

and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

In the note to the foregoing it is said:—

The concluding words of the definition appear to give a general rule for dealing with all things attached to the land, other than emblements and industrial growing crops, and to get rid of subtleties as to whether they were to be severed by buyer or seller, or whether they were to get any benefit from remaining attached to the land before severance. Under the Act the sole test appears to be whether the thing attached to the land has become by agreement goods, by reason of the contemplation of its severance from the soil.

The case of *Jones v. Tankerville*, [1909] 2 Ch. 440, was a case dealing with a contract for the sale of growing timber and at p. 445, Parker, J., said:—

Lastly, in determining the effect of such a contract at law the effect of the Sale of Goods Act, 1893, has now to be considered. Goods are there defined in such a manner as to include growing timber which is to be severed under the contract of sale.

The case of *Morgan v. Russell and Sons*, [1909] 1 K.B. 357, referred to in the judgment appealed from, is not in conflict with the law as laid down by Parker, J. In that case, the slag had become part of the ground or soil; it was the land itself. Lord Alverstone said:—

The contract appears to me to be exactly analogous to a contract which gives a man a right to enter upon land with liberty to dig from the earth *in situ* so much gravel or brick earth or coal on payment of a price per ton.

The distinction between the facts in that case and the facts in this case is obvious.

In my opinion s. 4 of the Statute of Frauds has no application because this is (by virtue of the Sale of Goods Act) a case of the sale of goods, and not an attempt to convey an interest in land. Of course, as incidental to every sale of goods not delivered, the purchaser has the right to go and get the goods purchased.

In Blackburn on Sales, at p. 16, it is recognized that the Sale of Goods Act has made a change in the law in regard to "things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

I think that, under the contract and the statute, the trees became goods before severance because they were to be severed under the contract of sale, and when that is the case the state of facts exists which by virtue of the statute converts what was real estate into goods. The sale being in my view a sale of goods, it was the sale of an ascertained quantity of goods, namely, all the

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