Tuesday, June 11.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

MORISON *v.* A. & D. F. LOCKHART.

Entail—Sale—Heir in Possession—Growing Timber—Transference of Property—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 17, 18, 62 (1) *and* (4).

The heir of entail in possession of an entailed estate entered into a contract of sale, which provided, *inter alia*, that the timber included in the sale should consist of a "clean cut" of part of a certain wood, that the purchaser should be at the sole expense of cutting off root and removing the timber, that the timber should be at the purchaser's risk from fire or other damage after acceptance of the offer, that the price should be payable, half within six days after acceptance of the offer and before commencing operations, and the balance when half the wood was cut, but not later than a certain date. The seller died before the whole of the timber was cut.

Held (1) that under the law of entail until actual severance the timber remained part of the entailed estate; the purchaser's right to cut timber consequently ceased on the death of the seller, and the succeeding heir of entail was entitled to interdict him from cutting thereafter: and (2) that the provisions of the Sale of Goods Act 1893 as to the passing of property at a sale did not apply.

Opinion (*per* Lord Johnston) that growing timber fell within the definition of "goods" in section 62 of the Sale of Goods Act 1893.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71) enacts—Section 17—"(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

Section 18—"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—

"Rule 1.—"Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

"Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof.

"Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done and the buyer has notice thereof. . . ."

Section 62 (1)—". . . 'Goods' include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. . . . (4) Goods are in a 'deliverable state' within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them."

Alexander Edward Forbes Morison, heir of entail in possession of the entailed estate of Bognie, in Aberdeenshire, *pursuer*, raised an action in the Sheriff Court at Aberdeen against A. & D. F. Lockhart, wood merchants, Huntly, *defenders*. The pursuer sought interdict against the defenders by themselves or others cutting, sawing up, or otherwise interfering with the trees that were standing on the estate of Bognie on 24th July 1911, the date of the death of Lieutenant-Colonel Frederick de Lemare Morison, the previous heir of entail, who was the pursuer's father.

On 27th March 1911 the defenders offered £575 for certain wood in accordance with, *inter alia*, the following conditions of sale, and the offer was accepted the same day on behalf of Colonel Morison, the exposer:—

"CONDITIONS OF SALE by private bargain of standing timber on Bognie estate, 1911, the property of Colonel F. de L. Morison of Bognie, hereinafter called 'the exposer.'

"*First.*—The timber embraced in the sale consists of a clean cut of part of Bogcoup wood, in two lots, which contain, as marked:—Lot 1. Situated on the rising ground — Larch, 931; fir, 2800; spruce, 723—total, 4454. Lot 2. Situated on the low ground—Larch, 154; fir, 533; spruce, 1145—total, 1832.

"*Second.*—The above numbers, although believed to be correct, are not guaranteed. A number of half-grown silver firs, &c., growing in the open spaces within No. 1 lot, as pointed out, is to be reserved, and must be left undamaged by the purchaser of the lot.

"*Third.*—The purchaser will be at the sole expense of cutting off root and removing the timber. A stance for a saw-mill will be allowed for each lot if required, but except at such stances no saw-mill shall be placed. The whole of the timber must be cut up and any saw-mill or engine removed from the wood by the 31st day of December 1911, and all cut up and sawn timber must be removed from the estate by the

31st day of January 1912, and in the event of the purchaser failing to remove from the estate the whole or any part of the timber by the above stipulated dates, he shall pay to the exposer the sum of £1 sterling of pactional damages for every day thereafter during which the wood or any part thereof, or any saw-mill, shed, or engine shall remain on the ground. The timber shall be entirely at the purchaser's risk from fire or other damage from the date of the acceptance of his offer.

"*Fourth.*—Should the purchaser prefer to leave all the sneddings of the trees to the exposer, and remove only the boles of the trees, the exposer shall burn and clean the ground of the sneddings at his own expense, but should the purchaser decide to retain possession of the sneddings, branches, and brushwood, or any part thereof, then he must clear the whole of the ground and leave it free of all sneddings, branches, and brushwood, and ready for planting by the 31st day of January 1912; and in the event of his leaving the ground littered with refuse and unfit for planting, the purchaser shall be liable for the cost of clearing the ground, or any part thereof, as shall be vouched by the accounts of those employed in doing so, without the necessity of any other voucher. . . .

"*Seventh.*—The price shall be payable half within six days after acceptance of offer and before commencing operations, and the balance when half of the wood has been cut off root—but not later than the 30th day of June 1911; and the purchaser shall, if required, grant caution for said balance to the satisfaction of the exposer. . . ."

The pursuer pleaded, *inter alia*—"(2) The pursuer not having been a party to or adopted the said contract of sale, and said contract being personal to the said Colonel Morison, the pursuer, as succeeding heir of entail in possession, is not bound by it, and the defender's licence to cut trees on the entailed estate ceased on the death of the said Colonel Morison. (3) The previous heir of entail's right to cut trees upon the said estate of Bognie having ceased at his death, all trees standing on the estate at that date became then the property of the pursuer as succeeding heir of entail, and he is entitled to interdict the defenders from interfering with the same."

The defenders pleaded, *inter alia*—"(1) The action as laid is irrelevant. (2) The defenders having purchased the timber in question from the party entitled to sell the same, and the property therein having passed to defenders at the date of the said contract of sale, the pursuer is not entitled to the interdict craved, and the interim interdict ought to be recalled. (3) The contract of sale, having been entered into by the late Frederick de Lemare Morison in the ordinary course of estate management, is binding on the pursuer as a succeeding heir of entail."

On 6th September 1911 the Sheriff-Substitute (LOUTTIT LAING) granted interim interdict, and on 14th November 1911 he pronounced this interlocutor—"*Finds in fact* (1) that by contract of sale dated 27th March 1911 the late Colonel Frederick de Lemare Morison, then heir of entail in possession of the entailed estate of Bognie, in the parish of Forgue and county of Aberdeen, sold to the defenders a quantity of standing timber comprised in two lots containing 6286 trees at the price of £575; (2) that in terms of the contract the defenders forthwith proceeded to cut said timber; (3) that on 24th July 1911 the said Colonel F. de Lemare Morison died, and was succeeded in said entailed estates by the pursuer; (4) that the defenders continued after said 24th July to cut down said timber; (5) that on 2nd September 1911 they received a letter from the pursuer's agents intimating to them that they must stop cutting said timber, as their right to do so had ceased as at the date of the death of the said Colonel F. de Lemare Morison; (6) that as the defenders refused to accede to this request, the pursuer on 6th September obtained interim interdict against them prohibiting them from cutting, sawing up, or otherwise interfering with the trees that were standing on the said estate of Bognie on 24th July 1911: *Finds in law* (1) that the said contract entered into between the said Colonel F. de Lemare Morison and the defenders, being personal to him, the pursuer, as succeeding heir of entail, is not bound thereby; and (2) that the right of the said Colonel F. de Lemare Morison to cut timber on said estate of Bognie having ceased on his death on 24th July 1911, the whole timber standing on said estate as at that date became the property of the pursuer as the succeeding heir of entail: Therefore repels the first plea-in-law for the defenders: Sustains the pleas-in-law for the pursuer: Declares the interdict already granted perpetual: Finds the pursuer entitled to expenses on the lower scale: Allows an account thereof to be given in, and remits," &c.

Note.—"Although the defenders aver that they have no knowledge of the pursuer's rights, this point was not raised at the discussion, and indeed there is no plea-in-law challenging his title, as the present heir of entail of Bognie, to bring the present proceedings. Further, as regards the facts essential for a decision at this stage, the facts as stated in the foregoing interlocutor may be taken as admitted, as it was upon them that both parties at the debate founded their respective contentions. Upon these facts the legal question arises whether the contract for the sale of timber on the estate of Bognie made by the late Colonel Morison is or is not binding on the pursuer as the succeeding heir of entail of Bognie. On consideration of the authorities cited to me, I think that the legal position of the pursuer as expressed in his second and third pleas-in-law is unchallengable. The right of an heir of an entail to refuse to recognise his predecessor's contracts of a personal nature, and in particular contracts of the nature of that made here, is I think

well settled by authority. I need not refer in detail to the earlier cases relied on by the pursuer's agent, as I think the law on this subject was fully stated in the opinion of Lord Moncreiff in the case of *Paul* v. *Cuthbertson*, 1840, 2 D. 1286, at p. 1307, in which opinion Lord President Hope and Lords Gillies, Mackenzie, Fullerton, Cockburn, and Murray concurred. In that case it was held that growing trees were part of the fee of a land estate, and so standing could only be effectually transferred in property along with the land itself, and consequently that they could not be effectually conveyed by a personal contract of sale followed by alleged symbolical delivery. It is true that the question raised was not one relative to the rights of an heir of entail, but in the course of their opinion the consulted Judges referred to thus expressed themselves with regard to the rights of an heir of entail in connection with the personal contracts of his ancestor—[*The Sheriff-Substitute here quoted Lord Moncreiff's opinion in Paul* v. *Cuthbertson*, *pp.* 1307-8, *from "an heir-substitute of entail is in some sense a singular successor" to "uniformly repelled."*] I refer also to the cases of *Earl of Galloway* v. *Duke of Bedford*, 1902, 4 F. 851 (*per* Lord Kinnear), 39 S.L.R. 692, and *Gillespie* v. *Riddell*, 1908 S.C. 628, 45 S.L.R. 514, where Lord Kinnear said that 'the general rule is established by a great mass of authority, that the personal contracts and obligations of heirs of entail are not binding on their successors in the entailed estate, and this rests on the obvious principle that a succeeding heir who takes his interest in the estate from the entailer alone does not represent a preceding heir from whom he takes nothing whatever.'

"The law as so laid down seems to me not only to support the pursuer's attitude, but also to clearly negative the contention of the defenders that the contract was one which could be regarded as one made in the ordinary course of estate management. It was, however, urged for the defender that on the assumption that the law was as stated *supra*, it must be held to have been altered by sections 17 and 18 of the Sale of Goods Act 1893, which prescribe the rules for ascertaining when the parties to a contract of sale of goods intended the property therein to pass, the argument being that the property in the timber sold by the late Colonel Morison to them, under the contract referred to, passed to them the moment the contract had been signed, *i.e.*, prior to severance of the timber sold. I think this argument is untenable. Trees prior to being cut are not moveable property. Trees are *partes soli*, *i.e.*, parts of the land on which they grow. 'So long as they remain such by growing in the soil, or by being so attached to it that a considerable degree of force would be required for severance, they are heritable, but as soon as they are cut down they become moveable—Rankine on Land Ownership, 1909 ed., p. 119. Now it is perfectly clear that wherever the subject of a sale is heritable it does not fall under the Sale of Goods Act, and accordingly as the growing timber which formed the subject of contract between the defender and the late Colonel Morison was at the date of sale heritable, it follows that the contract itself and the intentions of parties thereunder do not fall to be construed in light of the foregoing Act. In other words, the law as laid down in the authorities referred to is unaltered by that Act, for the simple reason that it in no way affects contracts of sale relative to heritable subjects.

"With regard to the date from which the pursuer is entitled to interdict, I think it clear from the foregoing authorities, and in particular from the case of *Veitch* referred to in a note in 1 Bell's Com., p. 51, where it was held that the right of the purchasers of timber was at an end the very instant of the heir of entail's death, and that they were obliged to account for the wood cut between the moment of his death at London and the time when it was known in Dumfriesshire, where the estate lay, that he (the pursuer) is entitled to ask the defenders to account for the wood cut as from 24th July 1911, the date upon which Colonel Morison died.

"I must therefore make the interdict perpetual, leaving it to the defenders to work out their remedy against the late Colonel Morison's executors. This case, I venture to think, should indicate to contractors and others who are in the habit of purchasing large tracts of growing timber on northern estates the expediency of ascertaining whether the vendor does or does not possess the estate, the wood of which he is selling, under the fetters of entail. As is made plain in the Juridical Styles (6th ed,), vol. ii, p. 1529, the contract of sale in the event of the vendor being a proprietor holding under an entail, can be so framed as to regulate the rights of both the vendor's executors and the purchasers in the event of such a position arising as has occurred in the present case.'

The defenders appealed—The case was argued on the assumption, which the pursuer denied, that the timber was ripe for cutting.

Argued for the defenders—Growing timber fell within the definition of "goods" in section 62 of the Sale of Goods Act 1893 (56 and 57 Vict. cap. 71). The stipulations as to payment of the price showed that it was the intention of parties that the property should pass at the date of making the contract of sale, and the trees were then in a "deliverable state" as defined by section 62 (4), for the buyer was bound to take delivery of them. Accordingly under sections 17 and 18 of the Act the property passed when the contract was made. Whereas formerly in Scotland trees ceased to be *partes soli* only on actual severance, now they ceased to be *partes soli* when the agreement to sell was made. There was no direct authority for this, but it was supported by *Marshall* v. *Green*, 1875, 1 C.P.D. 35; *Smith* v. *Surman*,

1829, 9 B. and Cr. 56; *Morgan* v. *Russell & Sons*, [1909] 1 K.B. 357; Chalmers on Sale of Goods Act (7th ed.) 143. There was not much force in the argument that it was not probable that a change in law would be effected in a definition clause, for the inclusion of "industrial growing crops," as moveables was clearly a change in the law made by the same definition, for formerly they were not moveable until separation—*Chalmers' Trustee* v. *Dick's Trustee*, 1909 S.C. 761, Lord Low at 769, 46 S.L.R. 521. The fact that the estate was entailed did not prevent the property passing, for an heir of entail had as full power as a fee-simple proprietor to contract for the sale of ripe timber, though under the old law this was subject to the resolutive condition that it should be separated before his death—*Paul* v. *Cuthbertson*, July 3, 1840, 2 D. 1286, at pp. 1306 and 1307. The only exception to this power which had crept into the law was regarding timber for the shelter and ornamentation of the mansion-house—*M'Kenzie* v. *M'Kenzie*, March 6, 1824, 2 S. 775 (643); *Boyd* v. *Boyd*, March 2, 1870, 8 Macph. 637; *Bontine* v. *Carrick*, June 16, 1827, 5 S. 811 (750). Reference was also made to *Gillespie* v. *Riddell*, 1909 S.C. (H.L.) 3, 46 S.L.R. 29.

Argued for the pursuer—The Sale of Goods Act 1893 did not apply to growing timber. "Things attached to," &c., referred to fixtures. Growing trees were *partes soli*, and only as such had the heir of entail any right to them at all—Ersk. ii, 2, 4; *M'Kenzie* v. *M'Kenzie* (*cit. sup.*). It was only when actually severed that they became corporeal moveables. The Sale of Goods Act 1893 merely gave a new mode of delivery, assuming there had been an effectual sale. In any case an heir of entail could not free from the fetters of the entail any tree until actually cut, and he could not confer upon a purchaser a higher right than he himself had—*Paul* v. *Cuthbertson* (*cit. sup.*). Thus similarly though a faculty of cutting might transmit to creditors, yet that ceased on the death of the heir of entail, for the right was personal—Bell's Com. (7th ed.), vol. i, p. 51; *Elibank* v. *Renton*, January 15, 1833, 11 S. 238, Lord Gillies at 243. The remedy of the purchaser was under section 12 against the representatives of the seller. Reference was also made to Sandford on Entails, p. 276, and Bell's Com., vol. i, p. 71.

At advising—

LORD JOHNSTON—So far as this case depends upon the law of entail in Scotland, unaffected by the provisions of the Sale of Goods Act 1893, it is covered by the decision of the Whole Court in *Paul* v. *Cuthbertson* (1840, 2 D. 1286), and on this branch of the question I concur, therefore, in the judgment of the Sheriff-Substitute, to which I should have had nothing to add; but I think that the argument addressed to us, founded on the Sale of Goods Act 1893, requires more serious consideration than the Sheriff-Substitute has given to it.

The interpretation clause, section 26, of that Act declares that the term "goods" where occurring in the Act "includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." Growing timber is admittedly attached to and in law forms part of the land, and is therefore "goods" in the sense of the statute, and a contract of sale of growing timber to be cut is therefore a contract of sale of goods, to which the provisions of the Act apply. But I do not think that this fact carries the defenders so far as they assume, for in the first place every contract of sale of goods is not made in the same circumstances, nor is it subject to the same incidents, nor under the statute has it the same effect; and in the second place the Act is solely concerned with regulating the rights of the parties to the contract of sale, and is not intended to affect the rights of third parties. It may regulate the transfer of property under the contract, but it does not affect the seller's rights in the subject of sale and enable him to deal with it in a manner and to an effect which he could not do independently of its provisions. It does not confer on the seller rights in the goods which he had not independently of the Act, nor deprive third parties of rights in them which they have at common law. The contract of sale may be binding between the parties as a contract, and give rise to liabilities *hinc inde*, yet it may be incapable of effect as a sale, for want of inherent power or title in the seller. Indeed, section 61 (2) expressly says—"The rules of common law, . . . save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud . . . *or other invalidating cause*, shall continue to apply to contracts for the sale of goods." A contract for the sale of timber may be a contract for the sale of goods in the sense of the Act, and in many cases perfectly good and effectual according to its terms, but if it comes up against an invalidating cause, such as the law of entail, there is nothing in the Act, still less in a mere interpretation clause, to override that law or to affect the rights of third parties under that law.

When, however, the provisions of the Act are examined, it is, I think, hardly necessary to have recourse to the above saving clause to expiscate the rights of all concerned under this contract. But I think, before considering them, some attention must be given to the terms of the particular contract itself. Growing timber can not be sold so as to transfer the property as it stands, for as long as it is growing it is *pars soli*, and can only be transferred with the land on which it is growing. If it is to be sold, and it is not already severed, it must be agreed to be severed before sale or under the contract of sale. While growing it may be "goods" in the sense of the Act, about which a contract of sale may be made, but it does not follow that a sale is effected, for there is a

distinction, to be afterwards noticed, between a sale and an agreement to sell. Till severed, growing trees are not in a "deliverable state" within the meaning of the Act, for they are not (section 62 (4)) "in such a state that the buyer would, under the contract, be bound to take delivery of them," for physically he could not do so. Hence a proprietor in a proper sale of timber may cut his growing trees and sell the felled timber, or he may sell his growing timber and agree to cut it for delivery, but there may come a time when supervening circumstances, and the law applicable to those circumstances, deprives him of the power to cut, and so to render the timber deliverable. Such is the case, for instance, when a fee-simple proprietor unconditionally divests himself feudally of the land on which the trees are growing, or when an entailed proprietor dies.

But the present case is not one of a proper contract of sale of timber. It is a compound of a contract of sale of growing timber and a licence to cut or sever, and so put it into a "deliverable state." But this makes no difference; the purchaser is merely doing vicariously what a proper contract of sale requires of the seller, and his licence falls as soon as the right of the licensor comes to an end. It cannot extend beyond the latter's own tenure of the land.

There are also details in the contract which must be noticed.

The sale is expressed to be of a "clean cut" of part of Bogcoup Wood. A "clean cut" means a clean sweep of the whole wood, leaving no inferior trees standing.

The purchaser is to be at the whole expense "of cutting off the root" and removing the timber, consequently the "goods" in a "deliverable state" are not "ascertained" till cut, for the quantity in each log more or less depends on the views or methods of the woodman.

Stances for sawmills are to be allowed, and such mills and their refuse must all be removed from the ground by 31st January 1912, under a penalty of £1 per day payable to the seller for delay, whereas the seller ceased to be proprietor by his death on 24th July 1911, six months before the expiry of this licence, and was succeeded by one who does not represent him, and who is under no obligation to give facilities for cutting and dressing timber on his land, irrespective of the question of the property in the timber.

Lastly, the price was to be paid forehand, and the risk of the timber was to be with the purchaser from the date of the contract.

This may have been a good contract of sale between the parties, but it is clear that both the parties to it ignored the fact that the seller was an heir of entail, and might die before the timber was felled, or were unaware of its bearing upon their transaction.

Turning now to the Act, I think it will be found that its provisions quite recognise the possibility of a contract of sale of growing timber, but regard such as an agreement to sell, and not as a sale, at least so long as the timber remains standing or is *pars soli*. In fact there may be a contract of sale of growing timber as "goods" in the sense of the Act, but what is the effect of the contract is a different thing.

Section 1 carefully discriminates between a sale and an agreement to sell. It tells us (sub-section (1)) that a contract of sale is a contract whereby the seller transfers or agrees to transfer the property in goods for a price. The distinction is between "transfers" and "agrees to transfer." It tells us further (sub-section(3)) that where under the contract the property is transferred the contract is a sale, but where the transfer is to be future, or subject to condition first to be fulfilled, the contract is an agreement to sell. The distinction is now between a transfer and a suspended or contingent transfer, but an agreement to sell becomes (sub-section (4)) a sale as soon as time elapses or the condition is fulfilled.

Transfer of property being thus the important point of distinction between a sale and an agreement to sell, the Act proceeds (section 16, *et seq.*) to assist in the ascertainment of the legal fact of transfer as an effect of the contract of sale. Where (section 16) the contract is for the sale of unascertained goods no property is transferred unless and until the goods are ascertained. As has already been pointed out a sale of growing timber may be a sale of goods in the sense of the Act, but until the timber is severed it cannot be said to be ascertained. Till then the property does not pass, and the contract of sale is only an agreement to sell, which has not yet developed into a sale.

But even if, in a contract of sale of growing trees, where "a clean cut" of a whole wood is sold, the subject, contrary to my opinion, could be held to be specific or ascertained, even then I do not think that under the statute the property would be transferred and the contract become a sale until the timber was severed from the ground and therefore deliverable; for the statute (section 17) says that where the contract is for the sale of specific or ascertained goods the property is transferred at the time when the parties to the contract intend it to be transferred, and that in ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. In the present case the terms of the contract and the conduct of the parties undoubtedly lead to the inference that they thought they were transferring the property and effecting a sale from the date of the contract, or, at any rate, on payment of the first half of the price. But I cannot conclude that it was their intention to do what at law, in the circumstanees of the case, it was out of their power to effect. I must assume that they intended the property in the goods to pass and the contract to effect a sale whenever in the carrying out of their contract it should pass at law.

They have made an incautious bargain,

but it is an agreement to sell nevertheless, though not a sale, and under it the parties have their rights and obligations *hinc inde*, for (section 12) it is an implied condition on the part of the seller, in the case of an agreement to sell, that he will have a right to sell the goods at the time when the property is to pass. But with this we are not here concerned. All we are concerned with is that the timber, so far as uncut at the death of the last heir of entail, was not "goods" of which he as the seller was in law the owner; that therefore these goods have been sold by a person who turned out in the circumstances not to be the owner, and who had not the consent of the owner; and consequently that (section 21 (1)) the buyer has acquired no title to them. I therefore think that for these reasons the Sheriff-Substitute's judgment falls to be affirmed.

The LORD PRESIDENT read the opinion of LORD MACKENZIE, who was absent at advising, as follows:—I am of opinion that the Sheriff-Substitute has come to a right conclusion in this case. It does not admit of dispute that prior to the passing of the Sale of Goods Act 1893 the contention of the appellants would have been untenable. The older cases settled that the heir of entail in possession of an estate could not transmit to his executors or to a third party a right to cut timber after his death. The estate passes on death with the trees then growing upon it to the next heir of entail. The heir of entail so succeeding had a right to refuse to recognise his predecessor's contracts of a personal nature. The right of a purchaser was at an end the instant the heir of entail in possession died. These points had all been established before the case of *Paul* v. *Cuthbertson*, 1840, 2 D. 1286. The passages from the opinions in that case quoted in the note of the Sheriff-Substitute bring out clearly the limitations upon the right of an heir of entail in possession.

It is said, however, that the provisions of the Sale of Goods Act altered the existing law. It was argued that the reason why before that Act an heir of entail in possession could not make such a contract as the one now under consideration was because he could not give delivery of the trees sold; that the definition of "goods" in section 62 of the Act is wide enough to cover trees; and that under the earlier sections of the statute the property in the trees passed when the contract was made. Even on the assumption that section 62 is wide enough to cover trees, that would not in my opinion be sufficient to establish the proposition for which the appellants contend. The contract in question purports to confer upon the purchaser a right to cut certain wood growing upon the estate of Bognie. The seller had no power to confer a right to cut which could be exercised after his death. The provisions of the Act do not and cannot enable an heir of entail in possession to invest a purchaser with a better title than he had himself. It is not a question of delivery; the question is one of capacity to contract. The Act, in my opinion, only applies to a case where an effective contract has been made. If no effective contract has been made, then the appellants cannot pray in aid the sections of the Act to validate it. The title of possession ends with the death of the heir of entail, and the Sale of Goods Act cannot extend it further. The appellant's case accordingly, in my opinion, fails at a point antecedent to the consideration of the question whether the provisions of the Sale of Goods Act in regard to delivery and passing of property can be applied to the contract in question here. If, however, it were necessary, I should be prepared to hold that the appellant's case failed here also. No doubt the contract provides (article third) that the timber shall be entirely at the purchaser's risk from fire or other damage from the date of the acceptance of his offer, and (article seventh) that the price shall be payable half within six days after acceptance of the offer and before commencing operations, and the balance when half of the wood has been cut off root, but not later than the 30th day of June 1911. The subject of sale, however, consisted, as stated in article first, of a "clean cut" of certain wood; and (article third) it was provided that the purchaser shall be at the sole expense of cutting off root as well as of removing the timber. These latter provisions show that the subject of the contract of sale was not timber in a deliverable state, but merely the right to cut timber. The sections of the Sale of Goods Act on which the defender relies do not in my opinion apply to such a contract, and I agree with the opinion of Lord Johnston as regards this. Even on the assumption therefore that the trees included in the contruct were ripe for cutting, which is denied by the heir of entail in possession, I am of opinion that the judgment of the Sheriff-Substitute should be affirmed.

LORD KINNEAR—I have come to the same conclusion, and substantially for the same reasons. I think it necessary to attend to the precise form of the action. It is an action brought by an heir of entail in possession of the estate of Bognie to have the defenders interdicted from cutting, sawing up, or otherwise interfering with the trees standing on his estate of Bognie on the 24th of June 1911, and therefore forming part of the soil of his estate. The answer is, that the defenders are entitled to enter upon the pursuer's lands and cut his trees by virtue of a contract of sale between them and the late heir of entail in possession, which they set out in some detail.

The question therefore is whether this contract of sale gives a good title after the death of the heir of entail, who was party to it, to enter upon the lands and cut down and carry off trees forming part of the property and in the possession of the succeeding heir of entail.

The contract is one of some complexity.

It is not in form or effect a contract for the transfer and delivery of growing trees as such. It is a contract for the sale of the wood that may be got out of certain trees when they are cut down, or of the portion of the trees severed from the root and turned into corporeal moveables; and that is combined with a licence or mandate to the purchasers to enter upon the estate and cut and saw the timber which is to be sold to them. The right to enter and cut is subject to some detailed regulations; the purchaser is limited as to the manner in which he is to enter, and he is tied down by specific details as to the particular operations which he is to execute for the purpose of getting the timber, and he is taken bound to maintain the roads by which he enters upon the lands. I think that is not a pure and simple sale of timber by any means, but a contract enabling the purchaser to enter upon the lands and cut down and carry away the timber which may be got from the trees. Now, if the question were whether prior to the Sale of Goods Act such a contract was binding upon a succeeding heir of entail the answer must be that it was not. I do not think that depends upon any view that may be taken as to the limitations of the right of an heir of entail in possession to cut down trees during his own occupation. We have heard a very able argument on that point, but it seems to me to be altogether beside the question. The heir of entail's right is said to rest upon his right as a fiar who is in possession of the land subject only to the fetters of the entail, provided only he commits no contravention of the entail. He is subject to certain limitations, but I do not think it is necessary for the purposes of this case to consider them in reference to his right to cut and sell timber. But the question really depends upon a different principle, which is that although the heir of entail is fiar in so far as he is not fettered, he is fiar only for the limited period of his own life. His power to affect the fee is determined by his death, and the new heir who becomes fiar in his turn is not bound by any contracts bearing to affect the lands which the previous heir may have executed except such leases as may be valid under statute or by the deed of entail. We had occasion to consider the law upon this subject very fully in the recent cases of *Gillespie* v. *Riddell* (1908 S.C. 628) and *Duke of Bedford* v. *Earl of Galloway's Tr.* ([1904] 6 F. 971), and I think that it would be out of the question to examine again the grounds upon which these decisions were based. But I think there are two cases to which I may refer shortly—the cases of *Cathcart* v. *Shaw* (1755, M. 15,399) and *Veitch of Elliock* (Bell's Commentaries, i, 51, note). In both of these cases a contract of sale of growing wood executed by an heir of entail in possession ceased to have any effect or value on the moment of the death of the heir of entail in possession, and that of course rests upon the law which was so clearly stated in *Paul* v. *Cuthbertson* (1840, 2 D. 1286), that while ordinary industrial crops which are sold and consumed from year to year are moveable before separation, trees which are intended to be parts of the ground for generations, and part of the soil, cannot be conveyed so long as they are still growing excepting as part of the land, however effectually they may be sold and delivered when they are cut down and turned into corporeal moveables.

The only question is whether that law is altered by the Sale of Goods Act 1893. I assume, but without expressing any definite opinion upon it myself, that the definition of "goods" in the 62nd section of the Act is wide enough to cover growing trees. Assuming that that be so, I do not think it carries the defenders very far, because it still remains to be considered what is the effect of the enacting clauses of the Act, construing the words in which they are expressed according to the directions of the definition clause. Now I apprehend that the argument for the validity of the contract as against the heir of entail is really this, that by the new law introduced by this Act the growing timber has been conveyed to the purchasers and become their property. It is said that was no part of the property to which the new heir of entail succeeded, because in law, although not in fact, it had been already separated and made over to them before the succession opened. They had no need, therefore, according to the argument, to inquire whether their vendor's personal obligations are transmissible against heirs of entail, because they no longer stand upon contract, but upon the real right given them by the statute. I do not doubt that in the cases to which the clause making a contract equivalent to a transference of property properly applies, the purchaser does obtain a real right in this sense; he acquires a right not only against the seller and his representatives but against all the world. I see great difficulty in the application of that doctrine to contracts for the sale of growing timber; but I do not think it necessary to consider how far it would apply to any other contract than that which is actually before us. The question is, whether the trees still growing on the pursuer's land, in so far as they are covered by the contract in question, are specific goods in a deliverable state so as to have been carried in property to the defenders by force of the statute. I am of opinion, for the reasons stated by Lord Johnston and Lord Mackenzie, that this is not a contract for the immediate sale and transference of the property of specific goods in a state in which at the date of the contract or now they can be said to be deliverable, but, as I have said, a contract which will enable the purchaser, so long as it is available to him, to enter upon the lands, turn the trees into a new form by cutting them down and severing the trunks and limbs from the stumps, and then to carry off the severed timber. In the meantime the trees are not in the possession of the purchasers, but in the owner of the land, and the purchasers cannot enter upon the land and remove them on

any other title than the deceased owner's personal obligation to allow them to do so on certain conditions. Their right therefore rests upon contract, and it is settled law that the contract is not binding on an heir of entail who was not a party to it and does not represent a party. I do not think it material that what remains to be done in order to put the trees into a deliverable shape as timber, and not as growing trees, is by the contract to be done by the purchaser and not by the seller, because the purchaser can only do it by authority of the seller's mandate authorising him to enter upon the lands and carry out the operations for sawing and cutting the timber, and that mandate, as I hold, falls by his death, inasmuch as it has no effect as against his successor, the present heir of entail in possession. I therefore agree in the opinions delivered.

LORD PRESIDENT — I have had more difficulty in this case than your Lordships have had, but in the end I agree with the result at which your Lordships have arrived. But I found my judgment entirely upon the particular contract here, and holding the view I do about it I am able to concur entirely in the last sentence of Lord Mackenzie's judgment and in the exposition which your Lordship has just given.

The Court pronounced this interlocutor—

"Dismiss the appeal, affirm the interlocutors of the Sheriff-Substitute, dated 6th September 1911 and 14th November 1911 respectively, repeat the findings in fact and in law in the last-mentioned interlocutor, and of new declare the interdict already granted perpetual, and decern. . . ."

Counsel for the Pursuer and Respondent —Blackburn, K.C.—D. P. Fleming. Agent —Alexander Ross, S.S.C.

Counsel for the Defenders and Appellants — Constable, K.C. — Skelton. Agents— Duncan & Hartley, W.S.

Wednesday, June 26.

FIRST DIVISION.

(SINGLE BILLS.)

WHYTE, RIDSDALE, & COMPANY, PETITIONERS.

Diligence—Decree—Charge on Court of Session Decree—Service of Charge by Post—Competency.

A charge upon a Court of Session decree cannot be served by post.

The holders of an extract-decree for £55 odd, obtained in the Court of Session against a defender resident in Thurso, presented a petition for warrant to serve the charge by post, or otherwise to grant warrant to a sheriff-officer to serve it.

The Court *granted* the latter alternative.

Observations (*per* Lord President) as to the scarcity of messengers-at-arms.

Whyte, Ridsdale, & Company, importers, London, the holders of a decree obtained in the Court of Session against a defender resident in Thurso, presented a petition to the First Division in which they craved the Court to grant warrant to serve the charge by post in the manner prescribed by the Citation Amendment (Scotland) Act 1882 (45 and 46 Vict. cap. 77), or otherwise to grant warrant to a sheriff-officer to serve it.

The petition stated—"That the petitioners have obtained decree in absence in an action at their instance in the Court of Session against William Murray, cycle agent, Thurso, for payment of £55, 9s. 11d. sterling with expenses, which decree they extracted on the 7th day of June 1912. That at the time of the passing of the Citation Amendment (Scotland) Act 1882 there were sixty-six messengers-at-arms practising in Scotland. There are now only thirty-four, of whom fifteen are in Edinburgh and Glasgow. That there is now no messenger-at-arms in Caithness, the nearest messenger-at-arms being in Inverness, a distance of about 100 miles. That the nearest sheriff-officer is in Wick, which is distant about 20 miles from Thurso.

"By the Court of Session Act 1868, sec. 19, services of summonses and citations of witnesses may be made by sheriff-officers in counties or districts of counties where there is no resident messenger-at-arms, but no provision is made for the execution of diligence in similar circumstances.

"By the Sheriff Courts (Scotland) Act 1907, sec. 49, it is provided that 'Where a charge is necessary upon a decree for payment of money granted in the Small-Debt Court and the place of execution of the charge is more than 12 miles distant from the seat of the Court where such decree was granted, a charge may be given by post in the manner prescribed by the Citation Amendment (Scotland) Act 1882.'"

The prayer of the petition was as follows —"May it therefore please your Lordships to grant warrant to charge the defender the said William Murray upon the said decree by post in the manner prescribed by the Citation Amendment (Scotland) Act 1882; and further, to grant warrant to any sheriff-officer in Caithness on the expiry of said charge to carry into execution all legal diligence competent to follow upon said charge should the same expire without payment having been made; or otherwise to grant warrant to any sheriff-officer in Caithness to charge the said William Murray upon the said extract-decree at the petitioners' instance, and thereafter to carry into execution all legal diligence competent to follow upon said charge should the same expire without payment having been made; to dispense with the reading of the minute book, and to authorise a certified copy of the interlocutor to follow hereon to be used in place of extract; or to do otherwise as to your Lordships shall seem proper."