Root & Branch!

Mark Pawlowski asks whether it is possible to own a freehold or leasehold estate in a tree

It is trite law that a tree growing on land forms part of the land and, therefore, attaches to the realty owned by the freeholder or leaseholder. What is, perhaps, less obvious is that it is possible for a landowner to own (and to transfer) a freehold or leasehold estate in a tree which is separate from estate ownership of the subjacent soil, provided that the tree has not been severed from the realty.

A separate estate distinct from the soil

A number of early English cases make this clear. In *Herlakenden's Case* (1589) 4 Co Rep 62a, at 63b, it was held that, "if trees be excepted in a feoffment to a man and his heirs, the trees in property are divided from the land, though in fact they remain annexed to it, and that if one should cut them down and carry them away, it would not be a felony". Similarly, in *Liford's Case* (1614) 11 Co Rep 46b, at 49a, it was decided that, where a lease is made of land for a term of years, the lessee has but a special interest in the trees, as to "have the mast and fruit of the trees and the shade for his cattle", but that the inheritance of the trees belonged to the lessor. In the modern English case of *Back v Daniels* [1925] 1 KB 526, Scrutton LJ stated (at 542):

> "Now it is clear that at common law, for the same land, though hardly for the same portion of it, two persons may be in possession at the same time, and each can bring trespass. In the case of a grant by the owner of the soil of the right to herbage. . . or growing crops, the owner can bring trespass for damage to his right to the soil; the person having a right to the herbage for damage to . . . the crops; but neither could bring trespass for the damage to the other's right."

The Canadian case law, based largely on the English common law, is to the same effect. Thus, in *McDonell Estate v Scott World Wide Inc* (1997) 149 DLR (4th) 645, Flinn JA in the Nova Scotia Court of Appeal said (at 649-650):

> "The authorities establish that an estate of inheritance can be granted in a tree, with an interest in the soil sufficient for its growth, while the fee in the soil remains with the grantor."

Moreover, if a fee simple estate in trees has been created, no additional right to enter on the land and cut and remove the trees need be conferred on the grantee as the right is one of the incidents of fee simple ownership: *John Austin & Sons Ltd v Smith* (1982) 132 DLR (3d) 311, at 319, (Ontario Court of Appeal). The point is also made in *Liford's Case*, above, at 49a: "If I grant you my trees in my wood, you may come with carts over my land to carry the wood." However, no soil passes, except for sufficient nutriment to sustain the vegetative life of the trees.

Legal formalities

It is apparent, therefore, that the soil and growing trees may be vested in different ownerships. However, any proprietary interest in trees created by the grant of a freehold or leasehold estate must comply with the necessary legal formalities appropriate to land: *Kursell v Timber Operators and Contractors Ltd* [1927] 1 KB 298. In this connection, it seems that a sale or lease of the trees would constitute a "sale or other disposition of an interest in land" within the meaning of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 requiring the contract of sale (or contract to grant the lease) to be in writing.

Although the 1989 Act contains no definition of "land", it is assumed that this word carries the same meaning as under the old law: see, s.205(1)(ix) of the Law of Property Act 1925. Earlier case law suggests that "land" in this context includes the natural products of the soil (i.e., grass and timber) unless they are to be severed by the vendor, or the contract requires the purchaser to sever them at once so that they will not remain part of the land for very long after purchase: *Marshall v Green* (1875) 1 CPD 35. Interestingly, s.2 of the Sale of Goods Act 1979 defined "goods" as including not only "industrial growing crops" but also "things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale". Some academic commentators, therefore, argued that all crops (including trees) could be treated as chattels for the purposes of s.2 of the 1979 Act. However, s.2(8) of the Consumer Rights Act 2015 (which has replaced the 1979 Act) now contains a new definition of "goods" as meaning "any tangible moveable items" which, therefore, excludes purchases of immovable property such as land or a house from the 2015 Act.

Leasehold estate

It also possible for a landowner to grant a lease of a tree retaining ownership of the soil. Because realty is capable of horizontal division, there is no reason why the term of years in the tree should not be owned by one person whilst the estate in the soil is owned by someone else. However, it seems that the largest estate which can be created in a growing tree is a fee simple conditional (or determinable) upon the life of the tree: *Smith v Daly* [1949] 4 DLR 45, at 48, (Ontario Supreme Court): "as long as such a tree shall grow" or "as long as such a tree stands". If a landowner was minded, therefore, to grant a lease of a tree, the term would inevitably determine once the tree was cut and severed from the land. At that point, it would, of course, cease to be attached to the realty and become capable of separate ownership as a chattel.

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