently overruling Pease v. Gibson, 6 Me. 81).
   Mo. Land Co. v. Watson, 129 Mo. App. 554, 107 S. W. 1045.
   N. H. Pierce v. Finerty, 76 Atl. 194, 79 Atl. 23; Hoit v. Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119.
   N. J. Wyckoff v. Bodine, 47 Atl. 23; Irons v. Webb, 41 N. J. L. 203, 32 Am. Rep. 193.
   Tex. *Contra.* Oil Co. v. Hamilton (Civ. App.) 153 S. W. 1194.
   Vt. Lbr. Co. v. Lyman, 94 Atl. 837; DeGoosh v. Baldwin, 82 Atl. 182.
   Va. Cf. Young v. Young, 109 Va. 222, 63 S. E. 748.
   W. Va. Keystone Co. v. Brooks, 65 W. Va. 512, 64 S. E. 614.

piration of the time limited for removal, [1] and on the other hand if the contract specifically provides for a reversion of all timber left on the land at the tine of expiration, the forfeiture will be sustained [2] Where timber already cut reverts to the land owner the one who cut will ordinarily be unable to obtain recompense for the labor bestowed upon the timber in cutting. [3]

If the contract contains no definite limitation of time for removal, the rule of the jurisdiction as to definite limitations will be applied after the expiration of a reasonable time. [4]

It is clear that the land owner should not be permitted to take advantage of a forfeiture of the timber if the failure of the purchaser to remove the timber was due to the fault of the land owner, and this principle has been recognized in specific cases, [5] and under such circumstances the vendee will be given an additional time within which to remove the timber. [6] It was also held that a limitation of the removal to one logging season would not be given effect in a locality where logging was carried on the year around and the removal of the timber sold could not be reasonably accom-

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1. Ala. Vizard v. Robinson, 181 Ala. 349, 61 So. 959.
   Ark. See Tucker v. Lbr. Co., 129 S. W. 1085.
   Cal. Ciapusci v. Clark, 12 Cal. App. 44, 106 Pac. 436. *See* Gibbs v. Peterson, 163 Cal. 758, 127 Pac. 62; Gibbs v. Peterson, 147 Cal. 1, 81 Pac. 121, 109 Am. St. Rep. 107.
   Ill. Walker v. Johnson, 116 Ill. App. 145.
   Ky. Shepherd v. Bank, 156 Ky. 495, 161 S. W. 214; Land Etc. Co. v. Moss, 97 S. W. 354, 29 Ky. L. Rep. 6.
   N. C. *See* Lbr. Co. v. Smith, 150 N. C. 253, 63 S. E. 954.
   Tex. Davis v. Conn. (Civ. App.), 161 S. W. 39; Lbr. Co. v. Taylor, 100 Tex. 270, 98 S. W. 238.
   W. Va. Brown v. Gray, 68 W. Va. 555, 70 S. E. 276.
   U. S. Lbr. Co. v. Long, 182 Fed. 82. Cf. U. S. v. Lbr. Co., 172 Fed. 714.
   Can. McNeill v. Haines, 17 Ont. 479; McGregor v. McNeil, 32 U. C. C. P. 538.
2. Gamble v. Gates, 92 Mich. 510, 52 N. W. 941.
3. Ibid.
4. Magnetic Ore Co. v. Marbury Lbr. Co., 104 Ala. 465, 16 So. 632, 53 Am. St. Rep. 73, 27 L. R. A. 434; Hoit v. Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119.
5. Small v. Robarge, 132 Mich. 356, 93 N. W. 874.
   See Kimsey v. Posey, 148 Ky. 54, 145 S. W. 1121.
6. Ky. Jackson v. Harding, 87 S. W. 1119, 27 Ky. L. Rep. 1110; Chestnut v. Green, 86 S. W. 1122, 27 Ky. L. Rep. 838.
   Mich. Sullivan v. Godkin, 172 Mich. 257, 137 N. W. 521 (Purchaser of land from which timber was sold must prove amount of timber removed after expiration of time limit).
   N. Y. But *see* Inderlied v. Whaley, 65 Hun 407, 20 N. Y. Suppl. 183.
   N. C. U. S. v. Mason Lbr. Co., 172 Fed. 714 (Indian timber).
   Tex. Brooks v. Moss (Civ. App.) 175 S. W. 791.
   Va. Cf. Furniture Co. v. Rhea, 114 Va. 271, 76 S. E. 330.
   Wis. Cf. Gotham v. Lbr. Co., 156 Wis. 442, 146 N. W. 505

plished within the period of time known as a logging season in other localities. [1]

§118. The Title to Timber Cut but not Removed before the Expiration of the Limited Time. In most American jurisdictions timber cut down within the period allowed for removal, but not removed, will be held to be personalty belonging to the purchaser, [2] and he will be permitted to remove the same, but in some jurisdictions the land owner will be given damages for the trespass involved in the entrance of the premises to take the timber cut or for the use of the land during the time of such removal. [3] In other jurisdictions it has been held that the mere severance of the trees prior to the expiration of the time for removal will not operate to defeat the reversion to the land owner. [4]

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1. Prentiss v. Lyons, 105 La. 382, 29 So. 944; Lancaster v. Roth (Tex. Civ. App.) 155 S. W. 597 (weather conditions interfering with operation of mill no excuse.)
2. Ark. Griffin v. Anderson Tully Co., 91 Ark. 292, 121 S. W. 297; Lbr. Co. v. Eldridge, 89 Ark. 361, 116 S. W. 1173; Plummer v. Reeves, 83 Ark. 10, 102 S. W. 376.
   Fla. Sanborn v. Lbr. Co., 55 Fla. 389, 393, 46 So. 85.
   Ga. Jones v. Graham, 141 Ga. 60, 80 S. E. 7.
   Ind. *See* Hallett v. Hallett, 8 Ind. App. 305, 34 N. E. 740; Owens v. Lewis, 46 Ind. 488, 15 Am. Rep. 295.
   Me. Erskine v. Savage, 96 Me. 57, 51 Atl. 242.
   Md. Mfg. Co. v. Morris, 84 Atl. 238.
   Mass. Douglas v. Shumway, 13 Gray 498.
   Mich. Hodges v. Buell, 134 Mich. 162, 95 N. W. 1078; Macomber v. Detroit Etc. R. Co., 108 Mich. 491, 66 N. W. 376, 62 Am. St. Rep. 713, 32 L. R. A. 102.
   Minn. Alexander v. Bauer, 94 Minn. 174, 102 N. W. 387.
   Mo. *See* Watson v. Gross, 112 Mo. App. 615, 87 S. W. 104.
   N. H. Tuttle v. Pingree Co., 75 N. H. 288, 73 Atl. 407.
   N. J. Irons v. Webb, 41 N. J. L. 203, 32 Am. Rep. 193.
   N. C. Midyette v. Grubbs, 145 N. C. 85, 58 S. E. 795, 13 L. R. A. (N. S.) 278.
   Ohio Walcutt v. Treish, 82 O. St. 263, 92 N. E. 423.
   Tex. Brooks v. Moss, (Civ. App.) 175 S. W. 791; Lancaster v. Roth (Civ. App.) 155 S. W. 597.
   Vt. Yale v. Seeley, 15 Vt. 221.
   Wis. Hicks v. Smith, 77 Wis. 146, 46 N. W. 133; Golden v. Glock, 57 Wis. 118, 15 N. W. 12, 46 Am. Rep. 32.
   W. Va. Fluharty v. Mills, 49 W. Va. 446, 38 S. E. 521.
   U. S. U. S. v. Mason Lumber Co., 172 Fed. 714 (N. C. case.)
3. Alexander v. Bauer, 94 Minn. 174, 102 N. W. 387.
4. Mass. Kemble v. Dresser, 1 Metc. 271, 35 Am. Dec. 364.
   Mich. Dye v. Woodenware Co., 134 N. W. 986 (express reversion stated) *See* Gamble v. Gates, 92 Mich. 510 (express reversion).
   Miss. Rowan v. Carleton, 100 Miss. 177, 56 So. 329.
   N. Y. McNeil v. Hall, 107 N. Y. App. Div. 36, 94 N. Y. Suppl. 920; Boisaubin v. Reed, 1 Abb. Dec. 161, 2 Keyes 323; McIntyre v. Barnard, 1 Sandf. ch. 52.
   N. C. Lbr. Co. v. Brown, 160 N. C. 281, 75 S. E. 714.
   Pa. Cf. Mahan v. Clark, 219 Pa. 229, 68 Atl. 667.
   Tenn. Bond v. Ungerecht, 129 Tenn. 631, 167 S. W. 1116.
   Wash. Mill Co. v. Vaughn, 57 Wash. 163, 106 Pac. 622.

The manufacture of the severed trees into timbers, ties, lumber, or other products, prior to the expiration of the time of removal would probably be held sufficient in all jurisdictions to vest the title irrevocably in the vendee. [1] If the one who cuts trees would profit through the conversion from realty to personalty, an equity court may hold that such wrongful cutting does not change the trees to personalty in order to prevent the one cutting from deriving an advantage from his wrongful act. [2]

The rules usually applied to trees which have been cut by a purchaser within the time limited for removal in the contract is in accordance with the general principles of the law regarding severed trees. Trees that have been severed either rightfully or wrongfully will ordinarily be considered personalty and will not pass with the land upon which they lie. [3] The same is true of products manufactured from the trees such as wood, hewed timber, posts and rails, not built into a fence, [4] lumber,[5] slabs and other refuse piled for firewood. [6]

§119. The Reservation of Title until Payment is Made. When standing timber is sold the title may be reserved in the vendor until full payment is made for the timber whether the contract requires that such payment be

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1. Ga. Johnson v. Truitt, 122 Ga. 327, 50 S. E. 135.
   Miss. Butler v. McPherson, 95 Miss. 635, 49 So. 257.
   Mo. Hubbard v. Burton, 75 Mo. 65.
   S. C. Jones v. Lbr. Corp., 92 S. C. 418, 75 S. E. 698 (cutting for tram, as allowed by contract, not a commencement.)
   Wis. Golden v. Glock, 57 Wis. 118, 15 N. W. 12, 46 Am. Rep. 32.
2. Porch v. Fries, 18 N. J. Eq. 204.
3. See References Note 1, p. 22.
   Also: Brock v. Smith, 14 Ark. 431; Jenkins v. Lykes, 19 Fla. 148, 158 (1882); Fitzpatrick v. Hoffman, 104 Mich. 228, (1895); Ind. School Dist. of West Point v. Werner, 43 Iowa 643 (1876); Hickey v. Rutledge, 98 N. W. 974, (Mich. 1904).
4. Schmidt v. Vogt, 8 Ore. 344, 347 (1880); Barrett v. Cohen, 119 Ind. 56 (1888); Frank v. Magee, 50 La. Ann. 1066 (1898); Carpenter v. Lewis, 6 Ala. 682 (1844); Peck v. Brown, 5 Nev. 81 (1869); Reyman v. Mosher, 71 Ind. 596 (1880); Thweat v. Stamps, 67 Ala. 96 (1880); Crouch v. Smith, 1 Md. Ch. 401 (1849); Cook v. Whitney, 16 Ill. 480 (1855); McCarthy v. McCarthy, 20 Can. L. J. Occ. N. 211 (Co. Ct. Ont. 1900).
5. Howell v. Barnard, 32 Ill. App. 120 (1889); Hinkle v. Hinkle, 69 Ind. 134 (1879); See Banfil v. Twyman, 71 Ill. App. 253 (1896).
6. Jenkins v. McCurdy, 48 Wis. 628 (1879).

made at one time or by installments. [1] In such a contract a failure of the vendee to make payment in the manner required by the contract may result in a forfeiture of the contract, but when ground for forfeiture has arisen, the right will be waived by a subsequent acquiescence of the vendor in expenditures by the vendee in connection with the contract, [2] and this waiver may be made by parol. [3] In a case in which the contract gave the vendee the power to sell the timber a Michigan court held that title passed to the one purchasing from the vendee [4] and in the same state the execution by the vendor of a bill of sale with no security but the notes of the assignee of the original vendee was held to effect a transfer of the title irrespective of the provisions in the original executory contract and the bill of sale as to title passing only after full payment. [5] Even though a provision in a contract requiring full payment before any timber is cut is not complied with, a subsequent full performance or tender of full performance will vest the legal title to the timber in the purchaser, [6] if no forfeiture were declared previous to the performance or tender of performance. If after partial payment is made a default occurs and the vendor takes possession of timber cut and makes expenditures in delivering the same to market, he is entitled to repayment of such expenses upon a subsequent completion of the contract by the vendee. [7] Unless there is an express agreement to that effect the vendor has no lien on timber cut for the purchase price. [8] Such a lien exists where the con-

1. Lbr. Co. v. Pretorious 82 Ark. 347, 101 S. W. 733; Winders v. Kenan, 161 N. C. 628, 77 S. E. 687. McMurphy v. Garland, 47 N. H. 316; Tyler v. Strang 21 g, Barb. (N. Y.) 198; Comstock v. Smith, 23 Me. 202; Lillie v. Dunbar, 62 Wis. 198, 22 N. W. 467; See Emerson v. Fisk, 6 Me. 200, 19 Am. Dec. 206; Wilkie v. Day, 141 Mass. 68, 6 N. E. 542; Briggs Iron Co. v. Richardson, 4 Allen 371; Warren v. Leland, 2 Barb. (N. Y.) 613. In re Mfg. Co. 166 Fed. 585.
2. Buskirk v. Peck, 57 W. Va. 360, 50 S. W. 432; See Garrison v. Glass, 139 Ala. 512, 36 So. 725; Sears v. Ohler, (Ky.) 139 S. W. 759; Rowe v. Charles, (Ky.) 121 S. W. 697; Hardy v. Ward, 150 N. C. 385, 64 S. E. 171; Hill v. Lbr. Co. 90 S. C. 176, 72 S. E. 1085; Dev. Co. v. Lbr. Co. (Tex. Civ. App.) 139 S. W. 1015.
3. March v. Bellew, 45 Wis. 36.
4. Artman v. Shaw, 37 Mich. 448.
5. In re Ortman, 80 Mich. 67, 45 N. W. 63; Cf. Lillibridge v. Sartwell, 8 Pa. St. 523.
6. Haven v. Beidler Mfg. Co., 40 Mich. 286; See Burgett v. Bissell, 14 Barb. (N. Y.) 638.
7. Burgett v. Bissell, 14 Barb. (N. Y.) 638.
8. Ga. Ray v. Schmidt 7 Ga. App. 380, 66 S. E. 1035. Mass. Douglas v. Shumway, 13 Gray 498; N. C. See Shingle Mill v. Sanderson 161 N. C. 452, 77 S. E. 414 Ore. Alderson v. Lee 52 Ore. 92, 96 Pac. 234 (statute) W. Va. Justice v. Moore (W. Va.) 71 S. E. 204. Williams v. Gillespie, 30 W. Va. 586, 5. S. E. 210. Can. But See, Summers v. Cook, 28 Grant ch. (U. C.) 179.

tract provides that full payment shall be made before the logs are removed from the land, [1] or where the title to standing timber is immediately transferred at the time of sale but the contract expressly gives the vendor a lien on the trees until payment is made. [2]

§120. Description of the Timber Sold. Unless a contrary intention is directly stated or may be clearly inferred [3] from the terms of the contract, provisions as to the size [4] or suitability [5] of trees to be taken will be construed as referring to the size or suitability of the trees for the purpose at the time when the conveyance was made. Where the contract provided for no rule of measurement, and no local usage to the contrary was shown, it has been held that the diameter limit specified in the contract was to be determined by a measurement from outside to outside, bark in-

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1. N. Y. See Arnold v. Spring, 135 N. Y. Suppl. 314 (Lien for cord wood as part of purchase price). Wash. Dew v. Pearson 73 Wash. 602, 132 Pac. 412. W. Va. Bushkirk v. Peck, 57 W. Va. 360, 50 S. W. 432. Wis. See Bunn v. Valley Lumber Co., 51 Wis. 376, 8 N. W. 232.
2. Ala. Lbr. Co. v. Ozment 187 Ala. 237, 65 So. 792. Ga. See Guin v. Lbr. Co. 6 Ga. app. 484, 65 S. E. 330. Me. Bradeen v. Brooks, 22 Me. 463. N. C. Rogers v. Lbr. Co. 154 N. C. 108, 69 S. E. 788. (Lien waived for consideration) W. Va. Wiggin v. Mankin, 65 W. Va. 219, 63 S. E. 1091. U. S. Cullen v. Armstrong 209 Fed. 704. (Negotiation of a note taken for price does not terminate lien. Can. Ford v. Hodgson, 3 Ont. L. Rep. 526.
3. Hardison v. Dennis Simmons Lbr. Co., 136 N. C. 173, 48 S. E. 588. Cf. Bryant v. Bates, 39 S. W. 428, 19 Ky. L. Rep. 191; Wheeler v. Carpenter, 107 Pa. St. 271.
4. Ala. Lbr. Co v. Monk, 159 Ala. 318, 49 So. 248.
   Ark. Griffin v. Anderson, Tully Co., 91 Ark. 292, 121 S. W. 297.
   Ga. Shaw v. Fender, (Ga.) 74 S. E. 792; Lbr. Co. v. Gates, 70 S. E. 672; Roberts v.Gress, 134 Ga. 271, 67 S. E. 802.
   Ky. Cf. Leonard v. Holland, 79 S. W. 227, 25 Ky. L. Rep. 2009.
   Minn. O'Connell v. Ward, 153 N. W. 865.
   N. Y. Turner v. Bissell, 69 Misc. 167, 126 N. Y. Suppl. 234
   N. C. Williams v. Lbr. Co., 154 N. C. 306, 70 S. E. 631; Whitfield v. Lbr. Co., 152 N. C. 211, 67 S. E. 512; Isler v. Lbr. Co. 146 N. C. 556, 60 S. E. 503; Warren v. Short, 119 N. C. 39, 25 S. E. 704; Whitted v. Smith, 47 N. C. 36. Cf. Goldsboro Lbr. Co. v. Hines Lbr. Co., 126 N. C. 554, 35 S. E. 458.
   Pa. Shiffer v. Broadhead et al., 126 Pa. 260. Cf. Dexter v. Lathrop, 136 Pa. St. 565, 20 Atl. 545; Boults v. Mitchell, 15 Pa. St. 364.
   Tex. Havard v. Lbr. Co., (Tex. Civ. App.) 125 S. W. 928.
   W.Va. Darnell v. Wilmoth, 69 W. Va. 704, 72 S. E. 1023.
5. Ala. Wright v. Lbr. Co., 186 Ala. 251, 65 So. 353; Stevenson v. Davis, 163 Ala. 562, 50 So. 1023. Cf. Yarborough v. Stewart, 67 So. 989 (sale of saw timber does not include right to turpentine.)
   Ark. Davis v. Stave Co., 113 Ark. 325, 168 S. W. 553.
   Ga. Allison v. Wall, 121 Ga. 822, 49 S. E. 831.
   S. C. Timber Co. v. Pegues, 93 S. C. 82, 76 S. E. 32.
   Vt. Lbr. Co. v. Lyman, 94 Atl. 837; Fed. Lbr. Co. v. Middleby, 194 Fed. 817 114 C. C. A. 521.

cluded, [1] but a contract may provide otherwise. [2] If the contract states that the timber sold is that which is suitable for a particular purpose, trees unsuitable for that purpose will not be included, [3] and the custom of the locality may be offered in proof as to the suitability of a certain species for the general purposes named in the contract. [4] However, if certain trees are suitable for the purpose named the purchaser may cut them even though he does not intend to use them for that particular purpose. [5] When a certain amount of timber, or all the timber, or certain species, or classes of timber, upon a specified tract of land is sold, the description of the timber [6] or of the land [7] need be only

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1. Hardison v. Lbr. Co., 136 N. C. 173, 48 S. E. 588. Cf. Lbr. Co. v. Frith, (Ky.) 118 S. W. 307; Olmstead v. Niles, 7 N. H. 522. But *see* Whitfield v. Lbr. Co., 152 N. C. 211, 67 S. E. 512 (bark excluded.)
2. Ayer & Lord Tie Co. v. Davenport, 82 S. W. 177, 26 Ky. L. Rep. 115.
3. Ala. See Jacobs v. Roach, 161 Ala. 201, 49 So. 576 (Reservation includes only existing timber.)
   Ga. Mills v. Ivey, 3 Ga. App. 557, 60 S. E. 299; Dickey v. Lbr. Co., 127 Ga. 460, 56 S. E. 481; Pennington v. Avera, 124 Ga. 147, 52 S. E. 324; Martin v. Peddy, 120 Ga. 1079, 48 S. E. 420. See Shaw v. Fender, 138 Ga. 48 (No limitation in deed as to use.)
   Ky. Lbr. Co. v. Coleman, 116 S. W. 266. Evans v. Dobbs, 112 S. W. 667, 33 Ky. L. Rep. 1053. (suitable at time of making contract.)
   N. Y. Turner v. Bissell, 69 Misc. 167, 126 N. Y. Suppl. 234.
   N. C. Herring v. Hardison, 126 N. C. 75, 35 S. E. 184.
   S. C. Lbr. Co. v. Alderman, 80 S. C. 106, 61 S. E. 217.
   Tex. Kelly v. Robb, 58 Tex. 377
   U. S. Nelson v. Mfg. Co., 186 Fed. 489.
   Can. Clark v. White, 3 Can. S. Ct. 309 (Good merchantable timber does not mean first class timber.)
4. Gray Lumber Co. v. Gaskin, 122 Ga. 342, 50 S. E. 164; Whitfield v. Rowland Lbr. Co., 152 N. C. 211. See Allen v. Crank, 23 S. E. 772 (Va. 1895)
5. Gray Lbr. Co. v. Gaskin, 122 Ga. 342, 50 S. E. 164. But see Handcock v. Lbr. Co., 127 Ga. 698, 56 S. E. 1021, ("Timber suitable for saw mill purposes" covers only live timber); and Mills et. al. v. Ivey 3 Ga. App. 557 sale "for saw mill purposes" does not convey a turpentine right.
   Herring v. Hardison, 126 N. C. 75, 35 S. E. 184.
6. Ala. Kennedy Stave Co., v. Steel Co. 137 Ala. 401, 34 So. 372.
   Ga. Clark v. Stowe, 132 Ga. 621, 64 S. E. 786; Perkins v. Wilcox 132 Ga. 166, 63 S. E. 831.
   Ky. Day v. Asher, 141 Ky. 468, 132 S. W. 1035. (Description of timber controls erroneous description of land.) Bradford v. Huffman, 88 S. W. 1057, 28 Ky. L. Rep. 18, Hayes v. McLin 115, Ky. 39, 72 S. W. 339. (All merchantable.)
   La. Lbr. Co. v. Hotard, 122 La. 850, 48 So. 286.
   Mich. Haskell v. Ayers, 35 Mich. 89 (All merchantable)
   N. C. Pitts v. Curtis 152 N. C. 615, 68 S. E. 189. Cf. Medlin v. Nav. Co., 145 N. C. 218, 58 S. E. 1075.
   Tenn. Dorris v. King, (ch. App. 1899.) 54 S. W. 683. (All merchantable) N. Y. etc. Iron Co. v. Greene County Iron Co. 11 Heisk, 434.
   W.Va. Darnell v. Wilmoth (1911) 72 S. E. 1023. (Particular words in granting clause as to species will not be enlarged by subsequent general words to include other species.)
   U. S. cf. Lbr. Co. v. Hodge, 218 Fed. 778. (Estimates by arbitrators.)
7. Ga. Powell v. Lawson, 12 Ga. App. 350, 77 S. E. 183.

(Footnote 7 continued on next page)

such as to make an unmistakable identification possible, but if the language is ambiguous or uncertain the contract will not be enforced. [1] If the description of the land on which the trees stand is erroneously given the purchaser will acquire no title to timber on land which did not belong to the vendor, [2] or which belonged to only one of the vendors and was not contemplated in the sale.[3] When the timber on a certain piece of land or the amount needed for a certain purpose is sold at a certain rate per piece or thousand feet, the amount covered by the contract will not ordinarily be limited to the precise amount which the vendor agrees to deliver [4] but a contract for the sale of a certain number of thousand feet or pieces which does not clearly contemplate the sale of a certain lot or the amount needed for a specific purpose will be held to embrace only the limited amount more or less than that specified which might accidentally be cut with the exercise of reasonable care. [5] The number of trees sold may prevail over the kinds named in the contract. [6] The title to standing timber will not pass at the time of the sale if some further action is necessary to identify the trees sold. [7]

In determining which trees were covered by a contract under which cutting was deferred for a number of years after the sale, the annual rings of growth exhibited by the stump have been recognized judicially as a means of determining the size of the trees at the time the contract was

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(Footnote 7 concluded from preceding page)
Clarke v. Stowe, 132 Ga. 621, 64 S. E. 786, Perkins Co. v. Wilcox, 132 Ga. 166, 63 S. E. 831.
Ky. Struble v. Lewis, 76 S. W. 150, 25 Ky. L. Rep. 605.
N. C. Byrd v. Sexton, 161 N. C. 569, 77 S. E. 697. Tremaine v. Williams 144 N. C. 114, 56 S. E. 694.
Tex. Huber v. Hill, (Tex. Civ. App.) 130 S. W. 219. Hughes v. Adams, 55 Tex. Civ. App. 197, 119 S. W. 134.
W.Va. Harding v. Jennings 68 W. Va. 354, 70 S. E. 1.
U. S. Trust Co. v. Lbr. Co. 212 Fed. 229.

1. Watson v. Gross, 112 Mo. App. 615. 87 S. W. 104; Mizell v. Ruffin, 113 N. C. 21, 18 S. E. 72.
2. Caughie v. Brown, 88 Minn. 469, 93 N. W. 656. cf. Day v. Asher 141 Ky. 468, 132 S. W. 1035. (Description of timber controls over erroneous description of land) Lbr. Co. v. Thompson, 108 Va. 612, 62 S. E. 358.
3. Jackson v. Hardin, 87 S. W. 1119, 27 Ky. L. Rep. 1110.
4. Bradford v. Huffman, 88 S. W. 1057, 28 Ky. L. Rep. 18.
5. United States v. Pine River Logging and Improvement Co., 89 Fed. Rep. 907.
6. Paalzow v. North Carolina Estate Co., 104 N. C. 437, 10 S. E. 527.
7. Moss v. Meshew, 8 Busb. (Ky.) 187; Byasse v. Reese, 4 Metc. (Ky.) 372, 83 Am. Dec. 481; Ayer and Lord Tie Co. v. Davenport, 82 S. W. 177, 26 Ky. L. Rep. 115; Barbard v. Poor, 21 Pick. (Mass.) 378; But See, McCoy v. Herbert. 9 Leigh (Va.) 548, 33 Am. Dec. 256.

made. [1] In fixing the measure of damages allowable for a failure of a purchaser to take all timber suitable for particular purposes on a tract, as the difference between the contract price and the market value of the timber at the time the action was brought, an Oregon court excluded evidence as to the cost of construction of a road to the timber.[2] It has been held that where a contract of sale fails because of the inability of the vendor to convey title, the purchaser can recover only the purchase money paid; [3] and that a purchaser of lands with notice of the existing license of another to cut timber from the land, cannot rescind the contract without placing the parties in statu quo. [4]

1. Shiffer v. Broadhead et al, 126 Pa. 260 (1889); Whitfield v. Rowland Lbr. Co. 152 N. C. 211. *Contra* Patterson v. McCausland, 3 Bland (Md.) 69 (1830).
2. Mackey v. Olssen, 12 Ore. 429.
   Cf. Lbr. Co. v. Crist, 87 Ark. 434, 112 S. W. 965; Veneer etc. Co. v. Hornaday (Ind. App.) 96 N. E. 784.
3. Adams v. Hughes (Tex. Civ. App.) 140 S. W. 1163.
4. Young v. Waggoner (Ind. App.) 98 N. E. 145.

CHAPTER XI

CONTRACTS REGARDING THE PREPARATION AND MANUFACTURE OF TIMBER PRODUCTS

§121. Contracts for the Logging of Timber. Whether a contract is to be construed as one for the sale of timber or merely for the cutting of it will depend upon the terms of the agreement.[1] In a Missouri case in which a party clearing land was to receive his pay from the timber removed, it was held that the title to the severed trees was in the one who severed,[2] but the terms of such contracts ordinarily make them only contracts of employment, and title to the timber remains in the owner of the land.[3]

A contract for the cutting and delivering of all the timber on a tract is performed when the land is cleared as closely as prudent and economical lumbermen in the locality are accustomed to clear.[4] If a contract provides that the logger shall not be required to cut timber which involves an expenditure of more than a certain per cent above the ordinary cost of logging, he cannot be required to cut such timber even though it be shown that he could cut it and yet realize an average price equal to that fixed in the contract.[5]

A requirement in the contract that the timber shall be cut in a "workmanlike" manner will be construed to mean that the work shall be performed as is customary among prudent and reliable lumbermen in that locality.[6] In

1. Lambden v West, 7 Del. Ch. 266, 44 Atl. 797. See Whistler v White (Ky.) 128 S. W. 297; Lbr. Co. v Herrick, 212 Fed. 834, 129 C. C. A. 288.
2. McAllister v Walker, 69 Mo. App. 496.
3. Jordan v. Jones, (Ga.) 35 S. E. 151; Gore v. Benedict (Tenn.) 61 S. W. 1054.
4. Seavey v. Shurick, 110 Ind. 494; Harper v. Pound, 10 Ind. 32; Nash v. Driscoe, 51 417; Maltby v. Plummer, 71 Mich. 578; Pallman v. Smith, 135 Pa. St. 188, 19 Atl. 891. See Haines v. Gibson, 115 Mich. 131, 73 N. W. 126, Kangas v. Boulton, 127 Mich. 539, 86 N.W. 1043; Hubberd v. Burton, 75 Mo. 65;
5. Wadleigh v. Shaw, 45 Iowa, 535. Cf. Savage v. Lbr. Co. 134 La. 629, 64 So. 491; Watkins v. Burdick, 176 Mich. 433, 142 N. W. 550; Owen v. Lbr. Co. 125 Minn. 15, 145 N. W. 402.
6. Button v. Russell, 55 Mich. 478; Grice v. Noble, 59 Mich. 515; Shores Lumber Co. v. Stitt, 102 Wis. 450, 78 N. W. 562.

logging contracts time is often of great importance, and completion of the contract within the time named will be required, [1] except where a provision in the contract, or very exceptional conditions, excuses a full compliance within the time specified. [2] If a contract does not specify the precise point of delivery of the logs, delivery to a place convenient to the logger and not unreasonable as to the needs of the other party to the contract will be accepted as a fulfilment; [3] and a substantial compliance with requirements as to the assorting of logs at the point of delivery will be sufficient if the failure to comply strictly with the terms of the agreement causes no loss or inconvenience to the other party. [4]

A logging agreement by which two parties agree to share the expenses of the work embraces interest [5] board of scalers [6] and other incidentals. A provision in an agreement that the proceeds of certain trees to be cut and logged by one party were to be divided, after the payment of certain expenses, with another party who claimed to be the owner of the timber was held not to create a partnership. [7] Likewise an agreement by which one party furnished the mill and other equipment for the manufacture of lumber and the other party managed the business with an understanding that the latter should have one-half of the profits of the business in return for his services was held a contract of employment and not one creating a partnership relation-

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1. Utley v. Wilcox Lbr. Co., 59 Mich. 263, 26 N. W. 488; See also Kentucky Lbr. Co. v. Martin, 49 S. W. 191, 20 Ky. L. Rep. 1358; Clark v. Lbr. Co. 90 Miss. 479,43 So. 813.
2. Godkin v. Monahan, 83 Fed. 116, 27 C. C. A. 410; Goodrich v. Hubbard, 51 Mich. 62, 16 N. W. 232; See Kerslake v. McInnis, 113 Wis. 659, 89 N. W. 895.
3. Palmer v. Fogg, 35 Me. 368, 58 Am. Dec. 708. Cf. Godkin v. Monahan, 83 Fed 116; Cf. Asher v. Saylor (Ky.) 128 S. W. 71; Millard v. Hart, 158 Mich. 602, 123 N. W. 38; Noyes v. Marlott, 156 Fed. 753, 84 C. C. A. 409.
4. Maltby v. Plummer, 71 Mich. 578, 40 N. W. 3; but see O'Brien Lbr. Co. v. Wilkinson, 117 Wis. 468, 94 N. W. 337. Cf. Gabrielson v. Box Co. 55 Wash. 342; 104 N. W. 635; Stubbs v. Johnston, 38 U. C. Q. B. 466.
   See also, Ashby v. Cathcart, 159 Ala. 474; 49 So. 75; Lbr. Co. v. Lbr. Co. (Ark.) 135 S. W. 796; Lbr. Co. v. Herrick, 212 Fed. 834, 129 C. C. A. 288.
   Hill v. Harris (Ga. App.) 75 S. E. 518; Cline v. Hatcher, 144 Ky. 711, 135 S. W. 955.
5. Hopkins Mfg. Co. v. Ruggles, 51 Mich. 474, 16 N. W. 862. Cf. Tie Co. v. Martin, 30 Ark. 100, 117 S. W. 1081; Veneer Co. v. Anderson, (Ky.) 105 S. W. 108.
6. Hackley v. Headly, 45 Mich. 569, 8 N. W. 511; Cf. Kieldsen v. Wilson, 77 Mich. 45.
7. Gulf City Shingle Co. v Boyles, (Ala.) 29 So. 800. Similar holdings in Gore v. Benedict, (Tenn.) 91 S. W. 1054 and Jordan v. Jones, (Ga.) 35 S. E. 151.

tion. [1] An arrangement under which one party furnished the logs which another sawed and the lumber was shared equally was also held not to make the parties liable as partners. [2]

§122. Divisible Contracts and Partial Performance. The payment of a logger for a certain integral part of the whole logging operation, as specified in the contract of employment, does not release him from a performance of the other work covered by the contract. [3] However, if a logger is released from his contract upon condition of his accepting a certain sum when the logs are marketed for the part already performed, he may recover such sum even though the logs are destroyed by fire before they are delivered to the marketing place. [4] A logger may recover reasonable compensation for extra labor performed at the request of the other party [5] and if logs which do not comply with the requirements of the contract are accepted, he may recover a reasonable amount for them. [6]

Where a contract for the cutting of logs provided that the owner of the timber should determine what logs were suitable for the market to which they were to go, the failure of the owner's agent to designate all the logs that should have been taken was held not to entitle him to relief for a breach

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1. Thornton v. McDonald, (Ga.) 33 S. E. 680.
2. Thornton v. George, (Ga.) 33 S. E. 633.
   For illustrations of the law of partnership as applied in timber cases *see*, Williams v. Hendricks, 115 Ala. 277, 22 So. 331.
   Cobb v. Benedict, (Colo.) 62 Pac. 222; Fay and Eagan Co. v. Ouachita Excelsior etc. Co. (La.) 26 So. 386;
   Citizen Nat'l Bank v. Weston, (N. Y.) 56 N. E. 494;
   Capital Lumbering Co. v. Learned, (Ore.) 59 Pac. 454;
   Williams v. Meyer, (Tex. Civ. App.) 64 S. W. 66;
   Jennings v. Pratt, (Utah) 56 Pac. 951;
   Dufur v. Paulson, (Wis.) 85 N. W. 965;
   Cf. Griffiths v. Blackwater Boom & Lbr. Co. (W. Va.) 33 S. E. 125.
3. Keystone Lbr. Etc. Mfg. Co. v. Dole, 43 Mich. 370; Hartley v. Decker, 89 Pa. St; 470; Bean v. Bunker, 68 Vt. 72, 33 Atl. 1068; See Bishop v. White, 68 Me. 104. Hopkins v. Sanford, 38 Mich. 611; Richardson v. Single, 42 Wis. 40. Cf. Loree v. Mfg. Co. 134 Wis. 173; 114 N. W. 449.
4. Lupton v. Freeman, 82 Mich. 638, 40 N. W. 1042; Bianchi v. Maggini, 17 Nev. 323 (charcoal burned); Cf. Owen v. Lbr. Co. 125, Minn. 15, 145 N. W. 402.
5. McCann v. Doherty, 98 Wis. 335, 73 N. W. 782 (Bark marking.)
6. Bresnahan v. Ross, 103 Mich, 483, 61 N. W. 793.
   For general interpretation of logging contracts see: Griffin v. Anderson-Tully Co.; 91 Ark. 292, 121 S. W. 297; Stave Co. v. Lbr. Co., 138 Ky. 372, 128 S. W. 96. Coal Etc. Co. v. Phillips, 100 S. W. 302, 32 Ky. L. Rep. 589; McMillian v. Mfg. Co., 125 La. 854, 51 So. 1013; Lbr. Co. v. Logging Co., 103 Minn. 471, 115 N. W. 406; Murphy v. Cooper, 41 Mont. 72, 108 Pac. 576; Fox v. Fitzpatrick, 190 N. Y. 259, 82 N. E. 1103.

of contract, in the absence of any evidence as to bad faith on the part of either the logger or the owner's agent.[1] However, in the same jurisdiction it was held in another case that the partial acquiescence by a logger in the direction of the owner of the timber that timber covered by the contract be left uncut, did not release the logger from liability for any loss sustained because of his failure to put in all of the logs, when he sought damages for a breach of contract by the owner; [2] and in still another case that the action of an owner in preventing the logger from cutting all merchantable timber on a tract, did not release the sureties of the logger, where the terms of the contract gave to the owner the decision as to what constituted merchantable timber. [3] The measure of damages for the failure of a logger to remove all the timber from certain land has been held to be the difference between the market value of the timber left standing and the contract price of timber at the time of the breach of contract by the logger. [4]

If the contract does not leave to the owner the determination of what timber is to be cut, and the action of the logger in failing to cut timber is not a mere acquiescence in the advice of the owner or a yielding to his objection but is rather a compliance with a positive direction or compelling action on the part of the owner, the owner will be liable for the difference between the contract price and what it would have cost the logger to fully complete his contract. [5] And in such an action, evidence as to the profits realized by the contractor on another contract carried out after the prevention of the execution of the one in suit has been rejected as incompetent in mitigation of damages. [6]

Where an agreement is made that one party shall advance money or furnish supplies for the cutting, hauling, driving

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1. Maltby v. Plummer, 71 Mich. 578.
2. McGregor v. Ross, 96 Mich. 103, 101 Mich. 575. But see Blood v. Herring (Ky.), 61 S. W. 273.
3. Haines v. Gibson, 115 Mich. 131.
4. Stillwell v. Paepcke-Leicht Lbr. Co. 73 Ark. 432, 84 S. W. 483, 108 Am. St. Rep. 42. *See also* Anderson v. Lbr. Co. 121 Ga. 688, 49 S. E. 725; Lbr. Co. v. Griggs, (Ky.) 118 S. W. 920; Smith v. Holmes, 167 N. C. 561, 83 S. E. 833; Wiley v. Lbr. Co. 156 N. C. 210, 72 S. E. 305; Heyser v. Hunter, 118 N. C. 964, 24 S. E. 712; Young v. Lloyd, 65 Pa. 199; Larson v. Cook, 85 Wis. 564, 55 N. W. 703.
5. Allen v. Murray, 87 Wis. 41; Corbett v. Anderson, 85 Wis. 218; Nash v. Hoxie, 59 Wis. 384; Salvo v. Duncan, 49 Wis. 151.
6. Allen v. Murray, 87 Wis. 41. But see Dunn v. Johnson, 33 Ind. 54, 5 Am. Rep. 177.

or sawing of logs, while the advances or supplies are to be used by the other party in the prosecution of the enterprise, the title to such advances or supplies will vest in the party receiving them unless there is a contractual or statutory provision to the contrary. [1] However, performance of the work for which the advances were made can be enforced, [2] and a failure by the party who agreed to make the advances to fulfill his agreement will render him liable in an amount equal to the profit which the other party would have realized if the advances had been made, [3] and for additional expenses directly due to the failure of the first party to furnish the supplies. [4]

In a suit under a contract by which a logger agreed to cut, haul, raft and deliver logs at a certain market on condition that he receive one-half of the proceeds from the sale of the logs at the point of delivery, it was held that such an agreement did not establish a partnership, that the logger could not lawfully sell the logs, and that the owner of the land from which the timber was taken might maintain replevin for the logs. [5] It has been held that the failure of the owner of timber to pay installments as agreed under a contract for cutting, booming, and delivering logs did not authorize the logger to refuse to proceed further and entitle him to recover the profits which he would have earned if he had fully performed, since the default did not in itself constitute a denial of the right of the contractor to continue and recover for all services rendered. [6] Under such circumstances the contractor may continue and complete performance, or he may abandon the contract and recover for what he has done before the default occurs. A contract for the delivery of a certain amount of logs each month for a term of eight years, with payment by installments as de-

1. Gavigan v. Evans, 45 Mich. 597; *See* Woodstock Iron Co. v. Reed, 81 Ala. 305 (charcoal); Andrew v. Jenkins, 39 Wis. 476, and Crane v. Williams (Ky.) 63 S. W. 610 (In which uncertain terms of written contract explained by oral testimony as to circumstances.) See Swim v. Shireff, 20 N. Brunsw. 25; and Cf. Shaw v. Stairs, 37 N. Brunsw. 593.
2. Hopkins v. Sanford, 38 Mich. 611.
3. Mason v. Alabama Iron Co., 73 Ala. 270 (charcoal); Graham v. McCoy, 17 Wash. 63; Skagit River Etc. Co. v. Cole, 2 Wash. 57.
4. Salvo v. Duncan, 49 Wis. 151.
5. Gore v. Benedict (Tenn.) 61 S. W. 1054; See also Jordan v. Jones, (Ga.) 35 S. E. 151 (Logs not subject to levy as property of logger.)
6. Beatty v. Howe Lbr. Co. (Minn.) 79 N. W. 1013.

livered and with stipulations and guarantees as to failures and breaches of its terms, none of which defaults would necessarily end the contract, was held to be an entire contract, and a suit on the ground of a default and a breach was held to act as a bar to subsequent suits. [1] Under a completed contract requiring one party to cut, haul and deliver from lands of the other party an average of 40,000 feet of logs each day for a period of two years, suit was brought for the damages sustained by the logger through the alleged failure of the manufacturing company to furnish timber as needed for prompt cutting. It was held that the company was obligated to furnish the timber for cutting at the rate named in the contract even though the contract did not expressly so state, but that the logger might have lost his right to damages through monthly settlements. [2] A contract requiring one party to cut and deliver to the other party a certain amount of pulp wood each year for a period of ten years, with an option of the paper company to extend the contract an additional ten years, and with an agreement by the first party not to sell lands or wood so as to jeopardize its ability to fulfill the contract was held to be one for the sale of chattels, and a prayer for a decree ordering a specific performance was denied, the court saying that the supervision of such a transaction was too great a burden for it to assume. [3]

§123. The application of General Legal Principles to Contracts for the Cutting of Timber. Under an agreement by which two parties were to furnish the supplies and labor necessary to cut timber from land which was supposed to belong to a third party and the profits were to be shared, the first parties entered upon the work; but later finding the third party's title apparently defective they attempted to acquire an adverse title. In a subsequent action by them for their expenditures upon the timber, the court held that they were not in a position to ask equitable relief. [4] In an action on a contract for the peeling of bark

1. Bucki & Son Lbr. Co. v. Atlantic Lbr. Co., 109 Fed. 411.
2. Camp v. Wilson (Va.) 33 S. E. 591.
3. St. Regis Paper Co. v. Santa Clara Lbr. Co., 67 N. Y. Suppl. 149.
4. Pharr v. Broussard (La.) 30 So. 296. Cf. Harris v. Amoskeag Lbr. Co. (Ga.) 29 S. E. 302 (Company sought to escape payment for timber, by assertion of paramount title after it had been purchased and cut.) *See* Tie Co. v. Martin, 90 Ark. 100, 117 S. W. 1081, and Veneer Co. v. Anderson, 105 S. W. 108, 32, Ky. L. Rep. 7. (Sharing expenses.)

at a certain rate per cord, a New Hampshire court held that the one who had performed the labor was entitled not only for the amount peeled upon the farm named in the contract, but also for that peeled by mistake upon an adjacent farm, no demand having been made for the trespass and the other party having accepted the bark and derived advantage from the labor. [1] Where a dispute had arisen as to the ownership of logs, and a manufacturing company had agreed to use the logs and hold the proceeds "as the logs themselves" pending a decision of the title, the court refused to read into the contract an agreement that the party taking the logs should be compensated for the care of them. [2]

It has been held that a contract for the cutting of timber survives the death of either party, [3] and that in an action for the breach of a contract providing for the delivery of a minimum and a maximum amount during a certain period, the logger was entitled to introduce evidence to show that it was impracticable to deliver the minimum amount within the first half of the period specified, as demanded by the other party. [4] In accordance with the general rule, evidence which is immaterial to the question at issue will not be admitted. [5] Questions as to the abandonment of a contract by a logger,[6] substantial compliance with the terms of a contract requiring a cutting of all logs, [7] the suitableness of the season for logging operations, [8] the necessity of certain equipment, [9] and other similar questions will be submitted to the jury.

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1. Maltais v. Foss (N. H.) 44 Atl. 599.
2. Rowell v. Lewis (Me.) 49 Atl. 423.
3. Billing's Appeal, 106 Pa. St. 558. But compare Dickinson v. Calahan's Adm'rs 19 Pa. 227 (1852) (contract for five years did not survive) and McCoy v. Fraley (Ky.) 113 S. W. 444.
4. Wager Lbr. Co. v. Sullivan Logging Co., 120 Ala. 558, 24 So. 949. Cf. Bement v. Claybrook, 5 Ind. App. 193, 31 N. E. 556; Lbr. Co. v. Logging Co., 103 Minn. 431, 115 N. W. 406; Carpenter v. Medford, 99 N. C. 495, 6 S. E. 785, 6 Am. St. Rep. 535.
   As to sufficiency of evidence, *see* Starnes v. Boyd (Ark.) 142 S. W. 1143; Lacy v. Johnson, 58 Wis. 414, 17 N. W. 246; Tie Co. v. Davenport, 82 S. W. 177, 26 Ky. L. Rep. 115.
5. Garrison v. Glass, 139 Ala. 512, 36 So. 725; Thornton v. Savage, 120 Ala. 449, 25 So. 27; O'Connell v. Ward (Minn.) 153 N. W. 865; Cf. Brooks v. Bellows, 179 Mich. 421, 146 N. W. 311.
6. Greenwood v. Davis, 106 Mich. 230, 64 N. W. 26.
7. Pallman v. Smith, 135 Pa. St. 188, 19 Atl. 891.
8. Smith v. Scott, 31 Wis. 437.
9. Carstens v. Earles, 26 Wash. 676, 67 Pac. 404.

§124. Contracts for the Sawing of Lumber. The interpretation of contracts for the sawing of lumber follow general legal principles. [1] Failure to deliver logs for sawing as agreed in a contract, [2] as well as the failure to saw those delivered, [3] will give rise to an action for a breach of contract; and the measure of damages will be the actual loss sustained by the party injured including reasonably proximate prospective profits. [4] However, if the contract does not bind a party to deliver any fixed amount during a certain period, no damages can be obtained by the mill owner for the failure of the other party to deliver logs, though the contract required him to saw all that should be delivered during that time. [5] Recovery of the contract price for the timber actually sawn, less any damages suffered by the other party, may be obtained by one who has failed to saw all logs covered by a contract. [6] Settlement for sawing upon the basis of a certain measurement which was agreed upon cannot be enforced if the measurement is shown to have been fraudulent. [7] When logs are delivered at a custom mill for sawing at a specified price, the mill operator, as a bailee, must use ordinary care in manufacturing the logs, [8] and account for all logs delivered or show that any loss was due to no fault on his part. [9] In interpreting a contract

1. Fletcher v. Prestwood, 150 Ala. 135, 43 So. 231; Lbr. Co. v. Clement, (Ark.) 135 S. W. 343; Lbr. Co. v. Cypress Co. 105 Ark. 421, 151 S. W. 275; Hale v. Trout. 35 Calif. 229; Hill v. Harris (Ga. App.) 75 S. E. 518; Lbr. Co. v. Tie Co. (Ky.) 143 S. W. 581; Toler v. Wheeler-Holden Co., 144 Ky. 829, 139 S. W. 1067; Wheeler-Holden Co. v. Reynolds, 140 Ky. 17, 130 S. W. 803; Tompkins v. Gardner Etc. Co., 69 Mich. 58, 37 N. W. 43; Wilcox v. Allen, 36 Mich. 160; Phillips v. Raymond, 17 Mich. 287; Wayland v. Johnson, 130 Mo. App. 80, 108 S. W. 1113; Dart v. Bean, 75 N. H. 606, 76 Atl. 172; Hurd v. Cook, 75 N. Y. 454; Penfield v. Dunbar, 64 Barb. (N. Y.) 239; Bowman v. Blankenship, 157 N. C. 376, 72 S. E. 994; Wilson v. Crowell, 48 Pa. St. 58; Maust v. Creasy, 42 Pa. S. Ct. 633; Hunter v. Felton, 61 Vt. 359, 17 Atl. 739; Dennis v. Montesano Nat. Bank, 38 Wash, 435, 80 Pac. 764; Fibre Co. v. Lbr. Co. 132 Wis. 1, 111 N. W. 237; Clark v. Clifford, 25 Wis. 597; Barker Etc. Lbr. Co. v. Edw. Hines Lbr. Co., 137 Fed. 300; Mill Co. v. Lbr. Co., 38 New Brunsw. 292.
2. Bassett v. Child, 11 Ill. 569; Dunn v. Johnson, 33 Ind. 54, 5 Am. Rep. 177; Whidden v. Belmore, 50 Me. 357; Stimpson v. Freeman, 38 Mich. 314; Fredenburg v. Turner, 37 Mich. 402; Snell v. Remington Paper Co., 102 N. Y. App. Div. 138, 32 N. Y. Suppl. 343. Cf. Hill v. Harris (Ga. App.) 75 S. E. 518; Little v. Barry, 125 Mich. 211, 84 N. W. 67; Toomey v. Atyoe, 95 Tenn. 373, 32 S. W. 254.
3. Fletcher v. Priestwood, 143 Ala. 174, 38 So. 847; Stephenson v. Collins, 57 W. Va. 351, 50 S. E. 439.
4. Dunn v. Johnson, 33 Ind. 54, 5 Am. Rep. 177.
5. Harrison & Garrett v. Wilson Lbr. Co., (Ga. 1903) 45 S. E. 730.
6. Grice v. Noble, 66 Mich. 700.
7. Youngs v. Johnson, 82 Wis. 102, 51 N. W. 1127.
8. Rhodes v. Holladay-Klotz Land Etc. Co., 105 Mo. App. 270, 79 S. W. 1145.
9. Gleason v. Beer, 59 Vt. 581, 10 Atl. 86, 59 Am. Rep. 757.

for the sawing of lumber, which provided that the sawing should be done in a workmanlike manner and in specified sizes, and that the mill operator should pay for all lumber spoiled in the sawing, a New York court held that "spoiled lumber" did not include lumber that was not sawn the right size, but that in an action for the price of sawing, the owner of the lumber might have a set-off to the amount of the damages due to unworkmanlike sawing, even though he had with protest received the lumber sawn to the wrong size. [1] Custom in the jurisdiction where the case arises will determine largely the meaning of the phrase "workmanlike manner" as used in a contract for the sawing of lumber. [2] But in a suit on a contract in which one party agreed to saw the logs of the other as fast as he could, the court declined to admit evidence of a custom to excuse his delay in sawing plaintiff's logs until he had sawn an entire raft of another party. [3] Storage charges for lumber left in the mill yard for a considerable time after the sawing have been denied, [4] and the admission of parol evidence inconsistent with the written terms of a contract for sawing has been refused. [5] A mill yard has been legally defined as a place devoted to the storage of logs to be sawn and of manufactured lumber. [6]

§125. Liens for Expenditures and Services in the Manufacture of Timber Products. The common law rule that any bailee for hire was entitled to a lien on the goods received for services performed which enhanced their value is applicable to logs, lumber and other timber products. Thus one owning or operating a sawmill has a lien, in the amount of the charge for sawing, upon the lumber sawn from logs delivered to him for sawing, irrespective of a special agreement for a lien. [7] This lien for the full charge

1. Harris v. Rathbun, 2 Abb. App. Dec. (N. Y.) 326, 2 Keyes 312. (There was a dissenting opinion.)
2. Button v. Russell, 55 Mich. 478; Shores Lbr. Co. v. Stitt, 102 Wis. 450.
3. Mowatt v. Wilkinson (Wis.) 85 N. W. 661.
4. Hunter v. Felton, 61 Vt. 359.
5. Denton v. Whitney, 31 Ohio St. 89.
6. People v. Kingman, 24 N. Y. 559, 562.
7. Holderman v. Manier, 104 Ind. 118; Palmer v. Tucker, 45 Me. 316; Hughes v. Tanner, 96 Mich. 113, 55 N. W. 661; Phillips v. Freyer, 80 Mich. 254, 45 N. W. 81; Chadwich v. Broadwell, 27 Mich. 6; Jacobs v. Knapp, 50 N. H. 71; Mount v. Williams, 11 Wend. (N. Y.) 77; Morgan v. Congdon, 4 N. Y. 552; Pierce v. Sweet, 33 Pa. St. 151; Walker v. Cassels, 70 S. C. 271, 49 S. E. 862; Arians v. Brickley, 65 Wis. 26, 26 N. W. 188, 56 Am. Rep. 611. *See* Germain v. Central Lbr. Co., 116 Mich. 245, 74 N. W. 644; Crouch v. Buerman, 6 Pa. Dist. 357.

for all lumber sawn, or for the balance due, may ordinarily be enforced against any portion of the logs or lumber. remaining in the possession of the one operating the mill. [1] However, under an agreement in New York by which one party was to deliver logs to another to be sawn and the latter was to retain one-half of the lumber for the sawing, it was held that the owner of the logs retained possession of all logs until all were manufactured into lumber, and that he might maintain trover for the value of all the logs and lumber, if the sawyer converted any part of the lumber before he had fully performed his contract. [2] Raftsmen who receive logs or lumber for the purpose of floating the same to market have been held to have a common law lien on the goods received for the value of the services performed.[3] The same principal should be applied when an individual or a company receives loose logs under a contract for floating them to market. [4]

A common law lien is dependent upon possession, and the ordinary contracts providing for the cutting and hauling of timber from land owned by another, and many of those for the driving of logs, do not give the one performing such services the possession essential to the maintenance of a common law lien, [5] nor does the one furnishing money advances or supplies for the cutting of timber have a lien on the logs in the absence of a statute or a specific agreement therefor. [6] One who had cut timber from the land of another and hauled the logs to his own mill for sawing was held to have a lien for his labor, both upon the lumber sawed and on the logs not yet manufactured, [7] however

1. Holderman v. Manier, 104 Ind. 118; Partridge v. Dartmouth College, 5 N. H. 286; Morgan v. Congdon, 4 N. Y. 552.
2. Pierce v. Schenck, 3 Hill (N. Y.) 28. *See* Wisconsin Statutes, 1913; sec. 4447 imposing a penalty for the non-delivery of lumber sawn on shares.
3. Iron etc. Co. v. Nester, 147 Mich. 599, 111 N. W. 177; Farrington v. Meek, 30 Mo. 578, 77 Am. Dec. 627; Mercantile etc. Co. v. Galloway, 156 Fed. 504.
4. Jacobs v. Knapp, 50 N. H. 71.
5. Cincinnati Cooperage Co. v. Woodyard (Ky.) 54 S. W. 831; Oakes v. Moore, 24 Me. 214, 41 Am. Dec. 379; Haughton v. Busch, 101 Mich. 267, 59 N. W. 621; Gamble v. Gates, 97 Mich. 465, 56 N. W. 855; O'Clair v. Hale, 35 N. Y. Appl. Div. 77, 54 N. Y. Suppl. 388 (Aff'm'g 25 Misc. (N. Y.) 31, 54 N. Y. Suppl. 386); Fitzgerald v. Elliott, 162 Pa. St. 118, 29 Atl. 346, 42 Am. St. Rep. 812. Compare: Anderson v. Tingley (Wash.) 64 Pac. 747 (Possession surrendered by contract and lien lost.)
   But *see* Farrington v. Meek, 30 Mo. 578, 77 Am. Dec. 627; Burgett v. Bissell, 14 Barb. (N. Y.) 638; Ottawa Bank v. Bingham, 8 Quebec Q. B. 359.
6. Andrew v. Jenkins, 39 Wis. 476; cf. Bogard v. Tyler (Ky.) 55 S. W. 709.
7. Palmer v. Tucker, 45 Me. 316. *See also* Germain v. Central Lbr. Co., 116 Mich. 245, 74 N. W. 644; Hughes v. Tanner, 96 Mich. 113, 55 N. W. 661.

such a lien will be lost if the one entitled thereto voluntarily parts with possession. [1] A lien for either skilled or unskilled labor, or for the furnishing of supplies or money advances in connection with the cutting, hauling or driving of logs may be obtained by contract; [2] but a lien cannot arise in favor of one who was a stranger to a contract with the owner of the logs or timber, [3] or who cut the timber without the consent of the owner. [4] If a contract contemplates a lien, it does not become effective until the service to be performed has substantially been completed, [5] especially if the agreement requires the delivery of the logs or lumber prior to the specified time of payment. [6]

§126. Statutory Liens. In many states there are statutes giving a lien on logs or lumber to one who advances money, furnishes supplies, or performs labor in connection with the cutting, hauling, driving, booming or sawing of logs. [7] Some of these laws are very comprehen-

1. Walker v. Cassels, 70 S. C. 271, 49 S. E. 862.
2. Oakes v. Moore, 24 Me. 214, 41 Am. Dec. 379; Haughton v. Busch, 101 Mich. 267, 59 N. W. 621; Strong v. Krebs, 63 Miss. 338; Mount v. Williams, 11 Wend (N. Y.) 77; Smith v. Scott, 31 Wis. 420. *But see* Boody v. Goddard, 57 Me. 602; McMaster v. Merrick, 41 Mich. 505, 2 N. W. 895.
3. Jacobs v. Knapp. 50 N. H. 71.
4. Hill v. Burgess, 37 S. Car. 604; Dresser v. Lemma, 122 Wis. 387, 100 N. W. 844.
5. Haughton v. Busch, 101 Mich. 267, 59 N. W. 621; Hodgdon v. Waldron, 9 N. H. 66. *But see* Kangas v. Boulton, 127 Mich. 539, 86 N. W. 1043, and Smith v. Scott, 31 Wis. 420.
6. Stillings v. Gibson, 63 N. H. 1; *see* Au Sable River Boom Co. v. Sanborn, 36 Mich. 358; Rhodes v. Hinds, 79 N. Y. App. Div. 379, 79 N. Y. Suppl. 437.
7. Ala. Code of 1907, Sec. 4818-21 (Boomage.)
   Ariz. Revised Statutes 1913, sec. 3657, p. 1256.
   Ark. Digest of Statutes, 1904, Kirby, Sec. 4089, 4995 and 6526.
   Calif. General Laws 1914, Henning & Deering, p. 925; Civil Code 1905, Kerr Sec. 3065.
   Fla. Compiled Laws 1914, Sec. 2197 (cutting and rafting), sec. 2208 (advances).
   Ga. Annotated Statutes 1914, Park; sec. 1838 (boomage), hauling sec. 3329 Cf. 3358 (on sawmill.)
   Idaho Revised Code 1908, sec. 5125-5140. Cf. sec. 1504.
   Iowa Code of 1897, sec. 4415 (on rafts).
   La. Revised Laws 1904, Wolff, p. 1331 (supplies, Laws 1882, p. 47; labor, Laws 1890, p. 8.)
   Me. Revised Statutes 1903, p. 811. Cf. p. 423.
   Mich. Annotated Statutes 1913, Howell, 2d Ed., sec. 13843-13858 (Cf. 4137 et. seq.; 7378 et seq.)
   Minn. General Statutes 1913, Tiffany, sec. 7058 and 7072-7076.
   Miss. Cf. Code. 1906, sec. 4973-4974.
   Mo. Annotated Statutes 1906, sec. 1494-1496 (to booming and rafting companies.)
   N. H. Public Statutes 1901, Chase, ch. 141, sec. 12, p. 452 and sec. 13 as Ann'd Suppl. 1913, p. 329.
   Mont. Revised Code 1907, sec. 5819-5836 (Act. Feb. 20, 1899) Cf. 5816-18.
   N. M. Annotated Statutes, 1915, sec. 3373.

(Footnote 7 continued on next page)

sive,[1] while others apply only to one or two of the classes of service named above. These statutes are sustained by the courts.[2] The lien will be given preference over nearly all claims and be satisfied out of any part of the material on which the labor or service was expended.[3] Under such statutes legal possession at the time of the performance of the service is unnecessary,[4] but attachment of the timber must be made before the lien can be enforced.[5] As the statutes are remedial they have been construed liberally in favor of those for whose benefit they were enacted.[6] Although a lien statute will not apply to a contract entered

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(Footnote 7 concluded from preceding page)

Nev. Rev. Stats. 1912, sec. 2230 (cutting); cf. sec. 1440 (Ref. to act Mar. 3, 1866, p. 198, which is quoted in Gen. St. 1885, sec. 1064-1071, giving lien for driving logs.)

Ore. Laws of 1910, Lord, sec. 7461-7464.

Vt. Cf. Public Statutes 1906, sec. 2654-2656.

Wash. Codes & Statutes, 1910, Rem. & Bal., sec. 1162-1181 (Laws 1877, p. 217.)

Wis. Statutes 1913, sec. 3329; *see* also sec. 3337-3342 b.

Wyo. Compiled Statutes, 1910, Mullen, sec. 3767-3768.

1. See Lawler Bankruptcy Case, 110 Fed. 135 (Holding a traveling salesman for a lumber company had a lien for his services.) Carver v. Bagley, 79 Minn. 114, 81 N. W. 757 (In favor subcontractors as well as contractors.)
2. Spofford v. True, 33 Me. 283, 54 Am. Dec. 621; Sullivan v. Hall, 86 Mich. 7; Craddock v. Dwight, 85 Mich. 587; Reilly v. Stephenson, 62 Mich. 509, 29 N. W. 99; Shaw v. Bradley, 59 Mich. 199, 26 N. W. 331; Hoffa v. Person, 1 Pa. Supr. Ct. 357; Fitch v. Applegate (Wash.) 64 Pac. 147; Winslow v. Urquhart, 39 Wis. 260; Munger v. Lenroot, 32 Wis. 541; Akers v. Lord, 67 Wash. 179, 121 Pac. 51. But *see* Bradley v. Cassels, 117 Ga. 517, 42 S. E. 857; Jacobs v. Knapp, 50 N. H. 71; Quimby v. Hazen, 54 Vt. 132; Townsend Sav. Bank v. Epping, 24 Fed. Cas. No. 14, 120, 3 Woods 390.
3. Austill v. Hieronymus, 117 Ala. 620, 23 So. 660; Akeley v. Mississippi, etc. Boom Co. 64 Minn. 108, 67 N. W. 208, (Waived lien); Martin v. Wakefield, 42 Minn. 176, 43 N. W. 966, 6 L. R. A. 362; Proulx v. Stetson etc. Mill Co., 6 Wash. 478, 33 Pac. 1067; Blonde v. Menominee Bay Shore Lbr. Co., 106 Wis. 540, 82 N. W. 552; De Morris v. Wilbur Lbr. Co. 98 Wis. 465, 74 N. W. 105.
4. Quimby v. Hazen, 54 Vt. 132.
5. Griffin v. Chadbourne, 32 Minn. 126, 19 N. W. 647.
   But see, Waterson v. Getchell, 5 Me. 435, 17 Am. Dec. 251 (Actual notice) and Steele v. Schricker, 55 Wis. 134, 12 N. W. 396 (Constructive notice), holding that a purchaser of logs with notice of the contract under which they were cut takes the logs subject to a lien for the cutting.
6. Davis v. Cox, 13 Ga. App. 509, 79 S. E. 383 (No Lien on trees); Lbr. Co. v. Hales, 11 Ga. App. 569, 75 S. E. 898; Haralson v. Speer, 1 Ga. App. 573, 58 S. E. 142. Murphy v. McGough, 105 Ga. 816, 31 S. E. 757 (lien to mill owner); Wiggins v. Houghton, 89 Mich. 468, 50 N. W. 1005; Carver v. Bagley, 79 Minn. 114, 81 N. W. 757; Breault v. Archambault, 64 Minn. 420, 67 N. W. 348; 58 Am. St. Rep. 545; Hopkins v. Rays, 68 N. H. 164; Robins v. Paulson, 30 Wash. 459, 70 Pac. 1113; Kendall v. Hynes Lbr. Co., 96 Wis. 659, 71 N. W. 1039; Johnson v. Iron Belt Min. Co., 78 Wis. 159, 47 N. W. 363; Jacubeck v. Hewitt, 61 Wis. 96; Collins v. Cowan, 52 Wis. 634; Kollock v. Parcher, 52 Wis. 393, 9 N. W. 67; Winslow v. Urquhart, 39 Wis. 260. But *see* Bierly v. Royse, 25 Ind. Appl. 202, 57 N. E. 939; Lord v. Woodward, 42 Me. 497; Clark v. Adams, 33 Mich. 159; Dallaire v. Gauthier, 24 Can. Sup. Ct. 495. *See* also Rowley v. Conklin, 89 Minn. 172, 94 N. W. 548 (holding such a law not applicable to public property), and Spalding Lbr. Co. v. Brown, (Ill.) 49 N. E. 725 (statute covering public property.) Hutchins v. Blaisdell, 106 Me. 92, 75 Atl. 291; Becherl v. Pluchak (Mich.) 137 N.W. 101; Sumpter v. Burnham, 51 Wash. 599,99 Pac. 752

into before its passage, [1] it has been held that an amendment as to the time or manner of enforcement of a lien does apply to liens which arose before the enactment of such provisions. [2] Some state statutes for this class of liens specifically authorize assignment, [3] but it has been held that a lien is assignable even where the statute does not so provide, [4] especially if the lien has been perfected by the required filing of notice. [5]

§127. Classes of Service Covered by Statutes. Whether a lien for any particular work in connection with the logging and manufacture of timber can be sustained will depend largely upon the wording of the statute. Except in the few states in which there is a comprehensive statute, only special services are protected, and in many states there are statutory liens which are restricted to the cutting and delivering of logs and other distinct provisions as to the manufacture of logs into lumber and other products. In some states a special lien on the logs is given one who furnishes money or supplies for the cutting, hauling or driving of logs; [6] and in others a lien on a sawmill or its products is given one who furnishes timber, logs or provisions for the operation of the mill. [7] Statutes giving a lien on a sawmill for timber and supplies furnished have been held not to comprehend the furnishing of money, machinery and labor, [8] nor to afford a lien for the purchase price of stum-

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1. Shuffleton v. Hill, 62 Cal. 483; Bass v. Williams, 73 Mich. 208, 41 N. W. 229.
2. Palmer v. Tucker, 45 Me. 316; McQuester v. Morrill, 12 Wash. 335, 41 Pac. 56; Paine v. Gill, 13 Wis. 561. But *see* Gapneau v. Port Blakely Mill Co., 8 Wash. 467 (Lien right not lost by repeal).
3. *See* Griffin v. Chadbourne, 32 Minn. 126, 19 N. W. 647; Dirimple v. McDonald and Dells Lbr. Co., 101 Wis. 509, 78 N. W. 182. Cf. Bernhart v. Rice, 98 Wis. 578, 74 N. W. 370; Kline v. Comstock, 67 Wis. 473, 30 N. W. 920; Tewksbury v. Bronson, 48 Wis. 581, 4 N. W. 749.
4. Phillips v. Vose, 81 Me. 134, 16 Atl. 463; Murphy v. Adams, 71 Me. 113, 36 Am. Rep. 299; *contra* Tewksbury v. Bronson, 48 Wis. 581, 4 N. W. 749.
5. Mulholland v. Ault (Wash. 1892), 32 Pac. 294; Casey v. Ault, 4 Wash. 167, 29 Pac. 1048; Dexter v. Sparkman, 2 Wash. 165, 25 Pac. 1070.
6. Abraham v. Agnew, 83 Wis. 246; Bradford v. Underwood Lbr. Co., 80 Wis. 50, 48 N. W. 1105; Garland v. Hickey, 75 Wis. 178; Patten v. Northwestern Lbr. Co., 73 Wis. 233, 41 N. W. 82; Stacy v. Bryant, 73 Wis. 14, 40 N. W. 632; Kollock v. Parcher, 52 Wis. 393.
7. Annotated Statutes of Georgia, 1914, Parks, sec. 3358.
8. Filer Etc. Co. v. Empire Lbr. Co. 91 Ga. 657, 18 S. E. 359; Balkcom v. Empire Lbr. Co. 91 Ga. 651, 17 S. E. 1020, 44 Am. St. Rep. 58; Empire Mill Co. v. Kiser, 91 Ga. 643, 17 S. E. 972; Dart v. Mayhew, 60 Ga. 104; Cypress Shingle Etc. Co. v. Lorio, 46 La. Ann. 441; In re Gosch 121 Fed. 604.

page bought by the mill owner. [1] However, in certain states a lien upon a mill or manufactured product for the purchase price of stumpage is specifically given by statute. [2]

A statute giving a lien for the "cutting, skidding and hauling" of logs has been held to cover chopping, swamping and loading, [3] and one which gave a lien for the "cutting" of timber was construed to afford a lien for all the labor of one who cut, peeled and piled poplar timber for pulp purposes. [4] In Maine a lien statute for the cutting of logs and one for the cutting of cordwood were held to merge so as to give a single remedy to one cutting both timber and cordwood. [5] One furnishing shingle bands was afforded the protection of a statute giving a lien for services in connection with the manufacture of shingles. [6] On the other hand a statute providing a lien for services in the manufacture of lumber was held not to cover the hauling of the manufactured timber away from a mill; [7] and a statute which declares the lien available while the lumber is at the mill or in the possession of the manufacturer is not available after the lumber is removed from the mill. [8]

A lien for services in connection with the driving of logs covers all essential parts of the work, [9] including the time devoted to the obtaining of the necessary equipment and caring for it during the drive and at the close, [10] but one who assisted another in a joint drive of their respective logs has

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1. Ray v. Schmidt, 7 Ga. App. 380, 66 S. E. 1035, Stanley v. Livingston, 9 Ga. App. 523; 71 S. E. 878; Loud v. Pritchett, 104 Ga. 648, 30 S. E. 878. Giles v. Gano, 102 Ga. 593, 27 S. E. 730.
2. Ala. Civil Code 1907, sec. 4814-4817 (Act. Dec. 17, 1894, Laws of 1894, p. 250.) Interpretation. Thornton v. Dwight, 137 Ala. 211, 34 So. 382; Austill v. Hieronymus, 117 Ala. 620, 23 So. 620. Cf. May v. Williams (Ky.) 60 S. W. 525 Wash. Codes & St. 1910, Sec. 1164, (Doyle v. McLeod, 4 Wash. 732, Interpretation)
3. Grand Rapids Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006.
4. Bondeur v. Le Bourne, 79 Me. 21, 7 Atl. 814. Cf. Sands. v. Sands, 74 Me. 239; Hadlock v. Shumway, 11 Wash. 690.
   And see Fisher v. Cone Lbr. Co. 49 Ore. 277, 89 Pac. 737 (Holding lien not destroyed by manufacture into lumber.)
5. Ouelette v. Pluff. (Me.) 44 Atl. 616. Cf. Anderson v. R. R. Co. 25 Ida. 433, 138 Pac. 123 (Ties included in "timber.")
6. Bass v. Williams. 73 Mich. 208, 41 N. W. 229.
7. Villenuve v. Sines, 92 Mich. 556, 52 N. W. 1007. Cf. Ryan v. Guilfoil, 13 Wash. 373; Winsor v. Johnson, 5 Wash. 429, 32 Pac. 215. *But see* Menery v. Backus, 107 Mich. 329 (Employed on timber operation and farm).
8. Judge v. Bay Mill Co., 18 Wash. 269; Smartwood v. Red Star Shingle Co., 13 Wash. 349; Campbell v. Sterling Mfg. Co. 11 Wqsn. 204.
9. East Hoquiam Boom Etc. Co. v. Neeson, 20 Wash. 142, 54 Pac. 1001; Yellow River Imp. Co. v. Arnold, 46 Wis. 21, 49 N. W. 971.
10. Minton v. Underwood Lbr. Co., 79 Wis. 646, 48 N. W. 857.

been denied a lien. [1] The same principles would apply to the cutting or hauling of logs, and a lien has even been given for the loss of a laborer's time through the fault of the owner of the logs.[2] But except as to services already performed a lien does not exist where an owner of timber defaults on his contract to employ another. [3] In several states a lien is specifically given by statute to cooks in logging and driving camps, [4] but irrespective of these provisions, cooks, [5] blacksmiths, [6] and other assistants [7] who perform services essentially incidental to the operations covered by a statute should be afforded the protection of a lien. A lien has been allowed to one who performed services in the construction of a road upon which logs were to be transported [8] and in the blasting of rocks which would prevent or impede the passage of logs in a river, [9] but the performance of service in connection with a road not actually used as an incident to the logging operation [10] or upon a railroad which was to be used in a general way for the transportation of other timber as well as that then being cut [11] has been held to give no lien. The same principles have been applied as to services upon a mill plant, by affording a lien to one who performed services in repair work at irregular intervals as an incident to the operation of the mill, [12] but denying one for services in the construction, improvement or permanent repair of a sawmill. [13] A statute giving a lien for personal services has been held not to cover the services of a team used by the one claiming the lien, [14] but if the statute is not

1. Lord v. Woodward, 42 Me. 497.
2. McCrillis v. Wilson, 34 Me. 286, 56 Am. Dec. 655. See Cross v. Dore, 20 Wash. 121.
3. Kennedy v. South Shore Lbr. Co. 102 Wis. 284, 78 N. W. 567.
4. Oregon Laws, 1910, Lord, sec. 7461; Wash. Codes & St. 1910, Rem. & Bal., sec 1162; Wis. St. 1913, sec. 3341.
5. Breault v. Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545; Winslow v. Urquhart, 39 Wis. 260; Young v. French, 35 Wis. 111. *But see* Bradford v. Underwood Lbr. Co., 80 Wis. 50, 48 N. W. 1105. (Contract for board.)
6. Breault v. Archambault, 64 Minn. 420.
7. Carpenter v. McDonald and the McCord Lbr. Co., 107 Wis. 611,617, 83 N. W. 764.
8. Proulx v. Stetson Etc. Mill Co., 6 Wash. 478, 33 Pac. 1067.
9. Duggan v. Washougal Land Etc. Co., 10 Wash. 84, 38 Pac. 856.
10. Duggan v. Washougal Land Etc. Co., 10 Wash. 84, 38 Pac. 856.
11. Carpenter v. McDonald and the McCord Lbr. Co., 107 Wis. 611, 83 N. W. 764.
12. Engi v. Hardell, 100 Wis. 407, 100 N. W. 1046.
13. Kendall v. Hynes Lbr. Co., 96 Wis. 659, 71 N. W. 1039; Glover v. Hynes Lbr. Co., 94 Wis. 457.
14. Coburn v. Kerswell, 35 Me. 126; McCrillis v. Wilson, 34 Me. 286, 56 Am. Dec 655. But *see* Hale v. Brown, 59 N. H. 551, 47 Am. Rep. 224.

thus restricted it will cover the services of a team. [1] The lien will exist even though the team is driven by a servant of the one making the contract, [2] or the team, which is driven by the one claiming the lien, is in his possession under a contract of hiring or of purchase, [3] but under a statute giving a lien for services performed in the cutting and hauling of timber there will be no lien to the owner for the services of a team which is driven by another under a contract of hiring, even though such contract expressly contemplates the use of the team in the logging operation. [4]

§128. Persons Entitled to Statutory Liens. Whether a person performing a particular service in connection with the production of lumber or other timber products is entitled to the protection of a lien upon the product or upon the plant or equipment will depend largely upon the terms of the statute in the jurisdiction where the case arises. In many states the view is taken that a lien for services comprehends only physical labor of men or animals working for specified wages, either by time or by the piece, under the direction of an employer. [5] Under such a construction the lien has been denied to one acting as a foreman or scaler, [6] but a contrary view has been taken in other states, [7] and in several states a statute specifically affords a lien for scaling, [8] or for the services of servants. [9] Many statutes have been held not to afford a lien to a contractor

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1. Hogan v. Cushing, 49 Wis. 169, 5 N. W. 490; *See* Klondike Lbr. Co. v. Williams, 71 Ark. 334, 75 S. W. 854; Martin v. Wakefield, 42 Minn. 176, 43 N. W. 966 6 L. R. A. 362.
2. Breault v. Archambault, 64 Minn. 420, 67 N. W. 348; 58 Am. St. Rep. 545: Cf. Martin v. Wakefield, 42 Minn. 176.
3. Kelley v. Kelley, 77 Me. 135.
4. McMullin v. McMullin, 92 Me. 336, 42 Atl. 500, 69 Am. St. Rep. 510; Richardson v. Hoxie, 90 Me. 227, 38 Atl. 142; Mabie v. Sines, 92 Mich. 545, 52 N. W. 1007; Edwards v. H. B. Waite Lbr. Co., 108 Wis. 164, 84 N. W. 150, 81 Am. St. Rep. 884; Lohman v. Peterson, 87 Wis. 227, 58 N. W. 407; Rheaume v. Batiscan River Lbr. Co., 23 Quebec Super. Ct. 166.
5. Littlefield v. Morrill, 97 Me. 505, 54 Atl. 1109, 94 Am. S. Rep. 513.
6. Meands v. Park, 95 Me. 527, 50 Atl. 706.
7. Kline v. Comstock, 67 Wis. 473, 30 N. W. 920.
8. Lindsay Etc. Co. v. Mullen, 176 U. S. 126, 20 S. Ct. 325, 44 L. Ed. 400.
9. Breault v. Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545; Hogan v. Cushing, 49 Wis. 169, 5 N. W. 490. But *see* Hale v. Brown, 59 N. H. 551, 47 Am. Rep. 224.

for the services performed by those in his employ, [1] nor even to one who performs manual work himself under an agreement by which he is to receive payment by the piece where his work and that of his servants and team is not performed under the direction and supervision of the owner of the timber. [2] However, if the work is performed under the immediate direction of the owner, the lien will extend to employees of the one contracting with the owner, [3] and under some statutes even to subcontractors. [4] A laborer's lien has been denied to one who furnished supplies to the laborers even though the credit was given under an agreement with the employer that payment for the supplies should be deducted from the wages of the men. [5] A lien will not be enforced in favor of a trespasser. [6] A lien right is primarily founded upon a contract and thus can be enforced only against one with whom the lien claimant has directly or indirectly entered into an agreement for the performance of services, [7] and one log owner cannot be charged

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1. Ark. Klondike Lbr. Co. v. Williams, 71 Ark. 334, 75 S. W. 854.
   Me. Rogers v. Dexter Etc. R. Co., 85 Me. 372, 27 Atl. 257, 21 L. R. A. 528.
   Pa. Burge v. Comerer, 5 Pa. Co. Ct. 5 (Holding one cutting and hauling timber to a mill not a manufacturer). But see Hoffa v. Person, 1 Pa. Super. Ct. 367.
   Wash. Campbell v. Sterling Mfg. Co., 11 Wash 204, 39 Pac. 451; but *see* Blumaer v. Clock, 24 Wash. 596, 64 Pac. 844, 85 Am. St. Rep. 966.
   Wis. Compare Bradford v. Underwood Lbr. Co., 80 Wis. 50, 48 N. W. 1105.
   Vt. Quimby v. Hazen, 54 Vt. 132.
   Can. Dallaire v. Gauthier, 24 Can. Sup. Ct. 495; Baxter v. Kennedy, 35 N. Brunsw. 179.
   Contra
   Mich. Phillips v. Freyer, 80 Mich. 254, 45 N. W. 81 (overruling Kieldsen v. Wilson 77 Mich. 45, 43 N. W. 1054); Shaw v. Bradley, 59 Mich. 199, and Hall v. Tittabawassee Boom Co., 51 Mich. 377, 16 N. W. 770.
   Minn. Carver v. Bagley, 79 Minn. 114, 81 N. W. 757 (Cf. King v. Kelly, 25 Minn. 522, where contractor expressly excluded by statute).
2. Littlefield v. Morrill, 97 Me. 505, 54 Atl. 1109, 94 Am. St. Rep. 513; Sparks v. Crescent Lbr. Co. (Tex. Civ. App. 1905) 89 S. W. 423.
3. Allen v. Roper, 75 Ark. 104, 86 S. W. 836; Klondike Lbr. Co. v. Williams, 71 Ark. 334, 75 S. W. 854 (distinguishing Tucker v. St. Louis Etc. R. Co., 59 Ark. 81, 26 S. W. 375); Doe v. Monson, 33 Me. 430; Reilly v. Stephenson, 62 Mich. 509; Babka v. Eldred, 47 Wis. 189, 2 N. W. 102; 599; Munger v. Lenroot, 32 Wis. 541. Contra, Wright v. Terry, 23 Fla. 160, 2 So. 6; Kendall v. Davis, 52 Ga. 9; Jacobs v. Knapp, 50 N. H. 71. And *see* Wilson v. Barnard, 67 Calif. 422, 7 Pac. 845; Gross v. Eiden, 53 Wis. 543, 11 N. W. 9. *See* Timber Co. v. Joseph 142 Wis. 55, 124 N. W. 1049.
4. Carver v. Bagley, 79 Minn. 114, 81 N. W. 757.
5. Hyde v. German Nat'l Bank, 115 Wis. 170, 91 N. W. 230.
6. Oliver v. Woodman, 66 Me. 54; Dwinel v. Fiske, 9 Me. 21; Carr v. Brick, 113 Mich. 664.
7. Oliver v. Woodman, 66 Me. 54; Shaw v. Bradley, 59 Mich. 199. Cf. Wright v. Terry, 23 Fla. 160; Bicknell v. Tuckey, 34 Me. 273, Gamble v. Gates, 97 Mich. 465; Federspiel v. Johnstone, 87 Mich. 303; Munroe v. Sedro Lbr. Etc. Co., 16 Wash. 694.

under a lien for services performed on the logs of another. [1] The number of decisions interpreting lien statutes is very large, and the development of this phase of the law so extensive that an attempt to fully discuss it in this treatise is not considered advisable. Any reader specially interested in the procedure necessary to perfect, preserve and enforce a lien upon logs, lumber or other timber products should consult the lien statutes and the text books or encyclopedic articles devoted to a discussion of liens. [2]

§129. Logging Roads and Railroads. The public has no right to use a private logging road, but the use of such a road does not of itself imply an agreement to pay for the use. [3] Even the custom of the public to use old logging roads does not give a right to use such a road if the owner of the land objects. [4] A breach of an agreement by which one party agrees to prepare a road over which the other party is to haul logs has been held to render the party at fault liable for damages at least to the amount of the profits that the other party would have realized except for the failure to prepare the road. [5] In several states there are laws specially authorizing the construction of logging roads, railroads and flume-ways, and in a few provision is made for the charging of a toll for the use of such road, railroad or flume by another. [6] A logging railroad has been defined by a court as one constructed for the convenience and accommodation of lumbermen. [7] Although the operators of such railroads are required to exercise reasonable care both

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1. Minton v. Underwood Lbr. Co., 79 Wis. 646; Losie v. Underwood, Lbr. Co., 79 Wis. 631. *See* McGuire v. McCallum, 110 Mich. 91.
2. See Cyclopedia of Law & Procedure, 1st Ed., Vol. 25, pp. 1586 to 1600.
   American & English Encyclopedia of Law, 2d Ed., Vol. 19, pp. 536-542.
3. Thomas v. Parrott, (Wis.) 82 N. W. 554.
4. Marshfield Land & Lbr. Co. v. John Week Lbr. Co. (Wis.) 84 N. W. 434.
5. Corbett v. Anderson, 85 Wis. 218; *Cf*, Sutton v. Lbr. Co. (Ky.) 44 S. W. 86 (Oral evidence not admitted.)
6. *See*
   N. C. Rev. Laws, 1908, Pell, Sec. 2686.
   N. M. Annot. Stat. 1915, Secs, 2117-2118 (Logging R. R. common carriers).
   Ore. Oregon Laws, 1910, Lord, Secs. 6503-6524, Secs. 6857-8 (condemnation).
   Pa. Purdon's Digest, 1905, Stewart, pp. 2345-2356.
   Wash. Annot. Code, 1910, Rem. & Bal., Secs. 7106-7109.
   W. Va. Code 1906, Sec. 2370. See Code. 1913, Hogg, See 3135 (railway tram).
   Wis. Statutes 1915, Sec. 1771.
   But see, Garbutt Lbr. Co. v. Ga. & Ala. Ry. (Ga.) 36 S. E. 942 (private R. R. may not take private property.)
7. Tompkins v. Gardner etc. Co. 69 Mich. 58, 37 N. W. 43.

in the construction and operation of them, it has been held that they are not liable for injuries to employees or to others to the same extent as the operators of a common carrier railroad. [1]

§130. An Employer's Liability for Injuries to Employees. Under the principles of the common law as applied to the relationship of master and servant, an employer is liable for injuries suffered by an employee in the regular course of his employment unless the injuries have resulted from the carelessness or other fault of the employee, or it be established that the employee understood fully the danger to which he was exposed in the employment and thus voluntarily assumed the risk incident to the employment. However, the employer is not liable as an insurer, but is merely required to exercise the reasonable care and precaution against injuries to employees that the nature of the employment demands and that would be exercised by an employer of ordinary prudence. [2] The degree of care required in a business of peculiar hazard is greater than that required in a less hazardous employment, [3] but the basis of liability in all cases is the negligence of the employer. [4]

If the direction of the work be delegated by the master to an agent, the master will be liable for any injury to an employee through the fault of such agent, the same as if he had himself been in direct charge of the work and had been remiss in his legal duty. [5]

The master is liable only for injuries that are received while the servant is acting within the scope of his employment. [6] But an employee who, on his way to discharge a directed duty, stopped in an open thoroughfare of a sawmill to exchange remarks with a fellow employee concerning the operation of a part of the machinery of the mill and was there injured by the breaking of a belt on a pulley eight feet

1. Lynn v. Andrim Lbr. Co. (La.) 29 So. 874; Simpson v. Enfield Lbr. Co. 131 N. C. 518, 42 S. E. 939.
2. Babcock Bros. Lbr. Co. v. Johnson, 120 Ga. 1030, 48 S. E. 438; Bouck v. Jackson Sawmill Co. 49 S. W. 472, 20 Ky. L. Rep. 1542; Eagan v. Sawyer Lbr. Co. 94 Wis. 137, 68 N. W. 756; Olsen v. North Pacific Lbr. Co. 100 Fed. 384.
3. *See* Bessemer Land etc. Co. v. Campbell, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17; Galveston etc. R. Co. v. Gormley, (Tex. Civ. App. 1894) 27 S. W. 105.
4. Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999.
5. Evans v. Louisiana Lbr. Co. 111 La. 534, 35 So. 736.
6. Lindstrand v. Delta Lbr. Co. 65 Mich. 254, 32 N. W. 424.

distant from where he stood was held not guilty of contributory negligence. [1]

The negligence of a master may consist in the operation of defective or unnecessarily dangerous machinery, or in the assigning of an inexperienced man, who is ignorant of the danger involved, to a work that requires unusual skill or precaution. In a case in which a new employee in a sawmill was injured by stepping into a hole in the floor, the court held that evidence that the mill was constructed in the customary manner of mills in that region was competent but not conclusive evidence in rebuttal of an allegation of negligent or defective construction.[2] A railroad employee injured through the breaking of the side stakes on a car used for the transportation of logs was allowed to recover for the injury on the ground that it was the duty of the railroad company to have the transportation equipment in proper condition to prevent such accidents. [3]

An employee who was unexpectedly directed to go upon a pile of lumber and received an injury because of the defective condition in which the lumber had been piled through negligence imputable to his employer was held not to have assumed the risk of the accident. [4]

On the other hand, a man of mature years, who had been a carpenter for ten years and had worked on circular saws for three years, was held to have assumed the risk of an injury on a saw that caused his death, even though evidence were offered that guards were sometimes used as a precaution against the occurrence of just such an accident; [5] and an employee, accustomed to working about a main saw in a mill, who was injured within two hours after being placed at work on a trimming saw in the same room was held

1. Moore v. Lbr. Co. (La.) 29 So. 990.
2. Nyback v. Champagne Lbr. Co. 109 Fed. 732.
3. Port Blakely Mill Co. v. Garrett, 97 Fed. 537; Cf. Lynn v. Andrim Lbr. Co. (La.) 29 So. 874; and Simpson v. Enfield Lbr. Co. 131 N. C. 518, 42 S. E. 939 (Both holding liability of operators of logging railroad somewhat restricted), and Fowles v. Briggs, (Mich.) 74 N. W. 1046 in which a shipper who improperly loaded a car with lumber was held not liable to injuries to a brakeman resulting from the negligent loading, since shipper owed no legal duty to the brakeman employed by the railroad.)
4. Millard v. Street Ry. Co. (Mass.) 53 N. E. 900, *Cf.* Spicer v. Boice, (N. J.) 49 Atl. 441, (Lumber dealer liable for injury to customer caused by faulty stairway in lumber shed.)
5. Tenanty v. Boston Mfg. Co. (Mass.) 49 N. E. 654; *Cf.* L. & N. R. R. Co. v. Semonis (Ky.) 51 S. W. 612, (Carpenter injured by splintery lumber, could have known danger, took own risk.)

to have assumed the risk in standing where ordinary intelligence would have indicated that there was danger. [1]

The negligence of an employer may also consist in the employment of an unskilful or incompetent person through whose fault injury results to a fellow servant, but the negligence of a skilfull and competent fellow-servant cannot ordinarily be imputed to the master. [2] It is the duty of an employee to report to his master, or to the one who hires and discharges the workmen, the unskilfulness or incompetency of a fellow-servant, if known to him, and a failure so to do indicates an assumption of the risk by himself. [3]

The determination of whether two persons may legally be classed as fellow-servants is often a perplexing problem. The test has been said to be subjection to the control and direction of the same general master in the same common object. [4] The theory of the assumption of risks because of the relationship of fellow-servants has often been carried to the extreme. It has been held that a locomotive engineer operating an engine for hauling timber to a mill and for transporting woodcutters to their work was a fellow-servant of the woodcutters and that the common employer was not liable for injuries to the latter caused by the negligence of the engineer. [5] On the contrary, it has been held that an inspector whose duty it was to prevent logs containing embedded iron from passing through a sawmill was not a fellow-servant of those engaged in sawing the logs and that the common employer was liable for injuries suffered by those within the mill through the negligence of the one employed to look for iron. [6]

A promise by a master to remedy a defective machine or to replace an incompetent fellow-servant will not necessarily charge the master with responsibility for a subsequent injury to the promisee who continues in the work, but if the work is not imminently dangerous, the question of whether the employee was guilty of contributory negligence may properly be submitted to a jury; [7] and it has been held that

1. Demers v. Deering, (Me.) 44 Atl. 922.
2. Ingram v. Dodge Lbr. Co. 33 S. E. 961.
3. Weeks v. Scharer, 111 Fed. 330.
4. Ingram v. Hilton & Dodge Lbr. Co. (Ga.) 33 S. E. 961.
5. Raily v. Garbutt (Ga.) 37 S. E. 369.
6. Covington Sawmill Mfg. Co. v. Clark, (Ky.) 76 S. W. 438.
7. Cross Lake Logging Co. v. Joyce, 83 Fed. 989.

a servant who had directed the attention of his foreman to the improper condition of a saw and had been assured that it would be fixed and told to go on with his work, did not assume the risk of the dangerous employment by continuing work a reasonable time after the promise.[1] Had he continued work without the receipt of a promise that the condition would be remedied, or for so long a time after the promise that he should have had reasonable ground to believe that the master did not intend to keep the promise, he would have been held to have assumed the risk.

Although the employment of a minor in a dangerous work without the consent of his parent is not negligence *per se*,[2] greater care must be exercised by the master as to minors than as to adult employees and he may be liable for injuries to a minor irrespective of negligence on the part of the minor.[3] The same rule should be applied in the case of a sub-normal adult. However, a minor must exercise the degree of care and discretion that may reasonably be expected in one of his age and experience. An intelligent boy of seventeen years who, after working two years at a lath machine, was injured while attempting to clean out clogged material from the machine without stopping it, was held to have assumed the risk,[4] and the employer was absolved from liability for the injury of a boy over fifteen years of age who, subsequent to being warned as to a danger which he understood, stumbled on a rise in the floor of a mill and was injured by a saw.[5]

The law of the place in which the injury occurs is ordinarily applicable to personal injury cases.[6]

Within the last two decades, and especially within very recent years, there has developed an entirely new social attitude regarding injuries to employees. The new trend of public opinion has occasioned an agitation for legislative action that has resulted in the enactment of many laws for the relief of employees. These laws, known in some states

1. Bell & Coggeshall v. Applegate, (Ky.) 62 S. W. 1124.
2. Pennsylvania Co. v. Long, 94 Ind. 250.
3. Marbury Lbr. Co. v. Westbrook, 121 Ala. 179, 25 So. 914.
4. Larson v. Knapp, Stout & Co. (Wis.) 73 N. W. 992.
5. Journeaux v. Stafford Co. (Mich.) 81 N. W. 259.
6. Rich v. Saginaw Bay Towing Co. 132 Mich. 237, 93 N. W. 632, 102 Am. St. Rep. 422.

as employers' liability acts and in others as workmen's compensation acts, vary greatly in the measure of protection afforded employees. However, they all abrogate partially or entirely the doctrines of assumption of risk, contributory negligence and fault of fellow-servant which formerly afforded unsympathetic employers an adequate defense to most actions for damages. Some of these laws have afforded employees an election between the benefits of the statute and the enforcement of their rights under the common law. The more advanced laws of this character provide a graduated scale of compensations, considered commensurate to the decrease in earning power caused by the various injuries. As a means of enabling employers to meet the burden thus imposed upon their business, a system of insurance against the losses due to accidents has been provided in several states. Since August 1, 1908, compensation for injuries to certain employees of the United States has also been provided by an act of May 30, 1908, (35 Stat. L. 556) and its amendments.[1]

Public act number 267 of the sixty-fourth Congress, approved by President Wilson on September 7, 1916, supercedes the previous acts and provides compensation to all Federal employees for injuries sustained in their employment provided the injury was not caused by the wilful misconduct of the employee or was not the proximate result of the intoxication of the employee.

The legislation of this character is still in a formative stage and is receiving modification almost yearly in many states. For this reason, as well as because compensation to employees is only indirectly related to the subject matter of this chapter, it is not considered advisable to include references to the state statutes. Any reader particularly interested in this branch of the law, should consult the late session laws and the most recent treatises devoted to this subject.

1. Amendments, Act Mar. 4, 1911, (36 Stat. 1363); Act. Mar. 11, 1912, (37 Stat. 74); Act July 27, 1912, (37 Stat. 238, 239)

CHAPTER XII

CONTRACTS FOR THE SALE OF TIMBER PRODUCTS

§131. Essentials and Scope of Contractual Agreements. Sales of logs and other products of severed trees are subject to the general rules and principles of law regarding the sale of personal property.[1] The offer must be definite and if the acceptance is restricted or conditional, the party making the original offer must assent to such modification. The contract may consist of a number of different letters or other expressions of the intention of the parties, [2] but it must be clear that the minds of the parties finally met on a definite agreement. Advertisements or general business notices are generally too indefinite to constitute an offer such as may ripen into a contract by acceptance, [3] and even a series of letters followed by a conference, the writing out of the schedules of lumber with the prices agreed upon, and the signature of the same by the party to be charged, without a definite statement that a purchase had been made, was held in New York not to meet the requirements of the section of the statute of frauds requiring a reduction to writing of contracts for the sale of goods above a certain value, when no part of the goods are delivered or part payment made. [4] On the other hand a Tenessee court held that, where a contract was only partially reduced to writing, oral evidence was admissible to show that title was to remain in the vendor until the purchase price was paid. [5] If a pur-

1. Bullock v. Lbr. Co. (Cal.) 31 Pac. 367; Palmer v. Huston, 67 Wash. 210, 121 Pac. 452; Lbr. Co. v. Wilson 69 W. Va. 598, 72 S. E. 651.
2. Wonderly v. Holmes Lbr. Co., 56 Mich. 412, 23 N. W. 79; E. B. Williams & Co. v. Louisiana Lbr. Co. (La.) 29 So. 491. True also as to a sale of standing timber, Swallow v. Strong, (Minn.) 85 N. W. 942.
3. Zeltner v. Irwin, 49 N. Y. Suppl. 337; But see Robinson v. Leatherbee Tie & Lbr. Co. (Ga.) 48 S. E. 380 (Goods shipped in response to advertisment and received.)
4. Slade v. Boutin, 71 N. Y. Suppl. 740.
5. Meyers v. Taylor, (Tenn.) 64 S. W. 719. See Wood v. Moriarty, 15 R. I. 518 (1887) (Question of parol evidence, sale lumber under seal).

chaser of logs has an opportunity to inspect them before payment therefor, or before the logs are manufactured into lumber, the courts will ordinarily reject a contention that there was an implied warranty that the logs were straight and sound or adapted to the purposes to which the purchaser intended to devote the material produced therefrom. [1] Even a statement in a contract as to the amount of logs sold may be construed as a mere estimate and not a warranty, [2] and where both parties could read and both had signed a contract, it was held that proof of a misrepresentation by one party as to the contents of the written contract, without evidence that the other party was deprived of an opportunity to read it, or that the first party had fradulently prevented the other from reading it, did not establish the kind of legal fraud necessary to make the contract void. [3] Where there were representations as to the quality of lumber to be sold, but a subsequent refusal on the part of the vendor to guarantee the grades, a Louisiana court held that one purchasing after such refusal could not establish a breach of warranty as to grades. [4] An agreement for the substitution of a cheaper grade of lumber for that called for by a contract and the acceptance of it has been held by a Mississippi court not to necessarily signify that the purchaser was to pay the same price for the cheaper grade; [5] but a Texas court has expressed the opinion that in the absence of evidence to the contrary the legal inference would be that the purchaser agreed to take the cheaper grade at the same rate. [6]

§132. **Legal Delivery and Transfer of Title.** The general rule regarding sales of personal property is that the seller's title divests and that of the purchaser vests at the moment of the transfer of the right of possession from the vendor to the vendee. This legal delivery does not necesarily involve a transfer of the physical possession of the

1. Brewer v. Arantz, (Ala.) 26 So. 922; Maxwell v. Lee, 34 Minn. 511, 27 N. W. 196; Ketchum v. Stetson Etc. Mill Co. 33 Wash. 92, 73 Pac. 1127.
2. Switzer v. Pincomming Mfg. Co., 59 Mich. 488, 26 N. W. 762.
3. Dunham Lbr. Co. v. Holt, (Ala.) 26 So. 663.
4. E. B. Williams & Co. v. Louisiana Lbr. Co. (La.) 29 So. 491.
5. Hunter v. Lake Mills (Miss.) 29 So. 519.
6. Florida Athletic Club v. Hope Lbr. Co., (Tex. Civ. App.) 44 S. W. 10.

property sold. The delivery may be constructive or symbolical, and the transfer of the goods sold to the actual possession of the purchaser does not necessarily effect a legal delivery and change of title. The question as to when delivery is to be effective is determined by the intention of the parties, and this intention will be gathered from the surrounding circumstances and the conduct of the parties if the terms of the contract are not clearly expressed in words. If delivery is to be made at a certain place, the transfer of title will not be effected until such delivery is made. If each of the parties has done all that he is required to do under the contract, and there is no condition expressed in the contract, title will pass to the buyer as soon as the agreement is concluded even though payment or delivery, or both payment and delivery, be delayed; but if the seller is required by the contract to perform some service as to the logs or lumber subsequent to the sale, or the logs are to be scaled or the lumber measured as a basis for payment, title will not ordinarily pass until these requirements are fulfilled. [1] Actual delivery of all the logs in a lot is not essential to a valid sale of the lot. A part may be delivered, or there may be a transfer of possession by merely pointing out or otherwise designating the logs which are sold within a stream or on its banks. A scale or survey of the logs in the manner agreed upon by the parties will ordinarily effect the symbolical delivery and vest the title in the purchaser. [2] If the contract does not definitely fix the time of delivery, a reasonable time after the sale will be allowed and required. [3] A provision

1. Ray v. Schmidt, 7 Ga. App. 380, 66 S. E. 1035; Davis v. Cox, 13 Ga. App. 509 79 S. E. 383; Sempel v. Lbr. Co. 141 Iowa 586, 121 N. W. 23; State v. Meehan, 92 Minn. 283, 100 N. W. 6; Martin v. Hurlbut, 9 Minn. 142; Strong v. Dunning, 175 Pa. St. 586, 34 Atl. 919. Carter v. Tie Co., 184 Mo. App. 523, 170 S. W. 445; *See also* Grant v. Merchants Etc. Bank, 35 Mich. 515; Creelman Lbr. Co. v. De Lisle, 107 Mo. App. 615, 82 S. W. 205; Hurd v. Cook, 75 N. Y. 454; Gatzmer v. Moyer, 9 Pa. Cas. 567, 13 Atl. 540; Cook v. Van Horne, 76 Wis. 520, 44 N. W. 767; Log Co. v. Land Co. 145 Wis. 286, 129. N. W. 1100; Coles v. Lbr. Co. 150 N. C. 183, 63 S. E. 736. Chaney v. Sutherland-Innes Co., 80 Ark. 572. 98 S. W. 967.
2. Bethel Steam Mill Co. v. Brown, 57 Me. 9, 99 Am. Dec. 572; Boynton v. Veazie, 24 Me. 286; Jewett v. Warren, 12 Mass. 300, 7 Am. Dec. 74; Brewster v. Leith, 1 Minn. 56. See also Gasper v. Heimbach, 53 Minn. 414, 55 N. W. 559. As to a raft *see* Williams v. Johnson, 26 N. C. 233; Hungerford v. Winnebago Tug Etc. Co. 33 Wis. 303; Nolan v. County (Okl.) 152 Pac. 63: Lbr. Co. v. Cameron, 45 Tex. Civ. App. 350, 101 S. W. 488; Middlebrook v. Thompson, 19 U. C. Q. B. 307.
3. Yellow Poplar Lbr. Co. v. Stephens, 69 S. W. 715, 24 Ky. L. Rep. 621; Chapman v. Ingram, 30 Wis. 290. *See also* Irish v. Pauley, (Calif. 1897) 48 Pac. 321; Peterson v. South Shore Lbr. Co., 105 Wis. 106, 81 N. W. 141. Lbr. Co. v. Magne-Silica Co. (Cal.) 112 Pac. 1089; Chunn v. Lbr. Co., 175 Mo. App 641, 158 S. W. 94.

in the contract for the forfeiture of all logs not delivered within a certain time will not be enforced; [1] but a provision that fifteen cents per hundred feet should be deducted from the purchase price of all logs not delivered by a certain date has been sustained as a statement of liquidated damages and not a penalty such as the law will not enforce. [2] A loss of logs or other timber products before delivery will fall upon the seller, even though title has passed, if the seller has failed to exercise ordinary care to prevent such loss; [3] but in a Nevada case in which payment was to be made when charcoal was delivered to a certain place it was held that, the manufacture of the product having been completed, the title had passed and the loss must fall upon the purchaser even though delivery to the place contemplated was not effected previous to its destruction. [4] In Washington under a contract for the cutting and rafting of logs which provided that the price agreed upon was to be paid when the logs were scaled, the court held that delivery was effected when unscaled logs were turned over to the control of the purchasers at their request, and that the seller could recover the value of logs which had escaped from the control of the purchasers' tug and had been negligently abandoned by them. [5] In other words, the court held that title had passed when the logs were taken by the purchasers' tug, even though something remained yet to be done to ascertain the total value of the property transferred. And in an Arkansas case it was held that an agreement that the seller should receive an additional amount upon the completion of loading the lumber sold, if it was found that there was a greater amount than that named in the contract, did not operate to defer the transfer of title until the exact amount of lumber was ascertained. [6] The mere physical delivery of timber into

1. Daniel v. Day Bros. Lbr. Co., 85 S. W. 1092 27 Ky. L. Rep. 650.
2. Kilbourne v. Lbr. Co. (Ky.) 64 S. W. 631. Cf. Wall v. Lbr. Co. 124 La. 844, 50 So. 769 (during floating season).
3. Buie v. Browne, 28 N. C. 404; Bigler v. Hall, 54 N. Y. 167; Lbr. Co. v. Cornett, 161 Ky. 98, 170 S. W. 516.
4. Bianchi v. Maggini, 17 Nev. 323. *See* Woodstock Iron Co. v. Reed, 81 Ala. 305. Izett v. Stetson & Post Mill Co. (Wash.), 60 Pac. 1128; Cf. Roy v. Griffin (Wash.); 66 Pac. 120, (Shipment of shingles on bill of lading in name of purchaser.) Eversole v. Wilson, (Ky.) 123 S. W. 1196; Noyes v. Marlott, 156 Fed. 753, 84 C. C. A. 409.
5. Anderson Tully Co. v. Rozelle, (Ark.) 57 S. W. 1102.

the possession of the purchaser will not operate to transfer the title if it be the understanding of the parties that payment in cash or other form shall be a condition precedent to the legal delivery of the timber; [1] and if a contract of sale requires a delivery of logs, lumber, or other products on cars at a certain place a subsequent marking of the specific goods to be covered by the sale as "sold and delivered" will not effect a transfer of the title. [2] The conditional acceptance of a part of the logs contemplated by a contract of sale does not preclude the purchaser from obtaining damages for a failure of the seller to comply fully with the requirements of his contract; [3] and an acceptance of logs delivered later than the time stipulated in the contract does not constitute a waiver of the right of the purchaser to recover the damages suffered, if there are not circumstances showing intention to waive this right. [4] The keeping of lumber for a period of fifteen days without objection has been held to establish an acceptance of it. [5] A delivery of ties along a railroad track as agreed and an inspection of the same will constitute a legal delivery and effect a transfer of title in the absence of a showing of fraud as to the inspection. [6] The same principle has been applied to lumber [7] In a Michigan case in which lumber of one party in the mill yard of another, acting as agent, was sold to a third party at specified rates for different qualities, the amount of which was not ascertained at the time of sale, with an agreement that the seller should stand all charges of putting the lumber over the rail of the vessel and that the cost of inspection was to be shared equally, and with no payment for lumber till after shipment, it was held that the title did not pass at the time of the sale; [8] and in New York under a contract for the planing of lumber to be selected from various piles in a mill yard and to be taken in installments as notification was given that a

1. Adams v. Roscoe Lbr. Co. (N. Y.) 53 N. E. 805; Woolsey v. Axton (Pa.) 43 Atl. 1029.
2. First Nat'l. Bank v. Peck, 70 N. Y. Suppl. 471.
3. Duplanty v. Stokes, 103 Mich. 630, 61 N. W. 1015; Walker v. Cooper, 150 N. C. 128, 63 S. E. 681. Cf. Lumber Co. v. Hopson, (Ark.) 133 S. W. 823.
4. Belcher v. Sellards (Ky.) 43 S. W. 676. Cf Lbr. Co. v. Irwin. 24 Can. S. Ct., 607.
5. O'Sullivan v. New York Lumber Corp. 61 N. Y. Suppl. 493
6. Intern'l & Gt. Nor. R. R. Co. v. Ogburn (Tex. Civ. App.) 63 S. W. 1072.
7. O'Sullivan v. New York Lbr. Corp., 61 N. Y. Suppl. 493.
8. Lumber Co. v. Charlton (Mich.) 87 N. W. 268.

quantity had been finished, it was held that title to any particular portion of the lumber did not pass until it was dressed and the purchaser notified. [1] In a Louisiana case one who purchased lumber for himself, but had the bill of sale executed to another from whom he obtained credit with which to effect the purchase, was denied the right to assert that the lumber belonged to his creditor and that he was liable only for so much as he had actually used. [2] In an action on a contract for the sale of all the pine timber on a tract to a company engaged in the logging and manufacture of lumber, with a clause reserving title to the owner until payment was made for the timber, but under which the vendor had permitted the purchasing company to place its mark upon all logs and to sell them as if it had title, the court held that the vendor was estopped from asserting title against a third party who had bought the logs without actual notice of the condition in the contract and that a statute regarding the recordation of conditional contracts was inapplicable. [3]

§133. Contracts for Delivery in Installments or as Manufactured. Controversies have arisen where contracts have been made for the purchase of all the output of a certain mill or for all lumber of certain grades produced at the mill. It has been held that the phrase "mill-run" in a contract for the purchase of lumber included all merchantable lumber produced at the mill, except the "mill-culls," which were excluded by the terms of the contract, irrespective of the percentage of the different grades; [4] that "mill-tally" in a contract for sawing logs included "mill-culls", [5] and that a logger under a contract providing for compensation at a certain rate per thousand exclusive of "dead culls" could not recover on a quantum meruit for the logging of cull timber by showing that such logs were manufactured and sold. [6] A contract which required one party to furnish all the lumber needed by the other for mining purposes, and provided that if the former failed to furnish lum-

1. Chambers v. Austin, 68 N. Y. Suppl. 53.
2. Cannon v. Vaughn Lbr. Co. (La.) 27 So. 276.
3. Mississippi River Log Co. v. Miller (Wis.) 85 N. W. 193.
4. Wonderly v. Holmes Lbr. Co., 56 Mich. 412, 23 N. W. 79.
5. Corneil v. New Era Lbr. Co., 71 Mich. 350, 39 N. W. 7.
6. Brigham v. Martin 103 Mich. 150, 61 N. W. 276. Cf. Hayes v. Cummings, 99 Mich. 206, 58 N. W. 46 ("Purchase scale").

ber as needed for such mining purposes the latter might hire another to produce it and charge the cost to the one obligated to saw lumber, was held to bind the mine operator to take from the sawyer all the lumber needed in the mine. [1] Under a contract for the sale of the total yearly cut of a mill, except mill culls, the court held that evidence as to exceptionally low water was admissable in explanation of failure to deliver the amount contemplated by the contract, but that the mill owner could not recover for all lumber delivered when much of it was not of the thickness agreed upon; [2] and in a contract for the purchase of the output of a sawmill by grades, the forwarding of drafts to the seller with a statement of the purchasers grading as each installment of lumber was received, and the cashing of the drafts by the seller was held to make it clear that the parties to the contract had not intended that the seller's grading should be made the basis of payment. [3] In an action on a contract for the sale and delivery of lumber it has been held that the withholding of the pay for one car until another should be delivered, for the purpose of enforcing a fulfillment of the contract, would not release the vendor in the absence of circumstances indicating that the vendee did not intend to fulfill his part; [4] and in a sale of a large amount of lumber with provision for a payment when it was loaded on cars, it was held that though the vendor could present evidence of a failure of the purchaser to make the partial payments as they became due to justify a rescission of the contract on his part, he could not recover for the contract price of the lumber delivered, if, before a formal rescission and without the consent of the purchaser he had sold over one-half of the lumber covered by the contract. [5] That is, although the contract was severable as to partial payments, it was entire as to performance. Where a contract for the sale of wood, with a provision for payment as fast as the purchaser sold it, stipulated that title should remain in the vendor until payment was made, an action by the vendor for the sale price of that

1. Tutwiler v. McCarty, (Ala.) 25 So. 828.
2. Barr v Henderson, (La.) 30 So. 158.
3. Long-Bell Lbr Co. v. Stump, 86 Fed. 574.
4. West v. Bechtel, (Mich.) 84 N. W. 69.
5. Easton v. Jones, (Pa.) 44 Atl. 264.

already disposed of by his vendee, was held not to constitute a waiver of a right to sue for the conversion of the remainder.[1]

§134. Delivery to a Common Carrier. Where a contract for the sale of timber products is silent as to the place of delivery, delivery of the property by the vendor to a common carrier for transportation to the buyer will of itself act to transfer the title from the vendor to the vendee to whom the property is consigned by a bill of lading. In such a case the law considers the carrier to be the bailee of the consignee and not of the consignor.[2] If a part or all of the property is lost or damaged after shipment the carrier is liable to the consignee and not to the consignor, and the carrier is under no obligation to hold the property for the use or protection of the consignor should doubt arise as to the ability or intention of the consignee to pay the purchase price of the property. However, this presumption of delivery rests upon the implication of intention to deliver shown in the billing of the property to the purchaser, and if it may fairly be gathered from the language of the bill of lading or from the terms of such bill and the surrounding circumstances that the vendor did not intend that the delivery to the carrier should constitute a delivery to the vendee, the shipment will not operate as a transfer of title to the vendee. If the bill of lading calls for a delivery to the "holder," the carrier will be required to deliver to the one who presents the bill, but if the property is consigned to the vendor or to his order, the carrier will be liable to the consignee only for a proper delivery at the point of destination. As a means of protection against loss through the extension of credit as well as to meet certain other conditions of trade, vendors of timber products, like other merchants, have been accustomed to sometimes ship lumber consigned to their own order and to attach to the bill of lading a bank draft drawn upon the vendee as payee. When this is done the carrier is authorized to deliver the property to the vendee only upon condition that the draft be accepted by him.[3] Under such a shipment no contractual relation exists between the car-

1. Bryant v. Kenyon (Mich.) 81 N. W. 1093.
2. A. J. Neimeyer Lbr. Co. v. Burlington & Missouri Riv. R. R. Co., 54 Neb. 321.
3. The Prussia, 100 Fed. 484.

rier and the vendee until the draft is accepted. It has been said that a prepayment of freight by a vendor on goods sold and shipped is *prima facie* evidence of an intention on the part of the vendor to retain title to the property while in transit. [1] Under a contract providing for an inspection and count of staves by the purchaser at his railroad point, it was held that the shipper retained title until acceptance of the property by the vendee. [2]

The duty of a common carrier to deliver timber products to the right person, unless prevented by an act of God or by a public enemy, is absolute. [3] If a consignee refuses or fails to accept the lumber or other timber product, it is the duty of the carrier to notify the consignor and hold the goods for a reasonable time; [4] but if the shipper is himself the consignee, a refusal to accept constitutes an abandonment, and the shipper cannot later hold the railroad for conversion. [5]

§135. Right of Stoppage. If full title to the lumber or other product has not already passed to the consignee, the consignor usually has what is known as the right of stoppage *in transitu*, as a protection against loss through insolvency of the consignee. This right, which is merely an extension of a vendor's lien, exists until actual delivery is made from the carrier to the consignee or his vendee. [6] Thus it was held in one case that the holding of lumber in storage for several months by the carrier and the acceptance by the shipper of the notes of the insolvent consignee did not destroy the right of stoppage, [7] and in another that the holding of lumber by a railroad company because the consignee failed to accept and pay the freight, and a subsequent arrangement by which the railroad agreed to purchase the lumber and credit its value on a debt owed to it by the consignee did not operate to defeat the consignor's right of stoppage *in transitu*. [8] In another case in which lumber consigned to one who had made false statements to a commercial agency

1. A. J. Neimeyer Lbr. Co. v. Burlington & Mo. Riv. R. R. Co., 54 Neb. 321.
2. Miller v. Somerset Cedar Post & Lbr. Co. (Ky.) 51 S. W. 615.
3. Oskamp v. Southern Express Co. (Ohio) 56 N. E 13.
4. Bailments, Inc. Carriers, Schouler, ed. 1905 (Boston) Sec. 399, p. 240.
5. Beedy v. Pacey (Wash.) 60 Pac. 56.
6. Branan v. Atlanta & West Point R. R. Co. (Ga.) 3 S. E. 836.
7. Brewer Lumber Co. v. Boston & Albany R. R. Co. (Mass.) 60 N. E. 548.
8. Wheeling & Lake Erie Ry. Co. v. Koontz et al. (Ohio) 54 N. E. 471.

regarding his business assets, was delivered by the railroad to a third party upon an order from the consignee, the shipper was allowed to replevin the lumber without tendering the amount of freight paid by the consignee's vendee who had knowledge of the fraud. [1]

§136. Rights and Liabilities of Common Carriers in Particular Cases. When timber products can be shipped over two or more routes for the same rate, the receiving railroad company and not the shipper may determine which connecting line shall be used. [2] Delivery of lumber upon its own pier by a railroad is not delivery to a steamship company such as to relieve the railroad from risk as to lumber. [3] A contract by an agent of a railroad to ship lumber for a certain rate from a point in the United States to one in Canada was held to include custom duties and to be within the apparent scope of the agent's authority, [4] and the measure of damages for the failure of a railroad to furnish cars as agreed for shipment of lumber was held to be the difference between the cost of obtaining cars and the contract price. [5] It has been held that a log driving corporation is a common carrier to the extent that the statutory right of a vendor to stop logs *in transitu* as a protection against an insolvent vendee applies to the transportation of logs by such a company. [6] A provision in a towing contract that the owner of logs might terminate the contract at any time that the services of the tug-man were unsatisfactory was held to authorize a rescission of the contract before any services were performed where the tug-man could not be found when the owner was ready for towing and the company honestly believed from this fact that the tug-man was unreliable [7] A water transportation company on the Great Lakes was relieved from liability for the loss of logs without fault on its part during a storm on the ground that the title to the lumber

1. Soper Lbr. Co. v. Halsted & Harmount Co. (Conn.) 48 Atl. 425.
2. Post v. Southern Ry. Co., (Tenn.) 52 S. W. 301.
3. Lewis v. Chesapeake & Ohio Ry. Co. (W. Va.) 35 S. E. 908.
4. Waldron v. Canadian Pacific Ry. Co. (Wash.) 60 Pac. 653.
5. Baxley v. Tallahassee & Montgomery R. Co. (Ala.) 29 So. 451.
6. Johnson v. Eveleth (Me.) 45 Atl. 35. But see Mann v. White River Log Etc. Co., 46 Mich. 38, 8 N. W. 550, 41 Am. St. Rep. 141; Chesley v. Miss. Etc. Boom Co., 39 Minn. 83, 38 N. W. 769.
7. Magee v. Scott & Holston Lbr. Co. (Minn.) 80 N. W. 781.

passed to the purchaser at the time it was loaded on barges at the mill in Canada. [1]

§137. General Principles Applied in Actions for Breach of Contracts for Sale of Timber Products. A refusal of a purchaser to accept all of a shipment of lumber as not meeting the requirements of the contract as to quality, and a return by the seller of a check for the lumber which the purchaser was willing to take, with a request that the purchaser have the lumber reloaded at the seller's expense, was held to effect a rescission of the original contract, and the vendor was required to pay the cost of the reloading. [2] In an action for the balance due on a contract for the sale of lumber, a counter-claim for damages because the lumber was not furnished in the sizes and at the time required by the contract has been allowed, including the loss due to wages paid men kept idle because of such failure. [3] It has been held that a purchaser of logs may deduct from the purchase price the amount which has been paid as stumpage because of learning subsequent to the purchase that the logs were cut in trespass on government land, [4] and also that a purchaser may refuse payment for the products purchased until liens are released or he is given security against the lien claims. [5]

The buyer may also deduct from the purchase price other charges connected with the transfer of the property, such as for scaling and inspection as ordinarily contemplated in such sales. [6] The measure of damages for a failure to deliver lumber in the quantity or of the quality agreed upon, [7]

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1. Donovan v. Standard Oil Co. (N. Y.) 49 N. E. 678. (The court saying the nature of the transaction and the custom of business as well as the letter of the contract must be considered.)
2. Wyckoff v. Swann, 62 N. Y. Suppl. 139.
3. Clark v. Koerner (Ky.) 61 S. W. 30.
4. Parish v. McPhee, 102 Wis. 241, 78 N. W. 421.
5. Saxton v. Krein, 107 Mich. 62, 64 N. W. 868.
6. McIlquhan v. Barber, 83 Wis. 500, 53 N. W. 502. *See also* Yellow Poplar Lbr. Co. v. Stephens, 69 S. W. 715, 24 Ky. L. Rep. 621; French v. Asher Lbr. Co., 41 S. W. 261, 46 S. W. 701, 20 Ky. L. Rep. 380; Fish v. Crawford Mfg. Co. (Mich.) 79 N. W. 793; Wemple v. Stewart. 22 Barb. (N. Y.) 154; Aitcheson v. Cook, 37 U. C. Q. B. 490; Reid v. Robertson, 25 U. C. C. P. 568.
7. Barr v. Henderson, (La.) 30 So. 158; West v. Bechtel (Mich.) 84 N. W. 69; Hair & Ridgeway v. Wheelihan (Minn.) 84 N. W. 638; Saxe v. Penokee Lbr. Co. (N. Y.) 54 N. E. 14; Hamilton v. Kirby (Pa.) 49 Atl. 214; Florida Athletic Club v. Hope Lbr. Co. (Tex. Civ. App.) 44 S. W. 10. But see: Soutier v. Kellerman, 18 Mo. 509 (1853). (By custom packs of shingles of certain size to be accepted in lieu of actual count.)

or to take lumber in accordance with a contract of purchase, [1] is the difference between the contract price and the market value at the time of the default. In accordance with general principles questions of fact as to whether a contract for the sale of timber products was actually made and as to agreements regarding scaling, inspection and other matters connected with the sale will be submitted to a jury,[2] and the general rules as to the admission of evidence are applicable to such cases. [3]

§138. The Liability of a Principal for the Acts of an Agent. A principal is bound by all acts of his agent that are authorized, and even unauthorized acts, which are apparently within the scope of the agent's authority and which are relied upon by a third party in good faith in determining his course of action, may bind the principal. [4] Thus it has been held that a lumber corporation was bound by acts of an agent that were informally authorized without a formal resolution by the board of directors, [5] and that it was not necessary for one who had relied upon acts apparently within the scope of an agent's authority to prove a written authorization.[6] The subsequent ratification of an unauthorized

1. Tripp v. Forsaith Machine Co. (N. H.) 45 Atl. 746.
2. Nelson v. Mashek Lbr. Co., 95 Minn. 217, 103 N. W. 1027; St. Anthony Lbr. Co. v. Bardwell-Robinson Co., 60 Minn. 199, 62 N. W. 274; Erisman v. Walters 26 Pa. St. 467; Tingley v. Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098;
3. Lbr. Co. v. Hopson (Ark.) 133 S. W. 823; Hicks v. Phillips, 146 Ky. 305, 142 S. W. 394; Cooperage Co. v. Smith, (Ky.) 115, or 116, S. W. 828. Helfrich Etc. Planing Mill Co. v. Everly, 32 S. W. 750, 17 Ky. L. Rep. 795; Swindell v. Gilbert, 100 Md. 399, 60 Atl. 102; Duplanty v. Stokes, 103 Mich. 630, 61 N. W. 1015; Clarke v. Hall Etc. Lbr. Co., 41 Minn. 105, 42 N. W. 785; Tenny v. Mulvaney, 8 Ore. 513. Evidence admitted as to division of cost of scaling logs, Keildsen v. Wilson, 77 Mich. 45; Hackley v. Headley, 45 Mich. 569; of lumber inspection, Fish v. Crawford Mfg. Co. (Mich.)79 N. W. 793; Godkin v. Weber, 158 Mich. 515, 122 N. W. 1083. *See also* Lbr. Co. v. Magne-Silica Co. (Cal.) 112 Pac. 1089; Guin v. Lbr. Co. 6 Ga. App. 484, 65 S. E. 330; Mechling v. Potter, 142 Ky. 798, 135 S. W. 266; McCoy v. Fraley (Ky) 113 S. W. 444; Partridge v. R. Co. 111 Me. 589, 90 Atl. 618; Mercier v. Murchie Co. 112 Me. 72, 90 Atl. 722; Kelley v. Chemical Co., 162 Mich. 525, 127 N. W. 671; Dunlevie v. Spangenberg, 66 Misc. 354, 121 N. Y. Suppl. 299; Coles v. Lbr. Co., 150 N. C. 183, 63 S. E. 736; Richardson v. Baker, 83 Vt. 204, 75 Atl. 151; Logging Co. v. Lbr. Co. 78 Wash. 568, 139 Pac. 625; Manley v. Lbr. Co., 140 Wis. 381, 122 N. W. 1057; Williams v. Lbr. Co., 167 Fed. 84, 92 C. C. A. 536; Rex v. Gilbert, 28 Can. S. Ct. 388. Stubbs v. Johnson, 38 U. C. Q. B. 466.
4. Witcher v. McPhee, (Colo.) 65 Pac. 806; Kruse v Seiffert & Weise Lbr. Co. (Iowa) 79 N. W. 118; Blood v. Herring, (Ky.) 61 S. W. 273.
5. Kentucky Land and Immigration Co. v Wallace, (Ky.) 55 S. W. 885, (Vice-president bound company); Flaherty v Atlantic Lbr. Co. (N. J.) 44 Atl. 186.
6. Columbia Land & Mining Co. v Tinsley, (Ky.) 60 S. W. 10.

act of an agent, [1] or the appropriation, with an understanding of the facts, of funds that have come into the hands of an agent without authority will bind the a principal. [2]

However, acts of an agent that are not in the regular course of employment and not such as may fairly be presumed to have been authorized by the principal will not bind the latter [3] and one is not bound simply because some person believed a third party to be his agent. It is the duty of the one dealing with a supposed agent to ascertain the extent of the agency and, unless the grounds upon which his belief in the agency rests are such as would satisfy a man of ordinary prudence, he will deal with the supposed agent at his own risk. [4] It has been held that an agent in charge of a retail lumber yard was not authorized to sign a bond as security for the performance of work by a contractor though it was clear that the purpose of such action was to effect a sale of materials to the contractor [5] and that statements of an agent for a corporation that the company for which he was buying was a partnership, did not bind the members of the corporation as partners, [6] the decision resting on the ground that the only principal the agent had was a corporation and not individuals.

The interest of an agent in lumber received for sale on commission has been held not to be subject to attachment by a creditor; [7] and, in a suit against an insurance broker for failure to use due diligence in placing insurance upon lumber, it has been held that the burden of proving negligence rested upon the owner of the lumber but that evidence as to the hazardous nature of lumber insurance was admissible as having a bearing upon the question of a reasonable time for the placing of the risk. [8]

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1. Hunter v Cobe, (Minn.) 87 N. W. 612.
2. Payne v Hackney, (Minn.) 87 N. W. 608.
3. Ayer & Lord Tie Co. v Davenport, (Ky.) 82 S. W. 177, 26 Ky. L. Rep. 115.
4. Rosendorf v Poling, (W. Va.) 37 S. E. 555;
5. Bullard v DeGroff, (Neb.) 82 N. W. 4.
6. McDonald v Cole, (W. Va.) 32 S. E. 1033.
7. Hampton & Branchville R. R. & Lbr. Co. v Sizer, 64 N. Y. Suppl. 553.
8. Backus v. Ames, (Minn.) 81 N.W. 766; See Hartford Fire Ins. Co. v. Post (Tex.) 62 S. W. 140.

CHAPTER XIII

THE INSPECTION AND MEASUREMENT OF TIMBER PRODUCTS

§139. Development of Legislative Regulation of Inspection and Measurement. As early as March 29, 1626, the shipment of timber from the Plymouth Colony without the approval of the governor and council was forbidden. [1] This order, as well as several of similar character in other New England colonies, was evidently aimed primarily at a conservation of the timber supply. The necessity of an official inspection of timber products to insure a satisfactory quality in exportations was first experienced in connection with the shipment of staves to the West Indies and the Madeira Islands. A Connecticut order of September 10, 1640, required an official inspection of all staves intended for shipment to a foreign market. [2] As an export trade developed, various provisions as to inspection were enacted in different colonies. The inspection of staves was provided for in Connecticut, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Virginia, North Carolina, and New York, in the order named. [3] The standard cord of wood was established by legal enactment in nearly, if not all, American colonies previous to the adoption of the Federal constitution, [4] and subsequent to the institution of the National government numerous acts regarding the measurement of firewood and the selection of official wood corders were passed both in the original states and in those later

1. Compact, Charter & Laws, Colony of Plymouth, Boston, 1836, p. 28.
2. Colonial Records of Connecticut, Hartford, 1850, Vol. 1, p. 60.
3. Conn., 1640; Mass., 1641; N. H., 1687; N. J., 1694; Pa., 1700; Va., 1752; N. C. 1770; N. Y., 1788.
4. Mass., 1647; N. Y., 1684; R. I., 1698; N. H., 1714 (earlier as a part of Mass.); S. C., 1738; Del., 1741; Ga., 1766; N. C., 1784.

admitted to the Union. [1] Previous to the establishment of the Federal government legislation regarding the inspection of lumber had been enacted in all American Colonies except Delaware, Maryland, South Carolina and Georgia. [2] The inspection of shingles early claimed the attention of the colonial legislatures, [3] and an inspection of hoops, heading and shooks was provided for in a few colonies. [4]

The very early laws regarding the quality of staves and many of the later ones fixing specifications for lumber, shingles, hoops, heading and staves were apparently directed principally to the end of maintaining in foreign markets a satisfactory reputation for the timber products of the colonies in which the laws were enacted. However, even in some of the earlier acts, there are indications that grave abuses in domestic commerce and purely local transactions had forced legislative regulation of the timber industry. The later acts prescribed with considerable detail the specifications of the different products and grades. Many statutes indicated a determined purpose to assure the election or appointment of thoroughly capable and trustworthy inspectors. [5]

Subsequent to the establishment of the Federal Union statutes regulating the inspection and measurement of timber products were enacted in many states. The earlier state laws, like those passed previous to March 4, 1789, related to finished products, but as the lumber industry developed and the practice of driving logs in the streams became extensive, a special need arose for a standard measurement of logs. The situation was partly met by legislative

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1. N. H. Acts Feb. 8, and June 15, 1791.
   Md. Act. Dec. 22, 1792; ch. 19, 1794.
   Del. Act Feb. 9, 1796; act June 26, 1829.
   Pa. Acts. Feb. 13, 1802; Mar. 10, 1817.
   La. Act Feb. 19, 1816.
   Me. Acts Mar. 8, 1821; Feb. 15, 1825; Apr. 1, 1836; Apr. 16, 1841, sec. 7.
   Vt. Act Nov. 10, 1824.
   Cf. Inspection Ground Oak Bark, Pa., 1804; Md. 1840; N. Y. 1840.
2. Mass., 1653; Conn., 1667; N. H., 1683; R. I., 1731; Pa. 1759; N. C. 1770; N. J. 1772; Va. 1786; N. Y., 1788.
3. Mass., 1695; R. I., 1731; S. C., 1738; Va., 1752; N. C., 1770; N. J., 1772; N. H. 1785; Conn., 1786; N. Y., 1788.
4. Mass. 1743; N. J., 1772; N. H., 1785.
5. See discussion of such laws in Forest Legislation in America Prior to March 4, 1789; Kinney, pp. 381 to 387 (published as Bulletin No. 370, Cornell University Agr. Exp. Station, January, 1916.)

provision for the selection of official scalers, upon whose uniformity of judgment reliance was placed for a standardization of measurement, and partly by the adoption of certain scaling rules as legal standards. [1]

Laws of this nature are now in force in many states. [2]

Only the earlier acts are here cited.

1. Ala. Act. Dec. 17, 1819; *See* Digest Laws of Ala., 1823, Toulmin, p. 859.
   Ark. Act. Mar. 17, 1883, Laws of Ark., 1883, p. 140, Act No. 83 (Logs)
   Cal. Act Mar. 28, 1878, and Mar. 30, 1878; Laws 1878, p. 604, p. 779. Cf. Act April 16, 1880, S. L. p. 119.
   Conn. Act. Dec. 1790, Stats. Conn., Hartford, 1808, p. 397, sec. 21-24.
   Del. Act Mar. 9, 1869, Laws of Del., Vol. 13, ch. 453; *See also* Rev. Laws of Del., 1874, p. 367.
   Fla. Act Nov. 21, 1828; see acts Fla. Terr. prior to 1840, Tallahassee, 1839, Duvall, p. 249.
   Ga. Acts of Dec. 16, 1794, and Dec. 5, 1799, Laws of Ga., Vol. 1, pp. 345 and 346; Digest, Prince, 1822, p. 483.
   Ida. Act Mar. 10, 1903, S. L., p. 90.
   Ill.
   Iowa Act Jan. 15, 1855, Laws of Iowa, 1854-5, p. 39, ch. 26.
   Me. Act Mar. 16, 1821, Laws Me., Brunswick, 1821, Vol. 2, p. 674; Gen'l Laws Portland, 1834, Vol. 2, p. 791, ch. 158.
   Md. Act Dec. 27, 1811; *see* Laws of Md., Annapolis, 1818, Vol. 4, ch. 70; act Feb. 9, 1818; Vol. 5, ch. 141.
   Mass. Act Feb. 13, 1822, Gen. L. Boston, 1823, Vol. 2, p. 566, ch. 73.
   Mich. Acts June 9, 1819, and Sept. 11, 1819, Laws Terr. Mich., Lansing, 1874; Vol. 2, pp. 156 and 163.
   Minn. Act Aug. 9, 1858; Gen. Stat. 1849-58, p. 828.
   Miss. Act June 11, 1822. *See* Miss. Code, Jackson, 1848, Hutchinson, p. 283, Act. Mar. 5, 1880, S. L., p. 176. (Logs).
   Nev. Act Mar. 3, 1866, S. L., p. 198, ch. 99.
   N. H. Act June 29, 1819, Laws of N. H., after 1815, Concord, 1824, Vol. 2, p. 43. Cf. Rev. St. Concord, 1843, p. 207, ch. 106.
   N. J.
   N. M.
   N. Y. Act Mar. 29, 1790, ch. 33, Laws N. Y., Greenleaf, 2d Ed., N. Y. 1798, Vol. 2, p. 315.
   N. C. Laws 1789, ch. 303; Laws 1791, ch. 345, 349.
   Ohio Act Mar. 3, 1842 (Acts of Ohio, Vol. 40, p. 31; Feb. 9, 1846; Vol. 44, p. 35.)
   Ore. Act Oct. 25, 1880, Laws of Ore., 1880, p. 16 (Coos Co.); Laws of 1895, p. 40 (Lane Co.)
   Pa. Act Sept. 29, 1789; *see* L. of C. Pa., Phila. 1810, V. 2, p. 504, ch. 1440.
   R. I. Rev. Laws R. I., Providence, 1798, p. 522 (Lumber and shingles); p. 617 (cordwood and charcoal).
   S. C. Act Dec. 19, 1827, Stat. of S. C., Columbia, 1839, Vol. 6, p. 320. Act Dec. 20, 1853, Vol. 12, p. 294.
   Vt. Rev. Stat. Burlington, 1840, p. 360, sec. 57-61. Act Nov. 16, 1869, Laws of 1869, p. 52. (Log measure.)
   Va. Act Feb. 21, 1818, Rev. Laws of Va., Richmond, 1819, Vol. 2, p. 197, ch. 227; Act Apr. 2, 1831, Laws of 1830-31, p. 109, ch. 42. Laws 1857-8, p. 105.
   Wash. Act Nov. 11, 1879, L. of 1879, p. 107; act Nov. 26, 1883, L. 1883, p. 106.
   W.Va. Act Feb. 24, 1883, Laws 1883, p. 97, ch. 66.
   Wis. Act Mar. 28, 1854, S. L., p. 284. Ch. 198.
2. Ark. Digest of Stat., Kirby, 1904, sec. 4075-4107, 8009 (Act Apr. 27, 1901)
   Cal. Gen'l Laws, 1914, H. & D. p. 927.
   Del. Rev. St. of 1852, as amd. to 1893, p. 546 (Act Mar. 9, 1869) (Vol. 13 ch. 453, Special to town of Laurel).
   Fla. Comp. L. 1914, sec. 1244-1255, 3710-11.
   Ga. Annotated Pol. Code, 1914, Park, Sec. 1834-8 and 1843.(Town) Annotated Penal Code, sec. 614-617, 646-649, and 728.
   Idaho Rev. Civil Code, 1908, sec. 1494-1505 (act Mar. 10, 1903).

(Footnote 2 continued on next page)

However, the tendency subsequent to the middle of the nineteenth century has been to leave the matter of timber and lumber inspection to the authorities of the political subdivisions of the state or to commercial associations.

§140. Legal Standards of Timber Measurement. A board one inch thick and having a superficial area of 144 square inches has quite generally been used in all American States, either with [1] or without express legal sanction, as the standard unit for the measurement of lumber, but there have been special provisions for the measurement of sawn or hewn timbers. [2] There have been a great number of different log measure rules in use, and about a half dozen distinct rules have been adopted as the legal standards in different states. Thus in Arkansas, Florida, Louisiana, and Mississippi, the Doyle rule; [3] in Idaho, Minnesota, Nevada, West Virginia,

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(Footnote 2 concluded from preceding page)

Ill. Annotated Statutes, 1913, par. 1334 (54), p. 947 (Cities to regulate.)
Iowa Annotated Code, 1897, sec. 3030-3036 (By counties.)
Md. Annotated Code, 1911, Bagby, Art. 98, Sec. 11, p. 2195.
Mass. Rev. Laws, 1902, ch. 60, p. 578-581 (Secs. 9-14 give specifications.)
Me. Rev. Stat. 1903, p. 418-421, ch. 42. (By towns)
Mich. Annotated Stat. 1913, Howell, 2d Ed., par. 7309 and 7316 (By commercial associations.) See Act May 28, 1879, S. L. p. 218.
Minn. Gen'l Stat. 1913, Tiffany, sec. 5453-5479, ch. 43.
Miss. Civil Code, 1906, Sec. 5972.
Mo. Annotated Stat., 1906. Cf. sec. 10577.
N. H. Pub. Statutes, 1901, Chase, Chap. 128 p. 403-406.
N. C. Revised Laws, 1908, Pell, secs. 4636, 4660-4668 (certain counties.)
N. D. Comp. L. 1913, sec. 3599, item 39 (Cities may regulate.)
Ohio Gen'l Code, 1910, sec. 5987 and 6040.
Ore. Laws 1910, Lord, sec. 5073-5076.
Pa. Purdon's Digest, 1903, Rev. by Stewart, p. 2356, sec. 57 and 58.
R. I. General Laws, 1909, pp. 557-563, ch. 161, 162, 175.
S. C. Code 1912, sec. 2414-2419.
Vt. Public Statutes, 1906, sec. 3427, 3514, 4916, 6261. (By towns, see act Nov. 16, 1869, L. of 1869, p. 52.)
Va. Code of 1904, secs. 1844, 1847, 1859, 1872, 1876, 1878-9, 1883, 1888.
Wash. Codes & Stats., 1910, Rem. & Bal., sec. 7070-7079; Cf. 7080-7090.
Wis. Statutes 1913, sec. 1730-1747, ch. 84.

1. S. C. Act Dec. 20, 1853, Stats. Vol. 12, p. 294.
Mo. Act Nov. 27, 1855, Rev. St. Mo., 1855, p. 1565, ch. 166.
2. Ga. Act Dec. 5, 1799, Vol. 1, p. 346 (Prince's Digest 1822, p. 483).
S. C. Act 1855, Stats. Vol. 12, p. 434.
3. Digest of Statutes of Arkansas, 1904, Kirby, sec. 4084 and 8009 (From Act of May 23, 1901. Cf. Act 1883, making Scribner's the standard.)
Compiled Laws of Florida, 1914, sec. 3710 (Act May 31, 1889; Act 3898, Laws of 1889.)
Revised Laws of Louisiana, 1908, Wolff, Vol. 3, p. 927 (from Act 147 of 1900). Cf. Act 64 of 1898, Rev. L. 1904, Wolff, p. 1836.
Annotated Code of Mississippi, 1906, sec. 5072 (from Act Mar. 5, 1880, S. L., p. 176.

Wisconsin and a part of Oregon, the Scribner rule; [1] in California, the Spaulding rule; [2] in New Hampshire, the Blodgett rule; [3] in Washington, the Drew rule, [4] and in Vermont, the Humphrey rule, [5] is the standard. Some of the statutes make measurement by any other rule than the standard illegal; [6] others specifically provide that measurement by another rule may be made by agreement of the parties, [7] while other statutes establish a standard but do not specifically forbid or authorize the use of a different rule. [8] It has been held that a law which did not expressly prohibit or authorize the use of any other rule than the standard was to be applied only to those transactions in which there was no agreement as to the rule to be used. [9]

The ordinary log rule, whether prepared by mathematical calculations or from experimental data, is intended to give the amount of lumber which a log of any particular dimension will saw out. [10] Some statutes have relied upon the general knowledge of the rule named as a sufficient identification of the standard adopted, [11] while others have either given the mathematical formula upon which the adopted rule is based, [12] or have set out in detail the scale for logs of different dimensions. [13]

§141. Custom often Controls. In recognition of custom some laws have expressly provided that lumber of

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1. Revised Civil Code of Idaho, 1908, sec. 1501.
   General Statutes, Minnesota, 1913, Tiffany, sec. 5460 (Act of Aug. 9, 1858, Stat. 1849-58, p. 828.
   Revised Laws of Nevada, 1912, sec. 1440, note. Act Mar. 3, 1866, Laws of '66, p. 198.
   Code of W. Va., 1913, Hogg, sec. 3412 (Act Feb. 24, 1883, Laws of 1883, p. 97, ch. 66.)
   Wisconsin Statutes, 1913, sec. 1737.
   Laws of Oregon, 1910, Lord, sec. 5076.
2. General Laws of California, 1914, Henning & Deering, p. 927 (Laws of 1877-78, p. 604, as amended by Laws of 1880, p. 119.)
3. Public Statutes of N. H., 1901, Chase, ch. 128, sec. 5, p. 404.
4. Codes & Statutes of Washington, 1910, Remington & Ballinger, sec. 7074.
5. Public Statutes of Vermont, 1906, Lord & Darling, sec. 4810; see sec. 4916, act Nov. 26, 1884, L. of 1884, p. 83, No. 90.
6. Arkansas; Washington. Cf. Mississippi (illegal if it gives less number of feet than Doyle). *See* Bellew v. Williams, (Miss.) 67 So. 849.
7. Florida, Idaho, Louisiana, New Hampshire, Oregon, West Virginia, Wisconsin.
8. California, Nevada, Minnesota, Vermont.
9. Peter v. Cypress Co. (La.) 69 So. 840; See Johnson v. Burns, 39 W. Va., 658, 20 S. E. 686.
10. See Smith v. Aiken, 75 Ala. 209.
11. Arkansas, Florida, Idaho, Minnesota, West Virginia.
12. Louisiana, New Hampshire, Vermont.
13. California, Wisconsin.

less than one inch in thickness might be considered standard, [1] while others have discouraged commercial customs which allowed a short count or measure, or required an excess. [2] The rejection of the fractions of a foot in measuring has been held legal where such mode of measurement was the established custom. [3] A contract containing a reference to the number of "thousand feet in each raft" has been held to call for linear measure, [4] and one requiring delivery of lumber by the "thousand feet" to contemplate measurement by a board rule and not by a log scale. [5]

If a contract does not fix the mode of measurement and there is no statute, the measurement should be made by the customary standard, [6] and if the contract contemplates delivery of a product for a certain market, the customary standard of that market should be used. [7] Where a contract provides for the method of scaling to be used, the parties will be bound by the scale made in accordance with that method as customarily applied, even though it be clear that the said method does not give a fair test of the actual board contents of a log, and it be shown that a fairer method is in common use; [8] and unless the contract clearly provides for the use of a different rule, the standard rule of the state will be enforced irrespective of its faults. [9]

1. Act Mar. 16, 1784, Laws of Com. Mass. 1780-1807, Vol. 1, p. 164, Gen. Laws of Mass., Vol. 1, p. 136, ch. 54.
2. Conn. Act of 1832, Stats. of Conn., New Haven, 1854, p. 624, sec. 15.
   Me. Feb. 25, 1828, Laws Me., Portland, 1831, Vol. 3, p. 255, ch. 404.
   Md. Code of 1860, p. 700, ch. 96, Sec. 22.
   See Purdon's Digest of Laws of Penn., 1903, 13th Ed. Stewart, p. 2356, sec. 57.
3. McGraw v. Sturgeon, 29 Mich. 426; Merrick v. McNally, 26 Mich. 374.
4. Brown v. Brooks, 25 Pa. St. 210.
5. Dutch v. Anderson, 75 Ind. 35; *but see* Hopkins v. Sanford, 41 Mich. 243, 2 N. W. 39. Cf. Farmer's High School v. Potter, 43 Pa. 134, holding that in view of state act of Apr. 15, 1835 (P. L. 1835, p. 384) adopting board foot as standard, contract for sale of flooring one and one-quarter in. thick by thousand called for payment for the additional thickness.
6. Sanderson v. Hogan, 7 Fla. 318; Strickland v. Richardson, 135 Ga. 513, 69 S. E. 871; Dam etc. Co. v. Clothing Co. 102 Me. 257; 66 Atl. 537; Heald v. Cooper, 8 Me. 32; Boyce v. Boyce, 124 Mich. 696, 83 N. W. 1013; Hale v. Handy, 26 N. H. 206; McKinney v. Matthews, 166 N. C. 576, 82 S. E. 1036; Richardson v. Baker, 83 Vt. 204, 75 Atl. 151; McIntyre v. Rodgers, 92 Wis. 5, 65 N. W. 503; Mann v. Paper Co. 41 N. B. 199 (Pulpwood).
7. Merick v. McNally, 26 Mich. 374; *See* Peterson v. Anderson, 44 Mich. 441; Smith v. Kelly, 43 Mich. 390; Dunlevie v. Spangenberg, 66 Misc. 354, 121 N. Y. Suppl. 299 (Rule of place of purchase prevails.)
8. Heald v. Cooper, 8 Me. 32; Boyle v. Musser-Sauntry Land Etc. Co., 86 Minn. 160, 90 N. W. 319; Hunter v. Felton, 61 Vt. 359; McIlquham v. Barber, 83 Wis. 500, 53 N. W. 902; Fornette v. Carmichael, 41 Wis. 200. *See* Baldwin v. Cornelius, 104 Wis. 68.
9. Fortescue v. Black Bayou Lbr. Co., 118 La. 725, 43 So. 387; Bulkley v. White & Wheeless, 113 La. 396.

The standard in general use at the time of the scaling has been given the preference over a standard customarily used at the time the contract was made; [1] and it has been held that even though a contract contemplated payment in accordance with a mill scale of the lumber sawn, the seller could recover compensation on the basis of the amount of logs delivered if the logs were not sawn within a reasonable time after such delivery. [2] It is sometimes incumbent upon the seller to prove a scale or survey of the logs before he can recover the purchase price, [3] and a party who has failed to perform his part as to a scale will not be permitted to take advantage of such failure. [4]

§142. A Measurement may be Conclusive. Unless provision is made in a contract for a rescaling in case of dissatisfaction by one of the parties, [5] the scale made in the manner or by the person contemplated by the contract will be enforced as final unless fraud or substantial mistake to the prejudice of one party is shown. [6] Errors of judgment on the part of a scaler will not disturb the conclusiveness of the

1. Hackley v. Headley, 45 Mich. 569, 8 N. W. 511.
2. Rowe v. Chicago Lbr. Etc. Co., 50 La. Ann. 1258, 24 So. 235.
3. Patterson v. Larsen, 36 N. Brunsw. 4; *But see* Peterson v. South Shore Lbr. Co. 105 Wis. 106, 81 N. W. 141.
4. Gaslin v. Pinney, 24 Minn. 322; Grice v. Noble, 59 Mich. 515, 26 N. W. 688; Lbr. Co. v. Coach, (Ore.) 146 Pac. 973; Rich v. Lbr. Co., 18 B. C. 543.
5. Kennedy v. South Shore Lbr. Co., 102 Wis. 284, 78 N. W. 567.
6. Ala. Ackley v. Lbr. Co., 166 Ala. 295, 51 So. 964.
   Cal. Bullock v. Consumers Lbr. Co. (1892) 31 Pac. 367.
   Fla. Shippers Assoc. v. Lbr. Co., 65 Fla. 313, 61 So. 639.
   Ky. Collins v. Lbr. Co., 158 Ky. 231, 164 S. W. 813.
   Me. Hutchins v. Merrill, 84 Atl. 412; Bank v. Hollingsworth Etc. Co., 106 Me. 326, 76 Atl. 880; Atwood v. Hub Etc. Co., 103 Me. 394, 69 Atl. 622; Nadeau v. Pingree, 92 Me. 196, 42 Atl. 353; Ames v. Vose, 71 Me. 17; Bailey v. Blanchard, 62 Me. 168; Berry v. Reed, 53 Me. 487; Robinson v. Fiske, 25 Me. 401; Oakes v. Moore, 24 Me. 214; 41 Am. Dec. 379.
   Mich. Brooks v. Bellows, 179 Mich. 421, 146 N. W. 311; Navigation Co. v. Salt Etc. Co., 174 Mich. 1, 140 N. W. 565; Navigation Co. v. Filer, 151 N. W. 1025; Robinson v. Ward, 141 Mich. 1, 104 N. W. 373; Sullivan v. Ross, 124 Mich. 287, 82 N. W. 1071; Bresnahan v. Ross, 103 Mich. 483; Malone v. Gates, 87 Mich. 332, 49 N. W. 638; Busch v. Kilborne, 40 Mich. 297.
   Minn. Boyle v. Musser-Sauntry Lumber &c. Co., 77 Minn. 206, 79 N. W. 659; State v. Lumbermens' Board of Exchange, 33 Minn. 471; Leighton v Grant, 20 Minn. 345.
   Mo. Strother v. McMullen Lbr. Co., 110 Mo. App. 552, 85 S. W. 650.
   N. H. Hale v. Handy, 26 N. H. 206.
   Tex. Cudlipp v. Export Co. (Civ. App.) 149 S. W. 444.
   Wis. Peterson v. South Shore Lbr. Co., 105 Wis. 106, 81 N. W. 141; Early v. Chippewa Logging Co., 68 Wis. 112; Scott v. Whitney, 41 Wis. 504 *See* Thiel v. Lbr. Co., 137 Wis. 272, 118 N. W. 802.
   U. S. Lbr. Co. v. Stone, 212 Fed. 713, 129 C. C. A. 325.
   Can. Patterson v. Larsen, 37 N. Brunsw. 28.

scale if no intentional misrepresentation, mistake as to logs to be scaled, or error in computation is proven.[1] However, the terms of the contract may provide that the decision of the scaler shall not be conclusive as to certain matters;[2] and to be accepted by the courts as final a scale must have been made in strict accordance with the terms of the contract,[3] In the construction of the contract due regard will be given to the customs of the locality as to those matters in which the terms of the contract are not explicit.[4] Though a scale report be conclusive as to the part of a lot of logs actually scaled, it will not be final as to any logs that were estimated by the same scaler but not actually scaled.[5] If a substantial mistake has been made the courts will correct the scale even though settlement has been made according to the erroneous scale.[6] A mutual agreement that a rescale of logs or a remeasurement of lumber shall be made as a basis for payment affords a sufficient consideration to support a new contract.[7] Whether the rule of *caveat emptor* as to quantity obtains in a sale of a lot of scaled logs, or whether there is an implied warranty by the seller as to quantity will depend upon the terms and conditions of the particular contract of sale.[8]

§143. Official Inspection and Measurement. In jurisdictions where provision is made by law for the scaling of logs or the measurement of lumber by officials whose scale bills or inspection reports are made prima facie legal

1. Malone v. Gates, 87 Mich. 332, 49 N. W. 638.
   But see Southern Lbr. Co. v. Asher, 64 S. W. 462, 23 Ky. L. Rep. 901; Robinson v. Fiske, 25 Me. 401; Ortman v. Green, 26 Mich. 209; Nelson v. Chas. Betcher Lbr. Co., 88 Minn. 517, 93 N. W. 661. Holding scale subject to correction without showing of fraud or bad faith, if no provision in contract that scale be conclusive.
2. Magee v. Smith, 101 Wis. 511, 78 N. W. 167.
3. Chase v. Bradley, 17 Me. 89; Eakright v. Torrent, 105 Mich. 294, 63 N. W. 293; Jesmer v. Rines, 37 Minn. 477, 35 N. W. 180; McIntyre v. Rodgers, 92 Wis. 5, 65 N. W. 503; *See* Bezer v. Soper Lbr. Co. 76 Wis. 145; Fornette v. Carmichael, 41 Wis. 200.
4. Gordon v. Cleveland Sawmill Etc. Co., 123 Mich. 430, 82 N. W. 230. Leonard v. Davis, 1 Black, (U. S.) 476, 17 L. Ed. 222.
5. Douglas v. Leighton, 53 Minn. 176, 54 N. W. 1053, Pratt v. Ducey, 38 Minn. 517; McAndrews v. Santee, 57 Barb. (N. Y.) 193, 7 Abb. Prac. N.S. 408; Vaughan v. Howe, 20 Wis. 497.
6. Horton v. Harbridge, 127 Pa. St. 11.
7. Porteus v. Commonwealth Lumber Co., 80 Minn. 234, 83 N. W. 143. *See* Yellow Poplar Lbr. Co. v. Stephens, 69 S. W. 715, 24 Ky. L. Rep. 621; Hunter v. Felton, 61 Vt. 359, 17 Atl. 739.
8. Wonderly v. Holmes Lbr. Co., 56 Mich. 412, 23 N. W. 79; Ortman v. Green, 26 Mich. 209; Day v. Gumaer, 80 Wis. 362, 50 N. W. 182; Gardner v. Wilber, 75 Wis. 601, 44 N. W. 628.

evidence as to the amount or quality of the timber measured or inspected, a recovery of the purchase price cannot be enforced if the measurement or inspection has not been made by an authorized official as required by the law. [1] However, the courts will refuse assistance only when it is clear that the sale was within the restrictions of the statute. [2] Such statutes will not be recognized outside the boundaries of the state, county or city to which they apply, [3] and they have usually been construed as intended merely for the protection of the purchaser and therefore as not restricting the freedom of the parties to a contract to waive compliance with the statute and provide for a scale or measurement by another than the regular official. [4] In a number of states there are statutes regarding the inspection of shingles, [5] naval stores [6] and other minor timber products, [7] and in many

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1. Knight v. Burnham, 90 Me. 294, 38 Atl. 168; Richmond v. Foss, 77 Me. 590, 1 Atl. 830.
   See also Durgin v. Dyer, 68 Me. 143; Coombs v. Emery, 14 Me. 404 (cordwood); Androscoggin R. Side Booms v. Haskell, 7 Me. 474; Wheeler v. Russell, 17 Mass 258; Colton v. King, 2 Allen, (Mass.) 317 (cordwood); Pray v. Burbank, 10 N. H. 377; Crawford v. Cockran, 2 Wash. Ter. 117; Lindsay Etc. Co. v. Mullen, 176 U. S. 126; Hospes v. O'Brien, 24 Fed. 145.
2. Thomas v. Conant, (Me. 1886) 5 Atl. 533; Gilman v. Perkins, 32 Me. 320; Whitman v. Freese, 23 Me. 185; Howe v. Norris, 12 Allen (Mass.) 82; State v. Addington, 121 N. C. 538, 27 S. E. 988. *See also* Huntington v. Knox, 7 Cush. (Mass.) 371; Tewksbury v. Schulenberg, 41 Wis. 584.
3. Hardy v. Potter, 10 Gray (Mass.) 89; *See* Blitz v. James, 31 Md. 264; Shoemaker v. Lansing, 17 Wend. (N. Y.) 327.
4. McNeil v. Chadbourn, 79 N. C. 149; *See* State v. Lumbermen's B'd of Exch., 33 Minn. 471, 23 N. W. 838.
5. Iowa Annotated Code, 1897, sec. 3030-3033 (county).
   Kan. Gen'l St., 1909, Dassler (Salvage for taking up), sec. 7373-76.
   N. H. Pub. St. 1901, Chase, p. 404, sec. 7 and 8.
   N. C. Pell's Revisal 1908, sec. 4659, 4664-65. (4665, no inspector to deal in.)
   Ohio Annotated Stat. 1910, Page & Adams, sec. 6040.
   Pa. Purdon's Digest, 13th Ed., Stewart, p. 5081, sec. 83 and 84.
   S. C. Code 1912, sec. 2413.
   Vt. Public Statutes, 1906, sec. 3427, 3514.
6. Fla. Comp. Laws 1914, sec. 3131-3141 and 3801-3808.
   Ga. Political Code, 1914, Park. Sec. 1832-33, and 1839-41.
   N. C. Pell's Revisal, 1908, sec. 4655, 4658 and 4666.
   S. C. Code, 1912, sec. 2398-2407.
   Va. Annotated Code, 1904. Sec. 1844, 1857, 1866, 1878, 1879 and 1883.
7. Conn. Gen. Stat. 1902, Sec. 4881 (Bushel defined for charcoal)
   Del. Rev. Code, 1915, Sec. 2930 (Bushel defined for charcoal)
   Ga. Annotated Code, 1914, Park, sec. 1843 (heading).
   Mass. Revised Laws, 1902, p. 563-564 (hoops and staves), p. 570 (charcoal)
   Md. Annot. Code, 1911, Art. 97, Sec. 24 (charcoal); Art 98, Sec. 11 (wood)
   Minn. General Statutes, 1913, Tiffany, sec. 5462 (posts and poles)
   N. H. Public Statutes, 1901, Chase, p. 404, sec. 9 (Clapboards and hoops,)
   Pa. Purdon's Digest, 13th Ed., Stewart, p. 5076, sec. 29 (bark), sec. 30 (charcoal).
   R. I. General Laws, 1909, p. 562-63 (hoops); p. 582, (charcoal).
   S. C. Code 1912, sec. 2413 (staves).

states provision is made for the official measurement of cord wood. [1]

Until a satisfactory showing to the contrary is made those assuming to act as official inspectors will be presumed to have been properly elected or appointed. [2] They regularly hold office until their successors have been appointed, taken the oath of office and complied with the other requirements of the law as to qualification. [3] A public surveyor is liable on his bond only for the faithful performance of his duty and not for errors of judgment or inaccuracies in the scale or measurement. [4] These statutes ordinarily forbid an official scaler from engaging in the buying and selling of logs, lumber, naval stores, or whatever timber product is covered by his authority, but it has been held that this prohibition applies only to transactions within the district in which he is the official scaler or inspector. [5] Double fees for the scaling of logs cannot be collected. [6]

§144. Kinds of Evidence Admissible. If a written contract for the sale of logs is silent as to the manner of scaling, parol evidence may be offered to prove an agreement as to the scaler or the method of scaling, [7] and in the

1. Ariz. Civil Code, 1913, sec. 5536.
   Conn. General Statutes, 1902, sec. 1891 (town).
   Del. Rev. Code, 1852, am'd to 1893, p. 395 (town). Rev. Laws, 1915, Sec. 3443.
   Ga. Annotated Code, 1914, Park, sec. 1843.
   Ind. Annotated Statutes, 1914, Burn's. Sec. 8655 (cities to regulate).
   Kan. General Statutes, 1909, Dassler, sec. 1279, 1402, 1580 (city regulation)
   Me. Rev. St. 1903, Ch. 42 (wood bark, and charcoal)
   Mass. Revised Laws, 1902, p. 568-570.
   Minn. General Statutes, 1913, Tiffany, sec. 5795.
   Neb. Revised Statutes, 1913, sec. 4098 (In Omaha).
   N. H. Public Statutes, 1901, p. 394, sec. 14-16.
   N. C. Pell's Revisal, 1908, sec. 4667-68.
   Ohio Annotated Code, 1910, Page & Adams, sec. 3651, 6409 (Cities to regulate).
   Pa. Purdon's Digest, 1909, 13th Ed., Stewart, p. 5082, sec. 95-97 (Phila). p. 3001, sec. 1046-1049; p. 495, sec. 97 is general in boroughs.
   R. I. General Statutes, 1909, p. 582-583. ch. 175.
   Vt. Public Statutes, 1906, sec. 3427, 3514 and 6161.
   Va. Code, Biennial, 1912, Pollard, p. 110, Sec. 1913.
   Wis. Statutes 1915, Secs. 925-52, Par. 45 (cities to regulate.)
2. McCutchin v. Platt, 22 Wis. 561.
3. Dow v. Bullock, 13 Gray (Mass.) 136; As to fees see Bennett v. Boom Corp. 115 Minn. 96, 131, N. W. 1059.
4. Hutchins v. Merrill, (Me.) 84 Atl. 412; Gates v. Young, 82 Wis. 272, 52 N. W. 178.
5. McKenzie v. Lego, 98 Wis. 364, 74 N. W. 249; *See* Buie v. Browne, 6 Ired. L. (28 N. Car.) 404.
6. Lovejoy v. Itasca Lbr. Co., 46 Minn. 216, 48 N. W. 911.
7. Mason v. Phelps, 48 Mich. 126, 11 N. W. 413,837; Johnson v. Burns, 39 W. Va., 658; McDowell v. Leav., 35 Wis. 171. Cf. Lbr. Co. v. Crist, 87 Ark., 434, 112 S. W. 965

absence of proof of a special agreement, it will be assumed that the parties contemplated a scale in accordance with the custom of that locality, [1] or by the regularly appointed official. [2] And even where the written contract specifies the scaler or method of scaling, evidence is admissible to show a subsequent mutual agreement that the scaling should be done by another party or by another method. [3] If the scaler named in the contract, or otherwise mutually agreed upon is dead, his scale will be presumed to be honest and accurate and oral evidence as to what he did and said at the time of the scaling will be admissible. [4]

Although the scale of logs or lumber by a sworn officer is prima facie correct, [5] and a properly identified scale bill is admissible as evidence, [6] without the presence of the scaler on the stand as a witness, [7] even when not certified as required by statute, [8] evidence is admissible to show negligence, [9] mistake, [10] incompetency [11] or fraud. [12] Proof of gross mistake is not conclusive evidence of fraud. [13] If the scale was made by an official or an experienced scaler the burden of proof is upon the one attempting to impeach the scale, [14] but if the scale was made by one employed by the

1. Heald v. Cooper, 8 Me. 32; Headley v. Hackley, 50 Mich. 43, 14 N. W. 693.
2. Peavey v. Schulenburg, etc. Lbr. Co., 33 Minn. 45; Herdic v. Bilger, 47 Pa. St. 60; Morrow v. Delaney, 41 Wis. 149.
3. Malone v. Gates, 87 Mich. 332, 49 N. W. 638; Savercowl v. Farwell, 17 Mich. 308. *See* Baker v. Kenney 145, Iowa 638, 124 N. W., 901.
4. Malone v. Gates, 87 Mich. 332, 49 N. W. 638. Iowa 638.
5. Boyle v. Musser-Sauntry Land Etc. Co., 86 Minn. 160, 90 N. W. 319; Antill v. Potter, 69 Minn. 192, 71 N. W. 935; Heilbruner v. Wayte, 51 Pa. St. 259; *see* Bullock v. Consumers Lbr. Co. (Cal. 1892) 31 Pac. 367; State v. Lumbermen's Board of Exch. 33 Minn. 471.
6. Haynes v. Hayward, 41 Me. 488; Peterson v. Anderson, 44 Mich. 441; 7 N. W. 56; Libby v. Johnson, 37 Minn. 220; Clark v. Nelson Lbr. Co. 34 Minn. 289, 25 N. W. 628; Smith v. Schulenberg, 34 Wis. 41. *See* Day v. Gumaer, 80 Wis. 362, 50 N. W. 182; Lindsay Etc. Co. v. Mullen, 176 U. S. 126; Glaspie v. Keator, 56 Fed. 203.
7. Bailey v. Blanchard, 62 Me. 168.
8. Christie v. Keator, 49 Wis. 640, 6 N. W. 334; *See* Welch v. Palmer, 85 Mich. 310; Crane Lbr. Co. v. Otter Creek Lbr. Co., 79 Mich. 307.
9. Leighton v. Grant, 20 Minn. 345, 355.
10. Burton v. Mayo, 106 Me. 195, 76 Atl. 486; Sullivan v. Ross, 124 Mich. 287, 82 N. W. 1071; Malone v. Gates, 87 Mich. 332; Gates v. Young, 78 Wis. 98, 47 N. W. 275.
11. Ortman v. Green, 26 Mich. 209; *See* Armstrong Furniture Co. v. Kosture, 66 Ind. 545.
12. Ozark Lbr. Co. v. Haynes, 68 Ark. 185, 56 S. W. 1068.
13. Leighton v. Grant, 20 Minn. 345.
14. Lbr. Co. v. Lbr. Co. 135 La. 511, 65 So. 627; Bank v. Hollingsworth, Co. 106 Me. 326, 76 Atl. 880; Atwood v. Hub Co. 103 Me. 394, 69 Atl. 622; Nutter v. Bailey, 32 Me. 504; Boyle v. Musser-Sauntry Land Etc. Co., 77 Minn. 206, 79 N. W. 659.

seller or under his direction, it is necessary for him to present satisfactory evidence as to the accuracy of the scale. [1] The testimony of an inexperienced scaler is admissible as to his own scale, [2] and if the parties have agreed that the scaling shall be done by an official scaler not assigned to the particular district where the scaling took place, his scale bill is admissible. [3] Where the evidence is not clear that the parties agreed to accept the scale of a certain party evidence is admissible as to the scale obtained by others; [4] and as a test of an estimate based on a stump scale evidence of a comparison between an estimate by the same party on another tract and the actual amount cut therefrom is admissible. [5]

The scale bill of one who, by agreement of the parties, measured only a part of the logs sold is admissible as to the part actually scaled, [6] but not as to logs which were estimated or averaged and not actually scaled; [7] and where the record of a joint scale by the parties to a contract of a portion of the logs was lost, it was held that a third person's scale of the whole lot was not competent evidence as to the part jointly scaled. [8] A scale of logs made in the woods is admissible to contradict or correct a scale of the same logs made at the mill deck, [9] or a measurement of the lumber sawn from the logs, [10] but a mere estimate, not based upon an actual count or measurement of the logs, is not admissible for the purpose of contradicting a scale. [11] A scaler will not be permitted to contradict his own scale or his original report as to quality. [12] A scale of logs made at a certain time and place will not be accepted as evidence of the amount of logs originally comprising the lot where there has been a transfer of ownership and the logs have been driven a

1. Atkinson v. Morse, 57 Mich. 276, 23 N. W. 812; Perkins v. Hoyt, 35 Mich. 506; Patterson v. Larsen, 36 N. Brunswick, 4.
2. Thomas v. Conant (Me. 1886) 5 Atl. 533; Busch v. Kilborne, 40 Mich. 297.
3. Carver v. Crookston Lbr. Co., 84 Minn. 79, 86 N. W. 871.
4. Soverign v. Mosher, 86 Mich. 36, 48 N. W. 611.
5. Busch v. Nester, 70 Mich. 525.
6. Bailey v. Blanchard, 62 Me. 168.
7. Pratt v. Ducey, 38 Minn. 517, 38 N. W. 611; See Douglas v. Leighton, 53 Minn 176.
8. Busch v. Kilborne, 40 Mich. 297.
9. Peterson v. South Shore Lbr. Co., 105 Wis. 106, 81 N. W. 141; *see* Day v. Gumaer et al., 80 Wis. 362, 50 N. W. 182.
10. Sigler v. Beebe, 44 W. Va. 587.
11. Fornette v. Carmichael, 41 Wis. 200.
12. Whitman v. Freese, 23 Me. 212.

long distance. [1] Evidence as to the conduct of one of the parties or of the scaler and expert testimony is admissible where it tends to impeach the scale. [2] Only when the original scale book or scale bill is not available for use as evidence, or where it is apparent that no record of the scale was made, will secondary evidence be admitted as to its contents. [3] Scale bills have been admitted as evidence of the delivery [4] or the possession of logs. [5] Courts have held that the phrases, "purchase scale", [6] "dead culls", [7] and "mill run", [8] have a fixed and recognized meaning in law; but evidence has been admitted for the purpose of determining whether the phrase "mill tally" in a contract included "mill culls." [9]

§145. Court Instructions to Juries. Juries have been instructed by courts to decide whether the parties agreed that the scale of a certain person should be final, [10] whether the scale made was such as the contract contemplated, [11] and whether there was negligence, mistake or fraud in the scale. [12] Instructions by a court to a jury that a scaler should be held competent if found to be as skillful and reliable as scalers ordinarily were, have been sustained by a higher court. [13] An instruction that a vendor would not be liable for a small shortage when logs were converted into lumber if in scaling the logs himself he had fairly applied the rule ordinarily used in that locality was sus-

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1. Itasca Lbr. Co. v. Gale, 62 Minn. 356, 64 N. W. 916.
2. McCann & Doherty, 98 Wis. 335; Gates v. Young, 82 Wis. 272; Gardner v. Wilber, 75 Wis. 601, 44 N. W. 628.
3. Antill v. Potter, 69 Minn. 192, 71 N. W. 935; Steele v. Schricker, 55 Wis. 134, 12 N. W. 396; Tewksbury v. Schulenberg, 48 Wis. 577, 4 N. W. 757.
4. Smith v. Schulenberg, 34 Wis. 41; See Itasca Lbr. Co. v. Gale, 62 Minn. 356; Peterson v. South Shore Lbr. Co. 105 Wis. 106.
5. Clark v. Nelson Lbr. Co., 34 Minn. 289.
6. Hayes v. Cummings, 99 Mich. 206, 58 N. W. 46.
7. Brigham v. Martin, 103 Mich. 150, 61 N. W. 276.
8. Wonderly v. Holmes Lbr. Co., 56 Mich. 412, 23 N. W. 79.
9. Corneil v. New Era Lbr. Co., 71 Mich. 350, 39 N. W. 7.
   Cf. Salmon v. Box Co. 158 Fed. 300, 85 C. C. A. 551 (As to meaning of "10 and up.")
10. Brooks v. Bellows, 179 Mich. 421, 146 N. W. 311; Sovereign v. Mosher, 86 Mich. 36, 48 N. W. 611.
11. Navigation Co. v. Filer, 151 N. W. 1025 (Mich.) (Fair scale by Doyle Rule); Bresnahan v. Ross 103 Mich. 483, 61 N. W. 793; Daggett v. Hayward, 95 Mich. 217, 54 N. W. 764; Mann v. Paper Co. 41 N. B. 199.
12. Sullivan v. Ross, 124 Mich. 287, 82 N. W. 1071; Gates v. Young, 82 Wis. 272, 52 N. W. 178.
13. McIlquham v. Barber, 83 Wis. 500, 53 N. W. 902.

tained, [1] and a charge to a jury that a defendant could not be bound by any agreement between the plaintiff and the scaler as to the scale was held to remove the prejudice against the defendant which might have resulted from the admission of evidence from the plaintiff as to such agreement. [2] Under a written contract in Michigan for the sale of all merchantable white pine to be cut from certain land, with a provision that the timber be measured by the Scribner scale with allowance for all defects, a controversy arose as to the merchantable contents of the logs delivered. The seller contended that the purchaser should pay for the number of feet Scribner scale, less proper allowance for visible defects, in every log which the scaler considered merchantable, irrespective of the grade of lumber which could be obtained from the log. The purchaser contended that the scaler should make such allowance as to insure that the purchaser obtained the number of feet of merchantable lumber that the scale rule gave as the contents of a log, exclusive of mill culls, even though such culls might have a market value. The instructions given the jury by the trial judge were to the effect that a merchantable log was one which contained lumber in such quantity and of such quality as to make it worth taking to a mill for manufacture and that the scale provided for by the contract did not contemplate the exclusion of mill culls. The question of whether the scale of the logs which had been made by direction of the purchaser had excluded mill culls in addition to visible defects was left to the jury. The jury rejected the defendant's scale and based their verdict for the vendor of the logs upon a measurement made under his direction. The instruction and finding of the jury were sustained by the Supreme Court of Michigan on appeal by the purchaser. [3]

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1. Hopkins v. Sanford, 41 Mich. 243, 2 N. W. 39; *see* Sullivan v. Ross, 124 Mich. 287, 82 N. W. 1071.
2. Malone v. Gates, 87 Mich. 332, 49 N. W. 638; *see also* Mason v. Phelps, 48 Mich. 126, 11 N. W. 413, 837; Horton v. Harbridge, 127 Pa. St. 11, 17 Atl. 675.
3. Gordon v. Cleveland Sawmill & Lbr. Co. (Mich. 1900) 82 N. W. 230.

CHAPTER XIV

THE TRANSPORTATION OF TIMBER PRODUCTS BY FLOTATION

§146. The Use of Streams. Under the English common law only those streams which the tide affected were considered navigable as a matter of law. Early in the development of the lumber industry in America it was recognized that many streams which were not affected by the tide in any part of their courses, and the upper portions of many which were subject to tidal effects only in their lower courses, must either be declared navigable or, legally designated as highways to facilitate the transportation of logs, spars and rafts.

It appears that the streams were at first used for the driving of logs and the floating of rafts to market without the formal sanction of the law, but when controversies arose the legislatures of several English colonies enacted laws declaring certain streams to be highways for such purposes and regulating their use. [1] Subsequent to the separation of the colonies from the mother country there was a marked development of this kind of legislation in New York [2] and Pennsylvania. [3] As the lumber industry extended to the

1. Acts of General Assembly of Province of New Jersey, 1753-1761 (Woodbridge,) N. J., 1761. p. 64, ch. 123.
   Acts of General Assembly of Province of New Jersey, (Burlington, N. J., 1776) p. 205, ch. 271.
   Laws of Com. of Penn. 1700 to 1810 (Phila. 1810), Vol: 1, p. 322, ch. 626; Vol. 1, p. 324, ch. 627; Vol. 2, p. 43, ch. 966; Vol. 2, p. 311, ch. 1144.
   Compare French v. Connecticut River Lbr. Co., 145 Mass. 261, and Scott v. Wilson, 3 N. H. 321, 325. (Indicating establishment of character of Connecticut River as highway through usage). But *see* Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584 (Holding streams highways because of adaptability for such use.) See also Browne v. Schofield 8 Barb N. Y. 239.
2. Laws of New York, Webster & Skinner, Albany, 1806, Vol. 4, p. 541; Vol. 5, pp. 93, 388, 467; Vol. 6, p. 74; Session Laws 1849, p. 663; S. L. 1880, p. 752; S. L. 1881, pp. 18, 80; S. L. 1891, p. 739; S. L. 1892, p. 710; S. L. 1897, p. 612, 703; S. L. 1898, p. 1118.
3. Laws of Com. of Penn., Phila. 1810, Vol. 3, pp. 70, 95, 122, 123, 127, 278, 315, 320, 369, 450, 464, 473; Purdon's Digest Laws of Pa., Rev. by Brightly, 1883, pp. 1094, 1107.

Lake States, the South and the Pacific region, laws of this character were enacted in various states.[1] The Federal legislature[2] and courts[3] also recognized the navigability of streams which were not affected by the tide.

In most American states any stream that, in its natural condition, is capable of being used for the floating of logs, is considered navigable, even though such flotation be practicable only during periods of seasonal high water; and the public has a right to use such streams for the transportation of logs, rafts or timber products in other forms.[4] A stream

1. Ala. Act. Jan. 31, 1877, Laws of 1877, p. 140 (Sec. 7863, Penal Code, 1907); Act of Feb. 28, 1887, Laws of 1887, p. 132 (Sec. 7864, Penal Code, 1907).
Calif. Act. Mar. 7, 1889, Laws 1889, p. 85 (Repealed 1897. See Gen. Laws Calif., 1914, H. & D. 2221.)
Dak. Act. Jan 2, 1863, Laws 1862-3, p. 238, ch. 47. Repeated by act Jan, 8, 1869, S, L. Ch. 11, p. 203.
Idaho Laws of 1885, p. 177 (See Rev. St. 1887, Sec. 830-836.)
Minn. Act Mar. 1, 1856, and Act July 28, 1858 (See Gen. Stat. 1849-58, p. 827.)
Mo. Act June 25, 1839, Laws 1838-39, p. 83; Two Acts of Feb. 11, 1841; Laws 1840-41, pp. 114 and 115. (Transportation by water.)
N. M. Act Mar. 18, 1907, Laws of 1907, Ch. 47, Sec. 1 (Annotated Stat. 1915, Sec. 3371.)
Ore. Laws of 1874, p. 87, General improvement in streams. Laws of 1889, p. 105; County courts to declare non-navigable streams highways. See Lord's Oregon Laws 1910, Sec. 6075, and 57 Pac. 1017.
S. C. Act. 1853, Laws of S. C., Vol. 12, p. 305 (Civil Code 1912, Sec. 1928.)
Tenn. Act. Mar. 19, 1883, Ch. 71, p. 68. (Code 1896, Shannon, Sec. 1808.)
Wash. Act. Mar. 17, 1890, Sess. L. 1889-90, p. 470, all meandered streams highways; others if improved. Cf. Act. Mar. 7, 1891, S. L. 217. (See Codes & Stats. 1910, Rem. & Bal., Sec. 7118.)
Wis. Art. 4, Sec. 1, of 1st Constitution, adopted Feb. 1, 1848. Rev. Stats. 1849, p. 248, ch. 34; Act Apr. 2, 1853, S. L. Ch. 72, p. 74.
Wyo. Act. Dec. 9, 1869; See Gen'l. Laws 1st Sess. Terr. Assembly, p. 324.
2. Act May 18, 1796 1 Stat. L. 468; Act. Mar. 3, 1803 (2 Stat. L., 235).
3. U. S. v. The Daniel Ball, 10 Wall (U. S.) 557; The Genesee Chief, 12 How. (U. S.) 443.
But see U. S. v. Rio Grande Irrigation Co., 174 U. S. 690,698; Wisconsin v. Duluth, 96 U. S. 379; Gilman v. Philadelphia, 3 Wall. 713.
4. Ala. Lewis v. Coffee County, 77 Ala. 190, 54 Am. Rep. 55; Walker v. Allen, 72 Ala., 456.
Blackman v. Mauldin, 164 Ala. 337, 51 So. 23.
Calif. See American River Water Co. v. Amsden, 6 Cal. 443; Heckman v. Swett. 99 Cal. 303, 33 Pac. 1099.
Fla. Bucki v. Cone, 25 Fla. 1, 6 So. 160; Sullivan v. Jernigan, 21 Fla. 264.
Ga. Railroad Co. v. Sikes, 4 Ga. App. 7. 60 S. E. 868.
Idaho La Veine v. Lbr. Co., 17 Ida. 51., 104 Pac. 666.
Ill. Healy v. Joliet Etc. R. Co., 2 Ill. App. 435; Hubbard v. Bell, 54 Ill. 110, 5 Am. Rep. 98.
Ky. Ireland v. Bowman 130 Ky. 153, 113 S. W. 56.
Ford Lbr. Etc. Co. v. McQueen, 14 Ky. L. Rep. 521; Goodin v. Kentucky Lbr. Co., 90 Ky. 625; 14 S. W. 775, 12 Ky. L. Rep. 573; See Murray v. Preston, 106 Ky. 561, 50 S. W. 1095, 90 Am. St. Rep. 232; James v. Carter, 96 Ky. 378. Huff v. Kentucky Lumber Co. 45 S.W.84.
Me. Brooks v. Cedar Brook Etc., Imp Co., 82 Me. 17, 17 Am. St. Rep. 459; Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561; Davis v. Winslow 51 Me. 264, 81 Am. Dec. 584; Gerrish v. Brown, 51 Me. 256, 81 Am. Dec. 569; Veazie v. Dwinell, 50 Me. 479; Brown v. Black, 43 Me. 443; Knox v. Chaloner, 42 Me. 150; Brown v. Chadbourne, 31

(Footnote 4 continued on next page)

that is capable of floating logs only during short periods of

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(Footnote 4 concluded from preceding page)

Me. 9, 50 Am. Dec. 641; Wadsworth v. Smith, 11 Me. 278, 26 Am. Dec. 525; Spring v. Russell, 7 Me. 273; Berry v. Carle, 3 Me. 269.

Mass. French v. Conn. River Lbr. Co., 145 Mass. 261.

Mich. McDonnell v. Rifle Boom Co., 71 Mich. 61; Butterfield v. Gilchrist, 53 Mich. 22; Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184; Middleton v. Flat River Booming Co. 27 Mich. 533; Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209. But see Bellows v. Lumber Co. (Mich.) 85 N. W. 1103 (Driving hardwood may be unreasonable use)

Minn. Doucette v. Little Falls Imp. Co., 71 Minn. 206.

Miss. Cue v. Breland, 78 Miss. 864, 29 So. 850.

Mo. McKinney v. Northcut, 114 Mo. App. 146, 89 S. W. 351.

Nev. Mandlebaum v. Russell, 4 Nev. 551.

N. H. Connecticut River Lbr. Co. v Olcott Falls Co., 65 N. H., 290, 21 Atl. 1090, 13 L. R. A. 826; Collins v. Howard, 65 N. H., 190, 18 Atl. 794; Carter v. Thurston, 58 N. H., 104, 42 Am. Rep. 584; Thompson v. Androscoggin River Imp. Co. 54 N. H. 545. Scott v. Wilson, 3 N. H. 321, 325.

N. Y. Brewster v. Rogers 169 N. Y., 73, 62 N. E. 164, 58 L. R. A. 495, 42 App. Div. 343, 59 N. Y. Suppl. 32.
Pierrepont v. Loveless, 72 N. Y. 211; Morgan v. King, 18 Barb. 277 35 N. Y., 454, 91 Am. Dec. 58; DeCamp v. Thompson, 16 N. Y. App. Div. 528, 44 N. Y. Suppl. 1014; Canal Fund Com'r's v. Kempshall, 26 Wend. 404; Shaw v. Crawford, 10 Johns, 236.
See Curtis v. Keesler, 14 Barb. 511; Browne v. Schofield, 8 Barb. 239; Munson v. Hungerford, 6 Barb. 265; DeCamp v. Bullard (N. Y.) 54 N. E. 26.

N. C. Burke County v. Catawba Lbr. Co., 116 N. C., 731,, 21 S. E. 941, 47 Am. St. Rep. 829, 115 N. C. 590, 20 S. E. 707, 847.

Ore. Kamm v. Normand, 50 Ore. 9, 91 Pac. 448, 126 Am. St. Rep. 698, 11 L. R. A. N. S. 290; Hunter v. Grande Ronde Lbr. Co., (1901) 65 Pac. 598; Hallock v. Suitor, 37 Ore. 9, 60 Pac. 384; Haines v. Hall, 17 Ore. 165, 20 Pac. 831, 3 L. R. A. 609; Shaw v. Oswego Iron Co., 10 Ore. 371, 45 Am. Rep. 146; Felger v. Robinson, 3 Ore. 455; Weise v. Smith 3 Ore. 445, 8 Am. Rep. 621. Cf. Hood River Lumbering Co. v. Wasco County, 57 Pac. 1017 (Act. 1889 unconstitutional)

Penn. White Deer Creek Imp. Co. v. Sassaman, 67 Pa. St. 415; Baker v. Lewis 33 Pa. St. 301, 75 Am. Dec. 598; Deddrick v. Wood, 15 Pa. St. 9.

Tenn. Stuart v. Clark, 2 Swan 9, 58 Am. Dec. 49; But see Irwin v. Brown (1889) 12 S. W. 340; Stump v. McNairy, 5 Hump. 363, 42 Am. Dec. 437.

Wash. Shingle Co. v. Skagland, 77 Wash. 8, 137 Pac. 304. Lbr. Co. v. Power Co., 72 Wash. 631, 131 Pac. 220; State v. Super. Ct. 60 Wash. 193, 110 Pac. 1017; Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. 813, 102 Am. St. Rep. 905, 70 L. R. A. 272; Watkins v. Dorris, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199.

W. Va. Gaston v. Mace, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848, 5 L. R. A. 392.

Wis. Bloomer v. Bloomer, 128 Wis. 297, 107 N. W. 974; in re Power Co., 140 Wis. 245, 122 N. W. 801. Falls. Mfg. Co. v. Oconto River Imp. Co., 87 Wis. 134, 58 N. W. 257 Stevens Point Room Co. v. Reilly, 44 Wis. 295; 49 N. W. 978; Oison v. Merrill, 42 Wis. 203; *See* Sheldon v. Rockwell, 9 Wis. 166, 76 Am. Dec. 265. Sellers v. Union Lumbering Co., 39 Wis. 525; Whisler v. Wilkinson, 22 Wis. 572. Cf. Allaby v. Service Co. 135 Wis. 345, 116 N. W. 4, 16 L. R. A. N. S. 420.

U. S. U. S. v. Marthinson, 58 Fed. 765; U. S. v. Burns, 54 Fed. 351; Heerman v. Beef Slough Mfg. Etc. Co. 1 Fed. 145, 8 Biss. 334; U. S. v. Miss. River Boom Co., 1 McCrary, 601.

Canada: Rowe v. Titus, 6 N. Brunswick 326; Esson v. McMaster, 3 N. Brunswick 501. Ward v. Grenville, 32 Can. S. Ct., 510.
But see Nardini v. Reid, 6 Newfd. 134.

exceptionally high water, [1] or only through the continuous application of force by persons or devices on the bank [2] or in boats [3] is not a public highway. However, interception to continuous navigation by rapids or falls does not destroy the navigable character of the stream if it is actually capable of navigation both below and above the obstruction, [4] and the character of a stream as a public highway for the transportation of logs and other timber products will not be affected by obstructions which arise from accident or the intentional act of some one. [5] The fact that the stream has been used ordinarily by only a limited number, or by certain classes of persons does not preclude the general public from using it, [6] but a stream is not subject to the public easement when the stage of water is such as to make it incapable of floating logs. [7] Except as provided by statute a stream is not subject to the public easement, if it can be made capable of floating logs only through artificial improvement. [8]

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1. See Lewis v. Coffee County, 77 Ala. 190, 54 Am. Rep. 55; Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439; Hubbard v. Bell, 54 Ill. 110, 5 Am. Rep. 98; Irwin v. Brown (Tenn. 1889) 12 S. W. 340.
2. Hooper v. Hobson, 57 Me. 273, 99 Am. Dec. 769; Treat v. Lord, 42 Me. 552, 66 Am. Dec. 298; Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Wadsworth v. Smith, 11 Me. 278, 26 Am. Dec. 525; *See* Haines v Hall, 17 Ore. 165, 20 Pac. 831, 3 L. R. A. 609, (Injunction), Olson v. Merrill, 42 Wis. 213.
3. Morgan v. King, 35 N. Y. 454, 91 Am. Dec. 58.
4. The Montello, 20 Wall (U. S.) 430; Spooner v. McConnell, 1 McLean (U. S.) 337; Matter of State Reservation Comm'rs, 37 Hun (N. Y.) 537, 16 Abb. N. Cas. (N. Y.) 159.
5. Treat v. Lord, 42 Me. 552, 66 Am. Dec. 298.
   Shingle Co. v. Skagland, 77 Wash. 8, 137 Pac. 304.
6. Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209.
   But compare Meyer v. Phillips, 97 N. Y., 485, 49 Am. Rep. 538; Haines v. Hall, 17 Ore. 165, and the citations under (1) above.
   And *see* Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439-a, license to float logs on a stream.
7. Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184, Mathews v. Mfg. Co., 35 Wash. 662, 77 Pac. 1046.
8. Ky. Banks v. Frazier, 111 Ky. 909, 64 S. W. 983, 23 Ky. L. Rep. 1197.
   Me. Person v. Rolfe, 76 Me. 385; Holden v. Robinson Mfg. Co. 65 Me. 215; Wadsworth v. Smith, 11 Me. 278, 26 Am. Dec. 525.
   Mich. Koopman v. Blodgett, 70 Mich. 610, 14 Am. St. Rep. 527; Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209.
   N. H. Connecticut River Lbr. Co. v. Olcott Falls Co., 65 N. H. 290.
   N. Y. DeCamp v. Thomson, 16 N. Y. App. Div. 528, 44 N. Y. Suppl. 1014; Ten Eyck v. Warwick, 75 Hun. 562. And see DeCamp v. Dix 54 N. E. 63 (N. Y. law unconstitutional, stream too small.)
   Ohio Jeremy v. Elwell, 3 O. Cir. Dec. 186, 5 O. Cir. Ct. 379.
   Ore. Nutter v. Gallagher, 19 Ore. 375; Haines v. Hall, 17 Ore. 165, 20 Pac. 831, 3 L. R. A. 609.

(Footnote 8 continued on next page)

§147. The Use of and Injuries to Land Adjacent to Streams. If the character of a stream is such that it is subject to a public easement for the driving or floating of logs and rafts, one using the stream legitimately may go upon the banks to remove temporary obstructions from the stream, [1] force logs past an obstruction, [2] break log jams, [3] remove stranded logs, [4] secure a boom or raft temporarily, [5] and do other acts reasonably necessary for the effective flotation of timber products. [6] The right to use the banks is limited to a necessary and reasonable use, [7] and any negligence on the part of one using the stream is ordinarily considered the basis of liability for damages. [8] He will not be

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(Footnote 8 concluded from preceding page)

Wash. East Hoquiam Boom Etc. Logging Co. v. Nelson, 20 Wash. 142, 54 Pac. 1001.

For application of Canadian statutes regarding improved streams, *See* Caldwell v. McLaren, 9 App. Cas. 392, 53 L. J. P. C. 33, 51 L. T. Rep. N. S. 370, (overruling Boale v. Dickson, 13 U. C. C. P. 337); Mackey v. Sherman, 8 Ont. 28; Whelan v. McLachlan, 16 U. C. C. P. 102. Hunt v. Beck, 9 Ont. W. N. 187; Neely v. Peter, 4 Ont. L. Rep. 293 1 Ont. W. R. 499; McLaren v. Calswell, 8 Can. S. Ct. 435.

1. Treat v. Lord, 42 Me. 552, 66 Am. Dec. 298.
2. *See* Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584 (Right very limited)
3. Hooper v. Hobson, 57 Me. 273, 99 Am. Dec. 769 (If necessary and no substantial damage done.)
   But see Haines v. Hall, 17 Ore. 165; Watkins v. Dorris, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199.
4. Ford Lbr. Etc. Co. v. McQueen, 14 Ky. L. Rep. 521; Carter v. Thurston, 58 N. H. 104; 42 Am. Rep. 584; Sheldon v. Sherman, 42 Barb. (N. Y.) 368, 42 N. Y. Rep. 484. See Garth Lbr. & Shingle Co. v. Johnson, 151 Mich. 205, 209; Forster v. Juniata Bridge Co., 16 Pa. St. 393, 45 Am. Dec. 506.
5. Hayward v. Knapp, 23 Minn. 430; Weise v. Smith, 3 Ore. 445, 8 Am. Rep. 621; Pursell v. Stover, 110 Pa. St. 43, 20 Atl. 403.
6. Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Moore v. Jackson, 2 Abb. N. Cas. (N. Y.) 211; Downsdale v. Grays Harbor Boom Co., 36 Wash. 198, 78 Pac. 904: Cf. Pursell v. Stover, 110 Pa. 43, 20 Atl. 403; State v. Super Ct. 60 Wash. 193, 110 Pac. 1017.
7. Ford Lbr. Etc. Co. v. McQueen, 14 Ky. L. Rep. 521; Sheldon v. Sherman, 42 Barb. (N. Y.) 368. *See* Brown v. Kentfield, 50 Calif. 129; Campbell v. Dickie, 36 Nova Scotia 40.
8. Ala. Harold v. James, 86 Ala. 274, 3 L. R. A. 407. *See* Gulf Red Cedar Co. v. Walker, 132 Ala. 553, 31 So. 374.
   Ark. Henderson v. Lbr. Co. 94 Ark. 370, 127 S. W. 459, 28 L. R. A. N. S. 144, 139 S. W. 649.
   Fla. R. Co. v. Yarbrough, 57 Fla. 101, 48 So. 634.
   Ky. Thurmon v. Morrison, 14 B. Mon. 296.
   Me. Howe v. Lbr. Co., 110 Me. 14, 85 Atl. 160.
   Mich. White River Logging Co. v. Nelson, 45 Mich, 578, 8 N. W. 587, 909; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.
   Minn. Mandery v. Boom Co., 105 Minn. 3, 116 N. W. 1027, 1035; Coyne v. Miss. Etc. Booming Co., 72 Minn. 533, 75 N.W. 748; 71 Am. St. Rep. 508, 41 L. R. A. 494; Miller v. Chatterton, 46 Minn. 338, 48 N. W. 1109. *See* Ramgren v. McDermott, 73 Minn. 368, 76 N. W. 47; Doucette v. Imp. Etc. Co., 71 Minn. 206, 73 N. W. 847.
   Breeland, 78 Miss. 864, 29 So. 850.
   v. Lbr. Co., 187 Mo. App. 386, 173 S. W. 15.

(Footnote 8 continued on next page)

liable for damages caused by the logs through an unusual and unexpected rise in the stream, if his conduct has been that of a prudent man; [1] but he will be liable if the sudden rise of water was customary at that season or the probability of damage because of an unusually high stage of water might have been reasonably anticipated, [2]

Liability will be incurred irrespective of negligence if an effort is made to drive a stream at a time when the flow is insufficient to float the logs, [3] or if logs are boomed along the bank without an agreement with the riparian owner. [4] Moreover, damages are recoverable for any substantial injury due to an entrance upon the shores to remove stranded logs or to break jams, even though such injury be necessarily incident to the operations. [5] The liability of the one using the stream may be reduced or entirely avoided by proof of a lack of ordinary care, [6] or a contributory negli-

(Footnote 8 concluded from preceding page)

N. Y. Brewster v. Rogers Co., 169 N. Y. 73, 62 N. E. 164, 58 L. R. A. 495, 42 App. Div. 343, 59 N. Y. Suppl. 32; Outterson v. Gould, 77 Hun. 429, 28 N. Y. Suppl. 798.

Ore. Hunter v. Grande Ronde Lbr. Co., 39 Ore. 448, 65 Pac. 598. (Overruling Haines v. Welch, 14 Ore. 319, 12 Pac. 502.)

Pa. Bald Eagle Boom Co. v. Sanderson, 81 1-2 Pa. St. 402.

Vt. Boutwell v. Realty Co., 94 Atl. 108.

Wash. *See* Peterson v. Arland, 79 Wash. 679, 141 Pac. 63; Johnson v. Lbr. Co., 79 Wash. 520, 140 Pac. 577 (liability of several owners for jam;) Watkins v. Dorris, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199.

Wis. Field v. Apple River Log Driving Co., 67 Wis. 569, 31 N. W. 17 (injury not trespass); Hackstack v. Keshena Imp. Co., 66 Wis. 439; Keator Lbr. Co. v. St. Croix Boom Corp., 72 Wis. 62, 7 Am. St. Rep. 837.

Canada Dumont v. Fraser, 48 Can. S. Ct. 137; Ward v. Grenville Tp. 32 Can. Sup. Ct. 510; Auger v. Cook, 39 U. C. Q. B. 537; Campbell v. Dickie, 36 Nova Scotia 40; Lowery v. Booth, 34 Ont. L. 204, 8 Ont. W. N. 529; Ireson v. Timber Co., 30 Ont, L. 209, 5 Ont. W. N. 577 (unreasonable obstruction); Langstaff v. McRae, 22 Ont. 78.
See also Cockburn v. Lbr. Co., 30 Can.S.Ct. 80 (arbitration of damages.)

1. Goodin v. Kentucky Lbr. Co., 90 Ky. 625, 14 S. W. 775, 12 Ky. L. Rep. 573; Lawler v. Baring Boom Co., 56 Me. 443; Borchardt v. Wausau Boom Co., 54 Wis. 107, 41 Am. Rep. 12.
See Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584.
2. Gulf Red Cedar Co. v. Walker, 132 Ala. 553, 31 So. 374.
3. Gwaltney v. Scottish Carolina Timber Etc. Co., 115 N. C. 579, 20 S. E. 465; *See* Hoskins v. Archer, 6 Ky. L. Rep. 671; Munson v. Hungerford, 6 Barb. (N. Y.) 265.
4. Lumber Co. v. Johnson, 151 Mich. 205, 115 N. W. 52; Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; (But *see* Canfield v. Erie, 1 Mich. N. P. 105;) Watkinson v. McCoy, 23 Wash. 372, 63 Pac. 245; *See* McPheters v. Moose River Log Driving Co., 78 Me. 329; Felger v. Robinson, 3 Ore 455. See Vt. Act Apr. 2, 1915 S. L. No. 140, p. 221.
5. Inspectors Assoc. v. Inspectors Assoc. 57 Fla. 399, 48 So. 603.
Hooper v. Hobson, 57 Me. 273, 99 Am. Dec. 769; Harrington v. Edwards, 17 Wis. 604, 86 Am. Dec. 768; *See* Gratwick Etc. Lbr. Co. v. Lewis, 66 Mich. 533. De Camp v. Bullard (N.Y.) 54 N. E. 26. Campbell v. Dickie, 36 N. Scotia 40.
6. Harold v. Jones, 86 Ala. 274; Lilley v. Fletcher, 81 Ala. 234, 1 So. 273. Huff v. Kentucky Lbr. Co. 45 S. W. 84.

gence [1] on the part of the injured party. The same rules obtain as to injuries from the overflowing of land because of log jams, splash dams, or booms. Any negligence in the construction of boom, lack of diligence in driving logs or unnecessary delay in the breaking of a jam will give rise to an action for damages, [2] and liability will be incurred even where due diligence is exercised if the frequent or continued overflow of lands is the natural and logical result of the operation of a boom. [3] The common law and statutory rights may be modified by contract. [4]

In several states statutes provide for an assessment of damages by disinterested parties; [5] but it has been held that such provisions do not preclude the determination of the damage by other means, [6] and that they are applicable only to ordinary and necessary damages and not to those resulting from negligence. [7] It has also been held that the remedy for damages was not limited to a seizure of logs as provided by statute, but that an action at law for damages might also be brought. [8] The transfer of title in a boom from one party to another carries with it such rights as have been acquired from riparian owners for the maintenance of the boom. [9] The general rules of law regarding the granting of an injunction, [10] the proof of title, [11] burden of proof, [12]

1. Miller v. Sherry, 65 Wis., 129, 26 N. W., 612.
2. *Mich.* Witheral v. Muskegon Booming Co. 68 Mich. 48, 35 N. W. 758, 13 Am. St. Rep. 325; Bauman v. Pere Marquette Boom Co., 66 Mich. 544, 33 N. W. 538; Anderson v. Thunder Bay River Boom Co., 61 Mich. 489, 28 N. W. 518; White River Log Etc. Co. v. Nelson, 45 Mich. 578, 8 N. W. 578, 909.
   Minn. Osborne v. Miss. Etc. River Boom Co., 95 Minn. 149, 103 N. W. 879; Coyne v. Miss. Etc. Boom Co., 72 Minn. 533, 75 N. W. 748, 71 Am. St. Rep. 508, 41 L. R. A. 494.
   Mont. Hopkins v. Butte Etc. Co., 16 Mont. 356, 40 Pac. 865.
   N. H. George v. Fisk, 32 N. H. 32.
   Wash. White v. Codd, 39 Wash. 14, 80 Pac. 836.
3. Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308; Hueston v. Miss. Etc. Boom Co., 76 Minn. 251, 79 N. W. 92; Weaver v. Miss. Etc. Boom Co., 28 Minn. 534; *See* Pumpelly v. Green Bay Co., 13 Wall (U. S.) 181; Barrett v. Bangor, 70 Me. 335. Baumgartner v. Sturgeon R. Boom Co. (Mich.) 79 N. W. 566.
4. Bradley v. Tittabawassee Boom Co., 82 Mich. 9, 46 N. W. 24; Lacy v. Green, 84 Pa. St. 514.
5. Bald Eagle Boom Co. v. Sanderson, 81 1-2 Pa. St. 402.
6. Miller v. Chatterton, 46 Minn. 338, 48 N. W. 1109; Brewster v. Rogers Co., 169 N. Y. 73, 62 N. E. 164, 58 L. R. A. 495, 42 App. Div. 343, 59 N. Y. Suppl. 32.
7. Mandlebaum v. Russell, 4 Nev. 551.
8. Coe v. Hall, 41 Vt. 325. See Howe v. Lbr. Co. 110 Me. 14, 85 Atl. 160.
9. Hoskins v. Brown, 76 Me. 68; *See* Engel v. Ayer, 85 Me. 448, 27 Atl. 352.
10. Buchanan v. Grand River Etc. Log Running Co., 48 Mich. 364, 12 N. W. 490.
11. Field v. Apple River Log Driving Co., 67 Wis. 569, 31 N. W. 17.
12. Anderson v. Thunder Bay River Boom Co., 61 Mich. 489, 28 N. W. 518.

admissibility and sufficiency of evidence, [1] and province of the jury, [2] are applicable to actions of this kind.

§148. The Rights of Riparian Owner as to the Use of Drivable Stream. A riparian owner may maintain a boom [3] or a dam [4] which does not interfere with the reasonable use of the stream by others. The public right to the use of a stream as a highway is primary and superior to the right of the riparian owner to maintain a dam, [5] but it is not exclusive and is subject to such restrictions as are essential to the reasonable enjoyment of the right of the riparian owner. [6] The maintenance of dams and the provision of sluiceways for the passage of logs is regulated by statute in many American states. [7] Subject to the limita-

1. Karwick v. Pickands, 181 Mich. 169, 147 N. W. 605, Cf. 137 N. W. 219. Coburn v. Muskegon Booming Co., 72 Mich. 134, 40 N.W. 198, Witheral v. Muskegon Booming Co., 68 Mich. 48, 35 N. W. 758, 13 Am. St. Rep. 325; Hopkins v. Butte Etc. Co., 16 Mont. 356, 40 Pac. 865; Sewall's Falls Bridge v. Fisk, 23 N. H., 171; Taylor v. Norfolk Etc. R. Co., 131 N. C. 50, 42 S. E. 464; Gwaltney v. Scottish Carolina Timber Etc. Co., 111 N. C. 547, 16 S. E. 692; Hunter v. Grande Ronde Lbr. Co., 39 Ore. 448, 65 Pac. 598; Shaw v. Susquehanna Boom Co., 125 Pa. St. 324, 17 Atl. 426; Edwards v. Wausau Boom Co., 67 Wis. 463, 30 N. W. 716. Johnson v. Lbr. Co. 75 Wash. 539, 135 Pac. 217.
2. Anderson v. Thunder Bay River Boom Co., 61 Mich. 489, 28 N. W. 518; Outterson v. Gould, 77 Hun. (N. Y.) 429, 28 N. Y. Suppl. 798; Garvin v. Gates, 73 Wis. 514 (as to what constitutes "good driving water" as used in contract.) *See* Lbr. Co. v. Henderson, 100 Ark. 53, 139 S. W. 649; Sutherland v. Boom etc., Co. 73 Wash. 75, 131 Pac. 455.
3. Warner v. Lumber Etc. Co., 123 Ky. 103, 93 S. W. 650, 29 Ky. L. Rep. 527, 12 L. R. A. N. S. 667; Brig "City of Erie" v. Canfield, 27 Mich. 479; Mill Etc. Co. v. Johnson, 52 Ore. 547, 98 Pac. 132, 132 Am. St. Rep. 716; Boom Co. v. Reilly, 44 Wis. 295; Brace v. Forwarding Co., 32 U. C. Q. B. 43. *But see* Atlee v. Union Packet Co., 21 Wall. (U. S.) 389; Northwestern Packet Co. v. Atlee, 2 Dill (U. S.) 479; Moore v. Jackson, 2 Abb. N. Cas. (N. Y.) 211; Tanguay v. Price, 37 Can. S. Ct. 657.
4. Middleton v. Flat River Booming Co., 27 Mich. 533; *See* Collins v. Howard, 65 N. H. 190; Munson v. Hungerford, 6 Barb. (N. Y.) 265; Martin v. Boom Co., 79 Wash. 393, 140 Pac. 355; A. C. Conn Co. v. Little Suamico Lbr. Mfg. Co., 74 Wis. 652.
5. Foster v. Searsport Spool Etc. Co., 79 Me. 208, 11 Atl. 273; Pearson v. Rolfe. 76 Me. 380; *see* Stratton v. Currier 81 Me. 497, 17 Atl. 579, 3 L. R. A. 809; Holyoke Water Power Co. v. Conn. Riv. Co., 52 Conn. 570; Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561.
6. Parks v. Morse, 52 Me. 260; Veazie v. Dwinel, 50 Me. 479; Buchanan v. Grand River Etc. Log Running Co., 48 Mich. 364, 12 N. W. 490; Crookston Waterworks Etc. Co. v. Sprague, 91 Minn. 461, 98 N. W. 347, 99 N. W. 420, 103 Am. St. Rep. 525, 64 L. R. A. 977; Kamm v. Normand, 50 Ore. 9, 91 Pac. 448, 126 Am. St. Rep. 698, 11 L. R. A. N. S. 290; Dumont v. Fraser, 48 S. C. 137; Conn. Co. v. Lbr Etc. Co., 74 Wis. 652, 43 N. W. 660; Ward v. Grenville Tp., 32 Can. Sup. Ct. 510. Cf. James v. Rathbun Co., 11 Ont. L. R. 271, 6 Ont. W. R. 1005.
7. Ala. Act. Feb. 28, 1887, Sess. L. 1887, p. 132; Criminal Code 1907, Sec. 7863.
   Dak. Act. Jan. 2, 1863, Laws of Dak. 1862-63, p. 238, ch. 47.
   Idaho Act of Feb. 5, 1885, Laws of Idaho, 1885 p. 177 (See Rev. St. Ida. Terr. 1887, p. 830-836. Rev. Code 1908, sec. 872.)
   Ky. Act Mar. 21, 1906; Same Ky. Stat. 1909, Ch. 38a.

(Footnote 7 continued on next page)

tion that no one shall be deprived of a substantial property right without due compensation, such statutes will be sustained by the courts. [1]

§149. Contracts for the Floating of Logs. The usual rules of law are applicable to contracts for the driving of logs. [2] There must be an unqualified acceptance of a definite offer. [3] If a contract does not clearly provide that performance shall be complete within a definite time, [4] performance within a reasonable time will be considered a sufficient compliance with the terms of the contract. [5] Reasonable care must be exercised by the one driving the logs. [6] Release from a contract is not ordinarily effected by a change in circumstances for which the other party is not responsible, even though such change imposes an additional burden and responsibility on the one who is to do the

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(Footnote 7 concluded from preceding page)

Minn. Act. Mar. 1, 1856; Act. July 28, 1858 (*See* Stat. Minn. 1849-58, p. 827) Gen. St. Minn. 1913, Tiffany, Sec. 5433-5437.

Nev. Act. Mar. 3, 1866, Laws of Nev. 1866, p. 198 (Gen. St. Nev. 1885, Sec. 1065.

N. Y. Act April 4, 1806, Ch. 139, Laws New York, W. & S. Albany, 1806, Vol. 4, p. 541; Act. Mar. 31, 1807 Ch. 78, Vol. 5 p. 93; Act April 5, 1810, Ch. 180, Vol. 6 p. 74.

Pa. Act Mar. 23, 1803, Laws Pa. 1810, Vol. 4 p. 20, Ch. 2342.

S. C. Act of 1856, Stat. at L. Vol. 12, p. 517; Same Code 1912, Sec. 1410.

Va. Act Mar. 4, 1880, Sess Laws p. 172 (Code 1904, Sec. 3876)

Wyo. Act Dec. 9, 1869, Gen'l Laws 1st Sess. Terr. Ass., p. 324.

1. Simons v. Munch, 107 Minn. 370, 120 N. W. 373; 121 N. W. 878; Power Co. v. Boom Co. 43 Minn. 380, 45 N. W. 714; Mille Lac. Imp. Co. v. Bassett, 32 Minn. 375, 20 N. W. 363; Anderson v. Munch, 29 Minn. 414, 13 N. W. 192; Lamprey v. Nelson 24 Minn. 304.
   Denton v. State, 72 App. Div. 248, 76 N. Y. Suppl. 167; Morris v. King, 18 Barb. (N. Y.) 277.
2. *See* Nav. Co. v. Salt etc. Co. 174 Mich. 1, 140 N. W. 565; Nav. Co. v. Filer, (Mich.) 151 N. W. 1025; Blakely v. Lbr. Co. 121 Minn. 280, 141 N. W. 172; Coleman v. Boom Co. 114 Minn. 443, 127 N. W. 192, 131 N. W. 641; 35 L. R. A. 1109; McGuire v. Lbr. Co. 97 Minn. 293, 107 N. W. 130; Phalen v. Lbr. Co. 136 Wis. 571, 118 N. W. 219; Ball v. McCaffrey, 20 Can. S. Ct. 319.
3. Seaton v. Pere Marquette Boom Co., 84 Mich. 178, 47 N. W. 560; Ames v. Port Huron Log Driving Etc. Co., 6 Mich. 266; Wausau Boom Co. v. Plummer, 35 Wis. 274; *See* Stewart v. Milliken, 30 Mich. 503; Lbr. Co. v. Boom Corp. 115 Minn. 296, 132 N. W. 259; Boom Corp. v. Lbr. Co. 27 Ont. L. 131, 4 Ont. W. N. 5, 22 Ont. W. R. 952.
4. Gainor v. Cheboygan River Boom Co., 86 Mich. 112, 48 N. W. 487; Darrah v. Gow, 77 Mich. 16, 43 N. W. 851.
5. Bonifay v. Hassell, 100 Ala. 269, 14 So. 46; Francis v. Shearer, (Ky. 1891) 16 S. W. 365, 17 S. W. 165, 13 Ky. L. Rep. 283; Hopkins v. Sanford, 41 Mich. 243, 2 N. W. 39; Whalon v. Aldrich, 8 Minn. 346; Garvin v. Gates, 73 Wis. 513, 41 N. W. 621; Cohn v. Stewart, 41 Wis. 527.
6. Palmer v. Penobscot Lumbering Asso., 90 Me. 193; *See* Tingley v. Bellingham Bay Boom Co., 5 Wash. 644.

driving. [1] The contractor must be prepared to meet ordinary contingencies. [2] However, the failure of water has been held to excuse performance where the terms of the contract did not specifically require an unconditional performance. [3] The obligation assumed in an agreement to drive certain logs is not affected by the failure of the other party to furnish the whole amount of logs contemplated by the contract, [4] and where a contractor had failed to drive logs within the time agreed, a Michigan court refused to take judicial notice of the alleged fact that the streams in the northern peninsula of that state were not open on April first of any year for the driving of logs. [5] The compensation per thousand feet or other unit fixed by a contract is recoverable only for the logs actually driven and delivered. [6] Recovery at the same agreed rate can be had for the driving of additional logs, [7] or for extra expenses for which the original contract contemplated additional compensation, [8] but parol evidence of an agreement inconsistent with the written contract will not be accepted. [9] The measure of damages for a failure to drive logs is the actual loss suffered by the party owning the logs, [10] including the profit which he might have realized if the logs had been driven as agreed.

§150. Commingled Logs. At common law a party who fails to properly drive his logs and thus obstructs a stream to the injury of another desirous of using it is liable

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1. Mississippi River Logging Co. v. Robson, 69 Fed. 773, 16 C. C. A. 400 (Affm'g Robson v. Miss. Riv. Log. Co., 61 Fed. 893.)
   Nav. Co. v. Salt etc. Co. 174 Mich. 1, 140 N. W. 565.
2. Haines v. Gibson, 115 Mich. 131; Garvin v. Gates, 73 Wis. 513; Godkin v. Monahan, 83 Fed. 116.
3. Clarksville Land Co. v. Harriman, 68 N. H. 374, 44 Atl. 527; *But see* Keystone Lbr. & Mfg. Co. v. Dole, 43 Mich. 370.
4. Boody v. Goddard, 57 Me. 602.
5. Haines v. Gibson, 115 Mich. 131.
6. Nav. Co. v. Filer (Mich.) 151 N. W. 1025.
   Gill v. Johnston Lbr. Co., 151 Pa. St. 534, 25 Atl. 120. See Gibson v. Trow (Wis.) 81 N. W. 411. (Payment to third party for delivery.) Noyes v. Marlott, 156 Fed. 753, 84 C. C. A. 409.
7. Meserve v. Lewiston Steam Mill Co., 64 Me. 438.
8. Davis v. Ladue, 58 Mich. 226, 24 N. W. 871; *See* Destrehan v. Louisiana Cypress Lbr. Co., 45 La. Ann. 920, 13 So. 230, 40 Am. St. Rep. 365; Mississippi Rafting Co. v. Ankeny, 18 Minn. 17.; Lbr. Co. v. Hotard 142 Ky. 346, 134 S. W. 133.
9. Meekins v. Newberry, 101 N. C. 17; *See* Johnson v. Cranage, 45 Mich. 14.
10. Parks v. Libby, 92 Me. 133, 42 Atl. 318; Whalon v. Aldrich, 8 Minn. 346; Palmer v. Penobscot Lumbering Asso. 90 Me. 193; *See* Penobscot Lumbering Asso. v. Bussell, 92 Me. 256.

for the damages suffered by the latter. [1] If logs are commingled in such a way that they cannot practically be separated until driven to a point farther down the stream, either party may ordinarily collect a reasonable compensation for driving the logs of the other to a point of convenient separation, provided such notice is given as to afford to the other party a reasonable time to care for his own logs [2] but this principle will not be extended so as to authorize compensation for unnecessary and voluntary services. [3] Where an explicit contract is made between two parties for the driving of logs the rights and duties of the parties will be enforced in accordance with the terms of such contract, irrespective of common law rules or of statutory regulations of the jurisdiction, provided the terms of the contract are not subversive of public policy. [4]

§151. General Statutory Regulation of Log Driving. In a few states there are laws prescribing the manner in which logs shall be floated and providing for a forfeiture of the logs or for other penalty if the logs are not floated in compliance with the terms of the statutes. [5] These acts aim at a prevention of injury by loose and uncontrolled logs, and have been sustained by the courts as constitutional. [6] In many states statutes provide that one who is compelled to break jams formed through the negligence of another party using the stream, or to drive the logs of another in

1. Bearce v. Dudley, 88 Me. 410, 34 Atl. 260; Bellant v. Brown, 78 Mich. 294, 44 N. W. 326; Miller v. Chatterton, 46 Minn. 338, 48 N. W. 1109, Auger v. Cook, 39 U. C. Q. B. 537.
2. Hodson v. Goodale, 22 Ore. 68, 29 Pac. 70.
3. Doyle v. Pelton, 134 Mich. 398, 96 N. W. 483; Peters v. Gallagher, 37 Mich. 407.
4. Dow v. Huckins, 34 Me. 110; McDonald v. Boeing, 80 Mich. 415, 45 N. W. 362; Beard v. Clarke, 35 Minn. 324, 29 N. W. 142; Walker v. Bean. 34 Minn. 427, 26 N. W. 232.
5. Ky. Act May 7, 1886, (Gen'l Laws Ky. 1887, p. 495.)
   Mass. Act Mar. 1, 1815. (Pub. & Gen'l Laws Mass., Boston, 1816. p. 462) (See Rev. L. Mass. 1902, p. 815, Sec. 5.)
   N. H. Act June 10, 1808 (Laws of N. H., Exeter, 1815, p. 339.)
   Ohio Act Mar. 23, 1840 (Laws of Ohio, 1839-40, p. 95, Sec. 35, Canal Act.)
   Pa. Act Mar. 20, 1812, Pamphlet Laws 1812, p. 136, ch. 91. Act Dec. 11, 1866, Pamphlet Laws 1867, No. 1366.
   Cf. Ala. Crim. Code, 1907, sec. 7868 (Act. Oct. 9, 1903, p. 536) and Col. Annotated Stat. 1912, Mills, Sec. 3019 (Bonds against injury to bridges.)
6. Com. v. Asher Lbr. Co., 32 S. W. 136, 17 Ky. L. Rep. 542; Johnson v. Com., 20 S. W. 200, 14 Ky. L. Rep. 257; Com. v. Puckett, 92 Ky. 206, 17 S. W. 353; Evans v. Com., (Ky. 1888) 7 S. W. 925; French v. Connecticut R. Lbr. Co., 145 Mass. 261; Harrigan v. Conn. R. Lbr. Co., 129 Mass. 580, 37 Am. Rep. 387; Barron v. Davis, 4 N. H. 338; Scott v. Wilson, 3 N. H. 321; Wendt v. Craig, 67 Pa. St. 424; Craig v. Kline, 65 Pa. St. 399, 3 Am. Rep. 636.

order to drive his own, shall be entitled to a reasonable compensation for his expenditures. [1] These statutes are also sustained by the courts. [2] This right to compensation may include even a proportional share of the cost of artificial means [3] and applies to various floatable timber products. [4] The fact that it has been customary not to require contribution for services thus rendered has been held not to affect the liability [5] and the statutes have been applied where the logs were intermingled by agreement. [6] Compensation will not be enforced for the driving of logs that did not interfere with the plaintiff's drive, [7] nor can recovery be had if the intermingling was due to the fault of the plaintiff. [8] If parties cooperate in the driving of logs, each will be entitled to compensation for any service rendered beyond the amount required to drive his own logs, provided such service was necessarily rendered and there was not a contract releasing

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1. Ala. Cf. Code of 1907, sec. 4818-21 (Act. Feb. 18, 1895, p. 992) boomage.
   Ark. Digest of Statutes, 1904 Kirby, Sec. 4089 (Act Mar. 17, 1883) Sec. 6526 to boom companies.
   Ga. Cf. Annotated Statutes, 1914, Park, sec. 1838, boomage.
   Idaho Rev. Codes 1908, sec. 1504.
   Iowa Code 1897, sec. 4402-4415 (General lien).
   Me. Rev. St. 1903, p. 423, sec. 6 of Ch. 43.
   Mich. Annotated Stat. 1914, Howell, p. 4137-43, 7378-80, 7397-98, 7481, 7509, 13843-13858.
   Minn. Gen'l Stat. 1913. Tiffany, Sec. 7069.
   Miss. Code of 1906, Sec. 4973-4974. Code 1902, Sec. 4408-4409.
   Mo. Annotated Stat., 1906, Sec. 1496; Rev. Stat. 1909 Sec. 5449.
   Mont. Revised Codes, 1907, Sec. 5816-5818 (Acts Mar. 7, 1895).
   Nev. Gen'l St. 1885 sec. 1065. (from Act Mar. 3, 1866).
   N. M. Annotated Stat. 1915, sec. 3373.
   Ore. Laws of 1910, Lord, sec. 7461-7476.
   Vt. Public Stat. 1906, Sec. 2654-2656.
   Wash. Codes & Stat. 1910, Rem. & Bal., see, 7123, to boom companions, sec. 1162, general.
   Wis. Stat. of 1913, sec. 1740. See act Mar. 5, 1869, Laws 1869 p. 76 Ch. 80.
2. Olive v. State, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33; Sullivan v. Spotswood, 82 Ala. 163, 2 So. 716;
   Crane Lbr. Co. v. Bellows, 117 Mich. 482; Wood v. Ayres, 39 Mich. 345, 33 Am. Rep. 396; Backus Lbr. Co. v. Scanlon-Gipson Lbr. Co., 78 Minn. 438; East Hoquiam Boom Etc. Co. v. Nelson, 20 Wash. 142; Wisconsin River Log Driving Asso. v. Comstock Lbr., 72 Wis. 464; Haywood v. Campbell, 72 Wis. 321; Duluth Lbr. Co. v. St. Louis Boom Etc. Co., 17 Fed. 419.
3. Crane Lbr. Co. v. Bellows, 117 Mich. 482; Beard v. Clarke, 35 Minn. 324, 29 N. W. 142; Merriman v. Bowen, 33 Minn. 455, 23 N. W. 843. Compare Kroll v. Nester, 52 Mich. 70, 17 N. W. 700; Shaw v. Bradley, 59 Mich. 199. (Changed by Statute).
4. Bearce v. Dudley, 88 Me. 410, 34 Atl. 260.
5. Osborne v. Nelson Lbr. Co., 33 Minn. 285, 22 N. W. 540.
6. Beard v. Clark, 35 Minn. 324; Walker v. Bean, 34 Minn. 427, 26 N. W. 232; *See* Stewart v. Milliken, 30 Mich. 503; McDonald v. Boeing, 80 Mich. 415; Hodson v. Goodale, 22 Ore. 68.
7. Bearce v. Dudley, 88 Me. 410, 34 Atl. 260; Butterfield v. Gilchrist, 53 Mich. 22.
8. Megquier v. Gilpatrick, 88 Me. 422, 34 Atl. 262; Peters v. Gallagher, 37 Mich. 407

the other party from liability for the service.[1] The one who first places his logs in a stream is entitled to a reasonable time for the completion of his drive and cannot be subjected to additional expense by one who subsequently places his logs in the stream.[2] Under some statutes it is necessary to give notice to the owner that his logs are intermingled.[3] Failure to care for the intermingled logs affords the basis for statutory compensation.[4] The mere fact that the owner of the intermingled logs has made adequate provision for the ultimate driving of his logs will not relieve him from liability to one who had no knowledge of such arrangement,[5] unless it be shown that he was exercising reasonable diligence in caring for his drive.[6] The character,[7] or the time[8] of the intermingling is immaterial if it be established that such intermingling occurred as to make a common drive essential. One who thus undertakes to drive the logs of another assumes the responsibility of an ordinary bailee for the transportation of goods.[9] He must make as clean a drive as is customary,[10] and deliver the logs at their proper destination.[11] However, they may be driven past their destination, if separation there is impracticable.[12] It is not essential to the recovery of compensation for the driving of intermingled logs that the one claiming such compensation shall have been the owner of the logs which were lawfully in his possession and for the driving of which he was re-

1. Lord v. Woodward, 42 Me. 497; Peters v. Gallagher, 37 Mich. 407; E. W. Backus Lbr. Co. v. Scanlon-Gispon Lbr. Co., 78 Minn. 438, 81 N. W. 216.
2. Megquier v. Gilpatrick, 88 Me. 422, 34 Atl. 262.
3. Osborne v. Nelson Lbr., 33 Minn. 285, 22 N. W. 540.
4. Hayward v. Campbell, 72 Wis. 321, 39 N. W. 540; *See* Ames v. Port Huron Log Driving Etc. Co., 6 Mich. 266. Miller v. Chatterton, 46 Minn. 338, holding abandonment must be negligent.
5. Foster v. Cushing, 35 Me. 60; *See* Megquier v. Gilpatrick, 88 Me. 422; Hayward v. Campbell, 72 Wis. 321.
6. Butterfield v. Gilchrist, 63 Mich. 155, 29 N. W. 682, 53 Mich. 22, 18 N. W. 542; Gibson v. Trow, 105 Wis. 288; Boom Corp. v. Lbr. Co. 27 Ont. L. 131, 4 Ont. W. N. 5, 22 Ont. W. R. 952.
7. Anderson v. Maloy, 32 Minn. 76, 19 N. W. 387.
8. Wisconsin River Log Driving Asso., v. Comstock Lbr. Co., 72 Wis. 464, 40 N. W. 146, 1 L. R. A. 717.
9. Foster v. Cushing, 35 Me. 60; Beard v. Clark, 35 Minn. 324, 29 N. W. 142.
10. Weymouth v. Beatham, 92 Me. 525, 45 Atl. 519; Bearce v. Dudley, 88 Me. 410, 34 Atl. 260. *But see* Boyle v. Musser, 77 Minn. 153, 79 N. W., 664.
11. Bearce v. Dudley, 88 Me. 410, 34 Atl. 260; Doyle v. Pelton, 134 Mich. 398, 96 N. W. 483; Boyle v. Musser, 77 Minn. 153, 79 N. W. 664; Miller v. Chatterton, 46 Minn. 338, 48 N. W. 1109; Osborne v. Nelson Lbr. Co., 33 Minn. 285; 22 N. W. 540.
12. Foster v. Cushing, 35 Me. 60; Beard v. Clarke, 35 Minn. 324, 29 N. W. 142.

sponsible. [1] However, no one but the actual owner of logs can be held for the cost of driving them. [2] The proportion of the whole drive which the intermingled logs constituted will ordinarily be accepted as a basis for the determination of a reasonable compensation by a prorating of the cost. [3] The rules of procedure and evidence in such cases follow general principles. [4]

§152. Log Driving and Booming Companies. About the beginning of the nineteenth century the necessity of special legislation to encourage the improvement of streams and to regulate the driving of logs by companies or associations was recognized by the enactment of laws in several states. [5] The early laws granted special privileges to specific corporations, but later general laws were passed under authority of which associations of this character might be formed. [6] It has been held that a boom company may

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1. Tibbets. v. Tibbets, 46 Me. 365; Wisconsin Log Driving Asso. v. Comstock Lbr. Co. 72 Wis. 464, 40 N. W. 146, 1 L. R. A. 717; cf. Dwinel v. Fisk, 9 Me. 21 (Logs cut in trespass).
2. Marsh v. Flint, 27 Me. 475; Edson v. Gates, 44 Mich. 253, 6 N. W. 645.
   But see, O'Brien v. Glasow, 72 Minn. 135, 75 N. W. 7. (Owner of mark cannot escape on ground that mark was put on for security only). *Compare*, Boyle v. Musser, 77 Minn. 153, 79 N. W. 664 (Mark of dissolved partnership used by one of former members).
3. Bearce v. Dudley, 88 Me. 410, 34 Atl. 260; E. W. Backus Lbr. Co. v. Scanlon-Gipson Lbr. Co., 78 Minn. 438, 81 N. W. 216; *See* Crane Lbr. Co. v. Bellows, 117 Mich. 482, 76 N. W. 67.
4. Marsh v. Flint, 27 Me. 475; Bellows v. Crane Lbr. Co., 131 Mich. 630, 92 N. W. 286; Bellows v. Crane Lbr. Co., 126 Mich. 476, 85 N. W. 1103; O'Brien v. Glasgow, 72 Minn. 135, 75 N. W. 7; Goff v. Brainerd, 58 Vt. 468, 5 Atl. 393; Norris v. U. S., 44 Fed. 735; Cockburn v. Imperial Lbr. Co., 30 Can. Sup. Ct. 80 (Revs'g 26 Ont. App. 19).
   Me. Act Feb. 11, 1832, Session Laws 1832, p. 6, Ch. 8.
5. Mass. Act of Mar. 11, 1805, incorporation Saco Boom Co. (Private & Spec. St. Mass., Boston, 1805, Vol. 3, p. 522).
   Compare Act May 16, 1883, S. L., p. 484, ch. 183.
   N. Y. Act Mar. 24, 1801, Laws 1801, p. 74. Act April 4, 1806, Ch. 128. See Laws of N. Y., Webster & Skinner, Albany, 1806; Vol. 4, p. 525.
6. Ark. Digest of Statutes, 1904, Kirby, Ch. 132, Secs. 6522-6544.
   Calif. Act Mar. 3, 1881, Laws of 1881, p. 25, (Repealed 1901). See Gen. Law 1914. H. & D., p. 221.
   Fla. *Compare* Compiled Laws 1914, sec. 2543.
   Idaho Act Feb. 28, 1899, Laws 1899, p. 332 (Rev. Codes 1908, Secs. 872-873, 2830-32).
   Iowa *Compare* Code 1897, sec. 2032, riparian owner may construct.
   Me. *Compare* Rev. St. 1903, ch. 42, sec. 5, p. 419 (Companies on Saco liable for obstruction).
   Mass. Revised Laws 1902, p. 823, sec. 17, Harbor & Land Com'rs may license booms in Connecticut River.
   Mich. Act Feb. 4, 1864, Sess. L. Mich, 1864, p. 23, Act. 16; Act. Apr. 5, 1869, Sess. L. 1869, p. 287, Act No. 149 (See Am'd'ts Apr. 17, 1871, p. 326; May 13, 1879, p. 181; Apr. 15, 1881, p. 75; Apr. 26, 1887, S.

(Footnote 6 continued on next page)

enjoy the benefits of general acts regulating the driving of logs and the collection of tolls, as well as of the special acts regulating incorporated companies.[1] There have been numerous court decisions defining the status, powers and liabilities of such companies and corporations.[2] It has been held that a boom includes not only the floating logs, spars, or timbers used to confine other logs to a certain portion of the surface of a body of water,[3] but also the piling and other structures which hold the enclosing logs in place.[4]

(Footnote 6 concluded from preceding page)
L. 1887, p. 98, No. 91, and Am'n'dt Apr. 4, 1889, Laws 1889, p. 49, Act. 42; Annotated, Stat. 1913, P. 7476-7504, and secs. 4143, 4163).
Minn. Act June 26, 1889. Sess. L. 1889, p. 218, Act No. 188. Cf. Act. Mar. 2, 1855, Stat. Minn. 1849-58, p. 826.
See Gen'l St. 1913, Tiffany, Secs. 6261-6267 and cf. 5478, side booms.
Mo. Annotated Statutes 1906, secs. 1492-1516. Rev. Stat. 1909, secs. 3465-3488.
Nev. Act Mar. 3, 1866, Laws of 1866, p. 198, Ch. 99 (Gen. St. 1885, secs. 1064-71).
N.Mex. Annotated Statutes 1915, secs. 3372-3373.
N.Dak. *Compare* Compiled Laws 1913, sec. 3056. (General authority to anyone provided no interference with navigation). See Rev. Code Dak. Terr. 1877, ch. 32, p. 145.
Pa. Purdon's Digest, 1903, Rev. by Stewart, pp. 2342, 2354-55.
S. Dak. *Compare* Rev. Penal Code, 1903, sec. 3196. (General authority to anyone provided no interference with navigation).
Wash. Annot. Code 1910, Rem. & Bal., secs. 7110-7126; cf. secs. 7106-7109 (Tolls for use of logging road). 4378-4390.
W. Va. Chap. 121 of 1877 and amendments.See Code 1906, secs. 2498-2531; Code of 1913, Secs. 3115-3148.
Wis. Statutes 1913, sec. 1777e.
Wyo. *Compare* Comp. Stat. 1910, Mullen, sec. 828, ch. 67.
See Watts v. Tittabawassee Boom Co., 52 Mich. 206; Anderson v. Thunder Bay River Boom Co., 61 Mich. 489.

1. Hall v. Tittabawassee Boom Co., 51 Mich. 377, 16 N. W. 770. *But see* Garth Lbr. & Shingle Co. v. Johnson, 151 Mich. 205, 206.
2. Me. Sibley v. Penobscot Lumbering Assoc., 93 Me. 399, 45 Atl. 293; *In re* Penobscot Lumbering Assoc., 93 Me. 391, 45 Atl. 290.
Mich. Ames v. Port Huron Log Driving Etc. Co., 6 Mich. 266.
Minn. Osborne v. Knife Falls Boom Corp., 32 Minn. 412, 21 N. W. 704, 50 Am. Rep. 590.
Pa. Genesee Fork Imp. Co. v. Ives, 144 Pa. St. 114, 22 Atl. 887, 13 L. R. A. 427; Power's Appeal, 23 Wkly Notes Cas. (Pa.) 485.
Wash. Nicomen Boom Co. v. North Shore Boom Etc. Co., 40 Wash. 315, 82 Pac. 412; Grays Harbor Boom Co. v. McAmmant, 21 Wash. 465, 58 Pac. 573; East Hoquiam Boom Etc. Co. v. Neeson, 20 Wash. 142, 54 Pac. 1001.
W. Va. Miller v. Hare (W. Va.) 28 S. E. 722 (Boom not a private nuisance).
U. S. Lindsay Etc. Co. v. Mullen, 176 U. S. 126, 20 S. Ct. 325, 44 L. Ed. 400; Sands v. Manistee River Imp. Co., 123 U. S. 288, 8 S. Ct. 113, 31 L. Ed. 149; Duluth Lbr. Co. v. St. Louis Boom Etc. Co., 17 Fed. 419, 5 McCrary 382.
Can. Queddy River Driving & Boom Co. v Davidson, 10 Can. Sup. Ct. 222.
3. Clark v. Nelson Lbr. Co., 34 Minn. 289, 10 Am. & Eng. Corp. Cas. 399; Power's Appeal, 125 Pa. St. 175, 187, 17 Atl. 254, 11 Am. St. Rep. 882; *See* Gasper v. Heimbach, 59 Minn. 102, 60 N. W. 1080, 53 Minn. 414, 55 N. W. 559.
4. John Spry Lbr. Co. v. Steam Barge C. H. Green, 76 Mich. 320; *See* Rollins v. Clay, 33 Me. 132, 138; Farrand v. Clarke, 63 Minn. 181, 65 N. W. 361.

Booms have been considered real estate [1] and are taxable as such. [2]

Since boom companies are considered to have a quasi public character, [3] they may be authorized to condemn real estate when essential to the performance of their functions. [4] A legislature cannot authorize the flowage [5] of private lands or the use of the banks [6] without compensation; nor can it authorize a boom company to assume control over the logs of those who do not desire the services of the company, if such logs do not interfere with the legitimate operations of the company. [7] So far as is consistent with the Federal constitution and laws enacted by congress, the legislatures of the several American states may grant exclusive rights for the driving and booming of logs in streams flowing through or lying within a state, [8] and it has been held that on a stream wholly within a state the legislature may authorize boom companies to completely obstruct navigation. [9]

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1. Peoples Ice Co. v. Steamer Excelsior, 43 Mich. 336; Brig City of Erie v. Canfield, 27 Mich. 479.
2. Hall v. Benton, 69 Me. 346.
3. Heiberg v. Boom Co. 127 Minn. 8, 148 N. W. 517; Osborne v. Boom Corp. 32 Minn. 412, 21 N. W. 704, 50 Am. Rep. 590;
   West Branch Boom v. Penn. Joint Lbr. Etc. Co., 121 Pa. St. 158, 6 Am. St. Rep. 766; Cohn v. Wausau Boom Co. 47 Wis. 314; Duluth Lbr. Co. v. St. Louis Boom Etc. Co., 17 Fed. 419, 5 McCrary 382; Lynch v. Richards, 38 N. Brunsw. 169.
4. Olive v. State, 86 Ala. 88; Lawler v. Baring Boom Co. 56 Me. 445; Benjamin v. Manistee River Imp. Co., 42 Mich. 628; Cotton v. Miss. Etc. Boom Co., 22 Minn. 372; North River Boom Co. v. Smith (Wash.) 45 Pac. 750.
5. Bradley v. Tittabawassee Boom Co., 82 Mich. 9; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308; Middleton v. Flat River Booming Co., 27 Mich. 533; Weaver v. Miss. Etc. Boom Co., 28 Minn. 534; Rogers v. Coal River Boom Etc. Co. (W. Va. 1896) 23 S. E. 919.
6. Cohn v. Wausau Boom Co., 47 Wis. 314; *See* Morgan v. King, 35 N. Y. 454, 91 Am. Dec. 58; Weise v. Smith, 3 Ore. 445, 8 Am. Rep. 621.
7. Ames v. Port Huron Log Driving Etc. Co., 11 Mich. 139, 83 Am. Dec. 731; Boom Corp. v. Lbr. Co. 27 Ont. L. 131, 4 Ont. W. N. 5, 22 Ont. W. R. 952.
8. Manistee River Imp. Co. v. Sands, 53 Mich. 593; Green v. Knife Falls Boom Corp., 35 Minn. 155; Osborne v. Knife Falls Boom Corp., 32 Minn. 412, 21 N. W. 704, 50 Am. Rep. 590; Wisconsin R. Imp. Co. v. Manson, 43 Wis. 255, 28 Am. Rep. 542.
   But see Boom Corp. v. Lbr. Co. 162 Fed. 287, 89 C. C. A. 267 (Minn-Can. boundary.)
9. Me. Lawler v. Baring Boom Co., 56 Me. 445; Treat v. Lord, 42 Me. 552, 66 Am. Dec. 298.
   Mich. Atty. Gen'l. v. Evart Booming Co., 34 Mich. 462.
   Wis. Keator Lbr. Co. v. St. Croix Boom Corp., 72 Wis. 62, 7 Am. St. Rep. 837; Edwards v. Wausau Boom Co. 67 Wis. 463; Black River Imp. Co. v. La Crosse Booming Etc. Co., 54 Wis. 659. 41 Am. Rep. 66; cf. Enos. v. Hamilton, 24 Wis. 658.
   U. S. Pound v. Turck, 95 U. S. 459; U. S. v. Bellingham Bay Boom Co., 72 Fed. 585; U. S. v. Beef Slough Mfg. Co., 8 Biss. 421; Heerman v. Beef Slough Mfg. Co., 1 Fed. 145, 8 Biss. 335.

§153. The Collection of Tolls by Driving and Booming Companies. Both the special acts and the general acts regulating the driving and booming of logs by associations and corporations provide for the collection of tolls to reimburse the initial and subsequent expenses of improving the stream and the cost of operation, together with what is considered a reasonable profit.[1] When the legislature merely fixes a maximum toll, the question of what is a reasonable charge is a proper one for a jury.[2] The courts have generally construed acts of this character liberally enough to authorize all acts necessary to a practicable and profitable operation by a company;[3] yet the grantee must be determined with sufficient certainty[4] and an act providing for a toll in the form of a public tax for special purposes was held unconstitutional in North Carolina on the ground that some of those taxed were deriving no benefit from the improvement.[5]

While the collection of a toll is dependent upon the fulfillment of the obligations of the company or corporation as to the improvement of the stream or the care of the logs during the drive;[6] a Pennsylvania court has held that one using a stream for log driving could not escape the payment of tolls to a regularly organized stream improvement com-

1. Ala. Cf. Galloway v. Henderson, 136 Ala. 318, 34 So. 957; Turner v. Mobile, 135 Ala. 128, 33 So. 132 (Lien for boomage).
   Me. Machias Boom v. Holway, 89 Me. 236, 36 Atl. 378; Penobscot Boom Corp. v. Fenobscot Lumbering Assoc., 61 Me. 533.
   Mich. Hall v. Tittabawassee Boom Co., 51 Mich. 377, 16 N. W. 770; Pere Marquette Boom Co. v. Adams, 44 Mich. 403, 6 N. W. 857; Benjamin v. Manistee River Imp. Co., 42 Mich. 628.
   Pa. Genesee Fork Imp. Co. v. Ives, 144 Pa. St. 114, 22 Atl. 887, 13 L. R. A. 427. *See* Boom v. Dodge, 31 Pa. 285 (St. not retroactive).
   Wis. Falls Mfg. Co. v. Oconto Riv. Imp. Co., 87 Wis. 134; Wisconsin Log Driv. Assoc. v. Comstock Lbr. Co., 72 Wis. 464; Wausau Boom Co. v. Plummer, 49 Wis. 115, 5 N. W. 26; Wisconsin R. Imp. Co. v. Mason 43 Wis. 255, 28 Am. Rep. 542.
   Can. *See* South Bay Boom Co. v. Jewett, 10 N. Brunsw. 267.
   For definition of "raftage" and "boomage," see Bangor Boom Corp. v. Whitney, 29 Me. 123; Farrand v. Clark, 63 Minn. 181, 65 N. W. 361; Moss Point Lbr. Co. v. Thompson, 83 Miss. 499, 35 So. 828.
2. Sturgeon River Boom Co. v. Nester, 55 Mich. 113, 20 N. W. 815. *See* Boom Co. v. Lbr. Co. 146 Wis. 559, 132 N. W. 1118 (Discrimination in rate).
3. Bassett v. Carleton, 32 Me. 553, 54 Am. Dec. 605; Androscoggin River v. Haskell 7 Me. 474; Northwestern Imp. Etc. Co. v. O'Brien, 75 Minn. 335, 77 N. W. 989.
4. Sellers v. Union Lumbering Co., 39 Wis. 525.
5. Hutton v. Webb, 124 N. C. 749, 33 S. E. 171; 126 N. C. 897, 36 S. E. 341.
6. Dam Co. v. Clothing Co. 102 Me. 257, 66 Atl. 537; Swift River Etc. Imp. Co. v. Brown, 77 Me. 40; Susquehanna Boom Co. v. Dubois, 58 Pa. St. 182. *See* Dam Co. v. Excelsior Co. 105 Me. 249, 74 Atl. 115.

pany, on the ground that few improvements had been made and that he could have driven his logs without the help of such improvements. [1] The tolls cannot be collected if the improvements are not maintained in fairly effective condition, [2] nor if they are made for some other purpose than that of preparing the stream for log driving. [3] It has also been held that the collection of tolls was dependent upon the establishment of an agreement where there was no statute fixing the rates. [4] However, the required agreement may be inferred from the conduct of the parties and the circumstances attending the driving. The state legislature has the power to fix the rate of compensation, [5] but where the state has not prescribed the rate, the court and jury will determine a reasonable rate, [6] if the rate has not been fixed by contract. [7] A driving or booming company ordinarily has a lien on the logs for the toll charges. [8] The contract must be substantially fulfilled before the lien may be enforced. [9] As in other cases in which a lien is given by statute, the lien must be enforced in strict accordance with the requirements of the statute. [10] Such a lien may be waived either expressly or by implication. [11] A booming

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1. Genesee Fork Imp. Co. v. Ives, 114 Pa. St. 114, 22 Atl. 887, 13 L. R. A. 427.
2. St. Louis River Dalles Imp. Co. v. Nelson Lbr. Co., 51 Minn. 10, 52 N. W. 976; Lehigh Coal Etc. Co. v. Brown, 100 Pa. St. 338.
3. Matter of Little Bob River, 23 Ont. App. 177. Cf. Franck v. Lbr. Co. 67 Wash. 553, 122 Pac. 7; Mackey v. Sherman, 8 Ont. 28.
4. Ocqueoc Imp. Co. v. Mosher, 101 Mich. 473, 59 N. W. 664; Coffin v. Robinson, 106 Me. 54, 76 Atl. 949; *Cf.* Mfg. Co. v. Lbr. Co. 12 Ont. L. 163, 8 Ont. W. R. 35.
5. Machias Boom v. Sullivan, 85 Me. 343; Side Booms v. Haskell, 7 Me. 474; West Branch Lumbermen's Exch. v. Fisher, 150 Pa. St. 475; *See* Merritt v. Knife Falls Boom Corp. 34 Minn. 245. Boom Co. v. Lbr. Co., 146 Wis. 559, 132 N. W. 118; Lbr. Co. v. Boom Co. 76 Wis. 76, 45 N. W. 18.
6. Pere Marquette Boom Co. v. Adams, 44 Mich. 403; Underwood Lbr. Co. v. Pelican Boom Co., 76 Wis. 76; Wausau Boom Co. v. Plummer, 49 Wis. 115.
7. Haughton v. Busch, 101 Mich. 267; Keystone Lbr. Co. v. Dole, 43 Mich. 370; Ames v. Port Huron Log Driving Etc. Co., 6 Mich. 266; Penobscot Boom Corp. v. Penobscot Lumbering Assoc., 61 Me. 533; Gill v. Johnston Lbr. Co., 151 P. A. St. 534; Weatherby v. Meikeljohn, 56 Wis. 78; Sellers v. Union Lumbering Co., 39 Wis. 525.
8. Hunter v. Perry, 33 Me. 159; Kroll v. Nester, 52 Mich. 70; Johnson v. Cranage, 45 Mich. 14; Robson v. Miss. R. Logging Co., 61 Fed. 893.
9. Lewiston Steam Mill Co. v. Richardson Lake Dam Co., 77 Me. 337; Haughton v. Busch, 101 Mich. 267; *compare* Swift River Etc. Imp. Co. v. Brown, 77 Me. 40; St. Louis River Dalles Imp. Co. v. Nelson Lbr. Co., 51 Minn. 10.
10. Clark v. Adams, 33 Mich. 159; Chapman v. Keystone Lbr. Etc. Co., 20 Mich. 358; Griffin v. Chadbourne, 32 Minn. 126; Overbeck v. Calligan, 6 Wash. 342; Tewksbury v. Bronson, 48 Wis. 581.
11. Tyler v. Blodgett Etc. Lbr. Co., 78 Mich. 81; Au Sable River Boom Co. v. Sanborn, 36 Mich. 358; Hutchins v. Olcutt, 4 Vt. 549, 24 Am. Dec. 634. *But see* Roberts v. Wilcoxson, 36 Ark. 355; Prentiss v. Garland, 67 Me. 345; Haughton v. Busch, 101 Mich. 267.

company may be required by law to survey all logs in its boom before enforcing the collection of tolls,[1] but an actual measurement or scaling of all logs is not necessary.[2] Defects in the boom which did not affect the particular lot of logs for which collection of toll is sought cannot be urged as a defense against the liability for such tolls.[3]

Some laws specifically authorize stream improvement companies to drive and boom logs which interfere with their operations[4] and afford a lien for the customary tolls[5] irrespective of any agreement for the performance of such services.[6] However, toll cannot be collected for the driving of logs which do not interfere with the operations of the company,[7] or for the driving of which the company cannot be held to assume responsibility,[8] especially if the company is notified that its assistance is not desired.[9] The right to collect tolls where no contract exists is dependent upon a public grant or license.[10] The statutes providing for the incorporation of log driving and booming companies often authorize the stoppage of the drive on the logs of a delinquent patron, but such stoppage is not always practicable and an action will lie in favor of the company for the recovery of a toll on the logs driven.[11] As indicated above

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1. Penobscot Boom Corp. v. Lamson, 16 Me. 224; 33 Am. Dec. 656; Androscoggin River Etc. v. Haskell, 7 Me. 474.
2. Wausau Boom Co. v. Plumer, 49 Wis. 115, 5 N. W. 26.
3. Penobscot Boom Corp. v. Wadleigh, 16 Me. 235; Androscoggin River Side Booms Co. v. Weld, 6 Me. 105.
4. McDonald v. Boeing, 80 Mich. 416; Sturgeon River Boom Co. v. Nester, 55 Mich. 113; Beard v. Clarke, 35 Minn. 324; Green v. Knife Falls Boom Corp., 35 Minn. 155; Walker v. Beam, 34 Minn. 427; Merriman v. Bowen, 33 Minn. 455; Anderson v. Maloy, 32 Minn. 76; Hodson v. Goodale, 22 Ore. 419. See Cockburn v. Lbr. Co. 30 Can. Sup. Ct. 80 (Revs'g Ont. App. 19) (May resort to arbitration instead of breaking jam).
5. Kroll v. Nester, 52 Mich. 70; Hall v. Tittabawassee Boom Co. 51 Mich. 377; Miller v. Chatterton, 46 Mich. 338; Clark v. Adams, 33 Mich. 159; Chapman v. Keystone Lbr. Etc. Co., 20 Mich. 358; Chesley v. DeGraff, 35 Minn. 415; Osborne v. Nelson Lbr. Co., 33 Minn. 285; Wisconsin River Log Driving Assoc. v. Comstock Lbr. Co., 72 Wis. 464.
6. St Louis Dalles Imp. Co. v. Nelson Lbr. Co., 43 Minn. 130, 44 N. W. 1080; East Hoquiam Boom Etc. Co. v. Neeson, 20 Wash. 142, 54 Pac. 1001; Duluth Lbr. Co. v. St. Louis Boom Etc. Co., 17 Fed. 419, 5 McCrary 382.
7. Peters v. Gallagher, 37 Mich. 407. *See* Lbr. Co. v. Boom Corp. 115 Minn. 296, 13 N. W. 259.
8. Chase v. Dwinal, 7 Me. 134, 20 Am. Dec. 352.
9. Washougal River Imp. Co. v. Skamania Logging Co., 23 Wash. 89, 62 Pac. 450; Gray's Harbor Boom Co. v. McAmmant, 21 Wash. 465, 58 Pac. 573.
10. Lamprey v. Nelson, 24 Minn. 304.
11. Bear Camp River Co. v. Woodman, 2 Me. 404; West Branch Logging Co. v. Strong, 196 Pa. St. 51, 46 Atl. 290. *Cf.* Mfg. Co. v. Lbr. Co. 12 Ont. L. Rep 163, 8 Ont. W. R. 35; Re. Mfg. Co 9 Ont. W. R. 99.

a sale of a part or all of the logs to satisfy a claim for tolls must be made in strict accordance with all material requirements of the statute authorizing a lien, [1] but unimportant irregularities will not invalidate a sale. [2]

§154. The Liability of Driving and Booming Companies. The specific charter or the general statute authorizing the operations of such companies ordinarily define in more or less comprehensive form the duties to be performed and the liabilities to be assumed by them. [3] The statutes often define what logs are to be driven, [4] the time when they must be driven [5] and the manner in which they are to be sorted and delivered. [6] If the charter provides that the company may drive all logs and timber in a certain stream, the company assumes full liability for all logs if it undertakes to carry out the full privilege conferred by the charter. [7] A driving or booming company is not liable as a common carrier, [8] but is liable for any loss due to a lack of reasonable care in the improvement of the stream or in subsequent operations. [9] There is a division of opinion as to whether the burden of proving ordinary care must be assumed by a log driving or booming company. [10] A company cannot be held liable if it be shown that ordinary diligence was used or that the loss was due to unavoidable cir-

1. Bennett's Branch Imp. Co. Appeal, 65 Pa. St. 242.
2. Hunter v. Perry, 33 Me. 159. *See* also Kennebec Log Driving Co. v. Burrill, 18 Me. 314.
3. Mississippi Etc. Boom Co. v. Prince, 34 Minn. 79, 24 N. W. 361; West Branch Boom Co. v. Dodge, 31 Pa. St. 285.
   Lynch v. Richards, 38 N. Brunsw. 242.
4. Patterson v. Penobscot Log Driving Co., 71 Me. 44; St. Louis Dalles Imp. Co. v. Nelson Lbr. Co. 43 Minn. 130, 44 N. W. 1080.
   Murray v. Boom Co. 75 Wash. 605, 137 Pac. 130.
5. Patterson v. Penobscot Log Driving Co., 71 Me. 44; *See* Bonifay v. Hassell, 100 Ala. 269.
6. Machias Boom v. Sullivan, 87 Me. 506, 33 Atl. 13.
7. Weymouth v. Penobscot Log Driving Co., 71 Me. 29; *But see* West Branch Boom Co. v. Pennsylvania Joint Lbr. Etc. Co., 121 Pa. St. 143, 15 Atl. 509, 6 Am. St. Rep. 766.
8. Mann v. White River Log Etc. Co., 46 Mich. 38, 8 N. W. 550, 41 Am. St. Rep. 141; Chesley v. Mississippi Etc. Boom Co., 39 Minn. 83, 38 N. W. 769.
9. Harold v. Jones, 86 Ala. 274; Sullivan v. Jernigan, 21 Fla. 276; Goodin v. Ky. Lbr. Co., 90 Ky. 625, 12 Ky. L. Rep. 573; Palmer v. Penobscot Lumbering Assoc., 90 Me. 193, 38 Atl. 108; Holway v. Machias Boom, 90 Me. 125; 37 Atl. 882; Davis v. Winslow, 51 Me. 264, 81 Am. Dec. 573; Foster v. Cushing, 35 Me. 60; Weld v. Androscoggin R. Side Booms, 6 Me. 93; Hebard v. Shaw, 123 Mich. 514; 82 N. W. 250; Hopkins v. Butte Etc. Com'l Co., 13 Mont. 223; Tingley v. Bellingham Bay Boom Co., 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055; Crane v. Fry, 126 Fed. 278, 61 C. C. A. 260.
10. *Must assume:* Chesley v. Mississippi Etc. Boom Co., 39 Minn. 83, 38 N. W. 769. *Contra:* Melendy v. Ames, 62 Vt. 14, 20 Atl. 161.

cumstances. [1] Any negligent or unnecessary obstruction of the stream by a boom, or improvement works, [2] or any unnecessary detention or interference with logs for the driving of which the company is not responsible, [3] will render the company liable in damages to the party injured. This liability is subject to the right of a reasonable detention for the purpose of sorting from the intermingled logs those for which the company is responsible. [4] Boom companies are not liable for damages resulting from the manner in which logs are driven or boomed by a contractor, if the injury was not proximately due to some requirement in the contract as to the time or manner of fulfillment. [5] A chartered boom company ordinarily has no paramount right of use in a stream but only a concurrent right which is limited by the rights of riparian owners, [6] mill owners, [7] and others using the stream for navigation purposes. [8] How-

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1. Penobscot Boom Corp. v. Baker, 16 Me. 233; Brown v. Susquehanna Boom Co., 109 Pa. St. 57, 1 Atl. 156; 58 Am. Rep. 708; Leigh v. Holt, 5 Biss. (U. S.) 338. *See* Lbr. Co. v. Boom Corp. 72 Wis. 62, 38 N. W. 529, 7 Am. St. Rep. 837.
2. Sullivan v. Jernigan, 21 Fla. 264; Watts v. Tittabawassee Boom Co., 52 Mich. 203, 17 N. W. 809; Pickens v. Coal River Boom Etc. Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819. *See* U. S. v. Bellingham Bay Boom Co., 176 U. S. 211, 20 Sup. Ct. 343 (Trip in boom not free passage, injunction, harbor act).
3. McPheters v. Moose River Log Driving Co., 78 Me. 329 (Damages include wages and board of men, etc.); Ames v. Port Huron Log Driving Etc. Co., 6 Mich. 266; West Branch Boom Co. v. Dodge, 31 Pa. St. 285; Mason v. Boom Co. 16 Fed. Cas. Mo. 9, 232, 3 Wall. Jr. 252.
   See also Lbr. Co. v. Dam Co. 115 Minn. 484, 132 N. W. 1126; Lawber v. Wells, 13 How. Pr. (N. Y.) 454; Murray v. Boom Co. 75 Wash. 605, 137 Pac. 130; Shields v. Lbr. Co. 48 Wash. 679, 94 Pac. 644.
4. West Branch Boom Co. v. Penn. Joint Lbr. Co., 121 Pa. St. 143, 15 Atl. 509, 6 Am. St. Rep. 766; Edwards v. Wausau Boom Co., 67 Wis. 463, 30 N. W. 716; Nester v. Diamond Match Co. 105 Fed. 567, 44 C. C. A. 606, 52 L. R. A. 950; *See also* Morgan v. King. 18 Barb. (N. Y.) 277; Powers' Appeal, 125 Pa. St. 175, 17 Atl. 254, 11 Am. St. Rep. 882, 23 Wkly Notes Cas. (Pa.) 485.
5. McDonnell v. Rifle Boom Co., 71 Mich. 61; Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209; Pierpont v. Loveless, 72 N. Y. 211; Bearrs v. Sherman. 56 Wis. 55.
6. Plummer v. Penobscot Lbr. Asso., 67 Me. 363; White River Logging Co. v. Nelson, 45 Mich. 578; Grand Rapids Boom Co. v. Jarvis, 30 Mich. 308; Bald Eagle Boom Co. v. Sanderson, 81½ Pa. St. 402; Hackstack v. Keshena Imp. Co., 66 Wis. 439.
7. Buchanan v. Grand River Etc. Log Running Co., 48 Mich. 364; Att'y Gen'l v. Evart Booming Co., 34 Mich. 462; Thunder Bay Booming Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184; Middleton v. Flat River Booming Co., 27 Mich. 533. *See* Pearson v. Rolfe, 76 Me. 380; Koopman v. Blodgett, 70 Me. 610; Kroll v. Nester, 52 Mich. 70; Beard v. Clarke, 35 Minn. 324; Merriman v. Bowen, 33 Minn. 455; Volk v. Eldred, 23 Wis. 410.
8. *See* references under (7) and also Brown v. Kentfield, 50 Cal. 129; Stevens Point Boom Co. v. Reilly, 46 Wis. 237, 44 Wis. 295; Harrington v. Edwards, 17 Wis. 586, 84 Am. Dec. 768; Atlee v. Union Packet Co., 21 Wall. (U. S.) 389; Beliveau v. Levasseur, 1 Revue Legale (Quebec) 720.

ever, the company will not be liable for damages to riparian owners or others if it can show the exercise of reasonable precaution against injury to others. [1] A driving or booming company will ordinarily be liable for damages caused a riparian owner through the raising of the water by dams at a time when the natural flow of the stream would not be sufficient to float logs, [2] but special privileges of this character may be granted to a company by the legislature. [3]

§155. Scattered and Stranded Logs. Under the common law the bed of a non-navigable stream is owned by the riparian owners on each side to the middle thread of the stream. From efforts of courts in America to follow the principles of the law as established in England and at the same time conform to the reasonable requirements of changed conditions great confusion and irreconcilable conflict of decisions have arisen. Some courts have held that those owning land adjoining non-tidal navigable streams owned the bed of the stream to the middle thread, some that the riparian owner controlled the land to the low water mark, and others that the boundary to the lands of riparian proprietors was at the high water mark. By high water mark is here meant, not the highest point reached by the water in a time of freshet, but the elevation at which the water stands for a period of the year sufficient to prevent the growth of perennial vegetation. Some decisions have held that the line marking the ordinary stage of water should constitute the boundary of riparian owners. The

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1. Harold v. Jones, 86 Ala. 274 5 So. 438, 3 L. R. A. 406; White River Log Etc. Co. v. Nelson, 45 Mich. 578; Haines v. Welch, 14 Ore. 319; Heator Lbr. Co. v. St. Croix Boom Corp., 72 Wis. 62, 7 Am. St. Rep. 837; Field v. Apple River Log Driving Co., 67 Wis. 569 (Injury not trespass).
   But see, Baumgartner v. Sturgeon River Boom Co. (Mich.) 79 N. W. 566 (Holding that it was unnecessary to show negligence on the part of the boom company, if damage due to raising of water by boom, nor was it necessary to plead no contributory negligence on part of plaintiff.)
   And see Bowers v. Miss. & Rum R. Boom Co. (Minn.) 81 N. W. 208. (Boom company liable for injury though piling not on Bowers' land, and Bowers given successive actions for the continuing injuries).
2. Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184; Middleton v. Flat River Booming Co., 27 Mich. 533; See Beard v. Clarke 35 Minn. 325; Merriman v. Bowen, 33 Minn. 455; Hackstack v. Keshena Imp. Co., 66 Wis. 439.
3. Stevens Point Boom Co. v. Reilly, 44 Wis. 295, 46 Wis. 237, 49 N. W. 978

high water mark rule is undoubtedly the most satisfactory.[1] The common law has been specifically modified by statute in Maine and Massachusetts so as to extend the title of riparian proprietors to low water mark even on tidal waters.[2] A riparian owner may rightfully take and use drift stuff which lodges upon the shores adjacent to his land, whether the stream be tidal or only navigable in fact; but material which has merely escaped from the possession or control of its owner and has not been abandoned is not subject to appropriation by a riparian owner as drift stuff.[3] Under the common law a riparian owner cannot legally appropriate logs, lumber or other timber products stranded upon the banks of a lake or stream but not abandoned by the owner.[4] In some American jurisdictions it has been held that an owner of personal property that has been unavoidably washed upon shores owned by another has a common law right to remove the same, while in other American states such entry will be held to constitute trespass.[5] Of course the right of removal may be acquired by contract.[6]

§156. Statutory Regulation of the Disposal of Floated Timber over which the Owner has Lost Control. The necessity of statutory regulation as to the disposal of scattered or stranded timber became apparent early in the development of the lumber industry in New England. An act passed by the General Assembly of Connecticut on May 14, 1752, contained comprehensive provisions as to the course to be pursued regarding timber products stranded along the Connecticut River, prescribed rates of compensa-

1. Shively v. Bowlby, 152 U. S. 1: Barney v. Keokuk, 94 U. S. 324. For conflicting citations see Am. & Eng. Enc. of Law, 2d Ed., Vol. 4, pp. 823-828; Cyc. of Law & Proc., 1st Ed., Vol. 5, pp. 894-897. See also U. S. v. Roth, 2 Alaska 257.
2. See citations in Am. & Eng. Ency. of Law, 2d Ed., Vol. 4, p. 820; also Vol. 21, p. 437; Cyc. of Law & Proc., Vol. 5, 893.
3. Lbr. Co. v. Fix. (Ark.) 126, S. W. 287; Norman v. Lbr. Co. 22 Ida. 711, 128 Pac. 85; Lbr. Co. v. Stout, 134 La. 987, 64 So. 881; Bennett v. Pulpwood Co. 181 Mich. 33, 147 N. W. 490; Timber Co. v. Lbr. Co. 117 Minn. 355, 135 N.W. 1132 See Watson v. Knowles, 13 R. I. 639, 641; Barker v. Bates, 13 Pick. (Mass.) 255; Creagh v. Bass, (Ala.) 67 So. 288; Voisin v. Lbr. Co. 131 La. 775, 60 So. 241.
4. West Branch Lumbermen's Exch. v. McCormick Estate, 1 Pa. Dist. 542; compare Eastman v. Harris, 4 La. Ann. 193; Deadrick v. Oulds, 86 Tenn. 14, 6 Am. St. Rep. 812: Whitman v. Lifting Co. 152 Mich. 645, 116 N. W. 614, 20 L. R. A. N. S. 984.
5. Cyclopedia of Law & Proc., 1st Ed., Vol. 38; p. 1057.
6. Bradley v. Tittabawassee Boom Co., 82 Mich. 9, 46 N. W. 24. See Tome v. Dubois, 6 Wall. 548 (Sawing of logs after notice by owner not to saw any more.)

tion for the salvage of such products, and provided for a forfeiture if the owner did not claim the property and discharge the lien within six months after the timber was taken up. [1] Similar acts were enacted in Massachusetts, on April 28, 1781, [2] in Vermont, on October 27, 1787, [3] in New Hampshire, on January 4, 1792, [4] in New York, on April 9, 1804, [5] in Pennsylvania, on March 20, 1812, [6] and in various other states at subsequent periods. [7] There are

1. Colonial Records of Conn., Vol. X (1751-1757) p. 101. See also Act Oct. 1771, Colonial Records of Conn., Vol. XIII (1768-1772), p. 514, and Act Oct. 1785, Acts and Laws, State of Conn., Hartford, 1786, p. 334.
2. Laws of Com. Mass. (1780-1807) Boston, 1807 Vol. 1, p. 53, Gen. Laws. Mass. Boston, 1823, Vol. I, p. 44, ch. 31. See other acts, Feb. 22, 1794, (Laws 1793, ch. 42), June 16, 1801, June 20, 1804, Mar. 14, 1805, Feb. 28, 1807, (Laws Com. Mass., 1807, Vol. 2, p. 610; Vol. 3, pp. 25, 237, 266, 399; Gen. Laws Mass. 1823, Vol. 1, p. 434; Vol. 2, pp. 47, 99, 110, 170); Laws 1814, ch. 50; Feb. 16 1816. (Pub. & Gen. L. 1816, Vol. 4, p. 524); Feb. 9, 1818, Feb. 17, 1819, (Gen Laws 1823, Vol. 2, pp. 430, 484); Rev. St. Boston 1836, pp. 389, 806; Laws 1841, ch. 26; Laws 1852, ch. 312 (Gen. St. Boston 1860, p. 424; act May 27, 1882, S. L. Ch. 274, p. 235; act May 16, 1883, S. L. ch. 183, p. 484.)
3. Statutes of Vermont, Bennington, Vt., 1791, p. 182; cf. Act Nov. 4, 1800, Sess. Laws of 1800, p. 25; Act Nov. 5, 1801, S. L. p. 28; Act Nov. 29, 1840, S. L. p. 58; Act Nov. 13, 1849, S. L. No. 24; Act Nov. 25, 1858, S. L. No. 57.
4. Laws of N. H., Portsmouth, 1797, p. 366; cf. Act Dec. 28, 1805; Laws of N. H., Exeter, 1815, p. 397, and Act June 10, 1808, p. 399, same volume. Cf. Act Feb. 15, 1791, Laws N. H. 1797, p. 288; Laws 1815, p. 179, Laws 1830, Hopkinton, p. 81; Act July 7, 1826, Laws 1830, p. 440; Rev. St. 1843, p. 259.
5. Laws of New York, Webster & Skinner, Vol. 3, (1802-1804) p. 640. Cf. Apr. 7, 1806, Ch. 171 (Web. & S., Vol. 4, p. 621); Act June 19, 1812, Ch. 215 (Web. & S. Vol. 6, p. 567); Act. Mar. 19, 1813, p. 166 (Repealed Dec. 10, 1828, Rev. St. 3d Ed. Albany, 1848, Vol. 3, p. 161). Cf. Laws of 1892, Vol. 2, p. 2254, sec. 136.
6. Session Laws of Penn., 1812, p. 136, ch. 91; Act. Apr. 20, 1853, P. L. Ch. 361, p. 646, sec. 8; Act May 8, 1855, P. L. No. 548, p. 529; Act Apr. 10, 1862, P. L. No. 393, p 383. Cf. Act Mar. 6, 1849, Pamph. L. 1849, p. 138, ch. 119.
7. Ala. Act Feb. 17, 1885, Laws of 1884-5, p. 165.
   Ark.
   Calif. Act Feb. 14, 1872. (Codes & Stats., 1876, Hittell, sec. 2389-2393.)
   Colo. Act Feb. 3, 1872, Laws of 1872, p. 134 (See Gen. Laws Colo. 1877, p. 643).
   Dak. Act June 6, 1863, Laws 1862-63, p. 239, ch. 48.
   Fla. Act Feb. 10, 1834, Acts of Fla. prior to 1840 (Tallahassee 1839, Duvall, p. 250.) Act Jan. 8, 1853, Laws 1852, p. 84, ch. 507.
   Ga. Act Dec. 5, 1799, Laws of Ga., Vol. 1, p. 346 (See Digest Laws of Ga., 1822, Prince, p. 483).
   Idaho Act Feb. 5, 1885, Laws of 1885, p. 177; See also act Feb. 29, 1899, Laws of '99, p. 332.
   Ind. Act Mar. 11, 1901, Laws 1901, Ch. 221.
   Kan. Laws of 1869, ch. 85; Laws 1873, ch. 127.
   Ky. Act Mar. 22, 1873, Gen. St. Ky. 1873, p. 795. (Later acts in Gen'l St. Ky., Louisville, 1887, pp. 489-495). Acts Jan. 28, Mar. 11, and Mar. 13, 1890, Laws 1890, pp. 117, 604, and 630, respectively.
   La. Act 34 of Laws of 1888, and Act 104 of 1892 (Wolff's Rev. L. 1908, p. 342).
   Me. Act Mar. 16, 1821, Laws of Me., Brunswick, 1821, Vol. 2, p. 749. Acts Feb. 9, 1822, and Apr. 1, 1831, Gen. Laws 1831, Vol. 3, pp. 24 and 409; act Feb. 20, 1839, p. 528.
   Md. Act Apr. 7, 1870, Laws of 1870, p. 419, ch. 229; See Act Apr. 1, 1872, L. of '72, p. 430, ch. 258.

(Footnote 7 continued on next page)

now statutes in nearly all American states regulating the manner in which timber shall be floated, prescribing the procedure to be followed by those taking up floating or stranded timber belonging to another, and fixing penalties for the appropriation of the same. [1]

(Footnote 7 concluded from preceding page)

Mich. Rev. Stat. 1838, ch. 10, p. 215; Rev. St. 1845, p. 195, ch. 46; Comp. L. 1857, sec. 1599-1602; Act Mar. 16, 1861, p. 557, No. 263; Act Mar. 20, 1863, p. 374, No. 221; Act May 20, 1879, p. 83, No. 85. See also Act June 7, 1905 S. L., No. 189; Act May 22, 1907, S. L., No. 104.

Minn. Act Mar. 3, 1854, Act Aug. 9, 1858, Stats. of Minn. 1849-58, p. 825 ch. 122. Cf. p. 258, ch. 12, sec. 16 to 18.

Miss. Act Feb. 28, 1882, Laws of 1882, p. 87; see also Act Mar. 9, 1882, L. of '82, p. 144. Cf. Rev. Code, 1857, p. 192, Sec. 8 and 9.

Nev. Act Mar. 3, 1866, Session Laws, p. 198.

N. J. Act Mar. 8, 1848, Laws of 1848, p. 184; act Mar. 17, 1855, Laws of 1855, p. 322, ch. 120. Act Mar. 20, 1857, Laws 1857, p. 365.

N. M. Session Laws 1907, Ch. 47, p. 68.

N. C. Act Feb. 10, 1855, Laws of 1854-55, p. 101, ch. 45. S. L. 1909, Ch. 52.

Ohio Act June 1, 1883, Session Laws, Vol. 80, p. 195.

Ore. Act Feb. 20, 1891, Session Laws 1891, p. 84.

S. C. Act Dec. 20, 1853, Statutes of S. C. (1850-61), Vol. 12, p. 294, Act 4433.

Tenn. Act Mar. 28, 1883, S. L. Ch. 152; Act Apr. 6, 1901 S. L. Ch. 29; Act Apr. 20, 1901, Ch. 54.

Tex. Act Apr. 7, 1879, Laws of 1879, ch. 72.

Va. Laws of 1881-2 p. 366, p. 378; Laws of 1893-4, p. 375, p. 462, p. 513; Laws 1902-3, p. 897.

Wash. Act Dec. 1, 1881, Laws of 1881, p. 38; Act Nov. 28, 1883, p. 60; Act Mar. 28, 1890, Laws of 1889-90, p. 110; Act Mar. 2, 1891, Laws 1891, p. 121, Sec. 8.

W. Va. Act Mar. 27, 1882, Laws of 1882, p. 338, ch. 119.

Wis. Rev. St. 1849, p. 249, ch. 35; Act Apr. 3, 1854, Laws of 1854, p. 141, ch. 99; Act Mar. 29, 1855, p. 56, ch. 60; Act Mar. 28, 1856, p. 50, ch. 48; Act Mar. 20, 1858, p. 33, ch. 31.

Wyo. Act Dec. 9, 1869, Gen. Laws 1st Sess. Ter. Ass., p. 324.

1. Ala. Criminal Code 1907, Sec. 7331-7333 and 7863-7868.

Ariz. Penal Code 1913, Sec. 360 (altering marks).

Ark. Digest of Statutes, 1904, Kirby, Sec. 4075-4107, 8009.

Calif. Penal Code, 1915, Deering, Sec. 356, p. 154 (Acts of Feb. 14, 1872).

Colo. Annotated Statutes, 1912, Mills, Sec. 3019 (Act. Feb. 3, 1872).

Fla. Compiled Laws, 1914, Sec. 1256-1260, 2541-2554 and 3708-3709.

Ga. Annotated Codes, 1914, Park. Political Code, Sec. 1837; Penal Code, Sec. 224-225, and 776.

Idaho Revised Codes, 1908, Secs. 867-873, and 1494-1505.

Ind. Annotated Stat. 1914, Burns, Sec. 7186-7201 (Act of Mar. 11, 1901 Sess. L. 1901, p. 506).

Iowa Annotated Code, 1897, Secs. 2371-2381, and 4834-4839.

Kan. General Statutes, 1909, Dassler, Sec. 6607-6610, 7373-7376 (ch. 85 of 1869 & ch. 127 of 1873.)

Ky. General Statutes, 1915, Carroll, Sec. 1409 (From Act of Mar. 23, 1900).

La. Revised Laws, 1904, Wolff, p. 342 (Act 34 of 1888 and Act 104 of 1892),

Me. Revised Statutes, 1903, ch. 43, pp. 422-423.

Md. Code of Public Civil Law, 1911, Bagby, p. 959-960, Sec. 13-20.

Mass. Revised Laws, 1902, Vol. 1, ch. 93, sec. 1-7, pp. 814-815.

Mich. Annotated Statutes, 1914, Howell, Sec. 4137-4164, and 7401 et. seq., Cf. Sec. 14652-14654.

Minn. General Statutes, 1913, Tiffany. Sec. 5453 and 5479.

Miss. Codes of 1906, Civil, Sec. 4973-4974 (Law of 1882) Penal Sec. 1224.

Mo. Annotated Statutes, 1906, Sec. 1492-1515, 4573 and 9717-9130. Cf. Rev. Stat. 1909, Sec. 10774, (Lumber not subject to).

(Footnote 1 continued on next page)

In the construction of laws of this nature it has been held that provisions as to the salvage of floating logs did not authorize compensation for the work bestowed on stranded logs, [1] that the title of the original owner is wholly lost if the logs are not claimed within the time limit named in the statute, [2] and that provisions as to forfeiture do not involve a violation of constitutional prohibition against the taking of private property without compensation and due process of law. [3] Provisions in such statutes for the disposal of logs upon which the marks have become obliterated, and known as prize logs, have also been maintained. [4] Some of the laws have provided for a pro rata division of

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(Footnote 1 concluded from preceding page)

Mont. Revised Codes, 1907. Sec. 8458.
Neb. Revised Statutes, 1913, Sec. 6691-6699 (Acts of 1883, p. 285).
Nev. Cf. Rev. Laws, 1912, Sec. 1440. Act Mar. 3, 1866, Laws of 1866, p. 198.
N. H. Public Statutes, 1901, Ch. 146, p. 466, Ch. 244, Sec. 2, p. 758.
N. J. Compiled Statutes 1709-1910, Vol. 2, p. 1789, sec. 139; Vol. 4, p. 5397 sec. 7-11
N. M. Annotated Statutes, 1915, sec. 3371-3377.
N. Y. Consolidated Laws, 1909, Birdseye, Cum. & Gil., Vol. 5, p. 6128-6129; Vol. 3, p. 3985, sec. 1360 of Penal Law.
N. C. Revised Laws 1908, Pell, Sec. 3023-3025, and 3853-3856. Suppl. 1911 to Pell's Revisal, Vol. 3, Sec. 3689. b
N. D. Compiled Laws , 1913, secs. 3056, 9724, 10243 and 10244.
Ohio Annotated Gen'l Code, 1912, Page & Adams, sec 6228-6240; sec. 12460, 12509.
Okla. Revised Laws, 1910.
Ore. Laws, 1910, Lord, Sec. 5074-87.
Penn. Purdon's Digest, 1905, Stewart, pp. 2342-2356.
R. I.
S. C. Cr. Code of 1912, sec. 256. Cf. sec. 235 (rafting without light).
S. D. Revised Political Code, 1903, sec. 3196, Penal Code, sec. 432, 760 & 761.
Tenn. Code of 1896, Shannon, Secs. 1823, 1824; Suppl, 1903, pp. 621-624.
Tex. Revised Civil Statutes, 1911, sec. 7727-7730; Penal Code, 1911, White, secs. 832-837.
Utah Compiled Laws 1912, sec. 4451 and 4473.
Vt. Public Statutes, 1906, Lord and Darling, sec. 4087-4092; 4231-36; 5702.
Va. Code 1904, secs. 1906b and 1906c. Cf. sec. 1344-45 and 7091-7126.
Wash. Codes & Statutes, 1910, Remington & Ballinger, secs. 2594-2595.
W. Va. Code 1913, Hogg, secs. 3586-3593, 5215 and 5231.
Wis. Statutes 1913, secs. 1600, 1600a, 1600b, and 4449-4452.
Wyo. Compiled Statutes, 1910, Mullen, secs. 828, 5874, 5877-80, 5889.

1. West Branch Lumbermen's Exchange v. Fisher, 150 Pa. St. 475, 24 Atl. 735 Aff'm'g 11 Pa. Co. Ct. 328; Etter v. Edwards, 4 Watts (Pa.) 63; West Branch Lumbermen's Exchange v. McCormick, 1 Pa. Dist. 542; Craig v. Kline, 2 Leg. Gaz. (Pa.) 81. See Wilson v. Wentworth, 25 N. H. 245.
2. Scott v. Wilson, 3 N. H. 321; See Wilson v. Wentworth, 25 N. H. 245; West Branch Lumbermen's Exch. v. Lutz, 2 Pa. Super. Ct. 91, 38 Wkly Notes Cas. 434.
3. Henry v. Roberts, 50 Fed. 902; But see Ames v. Port Huron Log Driving Assoc., 11 Mich. 139, 83 Am. Dec. 731.
4. Kennebec Log Driving Co. v. Burrill, 18 Me. 314.

prize logs among those using the stream [1] and others for the use of the proceeds therefrom for some public purpose. [2] Laws regarding the disposal of floating timber taken up by another than the owner ordinarily provide for a special notice to the owner, [3] a public advertisement, [4] or a filing of a description of the property taken up with a specified town or county official. [5] Proceedings to enforce forfeiture must generally be instituted before the title of the owner is divested; [6] and if the owner gains possession before such proceedings are started, forfeiture cannot be enforced. [7]

§157. The Conversion of Floating or Stranded Logs. One who unlawfully converts to his own use the logs of another, whether floating or stranded, is liable for conversion. [8] The measure of damages in such cases will be

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1. Dig. of St. Ark., 1904, Kirby, Sec. 4088 (See act Mar. 17, 1883, S. L. 83, p. 140). Idaho Rev. Code, 1908, sec. 1504; Wisconsin Statutes, 1913, sec. 1740.
2. For school fund Act of Feb. 10, 1834, Laws of Fla. pub. 1839, p. 250; Comp. L. 1914, sec. 2547 and 2554; Codes & Stat. of Calif, 1876, sec. 2393.
   To improve river:
   Me. Act Feb. 22, 1825, Laws of Me., Portland, 1831, Vol. 3, p. 133, sec. 2.
   Mass. Act. Feb. 28, 1807, See Gen. Law of Mass., Boston, 1823, Vol. 2, Ch. 118, p. 170; Laws Com. Mass. 1807, Vol. 3, p. 399. Act Mar. 4, 1808, Public & Gen. Laws, Mass., Boston, 1816, Vol. 4, p. 23. Act Mar. 2, 1816, Public & Gen. Laws, Vol. 4, p. 499.
3. Act Mar. 3, 1866, L. of Nev. '66, p. 198 (Gen. L. 1885, sec. 1065) See Sullivan v. Woolridge, 107 Ark. 256, 154 S. W. 508.
4. Act Feb. 22, 1794, Gen. Laws of Mass., Boston, 1823, Vol. 1, p. 434, ch. 42. Pub. St. N. H., 1901, Chase, ch. 146, p. 466; Laws of Pa. for 1849, p. 138, act Mar. 6, 1849.
   Wendt v. Craig, 67 Pa. St. 424; Craig v. Kline, 65 Pa. St. 399.
5. Pub. St. N. H., 1901, Chase, ch. 146, p. 466 (See act Jan. 4, 1792, in laws of N. H. Portsmouth, 1797, p. 366.); act Mar. 20, 1812, S. L. Pa. p 136, ch 91: act Nov. 5, 1801, S. L. Vt. p 28; Seagrist v. Clement, 6 Pa. Co. Ct. 671; Hynicka v. Smith, 26 Pa. St. 499.
6. Log Owner's Booming Co. v. Hubbell, 135 Mich. 65, 97 N. W. 157, 4 L. R. A. N. S. 573.
7. Barron v. Davis, 4 N. H. 338.
8. Ala. See Creagh v. Bass, 67 So. 288; Lbr. Co. v. Austin, 162 Ala. 110, 49 So. 875.
   Ark. Lbr. Co. v. Fix. 126 S. W. 287.
   Ida. Norman v. Lbr. Co., 22 Ida. 711, 128 Pac. 85.
   Ky. Tie Co. v. Myers, 116 S. W. 255; cf. Day v. Asher Lbr. Co. 141 Ky. 468, 132 S. W. 1035.
   La. Lbr. Co. v. Stout, 134 La. 987, 64 So. 881 (sunken logs); Voisin v. Lbr. Co., 131 La. 775, 60 So. 241; Eastman v. Harris, 4 La. Ann. 193.
   Me. Martin v. Mason, 78 Me. 452; Moulton v. Witherall, 52 Me. 237.
   Mich. Bennett v. Pulpwood Co., 181 Mich. 33, 147 N. W. 490; Seymour v. Bruske, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691; Bellows v. Crane Lbr. Co., 129 Mich. 560, 89 N. W. 367; Kimberly v. Guilford, 34 Mich. 259.
   Minn. Timber Co. v. Lbr. Co., 117 Minn. 355, 135 N. W. 1132 (Unmarked logs being driven by third party); Williams v. Monks, 108 Minn. 256, 122 N. W. 5; Breault v. Merrill Etc. Lbr. Co., 72 Minn. 143, 75 N. W.

(Footnote 8 continued on next page)

the value of the logs at the nearest convenient market, less the cost of transportation to such market. [1] If an owner of logs fraudulently mingles the unmarked or similarly marked logs of another with his own, or intermingles the lumber sawn from the logs of another with that sawn from his own in such manner that the ownership of the identical logs or lumber cannot be determined, the logs or lumber belonging to the guilty party may be forfeited to the innocent party under the doctrine of confusion of goods. [2] However, because of the aversion of the courts to forfeitures, where no fraudulent intention is manifest the party wronged will ordinarily be accorded the possession of the confused goods, but the party at fault will be entitled to recover such portion, or the value thereof, as he can clearly prove to belong to him. [3] As a means of avoiding disputes as to the ownership of logs and to aid in the prevention of theft of timber products, many states have enacted laws which provide for the adoption of a distinguishing mark by each person, firm or corporation placing logs or other timber products in a certain stream or its tributaries. These statutes ordinarily provide for the recordation of the adopted mark

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(Footnote 8 concluded from preceding page)
122; Libby v. Johnson, 37 Minn. 220; Clark v. Nelson Lbr. Co., 34 Minn. 289.

Vt. Hassan v. Lbr. Co., 82 Vt. 444, 74 Atl. 197.
Wash. Boom Co. v. Boom Co., 52 Wash. 564, 101 Pac. 48.
Wis. Arpin v. Burch, 68 Wis. 619, 32 N. W. 681.
U. S. Tome v. Dubois, 6 Wall, 548.
Can. Smith v. Baechler, 18 Ont. 293.

1. Hodson v. Goodale, 22 Ore. 68, 29 Pac. 70. See Stillwell v. Paepke-Leicht Lbr. Co., 73 Ark. 432, 84 S. W. 483, 108 Am. St. Rep. 42; Snyder v. East Bay Lbr. Co., 135 Mich. 31, 97 N. W. 49; Miles v. North Pac. Lbr. Co., 38 Ore. 556, 64 Pac. 303; Walker v. Duncan, 68 Wis. 624, 32 N. W. 689. Cf. Lbr. Co. v. Wagner (Ky.) 119 S. W. 197 (Prevention of sale by wrongfully marking logs.)
2. Wingate v. Smith, 20 Me. 287; Ryder v. Hathaway, 21 Pick. (Mass.) 298; Root v. Bonnema, 22 Wis. 539; Jenkins v. Steanka, 19 Wis. 126, 88 Am. Dec. 675.
3. Idaho Norman v. Lbr. Co., 22 Ida. 711, 128 Pac. 85.
Ky. Day v. Asher, 141 Ky. 468, 132 S. W. 1035.
Me. Dillingham v. Smith, 30 Me. 370. Cf. Bryant v. Ware, 30 Me 295; Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627.
Mass. See Ryder v. Hathaway, 21 Pick. 298.
Mich. Keweenaw Asso., Ltd. v. O'Neil, 120 Mich. 270, 79 N. W. 183; Crane Lbr. Co. v. Bellows (Mich.), 74 N. W. 481; Foster v. Warner, 49 Mich. 641, 14 N. W. 673 (No forfeiture to advantage of third party—shingles.)
Miss. Blodgett v. Seals, 78 Miss. 522, 29 So. 852.
N. Y. Nowlen v. Colt, 6 Hill (N. Y.) 461, 41 Am. Dec. 756 (Wood accidentally mixed by flood, held tenants in common.)
U. S. Norris v. U. S., 44 Fed. 735.

at the office of a town, county, or state official.[1] The later laws of this nature provide also for the recording of each transfer of title in marked logs and impose a distinct legal disadvantage upon one who claims to own logs that are not marked or that bear an unrecorded mark.[2] It has been held that the requirements of such a law as to the recordation of a conveyance referred to the transfer of the marked logs and not to the transfer of the mark itself;[3] and that laws of this character were not applicable to transfers of standing timber.[4] Provisions in such laws that no sale or transfer of logs shall be legal unless properly recorded will not be construed so as to defeat the rights of the real owner to the advantage of a mere stranger or trespasser,[5] nor will they be held to apply to logs on the land and in the actual possession of the true owner.[6] The mere fact that one claiming logs has recorded the mark thereon is prima facie evidence of the ownership of the logs.[7] Evidence as to an unrecorded mark is admissible,[8] but parol evidence in explanation of a mark has been held inadmissible.[9]

§158. Criminal Interference with Floating Timber. In most states the careless or fraudulent obliteration or modification of the marks on floating or stranded timber

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1. See Statutes under Note 1, page 234. See also Murray v. Boyd, 165 Ky. 625, 177 S. W. 468; Burris v. Stepp, 162 Ky. 269, 172 S. W. 526; Bennett v. Co., 133 Ky. 452, 118 S. W. 332; Whitman v. Lifting Etc. Co., 152 Mich. 645, 116 N. W. 614, 20 L. R. A. N. S. 984; Weiler v. Coleman, 71 Pa. St. 346; Smith v. Haines, 7 Phila. (Pa.) 188; Cook v. Van Horne, 76 Wis. 520.
   See Astell v. McCuish, 110 Minn. 61, 124 N. W. 458, for interpretation of statute providing that unmarked floating logs become property of one placing recorded mark on them.
2. Cook v. Van Horne, 76 Wis. 520, 44 N. W. 767; See Iowa Code 1897, sec. 4836 Fla. Comp. L., 1914, Sec. 2548. (Mark on logs evidence of ownership).
3. McCutchin v. Platt, 22 Wis. 561.
4. Wing v. Thompson, 78 Wis. 256; Bunn v. Valley Lbr. Co. 51 Wis. 376; Cadle v. McLean, 48 Wis. 630.
5. Gaslin v. Bridgman, 26 Minn. 442, 4 N. W. 1111; Lovejoy v. Itasca Lbr. Co 46 Minn. 216.
6. Lbr. Co. v. Dam Co. 115 Minn. 484, 132 N. W. 1126; Stanchfield v. Sartell, 35 Minn. 429, 29 N. W. 145; Plummer v. Mold, 14 Minn. 532.
   Cf. Timber Co. v. Lbr. Co. 117 Minn. 355, 135 N. W. 1132, (Unmarked logs being driven by another not abandoned.).
7. Watson v. Tie Co. 148 Mich. 675, 116 N. W. 614, 20 L. R. A. N. S. 984; Seymour v. Bruske, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691; Fox v. Ellison, 43 Mich. 41, 44 N. W. 671; Weiler v. Coleman, 71 Pa. St. 346; Long v. Davidson, 77 Wis. 509, 46 N. W. 805.
8. St. Paul Boom Co. v Kemp, 125 Wis. 138, 103 N. W. 259.
9. Stuart v. Morrison, 67 Me. 549.

has been made a specific misdemeanor or a felony, [1] and the taking of such logs with fraudulent intent has been declared by statute in several states to constitute larceny. [2] The

1. Ala. Criminal Code 1907, sec. 7333.
Ariz. Penal Code 1913, sec. 360.
Ark.
Calif. Penal Code 1915, Deering, p. 154, sec. 356 (Act Feb. 14, 1872.)
Colo.
Conn.
Fla. Compiled Laws, 1914, sec. 3294-3295, and 3386. Cf. sec. 2542.
Ga.
Idaho Penal Code 1908, sec. 7060.
Ind. Annotated Stats., 1914, Burns, sec. 7196.
Iowa Annotated Code, 1897, sec. 4834 (larceny.)
Ky. Statutes 1915, Carroll, sec. 1409, par. 11 (felony); Act May 7, 1886, Gen'l Stat. of Ky., 1887, p. 495.
La. Rev. Laws, 1904, Wolff, p. 342; Act 104 of 1892.
Md. Code 1911, Art. 34, Sec. 19 and 20 (Act. Apr. 1, 1872, S. L. 430.)
Mass. Rev. Laws 1902, p. 814, sec. 2-4.
Mich. Annotated Stat. 1913, Howell, 2nd Ed., par. 4154, p. 1766.
Minn. Gen. St. Tiffany, 1913, 5473 & 5475.
Miss. Annotated Code 1906, Sec. 1056, (Act Mar. 9, 1882, S. L. p. 144.)
Mo. Annotated Statutes, Mo., 1906, sec. 1511.
Mont. Revised Codes, 1907, sec. 8458.
Nev. Rev. St. 1912, sec. 1440 (See Gen. St. 1885, sec. 1068, Laws of '66 and '75.)
N. H. Public Statutes, 1901, Chase, p. 467, ch. 146, sec. 11; See acts Feb. 15 1791, and July 7, 1826.
N. J.
N. M. Annotated Stats., 1915, sec. 3376.
N. Y. Consolidated Laws, Bird. Cum. & Gil. 1909, Penal Laws, sec. 1360.
N. C. Rev. L., 1908, Pell, sec. 3855.
N. D. Comp. L. 1913, sec. 9724.
Ohio Annotated Code, 1912, Page & Adams, sec. 12509 and 13157.
Ore. Laws of Oregon, 1910, Lord, sec. 5086 (from Laws 1891, p. 84).
Pa. Purdon's Digest, 1903, Stewart, p. 2356, sec. 56.
S. C.
S. D. Rev. Code 1903, sec. 432.
Tenn. Supp'l. to Shannon Code, 1903, p. 620.
Tex. Rev. Crim. Stat. 1911, Art. 1301.
Utah Compiled Laws 1912, sec. 4473.
Vt. Public Statutes 1906, sec. 5842-5843. See Act Mar. 4, 1797, R. L. 1824, p. 280.
Va. Code 1904, sec. 1346, secs. 1906-b and 1906-c.
Wash. Codes & Stats., 1910, Rem. & Ballinger, sec. 7097 (misdemeanor).
W. Va. Code 1913, Hogg, sec. 3589, 3590. Cf. 3136.
Wis. Wis. St. 1913, sec. 4452 (Act. Mar. 29, 1855, L. 1855, p. 59, ch. 66).
Wyo. Comp. St., 1910, Mullen, sec. 5880 (misdemeanor).

2. Fla. Act of Feb. 10, 1834; Acts of Fla. Prior to 1840, by Duvall, 250.
Iowa Annotated Code 1897, sec. 4834-4835.
Ky. Statutes 1915, Carroll, sec. 1409, par. 12 (felony). Act Apr. 3, 1886.
Me. Rev. St. 1903, p. 422, ch. 43, sec. 2. Act Feb. 20, 1839, Laws 1839, p. 528, ch. 370.
Mass. Laws of 1854, ch. 339 (Gen. St. 1859, p. 424). See Rev. L. 1902, p. 815, sec. 7. (Not larceny).
Mich. Cf. Annotated Stat. 1913, Howell, 2nd Ed. par. 4155, p. 1767. (misdemeanor).
Minn. Gen. St. 1913, Tiffany, sec. 5473-5475.
Neb. Rev. Stat. 1913, sec. 6699.
N. H. Pub. St. 1901, Chase, ch. 146, sec. 12. Act July 7, 1826, L. N. H. 1830 Hopkinton, p. 440.
N. M. Annotated Stat. 1915, sec. 3377.

(Footnote 2 continued on next page)

words of these acts, like other criminal statutes, will be strictly construed. Thus statutes prohibiting the taking of logs from the banks of a stream will not be construed to cover the taking of logs lying at a considerable distance from the stream, [1] and the pleadings, proof and verdict must conform strictly to the requirements of the law. [2] Under these acts the possession of logs on which the marks have been obliterated or altered ordinarily raises a presumption of guilt which must be overcome by the defendant, [3] and a purchaser of logs with notice of an unlawful taking will be subject to the penalties of the law. [4] In many states the cutting loose of rafts or booms, [5] or the driving of a nail or other hard substance into a sawlog has been declared a misdemeanor or a felony. [6] However, either the cutting loose of timber or the malicious driving of nails into logs would doubtless be actionable at common law. [7]

(Footnote 2 concluded from preceding page)

N. C. Rev. Laws 1908, Pell, sec. 3853. Act Feb. 10, 1855, Laws 1854-1855, p. 101.
Ohio Annotated Stat. 1910, Page & Adams, sec. 12509.
Ore. Laws 1910, Lord, sec. 5087.
W. Va. Code of 1913, Hogg, sec. 3590 & 5231. Act Mar. 29, 1882, Laws of 1882, p. 478.
Wis. Statutes, 1913, sec. 4448, 4449, 4449a. See Act Mar. 29, 1855, S. L., p. 59, ch. 60. And compare Acts Apr. 12, 1866, S. L., p. 180, ch. 134, and Apr. 11, 1867, S. L., p. 159, ch. 161.

1. State v. Adams, 16 Me. 67; Parkhurst v. Staples, 91 Wis. 196, 64 N. W. 882. See Bradley v. Tittabawassee Boom Co., 82 Mich. 9.
2. State v. Loomis, 129 Iowa, 141, 105 N. W. 397; Frost v. Rowse, 2 Me. 130; Little v. Thompson, 2 Me. 228; State v. Fackler, 91 Wis. 418, 64 N. W. 1029. Cf. State v. Dean, 49 Iowa 73; State v. Taylor, 25 Iowa 273 Bennett v. Com. 133 Ky. 452, 118 S. W. 332; State v. Gainey, 135 La. 459 65 So. 609; State v. Smith, 119 Tenn. 521, 105 S. W. 68; Farquharson v. Oil Co. 30 Can. S. Ct. 188.
3. State v. Loomis, 129 Iowa 141; 105 N. W. 397.
4. Howes v. Shed, 3 Me. 202.
5. Ala. Criminal Code, 1907, sec. 7331 (See act Feb. 17, 1885, Laws of 1884-5 p. 165.)
   Iowa Code 1897, sec. 4824.
   La. La. Rev. Laws, 1904, p. 342. (S. L. 1888, No. 34 p. 26.)
   Me. Rev. St. 1903, p. 946, sec. 10 cf. ch. 128.
   Md. Revised Stat. 1903, p. 946, sec. 10.
   Mich. Annotated Stat., 1913, Howell; Sec. 4141.
   Mont. Penal Code 1907, Sec. 8756. Acts 1st Terr. Ass., 1864, p. 214, sec. 146.
   Wash. Code of Terr. Wash. 1881, sec. 843, p. 1681.
   W. Va. Code of 1913, Hogg, sec. 5215 (felony).
   Wis. Statutes 1915, sec. 4453.
6. Calif. Penal Code 1808, Kerr, sec. 593a, p. 569 (felony) Gen. L. 1914, H. & D., p. 939 (see act Feb. 9, 1876, Law of 1875-6, p. 32).
   Me. Rev. St. 1903, p. 945, sec. 9, ch. 128.
   Mich. Annotated Stat., 1913, Howell, sec. 14651.
   Vt. Public Stat. 1906, sec. 5844 (Act. Nov. 26, 1878, Laws of 1878, p. 42 No. 28).
   Wis. Statutes 1913, sec. 4451, (felony).
7. Ballant v. Brown, 78 Mich. 294; Auger v. Cook, 39 U. C. Q. B. 537.

CHAPTER XV

STANDING TIMBER AS INCLUDED IN A MORTGAGE

§159. The Legal Effect of a Realty Mortgage. At common law a mortgage of real estate was in effect a conveyance of the realty to the creditor. This conveyance was subject to defeasance upon the fulfillment of the obligation of the mortgagor to the mortgagee, and immediately upon the payment of the debt the title to the land reverted to the mortgagor. However, the common law has not found favor with American courts and legislatures and in most American jurisdictions a mortgage on real estate is merely a lien on the realty for the payment of the debt secured by the mortgage. Under a mortgage of this character the title to the property does not pass until the mortgage is foreclosed, but upon foreclosure the title, for many purposes, relates back to the time when the mortgage was originally executed. [1]

A mortgage on land covers the growing timber standing upon the land, [2] unless such timber is excepted by the terms of the mortgage or it has been constructively severed prior to the giving of the mortgage and the mortgagee had notice of such severance. [3] Standing timber may be mortgaged separate from the land, but such a mortgage has been held to be a mortgage of realty. [4]

Under the common law theory of a mortgage which held the legal title vested in the mortgagee until the debt was discharged and which still prevails in some American States,

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1. Batterman v. Albright, 122 N. Y. 484, 25 N. E. 856, 19 Am. St. Rep. 510, 11 L. R. A. 800; Hamilton v. Austin, 36 Hun. (N. Y.) 138.
2. Maples v. Millon, 31 Conn. 598, Adams v. Beadle, 47 Iowa 439, 29 Am. Rep. 487; Hutchings v. King, 1 Wall. (U. S.) 53, 17 L. Ed. 544; In re Bruce 4 Fed. Cas. No. 2045, 9 Ben. 236.
3. Moisant v. McPhee, 92 Cal. 76, 28 Pac. 46; Mercantile Trust Co. v. Southern States Land etc. Co., 86 Fed. 711, 30 C. C. A. 349.
4. Williams v. Hyde, 98 Mich. 152, 57 N. W. 98.

a mortgagee can stop waste by the mortgagor in the way of cutting timber even when the cutting is not such as to imperil the security of the mortgage. [1] When the debt secured by a mortgage is paid the lien of the mortgage is discharged and the title to timber on the land both standing and severed reverts to the mortgagor or his vendee. [2] For trespass committed by a stranger before default the mortgagor can maintain an action in his own name, [3] except that some cases hold he has no action after the mortgagee takes possession. [4]

§160. A Mortgagee may Protect Interest in Timber when Mortgagor is in Possession of Land. Under the theory generally adopted in American States as to the legal effect of a mortgage a mortgagor who is in possession of the land prior to default or foreclosure may cut timber from the premises for either use or sale in accordance with the ordinary use and enjoyment of the estate, [5] but this cutting must not be so extensive as to substantially impair the security of the mortgage. [6] If the security of the mortgage is threatened the mortgagee may obtain an injunction restraining the mortgagor from cutting timber. [7] Injunction

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1. Byrom v. Chapin, 113 Mass. 308; Gooding v. Shea, 103 Mass. 360, 4 Am. Rep. 563; See King v. Bangs, 120 Mass. 514; Leavitt v. Eastman, 77 Me. 117. Cole v. Stewart 11 Cush. (Mass. 181.)
2. Barron v. Paulling, 38 Ala. 292; Hutchins v. King, 1 Wall. (U. S.) 53, 17 L. Ed. 544.
3. Ala. Hamilton v. Griffin, 26 So. 243.
   Ill. Abney v. Austin, 6 Ill App. 49.
   Md. Annapolis etc. R. Co. v. Gantt, 39 Md. 115.
   N. Y. Johnson v. White, 11 Barb. 194.
   Vt. Whitney v. Adams, 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598. See also relevant decisions cited in note 22, Cyc. Vol. 27, p. 1272.
4. Sparhawk v. Bagg, 16 Gray (Mass.) 583; Morey v. McGuire, 4 Vt. 327. See also related cases, 27 Cyc. p. 1272, note 23.
5. Judkins v. Woodman, 81 Me. 351, 17 Atl. 298, 3 L. R. A. 307; Smith v. Moore, 11 N. H. 55; Hapgood v. Blood, 11 Gray (Mass.) 400; Searle v. Sawyer 127 Mass. 491, 34 Am. Rep. 425; Angier v. Agnew, 98 Pa. St. 587, 42 Am. Rep. 624; Haskin v. Woodward, 45 Pa. St. 42; Wright v. Lake, 30 Vt. 206; In re Phillips, 16 Ch. Div. 104; See also Steward v. Scott, 54 Ark. 187, 15 S. W. 463; Adams v. Corriston, 7 Minn. 456; Moore v. Southern States Land etc. Co. 83 Fed. 399. Van Wyck v. Alliger 6 Barb. (N. Y.) 511.
6. Maples v. Millon, 31 Conn. 598; Dorr v. Dudderar, 88 Ill. 107; Wilmarth v. Bancroft, 10 Allen (Mass.) 348; Sanders v. Reed, 12 N. H. 558; Langdon v. Paul 22 Vt. 205; Simmins v. Shirley, 6 Ch. Div. 173.
7. Coker v. Whitlock, 54 Ala. 180; Buckout v. Swift, 27 Cal. 434, 87 Am. Dec. 90; Robinson v. Russell, 24 Cal. 467; Cooper v. Davis, 15 Conn. 556 Williams v. Chicago Exposition Co., 188 Ill. 19, 58 N. E 611; Gray v. Baldwin, 8 Blackf. (Ind.) 164; Brown v. Stewart, 1 Md. Ch. 87; Webster v. Peet, 97 Mich. 326;

(Footnote 7 continued on next page)

will be granted only on satisfactory showing that the security is actually imperiled; [1] and although the solvency of the mortgagor is important, [2] injunction may be granted where the mortgagor is solvent. [3] In a few states the mortgagee has no action in law against a mortgagor for waste and must rely upon injunction; [4] but in most jurisdictions, even where, under the equitable theory of a mortgage, the title to the realty is in the mortgagor until after foreclosure, the mortgagee has a right of action against either the mortgagor [5] or a third person [6] for an injury which affects the security of the mortgage. The right of action of mortgagee against a stranger will depend upon the extent to which the debt of the mortgagor remains unpaid, [7] or possibly in some

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(Footnote 7 concluded from preceding page)
Moriarty v. Ashworth, 43 Minn. 1, 44 N. W. 531; 19 Am. St. Rep. 203; Berthold v. Holman, 12 Minn. 335, 93 Am. Dec. 233; Dutro v. Kennedy, 9 Mont. 101, 22 Pac. 763; Verner v. Betz. 46 N. J. Eq. 256; Brady v. Waldron 2 Johns Ch. (N. Y.) 148 (See Cahn v. Hewsey, 8 Misc. (N. Y.) 384, 29 N. Y. Suppl. 1107, 31 Abbott N. Cas. 387); Beaver Lumber Co. v. Eccles, 43 Ore. 400, 73 Pac. 201, 99 Am. St. Rep. 759; Scott v. Webster, 50 Wis. 53, 6. N. W. 363; Fairbanks v. Cudworth, 33 Wis. 358; King v. Smith, 2 Hare 239; McLeod v. Avey, 16 Ont. 365. cf. Hampton v. Hodges 8 Ves. 105: Wright v. Atkyns 1 Ves. & B. 314.

1. See citations under Note 7, Page 242, and following: McLean v. Burton, 24 Grant Ch. (U. C.) 134, (Canada); King v. Smith, 2 Hare 239, 7 Jur. 694, 24 Eng. Ch. 239, 67 Eng. Reprint 99; Hippesley v. Spencer, 5 Madd. 422, 56 Eng. Reprint 956.
2. Bunker v. Locke, 15 Wis. 635.
3. Williams v. Chicago Exposition Co., 188 Ill. 19, 58 N. E 611; Triplett v. Parmlee, 16 Neb. 649, 21 N. W. 403; Starks v. Redfield, 52 Wis. 349, 9 N. W. 168; Fairbanks v. Cudworth, 33 Wis. 358.
4. Cooper v. Davis, 15 Conn. 556; Tomlinson v. Thompson, 27 Kan. 70; Vanderslice v. Knapp, 20 Kan. 647; See Triplett v. Parmlee, 16 Neb. 649.
5. Colo. Arnold v. Brood, 15 Colo. App. 389, 62 Pac. 577.
   Me. Holbrook v. Greene, 98 Me. 171, 56 Atl. 659.
   Mass. Searle v. Sawyer, 127 Mass. 491; Ingell v. Fay, 112 Mass. 451; Miner v. Stevens, 1 Cush. 482.
   Mo. Girard L. Ins. Annuity etc. Co. v. Mangold, 83 Mo. App. 281; But see Girard L. Ins. Annuity etc. Co. v. Mangold, 94 Mo. App. 125, 67 S. W. 955.
   Mont. Dutro v. Kennedy, 9 Mont. 101, 22 Pac. 763.
   N. H. Lawrence v. Lawrence, 42 N. H. 109; Smith v. Moore, 11 N. H. 55.
   N. J. Jersey City v. Kierman, 50 N. J. L. 246, 13 Atl. 170; Jackson v. Turrell, 39 N. J. L. 329; Fidelity Trust Co. v. Hoboken etc. R. Co. (Ch. 1906), 63 Atl. 273; Coggill v. Milburn Land Co., 25 N. J. Eq. 87; Emmons v. Hinderer, 24 N. J. Eq. 39.
   N. Y. Van Pelt v. McGraw, 4 N. Y. 110.
   Vt. Langdon v. Paul, 22 Vt. 205.
   Wis. Scott v. Webster, 50 Wis. 53, 6 N. W. 363.
   Can. McLeod v. Avey, 16 Ont. 365; Mann v. English, 38 U. C. Q. B. 240. See 35 Cent. Dig. Tit. Mortgages, Sec. 555.
6. Lavenson v. Standard Soap Co., 80 Cal. 245, 13 Am. St. Rep. 147; Gooding v. Shea, 103 Mass. 360; Webber v. Ramsey, 100 Mich. 58, 43 Am. St. Rep. 429; Ogden Lbr. Co. v. Busse, 92 N. Y. App. Div. 143, 86 N. Y. Suppl. 1098; Van Pelt v. McGraw, 4 N. Y. 110; Allison v. McCune, 15 Ohio, 726, 45 Am. Dec. 605; Atkinson v. Hewett, 63 Wis. 396; See Cases cited 27 Cyc. p. 1272, Note 24.
7. Kennerly v. Burgess, 38 Mo. 446; Triplett v. Parmlee, 16 Neb. 649, 21 N. W. 403; Vogel v. Walker, 3 Utah 227, 2 Pac. 210.

jurisdictions upon the insolvency of the mortgagor.[1] It has been held that a mortgagee cannot maintain an action against a stranger to the title for negligently injuring the mortgaged premises so that the security is lost,[2] and this rule would evidently apply to a careless burning of timber.

In an action by the mortgagee to protect his security it is unnecessary that he prove an intention on the part of the mortgagor to impair the security,[3] and the measure of damages will be the injury to the security.[4] For the removal of nursery stock in accordance with the usual course of business conducted on the land covered by the mortgage the mortgagee can maintain neither an injunction nor an action in law against the mortgagor or his tenant in possession before foreclosure,[5] except where the insolvency of the mortgagor is averred,[6] and for any injury to the freehold which does not affect the security of the mortgage the mortgagee who does not have title has no action until he obtains possession under a default on the mortgage.[7]

A mortgagee has been permitted to maintain an action of *quare clausum fregit*,[8] to recover the value of the timber and other things removed from the land in an action of trover or *de bonis asportatis*,[9] and to recover by replevin that which was removed.[10] Some decisions have held that the value of timber cut by the mortgagor and sold to a purchaser for value without notice of the mortgage cannot be recovered by the mortgagee either in trespass or trover,[11] even where

1. Morgan v. Gilbert, 2 Fed. 835, 2 Flipp. 645; *Contra.* Ogden Lumber Co. v. Busse, 92 N. Y. App. Div. 143, 86 N. Y. Suppl. 1098.
2. Gardner v. Heartt, 3 Den. (N. Y.) 232.
3. Van Pelt v. McGraw, 4 N. Y. 110.
4. Turrell v. Jackson, 39 N. J. L. 329. Woodruff v. Halsey 8 Pick. (Mass.) 333.
5. Hamilton v. Austin, 36 Hun. (N. Y.) 138; But see, Batterman v. Albright, 122 N. Y. 484.
6. Robinson v. Russell, 24 Cal. 467.
7. Guthrie v. Kahle, 46 Pa. St. 331.
8. Leavitt v. Eastman, 77 Me. 117; Stowell v. Pike, 2 Me. 387; Smith v. Goodwin, 2 Me. 173; Sanders v. Reed, 12 N. H. 558; Cf. Dunlap v. Steele, 80 Ala. 424; Boswell v. Carlisle, 70 Ala. 244; Codman v. Freeman, 3 Cush. (Mass.) 306.
9. Searle v. Sawyer, 127 Mass. 491, 34 Am. Rep. 425; Cole v. Stewart, 11 Cush. (Mass.) 181; Frothingham v. McKusick, 24 Me. 403; Burnside v. Twitchell, 43 N. H. 390; Angier v. Agnew, 98 Pa. St. 587, 42 Am. Rep. 624.
10. Dorr v. Dudderar, 88 Ill. 107; See Mosher v. Vehue, 77 Me. 169; Searle v. Sawyer, 127 Mass. 491; Replevin lies under Rhode Island Statute: Waterman v. Matteson, 4 R. I. 539.
11. Buckout v. Swift, 27 Cal. 433, 83 Am. Dec. 90; Cooper v. Davis, 15 Conn. 556; Clark v. Reyburn, 1 Kan. 281; Harris v. Bannon, 78 Ky. 568; Webber v. Ramsey, 100 Mich. 58, 58 N. W. 625, 43 Am. St. Rep. 429; Hamlin v. Parsons, 12 Minn. 108, 90 Am. Dec. 284; Kircher v. Schalk, 39 N. J. L. 335; Wilson v.

(Footnote 11 continued on next page)

the legal title is in the mortgagee; and other cases have held that a bona fide purchaser for value from the mortgagor takes the timber subject to the paramount rights of the mortgagee, [1] except where the mortgagee has waived his prior claim. [2]

The rights of a mortgagor as to cutting timber prior to foreclosure may be limited by a covenant in the mortgage not to cut for sale or not to cut more than a certain amount, [3] or an agreement to apply the proceeds of the timber cut on the debt secured by the mortgage. [4] A license by the mortgagor for the cutting of timber for specific purposes will not excuse a use of the proceeds for a different purpose. [5]

§161. Remedies Available to Mortgagee After Foreclosure. Some decisions have held that a mortgagee has no action for damages until after a default by the mortgagor and a showing through foreclosure that the security of the mortgage is insufficient to cover the mortgage debt, [6] but such a rule manifestly does not afford the mortgagee a satisfactory protection. If upon foreclosure the property does not bring enough to satisfy the mortgage, the mortgagee has an action against the mortgagor for any cutting of timber which substantially impaired the security, [7] but there is conflict of authority as to whether the mortgagee may after foreclosure recover damages from the mortgagor for substantial injuries to the property before foreclosure which did not impair the security, some cases holding that he may recover [8] and some that he may not. [9]

(Footnote 11 concluded from preceding page)
Maltby, 59 N. Y. 126; Peterson v. Clark, 15 Johns. (N. Y.) 205; Cf. Atkinson v. Hewett, 63 Wis. 396, 23 N. W. 889. (In which purchaser knew of mortgage and timber formed chief value of the land); and Searle v. Sawyer, 127 Mass. 491, 34 Am. Rep. 425.

1. Gore v. Jenness, 19 Me. 53; Mosher v. Vehue, 77 Me. 169; Howe v. Wadsworth, 59 N. H. 397; Cf. Banton v. Shorey. 77 Me. 48.
2. Kimball v. Lewiston Steam Mill Co., 55 Me. 494.
3. Moisant v. McPhee, 92 Cal. 76, 28 Pac. 46; Wood v. Lester, 29 Barb. (N. Y.) 145; Chard v. Warren, 122 N. C. 75, 29 S. E. 373; Mann v. English, 38 U. C. Q. B. 240.
4. Howe v. Russell, 36 Me. 115; Fredonia Nat'l Bank v. Perrin, 172 Pa. St. 15, 33 Atl. 351.
5. Holbrook v. Greene, 98 Me. 171, 56 Atl. 659.
6. Cooper v. Davis, 15 Conn. 556; Taylor v. McConnell, 53 Mich. 587; Peterson v. Clark, 15 Johns. (N. Y.) 205; See Lane v. Hitchcock, 14 Johns (N. Y.) 213; Gardner v. Heartt, 3 Denio (N. Y.) 232.
7. Heitcamp v. La Motte Granite Co., 59 Mo. App. 244; Jones v. Costigan, 12 Wis. 677, 78 Am. Dec. 771.
8. Byrom v. Chapin, 113 Mass. 308.
9. Corbin v. Reed, 43 Iowa 459.

A mortgagor of a farm who remains in possession after a default on the mortgage may cut timber for fire wood, repairs and other uses which accord with good husbandry. [1]

It is the duty of the jury to determine whether the cutting of timber on mortgaged land is wrongful. [2]

§162. Limitations upon Use and Sale of Timber when Mortgagee is in Possession of Land. A mortgagee who is lawfully in possession may cut timber for ordinary uses on the premises and may cut and sell timber for the purpose of satisfying the debt provided he does no permanent injury to the property [3] and he may recover from a stranger for a timber trespass, [4] but in both instances he can be compelled by the mortgagor to account for the proceeds as profits received. It has been held that prior to foreclosure a mortgagee in possession cannot sell nursery trees growing on the premises and covered by the mortgage. [5] Injunction will be granted a mortgagor to restrain a mortgagee in possession from committing waste, [6] and for acts of waste in the cutting of timber an accounting will be decreed. [7]

§163. Rights in Timber After Foreclosure of Mortgage on Land. Prior to foreclosure a mortgagor, who has the legal title to the mortgaged premises, may convey whatever interest he has in land or timber subject, of course, to the lien of the mortgage; but trees which are standing upon land at the time of a foreclosure sale belong to the purchaser at such sale, even though the mortgagor had previously contracted to sell them and the mortgagee had released his lien upon the trees, unless the purchaser at the foreclosure sale knew at the time of his purchase that the

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1. Judkins v. Woodman, 81 Me. 351, 17 Atl. 298, 3 L. R. A. 607; Hapgood v. Blood, 11 Gray (Mass.) 400; Wright v. Lake, 30 Vt. 206; Cf. Estovers, Smith v. Jewett, 40 N. H. 530; 2 Blackstone Com. 35.
2. Searle v. Sawyer, 127 Mass. 491, 34 Am. Rep. 425.
3. Place v. Sawtell, 142 Mass. 477, 8 N. E. 343; Carson v. Griffin, 11 N. Brunsw. 244.
4. Guthrie v. Kahle, 46 Pa. St. 331.
5. Dubois v. Bowles, 30 Colo. 44, 69 Pac. 1067.
6. Youle v. Richards, 1 N. J. Eq. 534, 23 Am. Dec. 722; Givens v. McCalmont, 4 Watts (Pa.) 460; Farrant v. Lovel, 3 Atk. (Eng.) 723.
7. American Freehold Land Mortg. Co. v. Pollard, 132 Ala. 155, 32 So. 630; Perdue v. Brooks, 85 Ala. 459, 5 So. 126; Gore v. Jenness, 19 Me. 53; Steinhoff v. Brown, 11 Grant Ch. (U. C.) 114; Sandon v. Hooper, 6 Beav. 246; See Harrill v. Stapleton, 55 Ark. 1, 16 S. W. 474.
cf. Tucker Benev. dict, 116 La. 968, 41 So. 226.

lien upon the trees had been released. [1] If timber is cut and removed by a mortgagor, or one acting under an order or license from him, with a fraudulent purpose, either before or after the commencement of foreclosure proceedings, its value may be recovered by an action on the case in the nature of waste or trover for satisfaction of the mortgage. [2] Upon the acquisition of title under a foreclosure sale a purchaser may obtain an in unction to prevent waste in the cutting of timber by the mortgagor or his vendee, or he may bring an action on the case, [3] but timber cut before the foreclosure sale does not pass to the purchaser at such sale. [4]

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1. Batterman v. Albright, 122 N. Y. 484, 25 N. E. 856, 19 Am. St. Rep. 510, 11 L. R. A. 800; Hamilton v. Austin, 36 Hun. (N. Y.) 138; Barber v. Wadsworth, 115 N. C. 29, 20 S. E. 178; Beaufort County Lbr. Co. v. Dail, 111 N. C. 120, 15 S. E. 941.
2. Higgins v. Chamberlin, 32 N. J. Eq. 566; Hagar v. Brainerd, 44 Vt. 294; Langdon v. Paul, 22 Vt. 205; Lull v. Matthews, 19 Vt. 322.
3. Stout v. Keyes, 2 Dougl. (Mich. 1845) 184, 43 Am. Dec. 465; Van Derveer v Tallman, et al., 1 N. J. Eq. 9 (1830).
4. Berthold v. Holman, 12 Minn. 335, 93 Am. Dec. 233.

CHAPTER XVI

TREES ON BOUNDARY LINE OR IN HIGHWAY

§164. Rights of Adjoining Landowners Regarding Trees On or Near Division Line. In an early English case [1] it was held that if A planted a tree upon the extreme limit of his land and the tree in its growth extended its roots into the adjoining land of B, A and B became tenants in common of the tree; but that if all the roots grew in A's land, the branches even though they overhung the land of B would follow the roots and the property of the whole tree would be in A. Of course the difficulty of determining whether all of the roots were confined to the land owned by the one on whose land the trunk of the tree stood was so great as to render this doctrine scarcely capable of application. Another English case held that the branches would follow the trunk and the property in them would accordingly be in the one who owned the land on which the tree stood. [2] The modern doctrine in both England and America is that all property right in the tree, its branches and its fruit, is in him upon whose land it stands even though it be known that the roots extend into the land held by another. [3] In a Michigan case it was said that if A with the cooperation of the adjoining owner, who was A's grantor, established a division fence and planted trees along his side A might be estopped from cutting such trees without the consent of the grantor but that this estoppel would not operate in favor of a successor to A's grantor. [4] That is to say, there was no covenant which would bind A when his grantor disposed of his in-

1. Waterman v. Soper, 1 Ld. Raym. 737.
2. Masters v. Pollie, 2 Rolle 141.
3. Lyman v. Hale, 11 Conn. 177, 27 Am. Dec. 728, Hoffman v. Armstrong, 48 N. Y. 201, 8 Am. Dec. 537 (Aff'm. 46 Barb. 337); Dubois v. Beaver, 25 N. Y. 123, 82 Am. Dec. 326, (Aff'm. Relyea v. Beaver, 34 Barb. 547), Skinner v. Wilder, 38 Vt. 115, 88 Am. Dec. 645; Holder v. Coates, M. & M. 112, 22 E. C. L. 264; Millen v. Fandrye, Popham 161; Morrice v. Baker, 3 Bulst. 198; See 1 Washburn Real Prop., Sec. 7; 20 Vin. Abr. 417, 1 Chitty Gen'l. Prac. 652.
4. Reed v. Drake, 29 Mich. 222.

terest in the adjoining land. Under the modern doctrine an adjoining owner may cut off all branches and roots up to the line, especially if the owner of the tree has refused to do so when requested;[1] but he will be liable in trespass if he cut ever so little beyond the line [2] and in either trespass or trover if he convert to his own use either the branches or the fruit which overhang his land. [3] The owner of the land on which the trunk stands may probably cut off the branches or gather the fruit which overhangs the adjoining land provided in so doing he does not enter upon the adjoining land, [4] and the adjoining land owner will be liable for assault if he attempt by violence to prevent the owner of the tree from cutting the branches or gathering the fruit in the manner indicated. [5] Thus it would appear that fruit which should ripen on overhanging branches and fall upon the adjoining land, or branches which should be detached by a storm, would remain the property of the owner of the tree whose entrance upon the adjoining land for recovery of the same might be excusable provided no actual damage was done the adjoining landowner in the effecting of such recovery. [6]

It has been held that the adjoining landowner has no right to cut down a tree or injure its trunk even though the tree cause him personal inconvenience, discomfort or injury, [7] but relief may be had in the courts if the tree can be affirmatively shown to constitute a nuisance. [8] Such action might result either in damages or an abatement of the nuisance.

If the branches or roots which intrude over or into the

1. Grandona v. Lovdal, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121; Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623; Robinson v. Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582, 67 Conn. 538, 35 Atl. 504, 52 Am. St. Rep. 298; Lyman v. Hale, 11 Conn. 177, 27 Am. Dec. 728; Bright v. New Orleans R. Co., 114 La. 679, 38 So. 494; Hickey v. Michigan Cent. R. Co., 96 Mich. 498, 55 N.W. 989, 35 Am. St. Rep. 621, 21 L. R. A. 729; Buckingham v. Elliott, 62 Miss. 296, 52 Am. Rep. 188; Countryman v. Lighthill, 24 Hun. (N. Y.) 405; *Eng.* Crowhurst v. Burial Board, 4 Ex. D. 5; Lonsdale v. Nelson, 2 B. C. 302; Lemmon v. Webb, (1895) 3 Ch. Div. 1, 59 J. P. 564, 64 L. J. Ch. 205, 71 L. T. Rep. N. S. 647, 11 Reports 116.
2. Newberry v. Bunda, 137 Mich. 69, 100 N. W. 277.
3. Lyman v. Hale, 11 Conn. 177, 27 Am. Dec. 728; Hoffman v. Armstrong, 48 N. Y. 201, 8 Am. Rep. 537.
4. Hoffman v. Armstrong, 48 N. Y. 201, 8 Am. Rep. 537.
5. Hoffman v. Armstrong, 46 Barb. (N. Y.) 337, (Aff'd in 48 N. Y. 201, 8 Am. Rep. 537).
6. Mitten v. Fandrye, Popham 161.
7. Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623; Bliss v. Ball, 99 Mass. 597.
8. Grandona v. Lovdal, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121; Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623.

adjoining land cause an actual injury, damages may be recovered from the owner of the tree, but if the branches are neither poisonous nor noxious by nature, no action can be brought merely because of their intrusion. [1]

Felling a tree in such manner that it falls upon the land of another constitutes a trespass, [2] and damages have been collected from one who allowed the trimmings from a tree to fall upon adjoining land to the damage of the owner thereof. [3]

If the trunk of a tree is intersected by the boundary line the adjoining owners have a common property in it, though there is a difference of opinion as to whether they are tenants in common of the whole tree, or each has an ownership of that portion of the trunk which stands upon and the branches which overhang his own land. [4] However, in all jurisdictions an action will lie for the destruction or permanent injury of the tree by one adjoining owner without the consent of the other and treble damages have been allowed for such injury. [5] Where the theory is held that each adjoining owner has a full interest in that part upon or over his own land great liberty will be allowed in the cutting of branches and roots on his side of the line. [6]

Injunctions have been granted to prevent one from planting near his line willow trees which would injure the land

1. Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623; Buckingham v. Elliott, 62 Miss. 296, 52 Am. Rep. 188; Hoffman v. Armstrong, 46 Barb. (N. Y.) 337; Countryman v. Lighthill, 24 Hun. (N. Y.) 405; See Bliss v. Ball, 99 Mass. 597; Tanner v. Wallbrun, (1898) 77 Mo. App. 262; Crowhurst v. Burial Board, 4 Ex. D. 5, and especially Ackerman v. Ellis, (1911) 81 N. J. L. 1, 79 Atl. 883; and Smith v. Giddy, (1904) 2 Brit. Ruling Cas. 897, holding action maintainable for actual injury though trees not harmful by nature.
2. Newson v. Anderson, 24 N. C. 42, 37 Am. Dec. 406.
3. Mitten v. Fandrye, Popham 161; Lambert v. Bessey, T. Raym. 421, 467; See Wilson v. Newberry, L. R., 7 Q. B. 31. But see Maryland Code Public Civil Law, Bagby, 1911, Sec. 366, p. 694. Not liable, if felling neither wilfull nor careless.
4. Cal. Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623, 78 Cal. 611, 21 Pac. 366.
   Conn. Robinson v. Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582, 67 Conn. 538, 35 Atl. 504, 52 Am. St. Rep. 298.
   Del. Quillen v. Betts, 1 Pennew, 53, 39 Atl. 595.
   Iowa Musch v. Burkhart, 83 Iowa 301, 48 N. W. 1025, 32 Am. St. Rep. 305, 12 L. R. A. 484.
   N. H. Griffin v. Bixby, 12 N. H. 454, 37 Am. Dec. 225.
   N. Y. Dubois v. Beaver, 25 N. Y. 123, 82 Am. Dec. 326, (Aff'm Relyea v. Beaver, 34 Barb. 547); Hoffman v. Armstrong, 46 Barb 337 (Aff'd in 48 N. Y. 201, 8 Am. Rep. 537.)
   Pa. Miller v. Mutzabaugh, 3 Pa. Dist. 449; Miller v. Holland, 13 Pa. Co. Ct. 622.
5. Relyea v. Beaver, 34 Barb. 547 (Aff'd in 25 N. Y. 123, 82 Am. Dec. 326.
6. Robinson v. Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582, 67 Conn. 538, 35 Atl. 504, 52 Am. St. Rep. 298.

of an adjoining owner, [1] and to prevent the destruction of boundary trees to the injury of an adjoining owner. [2] In a Connecticut case it was said that if the trunk divides, parts which have more of a perpendicular than a horizontal direction should be considered a part of the trunk. [3]

In one state adjoining proprietors are forbidden by statute to plant on or near the boundary line trees which will be injurious to a neighbor, and the enforced removal of such trees is authorized, [4] and in several others the ownership of boundary trees is regulated by statutes which make adjoining land owners hold a tree in common if the trunk stands upon the line. [5]

§165. Trees Marked as Boundary, Corner or Witness Trees. In many states statutes were early enacted declaring the cutting of a tree marked for boundary purposes a misdemeanor or a felony. [6] That there was need for

1. Brock v. Connecticut etc. River R. Co., 35 Vt. 373.
2. Robinson v. Clapp, 65 Conn. 365; Musch v. Burkhart, 83 Iowa 301, 32 Am. St. Rep. 305; Relyea v. Beaver, 34 Barb. (N. Y.) 547; Comfort v. Everhardt, 35 Wkly. Notes Cas. (Pa.) 364.
3. Robinson v. Clapp, 65 Conn. 365.
4. La. Revised Civil Code La. Merrick, 2d Ed Sec. 691.
5. Cal. Av. Code 1915, Deering, Secs. 833-834; Mont. Revised Code 1907, Sec. 4532 and 4533. See Neb. Compiled Statutes, Brown & Wheeler, 1911, Sec. 5320 p. 1705, may plant on boundary. N. Dak. Compiled laws, 1913, Secs. 5355 and 5356. Okla. Compiled Laws, 1909, Secs. 7257 and 7258. S. Dak. Revised Code, 1903, Sec. 292-293.
6. See the following:

Ala.	Digest, Laws of Ala. 1843, Clay, p. 418, Sec. 9; Penalty increased in Code 1852, p. 567, sec. 3119.
Ariz.	Compiled Laws, Albany, N. Y., 1871, Ch. 10, sec. 69, p. 80; Same Comp. Laws, 1877, p. 80, sec. 305.
Ark.	Revised Stat., 1837, Art. IX, sec. 5, p. 255.
Calif.	Act. April 16, 1850, Stat. 1st. Leg. p. 236, Ch. 99, sec. 69.
Colo.	Laws of 1861, p. 302, sec. 64.
Conn.	Gen'l. Stat. 1866, p. 257, Sec. 77.
Del.	Code 1852, Sec. 987, (Forfeit to party wronged only)
Fla.	Act. Aug. 6, 1868, S. L. p. 79, sec. 61.
Ga.	Code of 1845, Hotchkiss, p. 761.
Ida.	Act Feb. 4, 1863, Laws 1st. Terr. Ass. p. 451.
Ind.	Act June 14, 1852, see Rev. Stat. 1852, p. 437, sec. 33.
Iowa.	Code of 1851, sec. 2683.
Kan.	Comp. Laws 1879, sec. 1852; Gen. St. 1897, p. 317, sec. 117.
Ky.	Rev. Stat. 1852, p. 375, sec. 7.
Me.	Rev. Stat. 1857, p. 694, Sec. 8
Md.	Laws 1722, Ch. 8, sec. 2; Laws Md. (1692-1839), Dorsey, Vol. 1, p. 59.
Mass.	Laws of 1785, Ch. 28; L. 1818, Ch. 3; L. 1823, Ch. 113; Rev. Stat. 1836, Ch. 126, p. 727.
Mich.	Rev. Stat. 1838, p. 633, sec. 42.
Minn.	Rev. Stat. Terr. 1851, p. 505, Sec. 43.
Miss.	Rev. Code 1857, p. 603, Art. 189.
Mo.	Act. Mar. 30, 1835, p. 181, sec. 58.
Mont.	Acts of Terr. Mont. 1st. Sess. p. 192, sec. 72.

(Footnote 6 continued on next page)

statutory prohibition of such acts is indicated by decisions in New Jersey in 1802 and in Virginia in 1837 to the effect that the cutting of a line tree was not punishable under any law in force in those states. [1] The Virginia act of March 6, 1838 was passed to meet the situation thus presented. There are now statutes in nearly all, if not all, states imposing a fine or imprisonment for the cutting of or mutilation of the marks upon a boundary tree, [2] and a Federal statute of June 10, 1896 (29 Stat. L. 321) imposing a penalty

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(Footnote 6 concluded from preceding page)

Neb. Laws of 1st. Sess. Terr Ass. (1855), Ch. 7. sec. 119, p. 241.
N. H. Act. June 24, 1858, S. L. Ch. 2105.
N. J. Act. Feb. 25, 1863.
N. M. Gen. Laws 1880, p. 340, sec. 34.
N. Y. See Rev. Laws. 1829, Vol. 2, p. 695, sec. 32; R. S. 1836, p. 580; R. S. 1846, Vol. 2, p. 780.
N. D. Session Laws, 1911, ch. 288.
Ohio Rev. Laws, 1824, p. 184, sec. 14.
Okla. Stat. of 1893, p. 519, sec. 2500.
Ore. Act. Feb. 6, 1851, sec. 52. (Gen. Crim. Act, 2d. Leg.)
Pa. Act. Mar. 1, 1799; Act. Mar. 20, 1810, Laws Com. Pa. 1700-1810, Vol. 5, p. 173.
R. I. Rev. Stat. 1857, Ch. 214, sec. 28, p. 534.
Tenn. Code 1858, sec. 4652 Par. 11, and sec. 4654.
Tex. Digest of Laws, Paschal, 1878, Act. No. 2343, p. 460.
Utah Comp. Laws 1876, p. 640, sec. 347.
Vt. Rev. Stat. Burlington, 1840, p. 433, sec. 24.
Va. Act. Mar. 6, 1838, S. L. Ch. 9, p. 22 (See Tate's Digest, 1841, p. 236) Sec. 66.
Wash. Act. Mar. 15, 1890, Laws 1st. State Leg. p. 127, sec. 11.
W. Va. Code 1868, p. 685, sec. 27; Act. Mar. 29, 1882, p. 477.
Wis. Stats. of Terr. Wis., Albany, N. Y. 1839, p. 356, sec. 37.
Wyo. Act. Dec. 10, 1869, Gen. Laws 1st. Leg., p. 112, sec. 49 (Same Comp. L. 1876, p. 257, sec. 49); Laws 1890, Ch. 73.

1. State v Burroughs, 7 N. J. L. 426 (Pub. Trenton, 1824) (Cf. 34 N. J. L. 410 below); Commonwealth v Powell, 8 Leigh 719.

(However, in Virginia the wilful cutting or carrying away of a tree was held to be a misdemeanor at common law. See Digest of Laws of Va., Tate, Richmond, 1841, p 236, sec. 65); Cf. State v. West, 10 Tex. 554, (Burden on Def. to prove inadvertence State v Malloy, 34 N. J. L. 410 (Statute of 1863 construed)

2. Ark. Digest of Maws, 1904, sec. 1922.
Colo. Annot. Stat. Mills, 1912, p. 880, sec. 2040.
Conn. Rev. Stat. 1902, sec. 1230.
Del. Code 1915, Sec. 3616.
Ind. Annot. Stat. Burns, 1914, sec. 2317.
Ky. Stat. of Ky., Carroll, 1909, Sec. 1228 (1 to 5 yrs. wilfully,) Sec. 1256
Me. Rev. Stat. 1903, p. 947, sec. 19.
Md. Annot. Code, Bagby, 1914, Vol. 3, p. 317, sec. 23 and 24.
Minn. Gen. Stat. 1913, sec. 8931.
Mo. Rev. Laws, 1909, sec. 4604.
Nev. Rev. Laws, 1912, Sec. 6752.
N. J. Comp. Laws (1709-1910) p. 1791. Sec. 150.
N. M. Annot. Stat. 1915, Sec. 1576.
N. D. Compiled Laws, 1913, sec. 4290.
Okla. Comp. Laws 1909, Sec. 2710; Revised Laws, 1910, sec. 2779.
Ore. Ore. Laws, Lord, 1910, sec. 1983.
Tenn. Code 1896, Shannon, sec. 6496, Par. 12, Corner tree, Sec. 6503 (felony).
Va. Code 1904, Pollard, sec. 3729.
Wyo. Comp. Stat. 1910, sec. 5867.

of not exceeding two hundred and fifty dollars or imprisonment for not over one hundred days for the offense of cutting a boundary witness tree or any tree blazed to mark the line of a government survey.

§166. Trees in Streets and Highways. In some cities the fee to the land within the streets is in the public but generally the public has only an easement for the use of the land comprised within the limits of a street or highway and the abutting land owners own the fee to the highway. If there are different landowners on opposite sides of the highway or street each one owns to the middle of the same. Where the fee to the street or highway is in the abutting owner he is entitled to full control and enjoyment of the land except as the land is burdened with the easement in favor of the public. He owns the trees within the street or highway, [1] may remove them at his pleasure [2] and is liable for injuries resulting from their existence. [3]

If the municipality owns the fee to the street or highway it owns the trees therein. [4] Even where the municipality does not own the fee in the streets or highways it often under its charter has a right of control over trees along the streets [5] and such control is not abridged by the exercise of a license on the part of abutting owners in the planting of trees or by permission granted to a telephone, telegraph, electric light, or street car company to use the streets for specific purposes. [6] An abutting owner can not be com-

1. Conn. Woodruff v. Neal, 28 Conn. 165.
   Ga. Atlanta v. Holiday, 96 Ga. 546, 23 S. E. 509.
   Iowa Overman v. May, 35 Iowa 89; Deaton v. Polk County, 9 Iowa 594.
   Mass. Denniston v. Clark, 125 Mass. 216.
   Mich. *Compare* Miller v. Detroit etc. R. Co. 125 Mich. 171, 84 Am. St. Rep. 569.
   N. H. Baker v. Shepard, 24 N. H. 208.
   N. J. Avis v. Vineland, 56 N. J. L. 474, 28 Atl. 1039, 23 L. R. A. 685.
   N. Y. Jackson v. Hathaway, 15 Johns 447, 8 Am. Dec. 263; Lancaster v. Richardson, 4 Lans. 136; Ellison v. Allen, 30 N. Y. Suppl. 441.
   Ohio Daily v. State, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. Rep. 578, 24 L. R. A. 724; Phifer v. Cox, 21 Ohio St. 248, 8 Am. Rep. 58.
   R. I. Tucker v. Eldred, 6 R. I. 404.
   S. D. *Compare*, Lovejoy v. Campbell (S. Dak. 1902), 92 N. W. Rep. 24.
   U. S. Barclay v. Howell, 6 Peters 498, 8 L. Ed. 477. See 25 Cent. Dig. Tit. Highways, Sec. 292.
2. Lancaster v. Richardson, 4 Lans. (N. Y.) 136.
3. Weller v. McCormick, 52 N. J. L. 470, 19 Atl. 1101, 8 L. R. A. 798.
4. Mt. Carmel v. Shaw, 155 Ill. 37, 39 N. E. 584, 46 Am. St. Rep. 311, 27 L. R. A. 580; Baker v. Normal, 81 Ill. 108.
5. Consolidated Traction Co. v. East Orange Tp., 61 N. J. L. 202, 38 Atl. 803.
6. Baker v. Normal, 81 Ill. 108; But see, Lancaster v. Richardson, 4 Lans. (N. Y.) 136. (Holding owner of fee may cut trees without permission of authorities).

pelled to care for trees planted by the municipality, unless a statute or a city regulation imposes this duty upon him; [1] and although the municipality may prohibit injuries to trees in its streets or highways and regulate the planting, protection and removal of trees, it cannot usually compel an abutting owner to cut a tree down. [2]

The right of the abutting owner to maintain trees or shrubs along a street or highway is limited by the rights of the public in general and other persons in particular to use the street or highway for all purposes comprised within the easement for a right of way. [3] Whether the fee to the street is held by the municipality or by the abutting landowner, the town or city may remove either branches of trees or the trees themselves when reasonably necessary to make room for sidewalks, a widening of the streets or for other public purposes. [4] These removals may ordinarily be made without hearing or notice to the abutting owner [5] but in some jurisdictions a private party cannot remove even obstructing branches without a permit from the proper officials, [6] and under some statutes giving a municipal corporation the right to remove trees from streets when public necessity demands, due notice is necessary prior to removal by the authorities. [7]

When it becomes necessary in the construction, repair or use of a street or highway, to cut down trees or remove their branches, the severed trees or branches may be removed to some place convenient to the owner of the land on which the trees stood, but in the absence of statutory authority neither a private person nor the public through its officials has any right to appropriate them for use in the repair of

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1. Weller v. McCormick, 47 N. J. L. 397, 1 Atl. 516, 54 Am. Rep. 175.
2. Sproul v. Stockton, 73 N. J. L. 158, 62 Atl. 275.
3. Pinkerton v. Randolph, 200 Mass. 24, 85 N. E. 892.
4. Atlanta v. Holliday, 96 Ga. 546, 23 S. E. 509; Mt. Carmel v. Shaw, 155 Ill. 37, 39 N. E. 584, 46 Am. St. Rep. 311, 27 L. R. A. 580 (Reversing 52 Ill. App. 429); Hildrup v. Windfall, 29 Ind. App. 592, 64 N. E. 942; Everett v. Council Bluffs, 46 Iowa 66; Wilson v. Simmons, 89 Me. 242, 36 Atl. 380; Avis v. Vineland, 56 N. J. L. 474, 28 Atl. 1039, 23 L. R. A. 685; Ellison v. Allen, 30 N. Y. Suppl. 441; Chase v. Oshkosh, 81 Wis. 313, 51 N. W. 560, 29 Am. St. Rep. 898, 15 L. R. A. 553.
5. Chase v. Oshkosh, 81 Wis. 313, 51 N. W. 560, 29 Am. St. Rep. 898, 15 L. R. A. 553.
6. State v. Pratt, 90 Minn. 66, 95 N. W. 589.
7. Stretch v. Cassopolis, 125 Mich. 167, 84 N. W. 51, 84 Am. St. Rep. 567, 51 L. R. A. 345; Clark v. Dasso, 34 Mich. 86; See. Bliss v. Ball. 99 Mass. 598.

the road or for other purposes; [1] and even where statute authorizes the use of trees growing within the highway for repair of the same, as is common in American states, trees which have been cut by the abutting owner and prepared for his own use cannot be thus appropriated. [2]

Where the abutting owner holds the fee to the street or highway he can maintain an action in trespass for any unjustifiable injury to trees within the highway, [3] and this rule has been applied to a highway commissioner removing a tree as an obstruction, without previous notice to the owner. [4] Under statutes the abutting owner may often maintain the action even when he does not hold the fee in the highway, [5] and in some jurisdictions even where the statute does not give the right if he has planted and often tained the trees with the sanction of the municipal authorities. [6] In a New York case in which the abutting owner did not own the fee it was held that he nevertheless had an action for injury to shade trees caused by the escape of gas from the pipes which were maintained in the streets by a corporation, [7] and in a Pennsylvania case an action in trover was sustained for the cutting of trees in a highway. [8]

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1. Reynolds v. Speers, 1 Stew. (Ala.) 34; Deaton v. Polk County, 9 Iowa 594; Boston v. Richardson, 13 Allen (Mass.) 146; Baker v. Shephard, 24 N. H. 208; Makepeace v. Worden, 1 N. H. 16; Ward v. Folly, 5 N. J. L. 485; Niagara Falls Suspension Bridge Co. v. Bachman, 4 Lans. (N. Y.) 523, (reversed on other grounds in 66 N. Y. 261); Tucker v. Eldred, 6 R. I. 404; Matthews Lumber Co. v. Van Zandt County (Tex. Civ. App. 1903) 77 S. W. 960. *Eng.* Turner v. Ringwood Highway Board, L. R., 9 Eq. 418, 21 L. T. Rep. N. S. 745, 18 Wkly. Rep. 424; See 25 Cent. Dig. Tit. "Highways," Sec. 293.
2. Goodman v. Bradley, 2 Wis. 257.
3. Western Un. Tel. Co. v. Krueger, 30 Ind. App. 28, 64 N. E. 635; Betz v. Kansas City Home Tel. Co., 121 Mo. App. 473, 97 S. W. 207; Kellar v. Central Tel. etc. Co., 33 Misc. 523, 105 N. Y. Suppl. 63; Huling v. Henderson, 161 Pa. St. 553, 29 Atl. 276; Andrews v. Youmans, 78 Wis. 56, 47 N. W. 304; O'Connor v. Nova Scotia Tel. Co. 22 Can. Sup. Ct. 276, (Reversing 23 Nova Scotia 509); Baunatyne v. Suburban Rapid Transit Co., 15 Manitoba 7; L'Hussier v. Brosseau, 20 Quebec. Super. Ct. 170.
4. Clark v. Dasso, 34 Mich. 86; Douglas v. Fox, 31 U. C. C. P. 140.
5. Langley v. Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; Rockford Gas Light etc. Co. v. Ernst, 68 Ill. App. 300; Kemp v. Des Moines, 125 Iowa 640, 101 N. W. 474; Osborne v. Auburn Tel. Co., 111 N. Y. App. Div. 702, 97 N. Y. Suppl. 874 (Revs'd on other grounds in 189 N. Y. 393, 82 N. E. 428); Edsall v. Howell, 86 Hun. (N. Y.) 424, 33 N. Y. Suppl. 892; Cf. Sanderson v. Haverstick, 8 Pa. St. 294; Lovejoy v. Campbell, 16 S. D. 231, 92 N. W. 24; Douglas v. Fox, 31 U. C. C. P. 140 (Canada); Cf. Unwin v. Hanson (1891), 2 Q. B. 115 (England).
6. Lane v. Lamke, 53 N. Y. App. Div. 395, 65 N. Y. Suppl. 1090.
7. Donahue v. Keystone Gas Co., 181 N. Y. 313, 73 N. E. 1108, 106 Am. St. Rep. 549, 90 L. R. A. 761 (Aff'g 90 N. Y. App. Div. 386, 85 N. Y. Suppl. 478).
8. Sanderson v. Haverstick, 8 Pa. St. 294.

Statutes have been passed prohibiting the mutilation of trees under police powers. [1]

It has been held that shade trees are not a nuisance *per se* but become such if they in fact interfere with the use of the highway. [2] Trees have been held to constitute an obstruction to a sidewalk. [3]

A city or other municipal corporation will be liable for any injury to a person resulting from the falling of a tree, or its branches, which stands within a street or highway, if it be shown that the city authorities knew, or might have learned through the exercise of reasonable diligence, that the tree constituted a menance to life or limb and made no effort to remedy the condition or to warn those using the street regarding the danger. [4] However, if the circumstances were such that the municipal authorities could not have reasonably suspected that the tree was dangerous, the corporation will not be liable for any injury suffered. [5]

Trees or shrubs which do not interfere with the use of a highway are not an obstruction, [6] nor is a log chute near the highway. [7] Logs and stumps within the highway [8] or lumber piled therein [9] may constitute an obstruction or a nuisance.

§167. Injuries to Trees by Public Service Corporations. Telegraph, telephone, electric light, and other com-

1. State v. Merrill, 37 Me. 329.
2. Frostburg v. Wineland, 98 Md. 239, 56 Atl. 811, 103 Am. St. Rep. 399, 64 L. R. A. 627.
3. Vanderhurst v. Tholcke, 113 Cal. 147, 45 Pac. 266, 35 L. R. A. 267; Chase v. Oshkosh, 81 Wis. 313, 51 N. W. 560, 29 Am. St. Rep. 898, 15 L. R. A. 553.
4. Duffy v. Dubuque, 63 Iowa 171, 18 N. W. 900, 50 Am. Rep. 743; Chase v. Lowell, 151 Mass. 422, 24 N. E. 212; McGarey v. New York, 89 N. Y. App. Div. 500, 85 N. Y. Suppl. 861; Norristown v. Moyer, 67 Pa. St. 355; Cf. McLoughlin v. Philadelphia, 142 Pa. St. 80, 21 Atl. 754, (Injury by window screens).
5. Gubasko v. New York, 14 Daly (N. Y.) 559, 1 N. Y. Suppl. 215; Jones v. Greenboro, 124 N. C. 310, 32 S. E. 675; But see, Vosper v. New York, 49 N. Y. Super. Ct. 296.
6. Crismon v. Deck 84 Iowa 344, 51 N. W. 55; Quinton v. Burton, 61 Iowa 471, 16 N. W. 569; Bills v. Belknap, 36 Iowa 583; Clark v. Dasso, 34 Mich. 86; People v. Carpenter, 1 Mich. 273; Wheatfield v. Shasley, 23 Misc. (N. Y.) 100, 51 N. Y. Suppl. 835; See Eaves v. Terry, 4 McCord (S. C.) 125.
7. Haines v. Barclay Tp., 181 Pa. St. 521, 37 Atl. 560.
8. Langworthy v. Green Tp., 88 Mich. 207, 50 N. W. 130.
9. McKune v. Santa Clara Valley Mill etc. Co., 110 Cal. 480, 42 Pac. 980; Smith v. Davis 22 App. Cas. (D. C.) 298; Covington Sawmill etc. Co. v. Drexilius 120 Ky. 493, 87 S. W. 266, 27 Ky. L. Rep. 903, 117 Am. St. Rep. 593; Holly v. Bennett, 46 Minn. 386, 49 N. W. 189; Winship v. Enfield, 42 N. H. 197; Pittsburgh etc. Bridge Co. v. Com., 4 Pa. Cas. 153, 8 Atl. 217; Cf. Harper v. Kopp, 73 S. W. 1127, 24 Ky. L. Rep. 2342; Friedman v. Snare, etc. Co., 71 N. J. L. 605, 61 Atl. 401, 108 Am. St. Rep. 764, 70 L. R. A. 147; State v. Webb's River Imp. Co., 97 Me. 559, 55 Atl. 495; Beardslee v. French, 7 Conn. 125, 18 Am. Dec. 86.

panies performing similar public functions have no legal right to enter, without the consent of the owner, upon private property for the purpose of cutting the trunks or branches of trees which interfere with the erection, maintenance or operation of such public utilities; [1] and such action will ordinarily give rise to an action in trespass even though the only cutting which is done is the trimming off of branches which overhang a street or highway. Damages will also be allowed to the abutting landowner for any unnecessary or wanton injury to trees which stand within a street or highway; [2] even where such owner does not hold the fee to the land upon which the tree stands, and especially if he has planted the trees with the acquiescence of the city. [3]

The court holdings are in direct conflict as to the liability for damages where the amount of cutting or trimming was no greater than was reasonably necessary for the construction, maintenance and operation of the telephone line or other public utility, some decisions allowing damages [4]

1. Ill. Western Union Tel. Co. v. Satterfield, 34 Ill. App. 386, 2 Am. Electric Cases 296.
   La. Tissot v. Great Southern Tel. etc. Co., 39 La. Ann. 996, 3 So. 261, 4 Am. St. Rep. 248.
   Miss. Clay v. Postal Tel. Cable Co., 70 Miss. 406. 11 So. 658;
   N. Y. Van. Sicien v. Jamaica Electric Light Co., 45 N. Y. App. Div. 1, 61 N. Y. Suppl. 210 (Aff'd in 168 N. Y. 650, 61 N. E. 1135).
   Tenn. Cumberland Tel. etc. Co. v. Shaw, 102 Tenn. 313, 52 S. W. 163; Cumberland Tel. etc. Co. v. Poston, 94 Tenn. 696, 30 S. W. 1040; Memphis Bell Tel. Co. v. Hunt, 16 Lea 456, 1 S. W. 159, 57 Am. Rep. 237.
   Tex. Southwestern Tel. etc. Co. v. Branham (Civ. App. of Tex. 1903), 74 S. W. 949.
   Can. Gilchrist v. Dominion Tel. Co., 19 N. Brunsw. 553; Roy. v. Great Northwestern Tel. Co., 2 Quebec Super. Ct. 135.
2. See Southern Bell Tel. Co. v. Francis, 109 Ala. 224, 19 So. 1, 55 Am. St. Rep. 930, 131 L. R. A. 193; Tissot v. Great Southern Tel. etc. Co., 39 La. Ann. 996, 3 So. 261, 4 Am. St. Rep. 248; See Wyant v. Central Tel. Co., 123 Mich. 51, 81 N. W. 928, 81 Am. St. Rep. 155, 47 L. R. A. 497; Bronson v. Albion Tel. Co., 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426; Van Sicien v. Jamaica Electric Light Co., 45 N. Y. App. Div. 1, 61 N. Y. Suppl. 210 (Aff'd in 168 N. Y. 650, 61 N. E. 1135); Memphis Bell Tel. Co. v. Hunt, 16 Lea 456, 1 S. W. 159, 57 Am. Rep. 237; Gilchrist v. Dominion Tel. Co., 19 N. Brunsw. 553.
3. Osborne v. Auburn Tel. Co., 111 N. Y. App. Div. 702, 97 N. Y. Suppl. 874.
4. Conn. Bradley v. Southern New England Tel. Co., 66 Conn. 559, 34 Atl. 499. 32 L. R. A. 280, under statutory provision.
   Ill. Board of Trade Tel. Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453.
   Miss. Cumberland Tel. etc. Co. v. Cassedy, 78 Miss. 666, 29 So. 762.
   Mo. Cartwright v. Liberty Tel. Co., 205 Mo. 126, 103 S. W. 982, 12 L. R. A. N. S. 1125; State v. Graeme, 130 Mo. App. 138, 108 S. W. 1131; McAntire v. Joplin Tel. Co., 75 Mo. App. 535.
   Neb. Bronson v. Albion Tel. Co., 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426.
   N. Y. Osborne v. Auburn Tel. Co., 111 N. Y. App. Div. 702, 97 N. Y. Suppl. 874.

(Footnote 4 continued on next page)

and others refusing to allow them. [1] In the absence of statute the determination of the question whether damages should be allowed in such cases should apparently depend upon whether the use of the street or highway for the purposes of the corporation was considered an ordinary use of the highway or as an additional servitude not embraced within the easement held by the public. [2] In some jurisdictions such use is held an additional servitude [3] and in others it is not so considered. [4]

If the quasi public corporation is not liable for the necessary cutting of trees, it is not necessary for it to give notice to the abutting owner so as to afafford him opportunity to do the trimming himself unless the statute requires such notice; [5] and it has been held that a telephone company which is required to move its wires and poles from a street to the adjoining sidewalk, is not liable to an abutting owner for the trimming of trees necessary to the removal. [6] Under a Canadian statute authorizing a telegraph company to remove branches overhanging the street which interfered with its line, it was held that the company was not liable to an abutting owner provided the necessary trimming was done without an entry upon his land. [7]

(Footnote 4 concluded from preceding page)

Ohio See Daily v. State, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. Rep. 578, 24 L. R. A. 724 (injury to ornamental trees in highway under Ohio statute).

Pa. Marshall v. American Tel. etc. Co., 16 Pa. Super. Ct. 615, under statutory provision.

Can. See O'Connor v. Nova Scotia Tel. Co., 22 Can. Sup. Ct. 276; Gilchrist v. Dominion Tel. Co., 19 N. Brunsw. 553; Hodgkins v. Toronto, 19 Ont. App. 537; Compare O'Connor v. Nova Scotia Tel. Co., 23 Nova Scotia 509.

1. Southern Bell Tel. Co. v. Francis, 109 Ala. 224, 19 So. 1, 55 Am. St. Rep. 930, 31 L. R. A. 193; Wyant v. Central Tel. Co., 123 Mich. 51, 81 N. W. 928, 81 Am. St. Rep. 155, 47 L. R. A. 497; Southern Bell Tel. Co. v. Constantine, 61 Fed. 61, 9 C. C. A. 359, 4 Am. Electric Cas. 219, 23 U. S. App. 56; See also, Western Union Tel. Co. v. Rich, 19 Kan. 517, 27 Am. Rep. 159, 1 Am. Elec. Cas. 271; Dodd v. Cons. Trac. Co. 57 N. J. L. 482.
2. Wyant v. Central Tel. Co., 123 Mich. 51, 81 N. W. 928, 81 Am. St. Rep. 155, 47 L. R. A. 497; Bronson v. Albion Tel. Co., 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426; But see, Southern Bell Tel. Co. v. Francis, 109 Ala. 224, 19 So. 1, 55 Am. St. Rep. 930, 31 L. R. A. 193; and McAntire v. Joplin Tel. Co., 75 Mo. App. 535.
3. See Eminent Domain, 15 Cyc. 681, 682.
4. Ibid.
5. Wyant v. Central Tel. Co., 123 Mich. 51, 81 N. W. 928, 81 Am. St. Rep. 155, 47 L. R. A. 497.
6. Southern Bell Tel. Co. v. Francis, 109 Ala. 224, 19 So. 1, 55 Am. St. Rep. 930, 31 L. R. A. 193; Southern Bell Tel. Co. v. Constantine, 61 Fed. 61, 9 C. C. A. 359.
7. Roy v. Great Northwestern Tel. Co., 2 Quebec Super. Ct. 135.

In a Nebraska case it was held that even where the circumstances were such as to entitle an abutting landowner to recover damages at law, injunction against the one threatening the trimming of trees growing in the street would not be granted unless there were a showing of special conditions which made the remedy at law inadequate. [1]

The cutting of trees by public utility corporations is embraced within the statutes making it an indictable offense for any one to cut down or injure fruit, shade or ornamental trees owned by another, [2] and oak and hickory trees growing along a highway have been held to be shade trees within the purview of such a statute. [3]

§168. Trees Subject to Eminent Domain. Trees are subject to condemnation proceedings, [4] except that gardens and orchards are in some jurisdictions exempt from condemnation. Not only will the value of the trees within the right of way of a railroad be considered in condemnation proceedings, but compensation has been allowed for injury to trees growing outside the right of way, [5] and telegraph, telephone, electric light, electric railroad and other power companies may be required to compensate the owner of trees for their removal or injury whether they have grown naturally or have been planted within a highway or on either inclosed or uninclosed adjoining land. [6] In such cases, where the trees are not primarily timber trees with a commercial value, the measure of damages will be the difference between the value of the property as a whole before and after the trees were cut or injured; and the value of the trees as thus determined may be greatly in excess of whatever sale value they may have had after severance. [7] Where

1. Bronson v. Albion Tel. Co., 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426.
2. Southern Bell Tel. Co. v. Allen, 109 Ala. 224, 19 So. 1, (Under Sec. 7833, Ala. Code).
3. Russellville Home Tel. Co. v. Commonwealth, 109 S. W. 340, 33 Ky. L. Rep. 132 But see St. Joseph Etc. R. Co. v. Dryden, 11 Kan. 186; Western Union Tel. Co. v. Rich 19 Kan. 517, 27 Am. Rep. 159 (Tel. Co. serving railroad may cut trees standing within right of way, if necessary).
4. Preston v. Dubuque etc. R. Co., 11 Iowa 15; Hayden v. Skillings, 78 Me. 413, 6 Atl. 830.
5. Haislip v. Wilmington etc. R. Co., 102 N. C. 376, 8 S. E. 926; Griffin v. Pennsylvania and Schuykill Valley R. Co., 2 Del. Co. (Pa.) 425.
6. McAntire v. Joplin Tel. Co., 75 Mo. App. 535; Marshall v. American Tel. etc. Co., 16 Pa. Super. Ct. 615; Cf. Gilmore v. Pittsburgh etc. R. Co., 104 Pa. St. 275; Lafferty v. Schuykill River East Side R. Co., 124 Pa. St. 297, 16 Atl. 869, 10 Am. St. Rep. 587, 3 L. R. A. 124.
7. Marshall v. Amer. Tel. etc. Co., 16 Pa. Super. Ct. 615.

a hedge or young trees are capable of removal, the cost of removal may be assessed in condemnation proceedings.[1] In determining the decrease in the value of property caused by a change in the grade of a street or highway, any destruction of, or injury to, shade trees should be considered;[2] but an Oregon case held that in estimating the damage to timber on a railroad right of way, the timber cut by the railroad company from lands outside the right of way limits should not be included.[3] Where timber land was taken for forestry purposes under a New York statute,[4] it was held that the one who held a contract with the owner of the land for the timber upon it was entitled under condemnation proceedings to the value of the timber on the stump with interest on such value from the time of the appropriation until the award was perfected.[5] There have been many decisions under state laws or city ordinances which encourage or regulate the planting and care of trees in streets or highways.[6]

1. Shawnee County Com'rs v. Beckwith, 10 Kan. 603.
2. See Cook v. Ansonia, 66 Conn. 413, 34 Atl. 183; Holley v. Torrington, 63 Conn. 426, 28 Atl. 613; Shelton Co. v. Birmingham, 61 Conn. 518, 24 Atl. 978; See Telephone and Tel. Co. c. Forke, 2 Tex. App. Civ. Cas. Sec. 368; Seattle etc. R. Co. v. Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503.
3. Oregon etc. R. Co. v. Barlow, 3 Ore. 311.
4. Chap. 220, Laws of 1897.
5. Turner v. State, 67 N. Y. App. Div. 393, 73 N. Y. Suppl. 372.
6. Jefferson County v. Hudson, 20 Kan. 71; Sharon v. Smith, 180 Mass. 539, 62 N. E. 981; Chase v. Lowell, 149 Mass. 85, 21 N. E. 233; Com. v. Wilder, 127 Mass. 1; White v. Godfrey, 97 Mass. 472; Smith v. Nobles County, 37 Minn. 535; Bigelow v. Whitcomb, 72 N. H. 473, 57 Atl. 680. 65 L. R. A. 676.

CHAPTER XVII

TREES, NURSERY EQUIPMENT AND SAWMILLS AS FIXTURES

§169. Definition of Fixtures. In the administration of the common law in England the doctrine of fixtures was evolved. The principles which were developed there have been applied in America except as statutory enactments have required the courts to modify such principles.

A fixture has been defined "as" a personal chattel substantially affixed to the land, but which may afterwards be lawfully removed therefrom by the party affixing it, or his representatives, without the consent of the owner of the freehold."[1] Fixtures have also been defined as "things of an accessory character, annexed to houses or lands, which become immediately on annexation part of the realty itself.[2] It will be noted that these definitions are essentially contradictory. The latter definition follows the earlier conception of the common law, which was developed at a time when realty was held in the greatest esteem. With social and industrial development came a realization that the rule *quicquid plantatur solo, solo cedit*, was harsh and impracticable as to things which were annexed to the land for business purposes or for the personal convenience of a tenant, and the theory of trade and domestic fixtures arose. Thus, although the earlier name "fixtures," which had been used to indicate that the personal chattels annexed to land had lost their identity as movable chattels, was retained, the meaning of the term was essentially reversed, and "fixtures" came to be used to designate those things which could be removed, even though they were attached to the realty to the extent which

1. Black's Law Dictionary, 2d Ed. 1910, See Cook v. Whiting 16 Ill. 480; Teaff v. Hewitt 1 Ohio St. 511, 59 Am. Dec. 634.
2. Wharton Law Dict. 7th Ed. 1883. See also American Statute Law. Stimson, Boston, 1886, Vol. 1, Sec. 2100.

had formerly been held to destroy their identity and movable character.

In view of the confusion that has arisen because of the ambiguous use of the term "fixtures," it has been suggested that the word be used to designate any personal chattel or movable object attached to realty and that the qualifying words "movable" or "irremovable" be prefixed to the word "fixtures" so as to clearly indicate the character of the chattels annexed. The ultimate test now recognized as to trade fixtures is not so much the degree of annexation as the intent and purpose of the annexor. The character of the annexed thing as realty or personalty is dependent upon the establishment of certain facts as to the circumstances surrounding the annexation.

§170. Trees and Nursery Appliances as Fixtures in England. Under the early common law fixtures, being considered a part of the freehold, were exempt from distress for rent, fines, duties, etc. An early statute [1] modified this rule to the extent of allowing landlords to distrain *fructus industriales*, such as corn, grass and hops; but trees and shrubs in nursery grounds were considered to partake of the nature of *frutcus naturales* to an extent which removed them from the operation of this law. [2]

In Penton v. Robert [3] Lord Kenyon held that nurserymen and gardeners might remove greenhouses and similar structures erected at their own expense in connection with the prosecution of their business on leased premises, but in the case of Elwes v. Maw [4] which was decided subsequently, Lord Ellenborough declined to extend to agricultural tenants the privileges of removal which had been granted tradesmen by statutory exception. [5] An English case also held that an outgoing tenant of a garden ground could not plow up the strawberry beds in full bearing at the end of his term, even though he had purchased them of the preceding tenant and though it was shown to be the custom for the incoming tenant to pay the outgoing one the appraised value of such

1. 11 Geo. 2 Chap. 19 Sec. 8.
2. Law of Fixtures, Amos and Ferard, Gould & Banks, New York, 1830.
3. 2 East 88, 91, 4 Esp. 33, 6 Rev. Rep. 376 (1801).
4. 3 East 38, 56, 6 Rev. Rep. 523, 2 Smith's Lead. Cas. (7th Ed.) 162. (K. B. Misc. I 1802). See Buckland v. Butterfield 2 Brod. & Bing. 58.
5. See Law of Fixtures, Amos and Ferard, N. Y. (1830), p. 46, 52.

plants. [1] However, in this case the injury appears to have been considered a malicious destruction, outside the regular course of business, and with no reasonable object. The modern English rule undoubtedly is that gardeners and nurserymen may not only remove greenhouses and other trade equipment [2] but may remove trees and shrubs which have been planted by them with an express view to sale if they are susceptible of removal without destruction, [3] but a person not professing to be a nurseryman or gardener, who raises young trees on demised land with a view to transplanting them on the same premises is not entitled to sell or remove such stock at the end of his term. [4]

§171. Trees and Nursery Appliances as Fixtures in the United States. The refusal of Lord Ellenborough in Elwes v. Maw to except agricultural fixtures from the general common law rule has been followed by the courts in America, but there has been a tendency through judicial decisions and legialstive enactments to bring such fixtures into the field of trade fixtures. [5] In agricultural fixtures the intention of the annexor has constantly received an increased attention, while less importance has been attributed to the physical character of the annexation. In the United States today, not only are greenhouses and similar structures erected by a nurseryman for business purposes considered trade fixtures, [6] but trees grown for sale purposes are likewise subject to removal as trade fixtures. [7]

1. Wetherell v. Howells, 1 Camp. N. P. C. 227 (1808).
2. Mears v. Callender (1901) 2 Ch. 388, 65 J. P. 615, 70 L. J. Ch. 621, 84 L. T. Rep. N. S. 618, 49 Wkly Rep. 584.
3. Wardall v. Usher 3 Scott, N. R. 508 (1841), 10 L. J. N. S. C. P. 316, 7 Taunt. 191. (Cannot sell trees cultivated for fruit they will produce.)
   Oakley v. Monck, L. R. 1 Exch. 159, 4 H. and C. 251, 12 Jour. N. S. 253; 35 L. J. Exch. 87, 14 L. T. Rep. N. S. 20, 14 Wkly Rep. 406 (1866).
4. Wyndham v. Way, 4 Taunt. 316, 13 Rev. Rep. 607 (1812). See Grey v. Cuthbertson 2 Chit. 482, 18 E. C. L. 397.
5. See Van Ness v. Pacard, 2 Pet. (U. S.) 137, 7 L. Ed. 374; Harkness v. Sears 26, Ala. 493, 62 Am. Dec. 742; Holmes v. Tremper 20 Johns (N. Y.) 29, 11 Am. Dec. 238; Wing v. Gray 36 Vt. 261, Law of Fixtures, Bronson, Keefe-Davidson, St. Paul, Minn. 1904, p. 31 et seq.; 13 Am. & Eng. Enc. Law (2 Ed.) p. 646.
6. Free v. Stuart, 39 Neb. 220, 57 N. W. 991.
7. Fox v. Brisac 15 Cal. 223 (1860); Maples v. Millon 31 Conn. 598; Adams v. Beadle 47 Iowa 439; 29 Am. Rep. 487; Price v. Brayton 19 Iowa 309; Whitmarsh v. Walker 1 Metc. (Mass.) 313; Miller v. Baker 1 Metc. (Mass.) 27; Brooks v. Galster 51 Barb. (N. Y.) 196, 1868; King v. Wilcomb 7 Barb. (N. Y.) 263 (1849); Duffus v. Bangs 122 N. Y. 423, 427 (1890) Aff'g 50 Supr. Ct. (43 Hun) 52, 53 (1887). See also Dubois v. Bowles 30 Colo. 44, 69 Pac. 1067; Smith v. Price 39 Ill. 28, 89 Am Dec. 284; Holmberg v. Johnson 45 Kan. 197 (1891); Adams v. St. Louis Etc. Ry. Co. 138 Mo. 242, 250, (1897); Hamilton v. Austin 36 Hun. (N. Y.) 138.

Trees which have been planted in a nursery by the own of the land are a part of the land and pass when the land is conveyed by a deed or mortgage, [1] and they would doubtless descend to the heir and could not be taken by the executor or administrator. However, a mortgagor of land may sell such trees for transplanting in the regular course of business as long as he has the right to redeem the land. [2]

It has been held that a chattel mortgage on unsevered nursery stock which was not clearly in condition for transplanting at the time of the mortgage, would not prevail against a prior mortgage of the land; [3] but other cases have indicated that through agreements between the owner and the tenant of the land as to the right of removal, nursery stock, attached to the land, may nevertheless be personalty. [4]

§172. Rule as to Fixtures Dependent upon Relationship between Parties. "The rule of *quicquid plantatur solo, solo cedit*, is applied with greater vigor in favor of the inheritance as between executor and heir than in the relations of landlord and tenant, and tenant for life, or in tail, and remainderman or reversioner. It is equally well settled, that in the absence of evidence of specific intention varying the rights of the parties, the same strict rule which prevails between heir and executor, prevails also between the grantor and grantee, and mortgagor and mortgagee of the land." [5] "Between a grantor and grantee and mortgagor and mortgagee the effort of a court is always to ascertain the intent of the parties, and to give it effect. If their language affords evidence that a chattel was intended to pass, it will of course pass, whether it be a mere chattel or one which by annexation has become part of the realty. But where no specific intention is collectible, or where the conveyance is of land by metes and bounds, and on the land a building

1. Dubois v. Bowles 30 Colo. 44, 69 Pac. 1067; Maples v. Millon 31 Conn. 598; Smith v. Price 39 Ill. 28, 89 Am. Dec. 284; Adams v. Beadle 47 Iowa 439, 29 Am. Rep. 487; Hamilton v. Austin 36 Hun. (N. Y.) 138 (1885), 43 Supr. Ct.; See 23 Cent. Dig. tit. Fixtures, Sec. 34, 49.
2. Adams v. Beadle 47 Iowa 439, 29 Am. Rep. 487 (1877); Price v. Brayton 19 Iowa 309; Miller v. Baker 1 Metc. (Mass.) 27 (1840) 3 Law Rep. 148.
3. Adams v. Beadle 47 Iowa 439.
4. Wallace v. Dodd, 136 Cal. 210 (1902); Adams v. St. Louis Etc. Ry. Co. 138 Mo. 242, 250 (1897); Liu Kong v. Keahialoa, 8 Hawaii 511 (1892). See Ewell's Fixtures, 2 Ed. Callaghan & Co., Chicago, (1905). p. 79 (x53) p. 99 (x64).
5. Ibid. p. 378.

stands in which is the thing in controversy, then it will pass on or not according as the thing is or is not in law a part of the realty." [1]

Many court decisions and some legal treatises on real estate and the law of fixtures have even considered as fixtures trees which have grown naturally on land. [2] In some American states there are statutes declaring that where there is an indictment for the unlawful taking of trees, the trees shall not be considered as fixtures. [3] It seems to the author that trees which have grown naturally can never properly be considered as fixtures, except possibly within a nursery and while yet small enough to be removed in the regular course of business.

§173. Sawmills and Related Structures or Mechanical Devices as Fixtures. These principles of the law of fixtures are of interest to foresters and lumbermen, not only as they affect the right to remove young trees which have been planted in nurseries, but also because of their bearing upon the right to remove sawmills and other trade fixtures used in the lumbering industry. Thus it has been held that a sawmill was not a part of the realty as between a chattel mortgagee of the same and a vendor of the land on which it stood, [4] but of course in each case that arises the decision as to the nature of the property must depend upon the mode of annexation, the purpose for which the annexation was made, and the intention of the annexor. It is apparently well settled that a sawmill built upon timbers lying upon the surface of the ground, and erected with a view to removal when the timber within convenient reach shall be cut

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1. Ewell's Fixtures, 2d Ed. Callaghan & Co., Chicago (1905) p. 386. cf. Murdock v. Gifford 18 N. Y. 28 (1858).
2. Johnson v. State 100 Ala. 55 (1893); McCall v. State 69 Ala. 227 (1881); Holly v. State 54 Ala. 238. Bonham v. State 65 Ala. 456 (1880) Nelson v. Nelson 6 Gray (Mass.) 385 (1856); State v. Thompson 93 N. C. 537, (1885); State v. Fay 82 N. C. 679 (1880); Comfort v. Fulton 39 Barb. 56 (N. Y. 1861). See Jackson v. State 11 Ohio St. 104. Schulenberg v. Harriman 88 U. S. 44, 64 (1874); Nelson v. Graff 12 Fed. 389 (U. S. C. C. Mich. 1882) Reg. v. Harris 11 Mod. 113. Blackstone 4 vol. p. 232. Law of Fixtures, Amos & Ferard p. 266. Law of Fixtures, Ewell, pp. 65, 70, 668. Law of Fixtures, Bronson, p. 393.
3. Revised Statutes of Nebraska, 1913, Sec. 8683. Cf. Civil Code of Cal. 1915, Deering, Sec. 660.
4. Burrill v. Wilcox Lumber Co., 65 Mich. 571. (1887). Cf. Ewell's Fixtures, 2d Ed. 1905, pp. x42 (60), x272 (381).

out, is personalty. [1] However, machines such as a shingle machine or a planer, closely integrated with a stationary mill [2] or detachable appliances such as circular saws when attached to the machinery are held to be a part of the realty. [3]

While annexed, fixtures are subject to the general rules regarding trespass upon realty. Since the plaintiff must have possession to maintain the action *quare clausam fregit*, this action cannot be brought by a landlord either against the tenant of the premises or against a trespasser during the tenancy. Trees or other tangible things when severed from the realty become personalty, but if they are accidentally or wrongfully severed they remain the property of the owner of the realty and he may bring an action of *de bonis asportatis* against the tenant or a stranger who appropriates them. Although a tenant can bring trespass *quare clausam fregit* for any injury to the fixtures while annexed, it would seem that he could not bring *de bonis asportatis* against the land-

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1. Tillman v. DeLacy, 80 Ala. 103 (Farm engine, mortgage); Empire Lbr. Co. v. Kiser, 91 Ga. 643, 17 S. E. 972 (Sawmill under statute giving lien thereon for supplies.) Taylor v. Watkins, 62 Ind. 511 (Sawmill, realty mortgage.) Lansing Iron & Engine Works v. Walker, 91 Mich. 409 (Sawmill, engine bricked in, yet personalty.) Brown v. Little, 6 N. W. 244 (Sawmill on timber); Crane v. Brigham, 11 N. J. Eq. 29 (Water power sawmill, engine added in dry year; personalty.) Randolph v. Gwynne, 7 N. J. Eq. 88 (Engine in water power paper mill, personalty.) Farrar v. Cauffetete, 5 Denio (N. Y.) 527 (Machinery on leased land, personalty). Hershberger v. Johnson (Ore.) 60 Pac. 838 (Sawmill set under lease, recited to be personalty). Vail v. Weaver, 132 Pa. 363, 19 Am. St. Rep. 598 (Electric light plant, personalty.) Hughes v. Edisto Cypress Shingle Co., 51 S. C. 1, 28 S. E. 2 (Sawmill set under lease to cut timber there.) Padgett v. Cleveland, 33 S. C. 339 (Sash and door mfr., engine not realty.) *But see* Potter v. Cromwell, 40 N. Y. 287, 100 Am. Dec. 485 (Grist mill realty.) Kile v. Giebner, 114 Pa. 381, 7 Atl. 154 (Sawmill realty.) Tunis Lbr. Co. v. Dennis Lbr. Co., 97 Va. 682, 34 S. E. 613 (Dry kiln erected as required by lease held realty). See Alexander v. Beekman Lbr. Co., 78 Ark. 169, 172; 95 S. W. 449. State v. Livermore, 44 N. H., 386 (Word "sawmill" does not necessarily imply a building). DeLoach Mill Mfg. Co. v. Bonner (Ark.) 43 S.W. 504. (Warranty of mill did not authorize damages for loss on logs delivered to site, too remote and not contemplated.)
2. Corliss v. McLagin 29 Me. 115; Trull v. Fuller 28 Me. 545. But see Wells v. Maples 15 Hun (N. Y.) 90; State v. Goodnow, 80 Mo. 271.
3. Burnside v. Twitchell 43 N. H. 395; Bigler v. New York Cent. Ins. Co. 20 Barb. (N. Y.) 635; Clark v. Hill 117 N. C. 11; Breman v. Whitaker 15 Ohio State 446; Newhall v. Kinney 56 Vt. 591; State v. Avery 44 Vt. 629; Wash. Nat'l Bank of Seattle v. Smith 15 Wash. 160. cf. Alexander v. Beekman Lbr. Co. 70 Ark. 169, 95 S. W. 449 (covering shed not part of sawmill) Liberty County Land Etc. Co. v. Barnes 77 Ga. 752, 1 S. E. 378 (goods in commissary store not part of mill.) See also Graham v. Magann Fawke Lbr. Co. 118 Ky. 192, 80 S. W. 799, 26 Ky. L. Rep. 70; Bogard v. Tyler 55 S. W. 709, 21 Ky. L. Rep. 1452; Frost's Detroit Lbr. Etc. Works v. Miller's Mut. Ins. Co. 37 Minn. 300, 34 N. W. 35, 5 Am. St. Rep. 846, Dexter v. Sparkman 2 Wash. 165; 25 Pac. 1070; *In re* Gosch 121 Fed. 604. See State v. Wilbert's Sons Lbr. & Shingle Co. 26 So. 106.

lord after the severance of the fixtures. Some courts have held that the execution of a chattel mortgage on a fixture effects a constructive severance and makes the subject matter of the mortgage personalty, [1] but in other jurisdictions such a severance will not be effective as against a purchaser of the land. [2] and a parol reservation of a fixture is generally held inoperative either on the ground that the parol evidence is inadmissible to prove the reservation [3] or on the ground that the fixtures are realty and thus within the statute of frauds. [4] Ordinarily fixtures are not considered an interest in land of such character as to require a writing for their transfer, except as between a grantor and grantee of the realty to which the fixtures are annexed. [5] Fixtures may of course be constructively severed by a writing which conforms to the requirements of a conveyance of realty in that jurisdiction, [6] or by an express ecxeption in a deed of the land. [7] The giving of a bill of sale, or a chattel mortgage, on articles annexed at the time of the execution and delivery of a mortgage on realty has been held to show an intention by the parties to the mortgage that the annexed articles were to be considered personalty and not subject to the realty mortgage. [8]

Chattels so annexed by the owner of land as to be ordinarily considered a part of the land cannot be attached as goods and chattels under a judgment against the land owner; [9] but in an execution against a tenant all fixtures which are removable by him may be levied upon as goods and chattels. [10]

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1. Manwaring v. Jenison 61 Mich. 117, 27 N. W. 899.
2. Madigan v. McCarthy 108 Mass. 376, 11 Am. Rep. 371; Burk v. Hollis 98 Mass. 55; Gibbs v. Estey 15 Gray 587; ex p. Ames. 1 Fed. Cas. No. 323, 1 Lowell 561; Fenlason v. Rackloff 50 Me. 362. But see Fuller v. Tabor 39 Me. 519.
3. Smith v. Price 39 Ill. 29.
4. Horne v. Smith 105 N. C. 323, 18 Am. St. Rep. 903.
5. Curtis v. Riddle 7 Allen (Mass.) 185; 1 Wm. Saunders 277; Amos & Ferard Fixtures, 253; Ewell's Fixtures, 343; Tyler's Fixtures, 730; Bronson, Fixtures, 266.
6. Johnston v. Phila. Mort. Etc. Co. 129 Ala. 515, 30 So. 15, 87 Am. St. Rep. 75.
7. Badger v. Batavia Paper Mfg. Co. 70 Ill. 302; Straw v. Straw 70 Vt. 240, 39 Atl. 1095.
8. cf. Burrill v. Wilcox Lumber Co. 65 Mich. 571.
9. Green v. Phillips 26 Grat. (Va.) 752 (Machinery in wood working factory). Krueger v. Pierce 37 Wisc. 269 (Lumber, Etc. piled on land for repair purposes.) cf. Homestead Land Co. v. Becker 96 Wis. 210, and Studley v. Ann Arbor Sav. Bank 112 Mich. 181, 70 N. W. 426.
10. Poole's case 1 Salk. 368.

CHAPTER XVIII

THE POLICY OF THE NATIONAL GOVERNMENT IN REGARD TO THE FREE USE OF TIMBER TAKEN FROM PUBLIC LANDS

§174. Use of Timber by Settlers and Temporary Occupants. The terms of the various donation and preemption acts and of the homestead act of May 20, 1862, (12 Stat. L., 392) and its amendments, clearly indicated a purpose on the part of the Government to encourage settlement of the public lands. Many of these lands were heavily timbered and it was impossible to cultivate any part of them until the timber was removed. Furthermore, the homestead act required a residence of five years upon the land before a patent would be issued. Although the act of March 2, 1831 (4 Stat. L., 472), and that of March 3, 1859 (11 Stat. L., 408), imposed penalties for the cutting of timber of any kind from the public lands of the United States, and although it was well settled that the title to the lands remained in the United States until patents were issued, the executive officers of the Government and the courts took the position that the provisions of the preemption and homestead acts modified the application of the penal statutes against trespass and adopted the rule that bona fide settlers might lawfully cut such timber from their claims as they needed for firewood or for the agricultural development of the lands entered in the way of building, fencing, etc. [1]

When it was once conceded that bona fide settlers on unsurveyed lands and homesteaders might lawfully cut timber from their claims for the purpose of clearing the land for agricultural use, it became logically necessary to hold that timber thus cut in good faith might be sold, or otherwise disposed of, rather than destroyed or allowed to waste. [2]

1. U. S. v. Nelson, 5 Sawy, 68, 27 Fed. Cas. No. 15,864.
2. Shiver v, U. S., 159 U. S. 491, 16 S. Ct. 54, 40 L. Ed. 231; U. S. v. Taylor, 35 Fed. 484; U. S. v. Murphy, 32 Fed. 376; U. S. v. Williams, 18 Fed. 475, 9 Sawy. 374; The Timber Cases, 11 Fed.*81, 3 McCrary 519.

However, this privilege of selling timber thus cut was held to be incidental to the clearing of the land for bona fide agricultural purposes, and the courts have declared that it must not be used as a cloak to cover a cutting conducted primarily with a view to the derivation of a profit from the sale of the timber, under penalty of civil prosecution under the common law or criminal prosecution under section 2461 or 5388 of the Revised Statutes or the acts which supersede these sections. [1]

Exemption from prosecution was also allowed to those who used timber within reasonable limitations upon mining claims acquired under the act of July 26, 1866 (14 Stat., L. 251), which, like the homestead acts, clearly contemplated Governmental encouragement to those who should engage in the development of the mineral resources of the nation.

Although those charged with the administration of the public land laws overlooked and even approved the use of timber from agricultural or mining claims, or even condoned the use of reasonable quantities from adjacent lands for bona fide domestic purposes, and the courts openly recognized and sanctioned such use in trespass prosecutions

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1. Stone v. U. S. 167 U. S., 178, 17 S. Ct. 778, 42 L. Ed. 127 (affm'g 64 Fed. 667, 12 C. C. A. 451); Shiver v. U. S., 159 U. S. 491, 16 S. Ct. 54, 40 L. Ed. 231; U. S. v. Cook, 19 Wall (86 U. S.) 591; U. S. v. Briggs, 9 How. 351, 13 L. Ed. 170; U. S. v. Ellis, 122 Fed. 1016; U. S. v. Blendauer, 122 Fed. 703 (Revs'd on other grounds in 128 Fed. 910, 63 C. C. A. 636); Potter v. U. S. 122 Fed. 49, 58 C. C. A. 231; Teller v. U. S. 117 Fed. 577, 54 C. C. A. 349; Teller v. U. S. 113 Fed. 273; Cunningham et al. v. Metropolitan Lbr. Co., 110 Fed. 332, 49 C. C. A. 72; Grubbs v. U. S., 105 Fed. 314, 44 C. C. A. 513; Conway v. U. S. 95 Fed. 615, 37 C. C. A. 200; U. S. v. Niemeyer, 94 Fed. 147; U. S. v. Perkins, 44 Fed. 670; U. S. v. Norris, 41 Fed. 424; U. S. v. Taylor, 35 Fed. 484; U. S. v. Murphy, 32 Fed. 376; U. S. v. Freyburg, 32 Fed. 195; U. S. v. Ball, 31 Fed. 667, 12 Sawy. 514; U. S. v. Lane 19 Fed. 910; U. S. v. Williams, 18 Fed. 475, 9 Sawy. 374; U. S. v. Yoder, 18 Fed. 372, 5 McCrary 615; U. S. v. Stores, 14 Fed. 824, 4 Woods, 641; U. S. v. Smith, 11 Fed. 487; 8. Sawy. 107; The Timber Cases, 11 Fed. 81, 3 McCrary 519; U.S. v. Mills, 9 Fed. 684; U. S. v. Nelson, 5 Sawy. 68, 27 Fed. Cas. No. 15, 864; U. S. v. McEntee, 26 Fed. Cas. No. 15673; King-Ryder Lbr. Co. v. Scott, 73 Ark. 329, 84 S. W. 487, 70 L. R. A. 873; Stevens v. Perrier, 12 Kan. 297; Orrell v. Bay Mfg. Co. 83 Miss. 800, 36 So. 561, 70 L. R. A. 881; Anderson v. Wilder, 83 Miss. 600, 35 So. 875; 4 Opin. Atty. Gen. 405, July 16, 1845; Winninghoff v. Ryan, 40 L. D. 342; Finley V. Ness, 38 L. D. 394; Davis v. Gibson, 38 L. D. 265; Patten v. Quackenbush, 35 L. D. 561; E. S. Gosney case, 29 L. D. 593, 30 L. D. 44; Isadore Cohn case 20 L. D. 238. See also Reports G. L. O. 1889, p. 291, 1887, p. 479; 1 L. D. 596 (Timber on accretions.)

And compare Jones v. Donahoo, Morr. (Iowa) 493; Hughell v. Wilson, Morr (Iowa) 383; Bower v. Highbee, 9 Mo. 259; Nickelson v. Cameron Lbr. Co. 39 Wash. 569, 81 Pac. 1059; Arment v. Hensal, 5 Wash. 152, 31 Pac. 464; U. S. v. Helena, 26 Fed. Cas. No. 15342, (Revers'g 26 Fed. Cas. No. 15,341); The Cherokee, 5 Fed. Cas. No. 2,639, 12 N. Y. Leg. Obs. 33.

which came before them, [1] there was no positive legislative authority for the practice. Section two of the trespass act of March 1, 1817 (3 Stat. L., 347), may be considered to have approved in a negative manner the use of the less valuable timber on public lands without liability to prosecution, in that the penalty imposed by it as to public lands not reserved for naval purposes was specifically made applicable only to live oak and red cedar cut for exportation from the place of cutting.

An act of April 30, 1878 (20 Stat. L, 46), making an appropriation for the payment of the expenses connected with the employment of timber agents by the General Land Office for the work of protecting the public lands from timber trespass, forbade the use of any portion of the special appropriation therein made in the collection of fines or damages for timber cut by settlers for their own actual use from unsurveyed and unoffered lands in any of the territories of the United States. Although free use was not expressly granted, it is apparent from this act that Congress recognized the need of an available timber supply to meet the requirements of settlers within the territories. However, the same act authorized the seizure of any timber cut from the public lands which should be exported out of the territory within which it was cut.

The act of June 3, 1878, Chapter 151, (20 Stat. L., 89), known as the "Timber and Stone Act," by a proviso in section four contained an unmistakable legislative recognition as to certain states and territories of the well established governmental policy of permitting miners and agriculturists to take from the public lands, free of charge, such timber as they needed for domestic purposes; [2] and another act, passed the same day, (Chapter 150, 20 Stat. L.,88), expressly granted to bona fide residents of the states and territories therein named the right to free use of timber, growing on mineral lands, for all domestic purposes, provided such timber were not exported from the states and territories in which it grew. The act of August 4, 1892, (27 Stat. L., 348) extended Chapter 151, June 3, 1878, to all public-land states.

1. U. S. v. Smith, 11 Fed. 487, 8 Sawy. 100.
2. G. L. O. Circular Nov. 30, 1908 (37 L. D. 289).

On March 3, 1891 (26 Stat. L. 1093), Congress again announced the policy of the Federal Government to be that of granting the free use of timber, under regulations to be prescribed by the Secretary of the Interior, from all nonmineral lands within certain states and districts in which mining operations were common. This act declared that in any civil action or criminal prosecution by the United States for timber cut from public lands within the States and territories of Colorado, Montana, Idaho, North Dakota, South Dakota and Wyoming, in Alaska or within the gold or silver regions of Nevada and Utah, it should be a defense for the defendant to show that the timber cut and removed from the public timber lands was taken by a resident of one of the said states or territories for agricultural, mining, manufacturing or domestic purposes, under regulations prescribed by the Secretary of the Interior, [1] and that it had not been transported out of the state or territory in which it was cut. The act authorized the Secretary of the Interior to designate the tracts from which timber might be taken and made it unlawful to remove timber from such lands except in accordance with the regulations prescribed by him. It was specifically provided that the act did not repeal the act of June 3, 1878 (20 Stat. L., 88) providing for the cutting of timber on mineral lands, and that it was not to be construed as enlarging the rights of any railroad to the free use of timber.

An act of February 13, 1893 (27 Stat. L., 444), extended the provisions of the act of March 3, 1891 (26 Stat. L., 1093) to the territories of New Mexico and Arizona, and one of March 3, 1901 (31 Stat. L., 1436) made the same law aplicable to the States of California, Oregon and Washington. The provisions of this act, so far as Alaska was concerned, were superseded by section 11 of an act of May 14, 1898 (30 Stat. L., 409). Exceptions to the rule against exportation from the state or territory in which the timber was cut were made by acts of July 1, 1898 (30 Stat. L., 618) [2] and March 3, 1901 (31 Stat. L., 1439). [3]

1. See Circular G. L. O. Feb. 10, 1900 (29 L. D. 572).
   See Circular G. L. O. Mar. 22, 1901 (30 L. D. 542).
   See Circular G. L. O. Mar. 25, 1913 (42 L. D. 22). No. 223.
2. Circular G. L. O. July 23, 1898 (27 L. D. 276).
3. Circular G. L. O. Mar. 20, 1901 (30 L. D. 540).

It is to be noted that the act of March 3, 1891 (26 Stat. L., 1093), and the acts amendatory thereof, applied only to non-mineral public lands, while the act of June 3, 1878 (20 Stat. L. 88) applied only to mineral lands. [1] The act of March 3, 1891, did not authorize the sale of timber from the public lands, but only the granting of free use under such regulations as the Secretary of the Interior should prescribe. [2] The Secretary was given no authority under either law to require permits for the cutting of timber on actual agricultural or mining claims but only on public lands to which no private claim had attached. The removal of timber from a claim for unlawful purposes subjected the offender to punishment under the penal statute, but his right of use was absolute so long as he cut only for lawful purposes. [3]

An act of August 10, 1912, (37 Stat. L., 269, 287) made special provisions for farmers and settlers by authorizing the sale of mature and dead and down timber from national forests to them at actual cost, and the act of March 4, 1913, (37 Stat. L., 1015) authorized the sale of fire-killed or injured timber from homesteads prior to final proof under the supervision of the Secretary of the Interior.

§175. The Cutting of Timber on Mineral Lands. An act of June 3, 1878 (20 Stat. L., 88), authorized all bona fide residents of the states of Colorado and Nevada, and of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho and Montana, as well as those of "all other mineral districts of the United States," to fell and remove from public lands mineral in character and subject to mineral entry only, [Act May 12, 1872 (17 Stat. L., 91)] timber and trees "for building, agricultural mining or other domestic purposes," subject to such regulations as the Secretary of the Interior might prescribe for the protection of the timber and undergrowth or for other purposes. A proviso

1. Circular G. L. O. Jan. 18, 1900, (29 L. D. 571).
   Circular G. L. O. Mar. 16, 1909 (37 L. D. 492).
   Circular G. L. O. Mar. 25, 1913 (42 L. D. 30) No. 222.
2. Circular G. L. O. Mar. 17, 1898 (26 L. D. 399).
   Decision of Secretary of the Interior (29 L. D. 322).
3. But see Lewis et al. v. Garlock (168 Fed. Rep. 153), holding that because of a paramount title the United States may sell insect infested timber on a mining claim for the protection of other timber even without the consent of the claimant.

excepted railroad corporations from its benefits, and the third section declared that a violation of the provisions of the act, or of any regulations prescribed by the Secretary of the Interior in pursuance thereof, would be deemed a misdemeanor punishable by a fine not exceeding $500, to which penalty might be added imprisonment for not over six months. It was held that the rules and regulations which were promulgated by the Department of the Interior under authority of this act had the full force of law, and violations of the same subjected the offender to the penalties prescribed in the act. [1] However, these regulations must conform to the intent and purposes of the act authorizing them, and they will not be enforced in such manner as to either enlarge or restrict the use which was contemplated by Congress. [2] One who attempts to justify the cutting of timber from public lands under authority of this act must show a reasonable compliance with all requirements of the regulations, [3] but a failure to comply with details, through inadvertance or misunderstanding, will not make him liable to exemplary damages as a wilful trespasser. [4]

Federal courts have held that the Secretary of the Interior had no authority under the act to prohibit the cutting of timber from public mineral lands anywhere within a state or territory for purposes of sale either as firewood in households, mines, smelters, or as manufactured lumber, provided the timber was not cut for exportation from the state or territory. [5] However, there has never been a de-

1. U. S. v. United Verde Copper Co., 8 Ariz. 186, 71 Pac. 954 (Aff'd in 196 U. S. 207, 25 S. Ct. 222, 49 L. Ed. 449); U. S. v. Rossi, 133 Fed. 380, 66 C. C. A. 442; U. S. v. Mullan Fuel Co., 118 Fed. 663; U. S. v. Price Trading Co., 109 Fed. 239, 48 C. C A. 331; U. S. v. Reder, 69 Fed. 965; U. S. v. Lynde, 47 Fed. 297; U. S. v. Williams et al., 6 Mont. 379. *See* G. L. O. Circulars Jan. 18, 1900, 29 L. D. 571; Mar. 16, 1909, 37 L. D. 492; Mar. 25, 1913, 42 L. D. 30.

2. U. S. v. United Verde Copper Co., 8 Ariz. 186, 71 Pac. 954 (Aff'd in 196 U. S. 207, 25 S. Ct. 222, 49 L. Ed. 449); U. S. v. Rossi, 133 Fed. 380, 66 C. C. A. 442. Mullan Fuel Co., 118 Fed. 663; U. S. v. Copper Queen Consol. Min. Co. (Ariz. 1900) 60 Pac. 885; U. S. v. Murphy, 32 Fed. 376;

3. U. S. v. Gumm 9 N. M. 611, 58 Pac. 398; U. S. v. Edgar, 140 Fed. 655; U. S. v. Basic Co., 121 Fed. 504, 57 C. C. A. 624; U. S. v. Gentry, 119 Fed. 70, 55 C. C. A. 658; U. S. v. Mullan Fuel Co., 118 Fed. 663; Stubbs v. U. S. 111 Fed. 366, 104 Fed. 988, 44 C. C. A. 292; U. S. v. Price Trading Co., 109 Fed. 239, 48 C. C. A. 331; U. S. v. Reder 69 Fed. 965.

4. Powers v. U. S., 119 Fed. 562, 56 C. C. A. 128. *See* U. S. v. Rossi, 133 Fed. 380, 66 C. C. A. 442 (Timber cut for lawful purpose, afterwards used for different purpose.)

5. U. S. v. Edgar, 140 Fed. 655; U. S. v. Thayer, 133 Fed. 1022; U. S. v. Rossi, 133 Fed. 380, 66 C. C. A. 442; U. S. v. Basic Co., 121 Fed. 504, 57 C. C. A. 624; U. S. v. Price Trading Co., 109 Fed. 239, 48 C. C. A. 331; U. S. v. Lynde, 47 Fed. 297; U. S. v. Richmond Min. Co., 40 Fed. 415; U. S. v. Edwards, 38 Fed. 812 U. S. v. Saucier, 5 N. M. 569, 25 Pac. 791.

cision by the Supreme Court directly sustaining this view, and the Department of the Interior still insists upon its right and duty to determine from what areas timber is to be cut when the amount to be taken in any consecutive twelve months exceeds $50 in stumpage value, and requires that the timber be cut by the user or by his agent. [1] The right to cut under this act is a special license, and the burden is upon the one cutting to show the mineral character of the land. [2] The cutting of timber from mineral lands for sale to a railroad company for purposes other than those of construction, authorized under the act of March 3, 1875 (18 Stat. L. 482), was held a violation of the act of June 3, 1878 (20 Stat. L. 88); [3] and the removal of timber from a mining claim and its disposal to the benefit of the claimant some time in advance of the actual beginning of mining operations was held to constitute an unnecessary and therefore unlawful removal of timber. [4] However, the Department of the Interior has held that a locator of a mining claim has a sufficient interest in the same to enable him to maintain a suit to prevent trespass thereon. [5]

In construing the two acts of June 3, 1878, one (20 Stat. L., 88) granting the free use of timber in certain portions of the public lands for special purposes, and the other, (20 Stat. L., 89) providing for the sale of timber lands and for other purposes, the Department of the Interior held that the former related to all mineral lands of the United States but not to lands of non-mineral character and did not authorize the cutting of timber for sale or commerce, and that the latter, as amended by the act of August 4, 1892 (27 Stat. L., 348) related to all non-mineral lands of the United States in all public-land states, and prohibited the cutting of timber on any such lands except as provided in the act. [6]

The act of June 3, 1878, Chapter 150, (20 Stat. L., 88),

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1. Circular G. L. O. March 25, 1913, No. 222, 42 L. D. 30. *See* U. S. v. Plowman, 216 U. S. 372.
2. Northern Pacific R. R. Co., v. Lewis (162 U. S. 366.); Lynch v. U. S. 138 Fed. 535, 71 C. C. A. 59.
3. U. S. v. Eureka & P. R. Co., Cir. Ct. Nev. (40 Fed. 419).
4. U. S. v. Nelson, Dist. Ct. Ore. (5 Sawyer 68)
5. Lewis Smith, et al. 1 L. D. 615. U. S. v. Rizzinelli, Cir Ct. Ida. (182 Fed. 675). (Nat'l For.).
6. 24 L. D. 167; 29 L. D. 349.

authorizing the use of timber from any mineral lands for building, agricultural, mining, or other domestic purposes within certain named states and territories and in all other mineral districts, was held not to apply to Oregon in which there was no "mineral district" established either by law or common reputation; [1] and it was held in another case that the cutting of timber from mineral lands within the state of California was governed by the provisions of the act of June 3, 1878, Chapter 151, (20 Stat. L., 89), which specifically mentioned California, and not by the act of the same date, Chapter 150, granting a special license for the cutting of timber from mineral lands but not specifically naming California. [2] The decision in United States v. Smith, that the act authorizing the removal of timber from mineral lands for domestic purposes in general was not applicable to Oregon, was followed in a decision rendered in 1901 which held that the use of timber from the public lands at a quartz mill in that state was a viloation of the said act and was not permissible under the proviso in section 4 of the "Timber and Stone Act" of June 3, 1878, Chapter 151, (20 Stat. L., 89) which declared that nothing therein contained should prevent any miner or agriculturist from clearing his land in the ordinary working of this mineral claim, improving his farm for tillage, or taking the timber necessary to support his improvements. [3] In reaching this conclusion the court took notice of the fact that in interpreting the "Timber and Stone Act" (Chap. 151, June 3, 1878) the Department of the Interior had instructed its officers and agents that where timber for mining or agricultural purposes could not be obtained on the land entered it might be taken from other public land near by. [4] The courts at first adopted the view that Chapter 150, June 3, 1878, authorized the cutting of timber for domestic uses from lands other than those actually entered or actually shown to be mineral provided they were within a well defined mineral district;[5] but later decisions declared that the defendant in a prose-

1. U. S. v. Smith, Cir. Ct. Oregon (11 Fed. 487), 8 Sawy. 100.
2. U. S. v. Benjamin, Cir. Ct. Oregon (21 Fed. 285.)
3. U. S. v. English et al., Cir. Ct. Oregon (107 Fed. 867) Aff'd in 116 Fed. 625, 54 C. C. A. 81.
4. See also U. S. v. Smith, Cir. Ct. Oregon (11 Fed. 487).
5. U. S. v. Richmond Mining Co., Cir. Ct. Nev. 1889 (40 Fed. 415); U. S. v. Edwards, Dist. Ct. Colo. 1889, (38 Fed. 812).

cution under this act must prove that the land from which the timber was cut was actually mineral land and not subject to entry as non-mineral land; [1] and it is now well settled that under this act timber cannot be cut from lands lying in a recognized mineral district, or adjacent to mineral lands, but not actually themselves valuable for minerals. [2] It was also held that the act of August 4, 1892, (27 Stat. L., 348) extending the "Timber and Stone Act" to all public land states, did not repeal by implication the privileges granted in special states, territories and mineral districts by the act of June 3, 1878, (Chapter 150, 20 Stat. L., 88). [3] The Department of the Interior held that both of the acts of June 3, 1878, authorized the cutting of timber by the owner of a sawmill or by other persons provided the timber was intended for the bona fide use of a miner or agriculturist for the purposes contemplated by the acts and that timber cut from actual claims in order that they might be developed could be sold or exchanged for lumber needed for improvements. However, the person selling lumber must take a certificate from the purchaser as to the purpose for which he intends to use it, as required by the regulations of the Interior Department. [4] The cutting of timber for smelting or roasting ores is authorized by Chapter 150 of 1878, supra. [5]

The act of March 3, 1891 (26 Stat. L. 1093) which authorized the cutting of timber on public lands for agricultural, mining and other domestic purposes, as amended by the acts of February 13, 1893 (27 Stat. L., 444) and March 3, 1901 (31 Stat. L., 1436), has been construed by the Interior Department, which is charged with the duty of regulating such use, as contemplating the use of timber cut from non-mineral lands for the same purposes as those permissible under the act of June 3, 1878 (20 Stat. L., 88), allowing cutting on mineral lands only. [6]

1. U. S. v. Price Trading Co. et al., C. C. A. 8th Cir. (109 Fed. 239), 48 C. C. A. 331.
2. U. S. v. Plowman, 216 U. S. 372. *See* Chrisman v. Miller, 197 U. S. 313; U. S. v. Silver Min. Co., 128 U. S. 673; Anderson V.U.S., 152 Fed. 87, 81 C.C.A. 311; U. S. v. Copper Queen Min. Co., 7 Ariz. 80, 60 Pac. 885; Brophy et al. v. O'Hara, 34 L. D. 596; Walker v. So. Pac. R.R. Co., 24 L. D. 172; Etting et al. v. Potter, 17 L. D. 424.
3. U. S. v. Price Trading Co. et al., C. C. A. (109 Fed. 239).
4. U. S. v. Reder (69 Fed. 965).
5. U. S. v. United Verde Copper Co. 196 U. S. 207, 25 S. Ct. 222, 49 L. Ed. 449; (Aff'mg 8 Ariz. 186; 71 Pac. 954.)
6. 34 L. D. 78.

§176. The Free Use of Timber by Telegraph and Railroad Companies. An act of July 24, 1866 (14 Stat. L., 221), U. S. Revised Statutes, Sec. 5264, granting a right of way over public lands to telegraph companies duly incorporated under the laws of any state or territory also granted the use of so much timber from those lands as should be needed for construction purposes. It has been held by the Interior Department that the use of timber for the construction of telephone lines was not authorized by this act. [1]

A similar grant of timber on lands adjacent to their line of track was made to railroads under an Act of March 3, 1875 (18 Stat. L., 482), giving duly incorporated railroads the right of way over public lands. The use of timber under this act and of various other special land grants to railroads was confined to original construction purposes [2] except in the case of the grant of June 8, 1872 (17 Stat. L., 339) to the Denver and Rio Grande Railroad, wherein use for repairs was also granted. But timber adjacent to the main line could be used in the original construction of branch lines subsequent to the completion of the said main line. [3]

It has been held that the privilege of taking timber" adjacent to line of said road," as granted in the act of March 3, 1875 (18 Stat. L., 482), could not be construed to authorize the taking of timber by the railroad from lands situated fifty miles distant from the right of way, even though there be no available timber at a nearer point on the public lands. [4] On the other hand a court has held that a grant of similar character to the Northern Pacific Railroad under section two of an act of July 2, 1864 (13 Stat. L. 365) authorized the cutting of timber from lands not directly contiguous to the right of way, and that timber taken from lands adjacent (the term being used in a sense of nearness) to the line of the road might be used for construction purposes

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1. 29 L. D. 1, July 1, 1899. Right of way over public lands, not reserved for public, uses, was granted by act of July 26, 1866 (14 Stat. L, 253.)
2. Denver etc. R. Co. v. U. S., 34 Fed. 838 (Aff'd in 150 U. S. 1, 14 S. Ct. 11, 37 L. Ed. 975.)
3. U. S. v. Price Trading Co., 109 Fed. 239, 48 C. C. A. 331.
4. Stone v. U.S., 167 U.S. 178, 17 S. Ct. 778, 42 L. Ed. 127 (Aff'mg 64 Fed. 667, 12 C. C. A. 451.)

upon any part of the road; [1] and a liberal construction of the words "adjacent to the line of said road" in the general act of March 3, 1875, has usually been given, [2] one decision holding a distance of three miles from the place of cutting to the line of the railroad to be within the meaning of the term "adjacent" as used in the statute, [3] and another holding that the cutting of timber twenty-five miles away from the track was not necessarily wrongful as a matter of law. [4] However, the word, "adjacent" will not be ignored, nor will its meaning be unreasonably expanded. [5] The determination of the meaning of the term in a particular case has been held to be a matter for both the court and the jury. [6] The circumstances in a particular case might justify a construction of the word which would not be permissible under a different set of conditions, [7] and the Supreme Court has rejected the suggestion that "adjacent" should be limited to the distance that the timber could reasonably be transported by wagons, [8] or to the area to be directly benefited by the proximity of the completed railroad. [9] The license granted by the acts in favor of railroad construction has been held to include the use of timber for the erection of station houses and other appurtenances of a railroad. [10]

Under the act of 1875 a railroad company could not be held in trespass for timber cut on lands adjacent to the line between the filing of articles of incorporation and proof of organization with the Secretary of the Interior and the approval of the same by him, [11] but could be held for any cut

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1. U. S. v. Lynde, 47 Fed. 297: U. S. v. Denver etc. R. Co., 150 U. S., 1, 14 S. Ct. 11, 37 L. Ed. 975; U. S. v. St. Anthony R. Co., 192 U. S., 524, 24 S. Ct. 333. 48 L. Ed. 548; U. S. v. Price Trading Co., 109 Fed. 239, 48 C. C. A., 331.
2. U.S. v. Denver etc. R. Co., 150 U. S., 1, 14 S. Ct., 11, 37 L. Ed., 975 (Aff'mg 34 Fed. 838); U. S. v. Price Trading Co., 109 Fed. 239, 48 C. C. A., 331; U. S. v. Denver etc. R. Co., 31 Fed. 886.
3. U. S. v. Denver etc. R. Co., 11 N.M., 145, 66 Pac. 550,
4. Batcheldor v. U. S., 83 Fed, 986, 28 C. C. A., 246 (Rev'g 9 N.M. 15, 48 Pac, 310.)
5. U. S. v. St. Anthony R. Co. 192 U. S., 524, 24 S. Ct. 333, 48 L. Ed. 548 (Rev'g 114 Fed. 722, 52 C. C. A., 354.)
6. Batcheldor v. U. S., 83 Fed. 986, 28 C. C. A. 246 (Rev'g 9 N. M. 15, 48 Pac. 310,)
7. U. S. v. St. Anthony R. Co., 192 U. S., 524, 24, Ct. 333, 48 L. Ed. 548 (Rev'g. 114 Fed. 722, 52 C. C. A., 354.)
8. U. S. v, Denver etc, R. Co., 31 Fed. 886; approved in Batcheldor v. U. S., 83 Fed. 986.
9. U. S. v. Chaplin, 31 Fed. 980, 12 Sawy. 605.
10. U. S. v. St. Anthony R. Co., 192 U. S., 524 v. Denver etc. R. Co. 150 U. S. 1; U. S, v. Price Trading Co., 109 Fed. 239; U. S. v. Chaplin, 31 Fed. 890, 12 Sawy. 605.
11. Kootenai Valley R. R. Co. (28 L. D. 439).

before such filing. [1] It was held that until the adjacent portions of its road were constructed, the Northern Pacific Railroad did not have such an interest in the odd sections granted it under the act of July 2, 1864 (13 Stat. L., 365) as to authorize it to license others to cut timber therefrom. [2] However, another decision declared that the same railroad had a sufficient equitable interest in the unidentified odd sections of unsurveyed public land within the area covered by the primary grant to the railroad to maintain a suit against a trespasser upon such unsurveyed land, the United States having refused to join in a suit. [3] The grant to railroads under the act of 1875 operated to transfer to a railroad company such timber as it should rightfully take irrespective of any regulations by the Department of the Interior, and an agent of the railroad engaged in cutting such timber was not guilty of trespass, [4] nor did such agent acquire any interest in the timber cut. [5]

An act of February 8, 1905 (33 Stat. L., 706) authorized the use of timber from public lands and from the national forests in the construction of irrigation works under the reclamation act of June 17, 1902 (32 Stat. L. 388.)

1. U. S. v. Eccles, et al., Cir. Ct. Dist. Utah, (111 Fed. Rep. 490).
2. U. S. v. Ordway et al., Cir. Ct. Dist. Oreg. (30 Fed. Rep. 30); U. S. v. Montana Lumber & Mfg. Co., (196 U. S. 573), (1904).
3. Northern Pacific R. R. Co., v. Hussey, C. C. A. (61 Fed. Rep. 231) Cf. U. S. v. Childers, 12 Fed. 586, (8 Sawyer 171). U. S. v. Eureka R. R. Co., C. C. Nev. (40 Fed. 419); U. S. v. Loughrey, 172 U. S. 206; Great Northern R. R. Co. (14 L. D. 566); Construction of term "adjacent" (1 L. D. 610); Report G. L. O. 1889, p. 291.
4. U. S. v. Chaplin, 31 Fed. 890, 12 Sawy. 605.
5. Falke v. Fassett, 4 Colo. App. 171, 34 Pac. 1005

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