N. S.
S. C.
HINGLEY v. LYNDS.
Mellish, J.

MELLISH, J.:—The trial judge has found that by oral agreement one Orlen Hingley undertook to let the defendant have the "cullings" of his (Hingley's) lands. This "culling" seems to mean such timber as was left thereon fit for sawing into lumber, and the agreement involved an irrevocable license by the vendor to go on the land and cut and carry away the timber within a reasonable time. I am disposed to think that this was a sale of "goods" within the Sale of Goods Act. I do not think this gave the defendant an "interest in land." The license merely renders legal an entry which, except for the license, would be illegal. Before the defendant had cut the logs in question (he had cut some in May, 1917, but apparently not as many as 15,000 ft., in respect to which no claim is made) the vendor sold the lands to the plaintiff, who, as the trial judge has found (and I agree with him as to this), had no notice of the actual agreement between the parties, but, on the contrary, was informed and believed that the agreement was limited to 15,000 ft. of lumber.

As above stated, and especially in view of such cases as *Marshall* v. *Green*, 1 C.P.D. 35, and *Jones* v. *Tankerville*, [1909] 2 Ch. 440, at pp. 444 and 445, and of the Sale of Goods Act, Acts of 1910, I am unable to say that the sale of an interest in land was contemplated. Notwithstanding this, however, I am of opinion that the trees were not "goods" until severed from the soil, and that at the time the deed was given to plaintiff they were a part of the realty and passed under the deed. I do not think the effect of the decisions or of the statute is to turn real estate into goods. If a sale of land or an interest therein is what the parties attempted, the contract might be enforceable in equity by the defendant against the vendor (*Jones* v. *Tankerville*, *supra*, at p. 443) although void or unenforceable at law; but he could not set up that equitable claim as an answer to this action, the plaintiff being in possession and holding the legal title without notice.

Assuming, however, that it is a sale of goods, and that the defendant had a legal right as against the vendor of the timber to enter on the lands for the purpose of cutting and carrying away the timber under an irrevocable license, nevertheless, I am of opinion that by selling the lands to the plaintiff the vendor made the contract between him and the defendant impossible of per-