

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

Boyd, C.]

[June 11.]

WORTS V. WORTS.

Will—Power to make advances—Discretion—Board of executors and trustees—Binding majority.

J. G. W., by his will, provided for the payment of annuities out of his estate for a period of ten years after his death, and then proceeded as follows:—"The residue of the income arising from my said estate to increase and accumulate for the said period of ten years. . . . I empower my trustees to make such advances from time to time to . . . as they (my trustees) in their discretion may deem advisable out of the principal or income of the share of such . . . ;" and by a codicil further provided "that the power to make advances in the eleventh clause of my will shall be limited to income only, and there shall be no power to make any such advance out of the principal."

Held, that the trustees had power to make advances without ascertaining the reason therefor, and that such advances were restricted to the accumulated income of the estate, but that each year's advances were not restricted to the accumulated surplus income of that year.

The will also declared "that any act done . . . by a majority of my trustees shall be deemed . . . the act . . . of all my trustees . . . and shall be binding upon all of them, and upon all persons claiming under this my will . . . and that my said trustees shall form a board, of whom W. H. B. shall be chairman . . . and each of my said trustees shall have one vote, with the exception of W. H. B., who shall have two votes, one equal with the other trustees . . . and another, or casting vote, whenever, by his first vote, the votes . . . are equal in number."

Held, that a majority of the whole board should bind the minority, and all persons claiming under the will.

Lash, Q.C., for the plaintiffs, the executors and trustees.

Robinson, Q.C., Moss, Q.C., and Bain, Q.C., for the beneficiaries.

J. K. Kerr, Q.C., and *Davidson*, for the infants.

Proudfoot, J.]

[June 16.]

PARTLO V. TODD.

Trade Mark and Design Act of 1879—Action to restrain infringement of registered trade mark—Prior user—Definition of trade mark.

In an action to restrain the infringement of a trade mark registered under the Trade Mark and Design Act of 1879,

Held, following *McCall v. Theal*, 28 Gr. 48, that prior user can be given in evidence to invalidate the trade mark.

Held, also, that the words "gold leaf," used in the plaintiff's trade mark distinguished the flour made by the plaintiff from that made by any other person, and as such was a proper subject of a trade mark within the language of section 8 of the Act.

Held, also, on the evidence that "Gold Leaf" was a common brand for patent flour in use before the registration of the plaintiff's trade mark, and that the plaintiff had not the right to endeavour to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined, and that there must be judgment for the defendant with costs.

Cassels, Q.C., and *Jackson*, for the plaintiff.

Moss, Q.C., and *G. W. H. Ball*, for the defendants.

June 16

MILLETTE V. SABOURIN.

Deed subject to condition of maintenance—Place of maintenance—Refusal of covenant to leave premises conveyed—Broken condition—Forfeiture.

H. S. by deed dated November 4th, 1863, granted his farm and some chattels to his son T. S. in consideration of \$300, subject to be defeated and rendered null and void upon the nonperformance of the said party of the second part of the following condition or any part thereof, viz. —The said party of the second part covenants to feed, clothe, support and maintain the said party of the first part . . . during the term of his natural life . . . T. S. having fulfilled the condition during his lifetime, died on October 3th, 1885, leaving a widow and one child. The widow removed from the farm, but offered to take H. S. with her to her father's house and have him provided for there or to allow him to go to her brother's house in the