

And therefore where the plaintiff delivered sheep to the defendant within a year from the making of a verbal contract with the defendant, under which the defendant was to deliver double the number to the plaintiff at the expiration of three years,

*Held*, that the contract was not within the statute.

*W. L. Walsh* for the plaintiff.

*A. H. Hughson* for the defendant.

Div'l Court.]

[March 3.]

ROGERS v. DEVITT.

*Sale of goods—Contract—Payment of price—Right of property—Right of possession—Trespass—Trover—Amendment—Account.*

A chattel mortgage was made to the plaintiffs by a firm of traders, covering wood then on certain premises, and thereafter to be brought thereon. Subsequently the mortgagors made two contracts with the defendant, by which he was to get out wood for them and place it upon the premises at a specified price, fifty per cent. of which was to be paid every month on all wood got out during that month, and the balance in cash upon and according to a measurement to be made by the mortgagors before a specified time. The defendant got out and delivered a quantity of wood upon the premises, and, before the time specified, a measurement was made by himself and the respective agents of the plaintiffs and the mortgagors, and the wood measured was then marked with the plaintiffs' mark. On the following day he wrote to the mortgagors asking payment of the balance due him according to the measurement. The mortgagors, three weeks later, made an assignment for the benefit of creditors, and, just before they did so, gave the defendant a written acknowledgment of a debt due him on account of the wood, "which it is agreed and understood he is to hold the wood measured by us for until it is paid for." Subsequently the defendant took away portions of the wood so marked and measured, and the plaintiffs brought this action, alleging a wrongful seizure and conversion of the wood, and claiming the value of it.

*Held*, that there was an appropriation to the contract by the assent of the defendant and mortgagors, of the wood measured and marked, the property in which thereupon became vested in the mortgagors, and through them in the plaintiffs; but the vesting of the property did not vest the right of possession without payment of the price, and therefore the plaintiffs could not maintain trespass or trover for the wood taken; but were entitled, upon amendment of the pleadings, to a decree declaring them entitled to the property in the wood, and to possession upon payment of the amount due to the defendant, and to make him account for so much of the wood as was not received by them.

*Shepley, Q.C.*, for the plaintiffs.

*J. T. Sproule* for the defendant.