

AMERICAN LAW REGISTER.

 JUNE 1876.

STUDIES IN THE LAW OF THE STATUTE OF FRAUDS.

VII. *Partnership Realty in its relation to the Statute of Frauds.*

UPON the question when and how far partnership realty is to be regarded as personalty, see Sugden on Vendors, 8th Am. ed., Perkins's notes 498-9, *cum notis*; 1 Amer. Lead. Cases, 5th ed., 592 (484); 1 Tudor's Leading Cases in Mercantile and Maritime Law, 1st Am. ed., 525; Fox's Digest of Partnership Law, tit. "Real Estate;" Collyer on Partnership, Perkins's ed., §§ 133-157, and notes. For a series of propositions on this point, see *Bird v. Morrison*, 12 Wis. 152; also Bissett on Partner. (Am. ed. 1847) *56. As to the bearing of the Statute of Frauds, see Story on Partnership, 5th ed., § 89, and note. In *Agate v. Gignoux*, 1 Robert. 278, it was decided that a lease owned by a partnership, though in equity it might be personalty for partnership purposes, must be transferred in writing under the Statute of Frauds. In *Black v. Black*, 15 Geo. 445, it was said that equity does not transmute land held by a partnership into personalty, but only treats it as such for the purpose of adjusting the rights of the parties between themselves and in relation to the firm-creditors. As to strangers, the land was said to be realty, and a contract concerning it to be within the Statute of Frauds. See *Wheatly v. Calhoun*, 12 Leigh 272, and *Le Fevre's Appeal*, 69 Penn. St. 125, to the same effect. In *Smith v. Burnham*, 3 Sumn. 458, a contract of partnership to buy and sell was said to be within the Statute of Frauds. See *Thorn v.*

Thorn, 11 Iowa 147; *Gray v. Palmer*, 9 Cal. 639; *Henley v. Brown*, 1 Stew. 144; *Clancy v. Craine*, 2 Dev. Eq. 363. In *Pitts v. Waugh*, 4 Mass. 426, the law-merchant as to partnership was said not to extend to speculation in land, and that by the Statute of Frauds no man is chargeable on any contract concerning the sale of land, but on some memorandum in writing, &c. In *Ballard v. Bond*, 32 Vt. 358, explaining and distinguishing *Hodges v. Green*, 28 Vt. 360, the plaintiff and defendant had agreed, by parol, that the former should convey to the latter certain land, and that if within a year the plaintiff could find a better purchaser, the defendant should convey to such purchaser the land and should share the profit with the plaintiff; the plaintiff conveyed to the defendant, and found a better purchaser within the year; the defendant refused to convey to the latter, and the Statute of Frauds was held a good defence.

In *Kidd v. Carson*, 33 Md. 37, the plaintiff conveyed land to the defendant, who by parol agreed to sell and credit the profit to a subsisting indebtedness of the plaintiff's to him; the Statute of Frauds held to apply. In *Henderson v. Hudson*, 1 Munf. 510, the plaintiff claimed to be a partner in a purchase of land made by the defendant, but only proved parol acknowledgments subsequent to the alleged agreement of partnership; the Statute of Frauds was held to apply.

Partnership contracts in land are within the Statute of Frauds, and must be evidenced by writing: *Bird v. Morrison*, 12 Wis. 152, where the point is fully treated; *Benton v. Roberts*, 4 La. Ann. 216; *Gant v. Gant*, 6 Id. 678; *Pecot Co. v. Armelin Bros.*, 21 Id. 667; *Rowland v. Boozer*, 10 Ala. 694. In *Linscott v. McIntire*, 15 Me. 203, one who had an interest in land procured it to be conveyed to another, who verbally promised to sell and pay over the proceeds of sale: *Held*, that the Statute of Frauds was no bar to an action for such proceeds. See *Leslie v. Rosson*, 39 Miss. 368; *Runnell v. Taintor*, 4 Conn. 568; *Trowbridge v. Wetherbee*, 11 Allen 361. In *Bruce v. Hastings*, 41 Vt. 380, an agreement was to sell a farm and divide the profits, and the Statute of Frauds was held no bar to an action for a share of the profits. Neither the plaintiff nor the defendant took the title in their own names, but had the deed made directly from the original owners to the vendees. In *Watkins v. Gilkerson*, 10 Tex. 340, citing 5 Id. 512, a contract to procure land-certificates and patents in consideration of part of the land, held not to be within

the Statute of Frauds. See *Miller v. Roberts*, 18 Tex. 19. In *Prive v. Sturgis*, 44 Cal. 594, a promise by one who has received a conveyance of land to pay so much out of the first proceeds of sale is not within the Statute of Frauds, "being not for the conveyance of land, but for the payment of a certain sum of money upon the happening of a certain event." Besides the references given at the beginning of this paper, see, on the general subject of partnership realty, Bispham on Equity, §§ 511-13; *Foster's Appeal* (Supreme Court of Pennsylvania), 13 Amer. Law Reg. N. S. 300, and note.

VIII. *How far Contracts relating to the Produce of Land are within the Statute of Frauds.*

"The sale of emblements," says Mr. Leake (Elements of the Law of Contracts 133-4), "or the annual growing crops sown by the tenant of land (see Co. Litt. 55 a, b; Williams Ex., 5th ed., 1860), is not considered as a contract concerning an interest in the land for the purpose of the statute: 1 Wms. Saund. 277 b, n. (f). An agreement for the sale of a growing crop of potatoes is not a contract for an interest in land within the 4th sect. of the statute: *Evans v. Roberts*, 5 B. & C. 829; *Sainsbury v. Matthews*, 4 M. & W. 343; so, a sale of growing crops of corn: *Jones v. Flint*, 10 A. & E. 753; but these contracts are within the 17th sect. of the statute, as being sales of goods: *Evans v. Roberts*; and see *Smith v. Surman*, 9 B. & C. 561. It has been held that a contract for the sale of growing crops of hops was not merely a sale of goods, but gave an interest in the land within the 4th sect.: *Waddington v. Bristow*, 2 B. & C. 451; also, that a sale of a growing crop of turnips was within the 4th sect.: *Emmerson v. Heelis*, 2 Taunt. 38; but these cases it is said would now probably be decided differently. See *Evans v. Roberts*; *Rodwell v. Phillips*, 9 M. & W. 501, 503; *Jones v. Flint*. A contract for the sale of a growing crop of grass, being a natural and permanent crop and not coming within the description of emblements, is a contract for an interest in land within the statute and must be in writing: *Crosby v. Wadsworth*, 6 East 602; *Evans v. Roberts*; *Shelton v. Livius*, 2 C. & J. 411; *Carrington v. Roots*, 2 M. & W. 248. So, a contract for the sale of a growing crop of trees or underwood: *Scovell v. Boxall*, 1 Y. & J. 396; *Teal v. Auty*, 2 B. & B. 99. A contract for the sale of crops of fruit growing on fruit trees, was held to be a contract for the sale of an interest in

land within the Stamp Act: *Rodwell v. Phillips*: Where a contract is made for the tenancy or possession of land, together with the growing crops left upon the land and the benefit of work, labor and materials previously expended in tilling the land, though the crops and tillages may be agreed to be paid for at a separate valuation, they are considered as forming part of the land, and the contract must be in writing: *Earl Falmouth v. Thomas*, 1 C. & M. 89; and see *Mayfield v. Wadsley*, 3 B. & C. 357. A contract for the sale of the produce of land to be taken as goods does not give any interest in the land, though it is not severed from the land at the time of the contract; as a contract for the sale of potatoes then being in the ground at so much per sack or so much per acre: *Parker v. Staniland*, 11 East 362; *Warnick v. Bruce*, 2 M. & S. 205. A contract for the sale of timber at so much per foot, being the produce of certain trees then growing when they should be cut down, was held not to be a contract for the sale of the growing trees, and, therefore, not to give any interest in the land: *Smith v. Surman*. A contract for the right to feed cattle on certain land was held to be a contract for the agistment of cattle and not to give an interest in the land: *Jones v. Flint*."

Fructus industriales, while growing, were held to be personal chattels in *Brittain v. McKay*, 1 Ired. 265, discussing *Crosby v. Wadsworth* and *Evans v. Roberts*. In *Whipple v. Toot*, 2 John. 418, it was held that wheat or corn growing was a chattel and might be taken in execution as such. *Newcomb v. Rayner*, reported in a note to *Whipple v. Toot*, was as follows: A. raised a crop on B.'s ground and sold it verbally to C., who brought trespass *de bonis asp.* against B., who had cut and carried it away: held he could recover. In *Rentch v. Long*, 27 Md. 97, a contract to deliver at a future period corn at the time of the promise ungathered, held not to be within the Statute of Frauds, labor being part of the contract: *Eichelberger v. McCauley*, 5 II. & J., cited. In *Brieker v. Hughes*, 4 Ind. 146, "growing crops raised annually by labor," were said to be "the subject of sale as personal property even before their maturity," and that their sale did "not necessarily involve an interest in realty requiring a written agreement." *Sherry v. Picker*, 10 Ind. 376, following *Brieker v. Hughes*, holds growing crops raised annually by labor to be personalty. See *Gant v. Gant*, 6 La. Ann. 678. In *Ross v. Welsh*, 11 Gray 235, a contract for sale at a certain price of growing cabbages not yet ready to be gathered, but which

afterwards, when ready for gathering, are counted to the parties, with an agreement that the purchaser may take them away at any time, makes a sufficient sale and delivery of the whole number, notwithstanding the Statute of Frauds. In *Bull v. Griswold*, 19 Ill. 632, growing wheat was held to be personal property and the subject of a parol sale. From the syllabus of *Powell v. Rich*, 41 Ill. 466, we extract the following: "As between landlord and tenant, debtor and creditor and (under the statute of Illinois) executor and heir, growing crops are personalty; but as between a wrongdoer and the owner of the soil, and between vendor and purchaser, they are real estate and pass by a conveyance, unless a reservation is made in the writing. Until matured they cannot be sold by the owner of the soil, unless the transfer is evidenced by a memorandum in writing." In *Marshall v. Ferguson*, 23 Cal. 69, it is held that the sale of growing *fructus industriales annual* is not within the Statute of Frauds, and that on this point the English and American authorities agreed: *Green v. Armstrong* and *Smith v. Bryan* cited. In *Frank v. Harrington*, 36 Barb. 415, it was held that hops growing and maturing on the vine are chattels. *Evans v. Roberts* was said to lay down the doctrine that maturity was not important, but that the test was whether or not labor and expense had been bestowed. *Bishop v. Bishop*, 1 Kern. 123, distinguished, and the English cases considered.

In *Austin v. Sawyer*, 9 Cowen 39, *Crosby v. Wadsworth*, and *Parker v. Staniland*, were regarded as inconsistent, and a contract for the sale of a growing crop held not to be within the Statute of Frauds; it was also said that the owner of the crop might have trespass *q. c. fr.* for an injury to it. In *Baker v. Jordan*, 3 Ohio 438, it was held that growing corn might be reserved by parol from the operation of a deed in the common form for the land whereon it grows; that evidence to this effect did not contradict the deed. In *McIlwaine v. Harris*, 20 Mo. 458, however, a deed was executed for land with growing wheat crop on it; a verbal reservation of the latter was made, and a sale of it (the crop) was afterwards made to the grantee of the land. The Statute of Frauds was held to apply. In *Bryant v. Crosby*, 40 Me. 21, the English cases were considered, and crops ready to be cut were held not to be within the Statute of Frauds. The New York cases were considered to go the entire length of treating growing crops as chattels always. In *Burns v. Webster*, 6 Cal. 664, it was held

that growing trees may be conveyed by deed, and are not chattels so as to require a delivery to perfect the assignment.

In *Penhallon v. Dwight*, 7 Mass. 34, corn ripe and fit to be cut held subject to execution as a chattel. See, however, as to the point of maturity, *Cradlock v. Riddlesberger*, 2 Dana 206. In *Bowman v. Cann*, 8 Ind. 58, a parol agreement to sell and deliver at sixty dollars per ton whatever broom corn should be raised in 1853 on a certain twenty-five acres, held to be a sale of goods, and for that reason within the Statute of Frauds: *Watts v. Friend* cited. In *Pitkin v. Noyes*, 48 N. H. 294, an agreement to raise three acres of potatoes and deliver them to the other party at so much per bushel, held to be a contract for chattels. See, upon the question of annual crops being personalty, *Stambaugh v. Yeates*, 2 Rawle 161; *Myers v. White*, 1 Id. 356, and the *Bank of Pennsylvania v. Wise*, 3 Watts 406.

In *Cutler v. Pope*, 1 Shep. 379, it was held that a contract for the sale of grass already grown and in a condition to be cut was not within the Statute of Frauds: *Crosby v. Wadsworth* criticised; *Parker v. Staniland* approved. In *The Bank v. Gary*, 1 Barb. 544, growing trees, fruits and grass, being parcel of the land, were held to be within the Statute of Frauds, and that they could not be sold or conveyed by parol. The distinction was made between yearly crops and those growing spontaneously and permanently, it being admitted that grass, *e. g.*, might be severed by a writing, and then, though still uncut, it would be a chattel. *The Bank v. Gary* was the case of an execution issued on growing grass as a chattel, with the parol consent of the defendant in the execution: held not good. *Crosby v. Wadsworth*, *Evans v. Roberts*, *Jones v. Flint*, and *Teal v. Auty*, were considered. See, however, *Cradlock v. Riddlesberger*, 2 Dana 206. *Huff v. McCauley*, 53 Penna. St. 210, citing *Crosby v. Wadsworth*, and *Yeakle v. Jacobs*, 33 Penna. St. 376, holds sales of growing timber, not made with a view to immediate severance, within the Statute of Frauds. A contract for the sale of growing trees is within the statute: *Mirzell v. Burnett*, 4 Jones Law Rep. In *Claffin v. Carpenter*, 4 Metc. 582 (see also *Seovell v. Boxall*), it was held that a contract for the sale of standing wood or timber, to be cut and severed from the freehold by the vendee, does not convey any interest in the land. A contract for wood to be cut and paid for at so much per cord is not within the Statute of Frauds: *Killmore v. Howlett*,

48 N. Y. 569. In *Smith v. Bryan*, 5 Md. 141, A. sold B. trees growing on the land of the former at a specific price; B. cut and removed some and resold the remainder to A. : *Held* to be a sale of goods, and that as to the portion resold delivery was perfected, citing 1 Greenl. on Evid., § 271. In *Warren v. Leland*, 2 Barb. 613, it was said that growing trees, except where there is a special ownership in the trees apart from the land, belong to the realty, and a contract concerning them is within the Statute of Frauds. In *Byasse v. Reese*, 4 Metc. (Ky.) 372, a sale of growing trees in contemplation of their immediate separation, held not to be within the Statute of Frauds, citing 1 Greenl. on Evid., § 271. In this case no time for the removal of the trees was fixed, but the vendee marked a certain number and had begun cutting them. In *Stephens v. Santee*, 51 Barb. 545, A. agreed to cut ties from his own land and deliver them to B. at so much per tie; B. furnished the money as the work progressed, and the timber was to be his as soon as cut. The ties were cut and hauled to the land of a third person, and there verbally turned over to B. as his property : *Held*, that they could not be levied on as A.'s property, and that the Statute of Frauds did not apply to such a contract. The rule was declared to be that where work upon the subject-matter of the sale is to be done for the vendee, the case is taken out of the statute. In *Nettleton v. Sikes*, 8 Metc. 35, an agreement by an owner of land that another may cut down trees on the land, peel them, and take the bark to his own use, held not to be within the Statute of Frauds. In *Hawell v. Miller*, 35 Miss. 700, the sale of growing trees with the right to enter and cut is within the Statute of Frauds. In *Kingsley v. Holbrook*, 45 N. H. 318, the law in Massachusetts and Maine, citing 1 Greenl. on Evid., § 271, said to be that sales of growing trees are not within the statute, unless it is shown that they (the trees) were left on the land to derive benefit from it, or unless the vendee was to have a beneficial interest in the land. The court, however, held the presumption to be the other way, and that the trees were realty, if the vendee had the right at a future time, whether definite or indefinite, to enter and take them. In *Buck v. Pickwell*, 27 Vt. 158, an agreement to sell all the timber on certain land to be taken off at the vendee's pleasure, held to be within the Statute of Frauds : *Smith v. Surman*, and *Sale v. Sceley*, distinguished, and a number of cases considered. Growing trees not nursery ones are not a subject of execution : Breese 221. In

Fitch v. Burr, 38 Vt. 683, approving *Buck v. Pickwell*, it was said that a contract for the future growth of trees and the beneficial use of the land for that purpose for a series of years, or during the pleasure of the vendee, may perhaps be distinguished from an ordinary purchase of stumpage by the foot or cord in contemplation of an early removal or delivery as chattels. In *Ellison v. Brigham*, 38 Vt. 66, a contract by the defendant to cut down timber on certain land and deliver it to the plaintiff, who was to pay for it at so much per cord, was held to be within the Statute of Frauds, and the court, citing *Smith v. Surman*, considered the agreement as one for the delivery of chattels and not for work and labor done. In the arguments of counsel a great many cases will be found cited. See *Whitmarsh v. Walker*, 1 Metc. 313. In *Erskine v. Plummer*, 7 Greenl. 451, *semble*, that a sale of growing trees to be cut and carried away is not within the Statute of Frauds; but otherwise, as to such a sale, with an indefinite time to the purchaser to take away the timber: the law of Connecticut said to hold even the bricks, &c., of a house to be severed to be personalty. In *White v. Foster*, 102 Mass. 375, a grant of a present estate in trees while growing, held to be within the Statute of Frauds; but otherwise as to a mere right, either definite or unlimited, as to the time to enter and cut with a title to the property when it becomes a chattel. In *Pattison's Appeal*, 61 Penna. 296, a sale of growing timber to be taken off at discretion, held to be within the Statute of Frauds. In *Caine v. McGuire*, 13 B. Mon. 340, a sale of growing timber with a view to immediate severance, held not to be within the statute: Greenl. Ev., § 271, approved. In *Green v. Armstrong*, 1 Denio 552, a contract for twenty-two growing trees, to be paid for at 1s. 6d. per saw-log, to be cut and carried away any time within twenty years, was held to be within the Statute of Frauds. In *Bennett v. Scott*, 18 Barb. 347, A. and B. agreed that the former should cut wood on the land of the latter and should have till the next winter to carry it away: the Statute of Frauds held to apply. An existing right in a third person to cut and remove trees is an encumbrance on land so as to give rise to a breach of a covenant to convey free of encumbrance land with regard to which such a right exists: *Spurr v. Andrew*, 6 Allen 420.

HENRY REED.