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away and a cigarette were sold automatically at 6 in the evening in his absence, it would be trading.

On the whole I see all sorts of inconsistencies in introducing judicially a test the legislature has not thought fit to insert, and I see also a great danger of breaking down a law that by common Australian sentiment has been enacted for general rest on Sunday. And it seems to me that with equal propriety the same idea could be applied to all Sunday liquor laws. I adhere to the plain and simple words of the text giving them their ordinary meaning, the meaning attached to them over thirty ago by Sir *Frederick Darley*, *Windeyer* J. and *Owen* J., and since ratified, as I think, by Parliament.

In my opinion the appeal should be allowed.

Appeal dismissed with costs.

Solicitor, for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors, for the respondent, *Mark Mitchell & Forsyth.*

B. L.

Dist *Xebec Pty Ltd (in liq) v Enthe Pty Ltd* 18 ATR 893

Cons *Lean v Comrs of the Rural & Industries Bank Ltd* (1991) 5 ACSR 455

[HIGH COURT OF AUSTRALIA.]

LOXTON . . . . . APPELLANT;
DEFENDANT,

AND

MOIR . . . . . RESPONDENT.
PLAINTIFF,

H. C. OF A. 1914.

SYDNEY, *May* 18, 19, 20; *Aug.* 6.

Griffith C.J., Isaacs, Gavan Duffy and Rich JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Trustee—Appointment of new trustee—Vesting of property in new trustee—Legal choses in action—Right of action on guarantee—Trustee Act 1898 (*N.S.W.*) (*No.* 4 *of* 1898), *sec.* 6.

Practice—Amendment—Action brought by wrong plaintiff—Substitution of another person as plaintiff—Application to High Court on appeal—Common Law Procedure Act 1899 (*N.S. W.*) (*No.* 21 *of* 1899), *secs.* 36, 37.

Sec. 6 of the *Trustee Act* 1898 (N.S.W.) provides, by sub-sec. 1, that whenever any trustee dies, or desires to be discharged from, or refuses, or becomes unfit or incapable to act in the trusts or powers in him reposed, a new trustee may by instrument in writing be appointed; and, by sub-sec. 2, that "so often as any new trustee is so appointed as aforesaid all the property (if any) which for the time being is vested in the surviving or continuing trustee, or in the heir, executors, or administrators of any trustee, or in the Chief Justice or senior Puisne Judge for the time being by virtue of the *Probate Act of* 1890, or any Act amending or consolidating the same, or in the trustee so desiring to be discharged, or refusing, or becoming unfit or incapable to act as aforesaid, and is subject to the trust in respect of which the new trustee is appointed, shall, by virtue of such instrument and without other assurance in the law, become and be conveyed, assigned, and transferred so that the same shall thereupon become and be legally and effectually vested in such new trustee, either solely or jointly with the surviving or continuing trustee as the case may require."

Held, by *Griffith* C.J. and *Isaacs* and *Rich* JJ. (*Gavan Duffy* J. doubting), that by virtue of that section a legal chose in action which is part of the trust property, vests as by operation of law in the new trustee either solely or jointly with the continuing trustee as the case may require.

Therefore, where the payment of interest on a mortgage debt due to trustees was secured by a deed of guarantee, and new trustees were appointed in their stead under sec. 6 of the *Trustee Act* 1898,

Held, that the right of action upon the guarantee was vested in the new trustees.

Decision of the Supreme Court: *Moir* v. *Loxton*, 13 S.R. (N.S.W.), 143, reversed.

The Supreme Court gave judgment for the plaintiff on a demurrer to the declaration, the ground of the demurrer being that he was not the proper person to bring the action. On appeal, the High Court having decided that the plaintiff was not the proper person to bring the action, and being about to allow the appeal and to give judgment for the defendant on the demurrer, an application was made to the High Court to substitute as plaintiffs the persons who could properly have brought the action.

Held, that the application should be refused.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by James Moir against Edward James Loxton, in which the declaration stated

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that the plaintiff sued the defendant, "For that on 30th June 1894 Lucinda Jane Loxton was duly registered under the provisions of the *Real Property Act* 28 Vict. No. 9 now consolidated and known as the *Real Property Act* 1900 as the proprietor of a life estate in certain lands being lands comprised in" certain "certificates of title . . . with power to the said L. J. Loxton to appoint the fee simple of the said lands by will or any other instrument under the *Real Property Act* aforesaid which said power of appointment was duly entered in the . . . register and endorsed upon the said certificates of title. And upon the said 30th June 1894 the said L. J. Loxton by memorandum of mortgage (wherein she was described as mortgagor) duly made and on 2nd July 1894 duly registered under the provisions of the said Act in consideration of the sum of £7,000 lent to her by Robert Maddrell and the plaintiff out of moneys belonging to them on a joint account both at law and equity and held by the said R. Maddrell and the plaintiff as trustees upon certain trusts not material to be herein mentioned appointed by way of mortgage to R. Maddrell and the plaintiff (therein described as mortgagees) all her estate and interest as aforesaid in the said lands and thereby covenanted with the said R. Maddrell and the plaintiff to pay to them the said sum of £7,000 on 1st July 1899 and interest on the said sum at the rate of £6 10s. per centum per annum by equal quarterly payments on the first day of the months of October January April and July in each and every year until the said sum should be fully paid and satisfied. And upon the said 30th June 1894 the defendant by deed after reciting the said memorandum of mortgage and that the said R. Maddrell and the plaintiff had agreed to lend the said L. J. Loxton the said sum of £7,000 on condition that the defendant entered into the guarantee thereinafter contained which he agreed to do in pursuance of the said agreement and in consideration of the advance made by the said R. Maddrell and the plaintiff to the said L. J. Loxton guaranteed the due and punctual payment to the said R. Maddrell and the plaintiff of the interest moneys secured by the said memorandum of mortgage on the days and at the rate and in the manner therein provided and the defendant covenanted with the said R. Maddrell and the plaintiff their heirs executors

administrators and assigns that in the event of the said L. J. Loxton making default in payment of any of the interest moneys secured by the said memorandum of mortgage on the days and in the manner therein provided for payment thereof he should and would pay the same on demand to the said R. Maddrell and the plaintiff or the survivor of them or the heirs executors or administrators of such survivor or his assigns and the said L. J. Loxton died upon 21st July 1898. And on 21st July 1900 the said R. Maddrell died and notice of his death was duly noted and entered on the said register and thereupon the plaintiff as surviving mortgagee became registered under the said Act as sole proprietor of the said mortgage. And thereafter on or before 24th October 1900 one Robert John Coghill Maddrell was duly appointed trustee of the said moneys secured by the said mortgage as aforesaid in place of the said R. Maddrell. And afterwards the plaintiff by memorandum of transfer of mortgage dated 24th October 1900 operating under and duly registered on 7th November 1900 in accordance with the said *Real Property Act* transferred to the plaintiff and to the said R. J. C. Maddrell all the estate and interest of which he was registered proprietor together with all his rights and powers in respect thereof as comprised and set forth in the said memorandum of mortgage which said transfer was duly noted and endorsed upon the said certificates of title. And on 24th October 1900 the plaintiff by deed after reciting that the plaintiff and the said R. J. C. Maddrell had become entitled to the benefit of the said guarantee and of the covenants therein contained assigned to the plaintiff and the said R. J. C. Maddrell and their assigns the said guarantee and the full benefit and advantage of the covenants lastly before mentioned and appointed them his attorneys in his name to sue for and recover and receive and to give effectual receipts and discharges for all moneys to become due then and thereafter under the said guarantee. And thereafter on or before 23rd January 1909 the plaintiff retired from the said trust and one Percy Douglas was duly appointed trustee in his place and afterwards again the plaintiff and the said R. J. C. Maddrell by memorandum of transfer of mortgage dated 23rd January 1909 operating under and duly registered on 27th January 1909 in accordance with

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the provisions of the said Act transferred to the said R. J. C. Maddrell and the said P. Douglas all the estate and interest of which they were registered proprietors together with all their rights and powers in respect thereof as comprised and set forth in the said memorandum of mortgage which said lastly mentioned transfer of mortgage was duly noted and endorsed on the said certificates of title and the said R. J. C. Maddrell and P. Douglas still continue to be registered proprietors of the said mortgage and on the said 23rd January 1909 the plaintiff and the said R. J. C. Maddrell by deed after reciting that the said R. J. C. Maddrell and P. Douglas had become entitled to the benefit of the said guarantee and of the covenants therein contained assigned to the said R. J. C. Maddrell and P. Douglas the said guarantee and the full benefit and advantage of the said covenants therein contained and appointed the said R. J. C. Maddrell and P. Douglas their attorneys in the names of the plaintiff and the said R. J. C. Maddrell to sue for recover and receive and to give effectual receipts and discharges for all moneys then and thereafter to become due under the said guarantee. And on and since 1st April 1897 and up to and including 10th March 1910 large sums of money became due and payable by the said L. J. Loxton and by her heirs executors and administrators and assigns in respect of the said interest moneys secured by the said memorandum of mortgage as aforesaid. And thereafter the plaintiff duly in accordance with the said guarantee made demand upon the defendant for the payment to the plaintiff of the said interest moneys and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to maintain this action for the breaches hereinafter mentioned yet the defendant did not nor did the said L. J. Loxton nor did her heirs executors administrators or assigns pay or satisfy the said interest moneys or any part thereof to the plaintiff or to the said R. Maddrell or to the said R. J. C. Maddrell or to the said P. Douglas. And the said interest moneys remain wholly due and unpaid. And the plaintiff claims £5,887 5s. 3d."

The defendant demurred on the grounds :—

"1. That the declaration discloses no cause of action.

"2. That the declaration discloses that the plaintiff is not entitled to sue for recover or receive or give effectual receipts or discharges for moneys due under the said mortgage or under the said guarantee.

"3. That the declaration does not allege that the defendant at any time had any notice of the trusts therein mentioned and the facts alleged in the declaration show that the guarantee was personal to the plaintiff and Robert Maddrell and did not enure for the benefit of their assigns.

"4. That the plaintiff by reason of the divers transactions and assignments set out in the declaration had dispossessed himself of the right to sue upon the said guarantee.

"5. That no proceedings can be taken by the plaintiff suing alone to recover moneys due or owing under the said mortgage or guarantee but such proceedings must be brought in the name of the plaintiff and Robert John Coghill Maddrell who are the only persons entitled to give a discharge."

There were subsequent pleadings and demurrers, but they are not material to this report.

The Full Court having given judgment for the plaintiff on the demurrer to the declaration (*Moir* v. *Loxton* (1)), the defendant now, by leave, appealed to the High Court.

Knox K.C. (with him *E. M. Mitchell* and *Clive Teece*), for the appellant. Under the *Trustee Act* 1898 on each appointment of a new trustee the right to sue upon the guarantee passed to the continuing and the new trustees. Sec. 6 was intended to and did create succession among trustees. The words "all the property" in sec. 6 (2) include legal choses in action. [Counsel referred to *Trustee Act* 1852 (16 Vict. No. 19), secs. 32, 33; *Trust Property Act of* 1862 (26 Vict. No. 12), sec. 63; *Trust Property Act Amendment Act of* 1893 (56 Vict. No. 27), secs. 1, 2; *Trustee Act Amendment Act* 1902 (No. 98), sec. 5.] On the registration of the transfer of a mortgage the mortgage debt and the whole benefit of the mortgage security, by virtue of sec. 52 of the *Real Property Act* 1900, pass to the transferees both in law and in equity, and there is a complete novation of the mortgage debt.

(1) 13 S.R. (N.S.W.), 143.

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That being so, the guarantee is at an end. [Counsel also referred to *Read* v. *Brown* (1); *In re Hallett & Co.*; *Ex parte Cocks, Biddulph & Co.* (2); *Wheatley* v. *Bastow* (3); *Stamford, Spalding and Boston Banking Co.* v. *Ball* (4); *Miller* v. *Stewart* (5); *Halsbury's Laws of England*, vol. xv., pp. 479 *et seq.*]

Ralston K.C. (with him *Maughan* and *Harry Stephen*), for the respondent. Sec. 6 of the *Trustee Act* 1898 is purely a conveyancing provision. It does no more than might have been done by the parties themselves before the Act was passed. The conveyance is not by virtue of the Act, but by virtue of the appointment of the new trustee. The section was merely intended to avoid the expense of transactions *inter partes*. In construing the section reference must be had to the meaning attached to the words used in the Acts from which the section was taken, viz., the *Trust Property Act of* 1862, sec. 63, and *Lord Cranworth's Act* (23 & 24 Vict. c. 145). [He also referred to *Conveyancing and Law of Property Act* 1881, sec. 34; *Trustee Act* 1850 (13 & 14 Vict. c. 60), secs. 27, 32, 33; *Trustee Act* 1853 (17 Vict. No. 4), sec. 2; *Wright* v. *Fairfield* (6); *Gibson* v. *Carruthers* (7); *Bailey* v. *Thurston & Co. Ltd.* (8); *Jeffery* v. *M'Taggart* (9); *Beckham* v. *Drake* (10); *Dufaur* v. *Professional Life Assurance Co.* (11); *Commissioners of Inland Revenue* v. *Angus* (12).]

As to the point in reference to sec. 52 of the *Real Property Act* 1900 counsel was stopped.

Knox K.C., in reply.

Cur. adv. vult.

August 6.

GRIFFITH C.J. read the following judgment:—This is an action brought by the respondent against the appellant upon a deed of guarantee dated 30th June 1894, and made between the appellant of the one part and the respondent and one Maddrell of the other part, whereby the appellant guaranteed the payment of interest

(1) 22 Q.B.D., 128.
(2) (1894) 2 Q.B., 256.
(3) 7 De G. M. & G., 261.
(4) 4 De G. F. & J., 310.
(5) 9 Wheat., 680.
(6) 2 B. & Ad., 727, at p. 729.
(7) 8 M. & W., 321.
(8) (1903) 1 K.B., 137, at p. 144.
(9) 6 M. & S., 126.
(10) 2 H.L.C., 579.
(11) 25 Beav., 599.
(12) 23 Q.B.D., 579.

upon a mortgage of even date of land under the *Real Property Act* made by the appellant's mother in favour of Moir and Maddrell. The memorandum of mortgage set forth that, in consideration of the sum of £7,000, lent to the mortgagor by the mortgagees out of moneys belonging to them on a joint account both at law and in equity and held by them as trustees upon trusts not material to be mentioned, the mortgagor appointed the lands to them, and covenanted to repay the principal on 1st July 1899 and to pay interest at the rate of £6 10s. per cent. (reducible to £5 10s. on punctual payment) quarterly until repayment. The declaration, after setting out these facts, goes on to state the death of Robert Maddrell and the appointment of R. J. C. Maddrell as trustee of the mortgage money in his place, the transfer of the mortgage to the new trustees and registration of the transfer, the retirement of the respondent from the office of trustee and the appointment of Percy Douglas in his place, the transfer of the mortgage to the new trustees and registration of the transfer, and two several assignments of the guarantee and the benefit of it, first, from the respondent to himself and R. J. C. Maddrell, and, second, from himself and Maddrell to the latter and Douglas, by which the assignees were appointed attorneys for the plaintiff, and for the plaintiff and Maddrell, respectively, to sue for the money due and to become due under the guarantee.

The appellant demurred to the declaration on the ground that in the events which have happened the right to sue on the guarantee is no longer vested in the respondent but in the new trustees. It is common ground that the right of action is part of the trust estate.

The question depends entirely upon the construction of sec. 6, par. 2, of the *Trustee Act* 1898, which provides that "So often as any new trustee is so appointed as aforesaid all the property (if any) which for the time being is vested in the surviving or continuing trustee, or in the heir, executors, or administrators of any trustee, or in the Chief Justice or senior Puisne Judge for the time being by virtue of the *Probate Act of* 1890 or any Act amending or consolidating the same, or in the trustee so desiring to be discharged, or refusing, or becoming

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unfit or incapable to act as aforesaid, and is subject to the trust in respect of which the new trustee is appointed, shall, by virtue of such instrument and without other assurance in the law, become and be conveyed, assigned, and transferred so that the same shall thereupon become and be legally and effectually vested in such new trustee, either solely or jointly with the surviving or continuing trustee as the case may require."

The general law of New South Wales still recognizes the distinction between legal and equitable choses in action, and will not allow a legal chose in action to be assigned by any instrument *inter vivos*, or otherwise than by operation of law. The learned Judges of the Supreme Court were of opinion that sec. 6 (2) only operates upon such kinds of property as by the law of New South Wales are capable of being conveyed, assigned, or transferred by instrument *inter vivos*, and that as a legal chose in action cannot be so assigned the right of suit still remains in the respondent as the survivor of the original covenantees. The appellant contends that the section effects a transfer by operation of law consequent upon the appointment of new trustees.

The learned Judges based their conclusion upon a comparison of previous legislation in the United Kingdom and New South Wales.

The *Trustee Act* 1898 is a consolidating Act. Sec. 6 is in the main a transcript of sec. 63 of an Act of 1862, the *Trust Property Act*, which in itself was an adaptation, but with material changes, of sec. 27 of the Act 23 & 24 Vict. c. 145, known as *Lord Cranworth's Act*, which directed that, in the cases to which it was applicable, upon the appointment of new trustees all the trust property " shall with all convenient speed be conveyed assigned and transferred so that the same may be legally and effectually vested in such new trustee or trustees either solely or jointly with the surviving or continuing trustee or trustees as the case may require," that is to say, that the transfer was to be effected by the ordinary appropriate instruments of assurance to be executed by the persons in whom the property was vested. The words " so that the same may be legally and equitably vested " were therefore, in that context, directory, and meant " in such manner that." It might well follow, and probably did follow, that

any trust property which by the law of England could not be assigned by instrument *inter vivos* was not within the provisions of the enactment.

But the New South Wales legislature in 1862 did not follow the language of the English Act. Instead of directing that "the property shall be conveyed," *i.e.*, by the legal owners, they said that all trust property "shall by virtue of such instrument and without other assurance in the law become and be conveyed assigned and transferred so that the same shall thereupon become and be legally and effectually vested in such new trustee or trustees." The learned Judges thought that the only effect of the change in language was to effectuate by a single instrument what had previously required two, that is to say, that the instrument of appointment of new trustees was to operate also as a conveyance or assignment or transfer executed by the legal owners, and could only operate upon property capable of being so dealt with, which construction, they thought, was emphasized by the words "without other assurance in the law." With all respect, I do not think that this view gives any effect to the important word "become," twice repeated, or to the change of the word "may" into "shall" in the second limb of the sentence.

It is an interesting, though perhaps not a material, fact that the Attorney-General and leader of the Legislative Council of New South Wales of that day was a distinguished equity lawyer and an accomplished Parliamentary draftsman, who afterwards became Mr. Justice *Hargrave*. Whoever framed the new provision, it is not likely that the word "become" was introduced and the word "shall" substituted for "may" without purpose. In my opinion the changed language was apt to express a change of idea. The words "so that" followed by the word "may" in *Lord Cranworth's Act* were directory words referring to the manner in which the act directed to be done was to be done, but the same words followed by the words "shall become" are in form words of enactment denoting an effect which is to follow by operation of law from the event on which they are to depend. The words "all trust property" are not in form limited to property capable of passing by conveyance or assignment, and it is not easy to find any ground for implying such a limitation. It

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is notorious that in those days, as now, settlements were often made of sums of money secured merely by covenant, as for instance moneys payable under policies of life assurance.

It may be, however, that if the question had been then raised in New South Wales, where the notion of a legal assignment of a chose in action was abhorrent to the mind of every common law student, this construction would not have been adopted.

But the Act which we are now called upon to construe is the consolidating Act of 1898. Our duty is to construe that Act as we find it. Between 1862 and 1898 other Acts had been passed which are also incorporated in the consolidation.

The Act 56 Vict. No. 27 (passed in 1893) by sec. 1 supplied an apparently accidental omission in sec. 63 of the Act of 1862, but sec. 2 contained a general provision that when a new trustee is appointed "all the right title and interest" of the old trustee in the trust property "shall be deemed to pass" to the new one. I do not see any reason for cutting down the word "all" in this enactment, the apparent object of which was to remove doubts whether legal choses in action were included.

By the *Probate Act of* 1890, amended by an Act of 1892, it was provided that on the death of any person, whether dying testate or intestate, all his real and personal estate should be deemed to be vested in the Chief Justice in the same manner as personal estate vested in the Ordinary in England. These provisions now stand as sec. 61 of the (Consolidating) *Wills, Probate and Administration Act* 1898.

In 1897 an Act was passed (No. 38) providing that when a new trustee is appointed, either by act of parties or under Statute, all the property vested in the Chief Justice by virtue of the *Probate Act of* 1890 and subject to the trust should, by virtue of the order or instrument appointing the new trustees and without other assurance in the law, become and be legally and effectually vested in the new trustee solely or jointly as the case may require.

It is impossible to doubt that under the Act of 1890 choses in action which were trust property and which vested in the Chief Justice upon the death of the trustee vested in him as fully and completely as in the administrator when appointed. It is equally

impossible to doubt that under the Act of 1897 the vesting in the new trustee was coextensive, as to both subject matter and legal effect, with the divesting from the Chief Justice. Otherwise the Chief Justice would in such cases have remained the only person in whose name the right to get in a legal chose in action could be asserted in an action at law.

Sec. 6 of the *Trustee Act* 1898, which re-enacts the provisions of sec. 63 of the Act of 1862, also extends them so as expressly to include the case of trust property vested in the Chief Justice, and prescribes the same consequences with regard to such property as with regard to other trust property.

The provisions of sec. 2 of the Act of 1893 were not explicitly repeated in the Act of 1898, it being apparently thought that the words of sec. 6 were sufficient to express the same idea. It is highly improbable that the legislature intended to revert to the supposed rule which, if it existed, had been abrogated by the Act of 1893.

It is again, in my opinion, impossible to doubt that the words "shall become and be conveyed," &c., "so that the same shall thereupon become and be legally and effectually vested" have an identical meaning as applied to the various subjects of which they are the common predicate. With respect to trust property vested in the Chief Justice, we know their meaning so far as it can be gathered from the words themselves and from the previous law. It follows that, whatever meaning might have been given to these words in the Act of 1862, their effect in the Act of 1898 is to vest all the trust property, whether legal or equitable, in the new trustee.

For some reason (possibly inadvertence) the provisions of the Act of 1897 are also expressly repeated in the Act of 1898 (sec. 67). The words as to vesting in the new trustee are identical with those used in sec. 6 (2). It is again impossible to suppose that they bear one meaning in sec. 67 (which is free from doubt) and another in sec. 6.

In my judgment, therefore, whatever may have been the proper construction of sec. 63 of the Act of 1862 when passed, the words, repeated in the Act of 1898, are to be construed in their new context, and, so construed, are effectual to vest a legal

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chose in action, being trust property, in new trustees upon their appointment.

It follows that the plaintiff is not entitled to maintain this action, and that the demurrer to the declaration should be allowed. I express no opinion upon the demurrers to the pleas.

ISAACS J. read the following judgment:—

1.—*The Trustee Act* 1898.—The first question is whether, on the appointment of A. as a new trustee in the place of B. who prior to the appointment was or had been the trustee, the right of action in respect of a guarantee still resides in B. if alive, or, if dead, in his personal representatives.

I emphasize this way of stating the question, because unless Moir has that right the action must fail. It may be that in respect to some classes of choses in action certain preliminary steps required by any special Statute, such as registration under the *Real Property Act* or the Companies Acts, may be formal evidentiary requirements to the complete right to sue. But in respect of a guarantee debt no such formality is necessary, and so the question is simply whether the appointment works, *by virtue of the Statute itself*, a complete divestiture of the debt.

The question turns on the effect of sec. 6 of the Act of 1898. The Supreme Court considered that the construction of *Lord Cranworth's Act*, perhaps with the addition of the English Act of 1881, necessarily determined that of sec. 6 of the Act of 1898.

Lord Cranworth's Act followed upon earlier legislation (6 Geo. IV. c. 74, and 11 Geo. IV. & 1 Wm. IV. c. 60), which simplified curial procedure, but left matters in the hands of the Court.

The Act of 1850, however, still further simplified the appointment of new trustees and the vesting of property by enabling certain persons to effect these results in certain cases without curial intervention at all. But at this point we must notice a vital difference between *Lord Cranworth's Act* and the local Statute. It is this: *Lord Cranworth's Act*, by sec. 27, directs that after the due appointment of the new trustee *certain persons* being persons in whom the trust property is then vested, and no others, shall execute *actual instruments* of conveyance, assignment and transfer, so that the trust property vested in them

"may be legally and effectually vested in such new trustee," that is, so that all that can be done by such instruments as are described and known to the law by name and effect shall be done in the future. It is like a decree to execute a transfer. The decree does not pass the title; the transfer does, and only to the extent to which such a document by law extraneous to the section gives title.

It is important to notice that almost the very words of the operative portion of Lord Cranworth's provisions were in use in trust deeds. For instance, in *In re Roche* (1), decided in 1842, we find these words: "conveyed, assigned, transferred, and assured respectively, according to the nature and tenure thereof, in such manner that the same might be legally and effectually vested in the newly appointed trustee," &c.

But though a private individual might use the words large enough to embrace all trust property, including rights of action, in his authority, the law itself did not permit choses in action to be so transferred. And as *Lord Cranworth's Act* did not profess to do more than enable individuals to execute such common law instruments as the law itself permitted, it is fair to assume that the precise efficacy attributable to those instruments by the law was still to continue: See *Price* v. *Dewhurst* (2).

Sec. 34 of the English Act of 1881 (see now sec. 12 of the Act of 1893) stands in contrast with the Act of 1850 in this respect. It strikes out a new line. If the deed of appointment of a new trustee itself contains a declaration that any trust land, or any chattel subject to the trust, or the right to recover and receive any debt or other thing in action so subject, shall vest in the trustees, then that declaration shall, "without any conveyance or assignment, operate to *vest* in those persons, as joint tenants, and for the purposes of the trust, that estate, interest or right."

The departure is significant: common law documents of title and their recognized effect are abandoned; instead, a new statutory result that could not be reached by the former method is created, and by this means no interference with the established force of old methods takes place.

(1) 2 Dr. & War., 287, at p. 288. (2) 8 Sim., 617, at p. 619.

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This course had been adopted in New South Wales in the Act of 1862, sec. 63. That section took up the instrument of appointment, and for the purpose of dealing effectively and without any necessity for curial process with the case of a trustee who had died, or desired to be entirely discharged, or refused or became unfit or incapable to act, the enactment bestowed upon that instrument a force and efficacy theretofore novel and unheard of in relation to such an instrument. It says that "by virtue of such instrument and without other assurance in the law" the whole of the trust property "shall become and be conveyed assigned and transferred so that the same *shall* thereupon become and be legally and effectually vested in such new trustee."

It is contended, and so the Supreme Court has held, that that provision went no further than *Lord Cranworth's Act*. It is not an accurate method of interpretation, first to assume the intention of Parliament being to go no further than the English Parliament went, and then to proceed upon the interpretation of the English Act.

The two Acts are not identical; they are so far from identical that, as already explained, a totally different principle has been adopted.

The legislature having declared that the trust property, which undoubtedly and admittedly includes the chose in action here, shall by virtue of the instrument of appointment "become and be" assigned and transferred so as to be legally and effectually vested in the new trustee, the necessary result, in my opinion, is that the vesting takes place. The language, though the same as was customarily used by private individuals, has a force that private dispositions could not have. The reason for refusing that force to private dispositions does not exist when Parliament itself speaks.

I cannot see how the natural meaning of the words used by the commanding authority of the legislature can be cut down by any hypothesis of limited effect. That limitation can only be reached by introducing by implication words that are not expressed, such as "to the same extent only as if the instrument of appointment were a deed of assignment executed by the retiring trustee." There are no such words, and a Court has no warrant

to insert them. Such words would materially affect the matter. See, for instance, *Re Boyce* (1).

The Act of 1897 (No. 38), sec. 1, incorporated in the later Act, I pass by as a separate enactment.

It is incorporated in the Act of 1898 twice: first, as part of sec. 6—which otherwise contains sec. 63 of the Act of 1862 and secs. 1 and 2 of the Act of 1893; next, in sec. 67, where it extends to appointments of new trustees, otherwise than in the manner set out in sec. 6. But sec. 6 and sec. 67 are both open to the same observations as the original sec. 63, in respect of the new statutory force to be given to a document otherwise incapable of vesting any property.

The reference to the Chief Justice in both sec. 6 and sec. 67 seems to make quite conclusive the intention of the legislature that a complete divestiture on the one side and a complete investiture on the other shall take place.

Various sections in the Act were pointed to by the respondent where express reference is made to the power of the Court to vest the power to sue. But that is a power which may be exercised as a single and separate power; and this point must be particularly noticed, for neglect to observe it appears to me to have led to considerable stress being placed upon an unsound argument. Part II. enabling the Court to appoint new trustees does not use any language declaring that the mere order of appointment is to vest the property. That is left for the consideration of the Court to work out in detail as and when it thinks proper (*cf. In re Manning's Trusts* (2)). On the contrary sec. 28 (1) contemplates documents of title being actually executed. Sub-sec. 2 confers on the trustee appointed by the Court only the same rights and powers as if appointed by a decree in a suit.

Then comes the Act of 1902 (No. 98). Sec. 5 applies to the case of one trustee out of three retiring. A deed may be executed discharging him without appointing any new trustee in his place. Again, "by virtue of the execution and registration of the said deed and without other assurance in the law" the retiring trustee is divested, and all the trust property, both real

(1) 4 De G. J. & S., 205, at p. 210. (2) Kay, App., xxviii.

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and personal, is "conveyed, assigned, and transferred to" and "legally vested in" the continuing trustees alone. It adds, "who shall be entitled to sue for and recover and to call for a transfer to them of all debts and choses in action subject to the trusts." It is suggested that in that case alone it is the intention of Parliament to permit the new trustee to sue. But I think the insertion of the power to sue was probably to obviate difficulties as to certain technicalities in such cases as company shares, insurance policies and other such cases not excepted by the proviso. The English Act of 1893, sec. 11, from which this section was taken with important modifications, provided by sub-sec. 2 for common law assurances, and in accordance with the long established principle of the New South Wales legislature the deed of change of trusteeship was given statutory efficacy.

The proviso to that section relating to property under the Mining Acts, Crown Lands Acts, and Real Property Acts, requiring actual transfers to be executed and registered, shows how wide the words of vesting are in previous Acts.

No reason can be suggested for making an exceptional case of the retirement of one trustee out of three. It cannot be denied that the constant effort of the legislature has been towards increasing simplicity in this connection. But the argument of the respondent leads to extraordinary perplexities. Thus it maintains the following results:—A., B. and C. are original trustees and the legal owners subject to the trust of land, chattels and debts. A. retires and B. and C. remain, no third trustee being appointed. By force of sec. 5 of the Act of 1902 B. and C. are clothed with property and the right to sue, A. being entirely discharged. I leave out the proviso. But if only D. were appointed in place of A., the contention is that sec. 5 of the Act of 1902 does not apply, but sec. 6 of the Act of 1898 alone, with the result that A. is still invested with the right of action, say, for damages to trust land or for the mortgage debt under the general law, and that D. is not so invested although he is a joint owner of all the trust property, or joint legal owner of the mortgaged property, and A. is not. I am unable to accept this view.

In *Brunton* v. *Commissioner of Stamp Duties* (1) Lord *Parker*, speaking for the Judicial Committee, said:—"Where in a Statute words are used capable of more than one construction the results which would follow the adoption of any particular construction are not without materiality in determining what construction ought to prevail."

The legislature has been steadily emerging from these difficulties, and has used the words not only capable of clearing them away but in their natural signification eminently suitable for the purpose. In my opinion, the "commanding principle" stated by Lord *Shaw* in *Butler* v. *Fife Coal Co.* (2) of giving full effect to the words for their obvious purpose should be applied.

Moir, in my opinion, ceased to have any interest, legal or equitable, in the guarantee on his supersession by the new trustees.

No special formality, as by registration, is required by any Act, and Parliament, having the power so to do, which an individual has not, has declared that independent of any consent of the debtor the debt shall pass to the new trustees.

In no other Australian State could this difficulty have arisen. Elsewhere the merits, and the merits alone, would have been in controversy, but here we have been engaged, as the Supreme Court was engaged, in a long and expensive preliminary argument respecting a mere matter of technicality. That is a heavy price to pay for antique procedure, whichever side wins.

2.—*The Real Property Act.*—Another point raised by the appellant was based on sec. 52 of the *Real Property Act* 1900 (No. 50). It was urged that upon registration of the new trustees as proprietors of the mortgage, the debt to Moir was extinguished, and a new debt owing to the new trustees arose, and so on the principle of *Commercial Bank of Tasmania* v. *Jones* (3) the guarantee was at an end.

But that case, as was indeed pointed out in *Perry* v. *National Provincial Bank of England* (4), rested on this, that as regarded the *debtor* there was no debt left. Here there is, and always has been, the same debt, so far as the debtor is concerned; the only change that has ever arisen is in the proper person to pay it to.

(1) (1913) A.C., 747, at p. 759.
(2) (1912) A.C., 149, at p. 178.
(3) (1893) A.C., 313.
(4) (1910) 1 Ch., 464.

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That point entirely fails; but, as the first one holds, the appeal succeeds. It is therefore unnecessary to determine the objection raised by the respondent on the construction of the guarantee.

GAVAN DUFFY J. I am disposed to think that the Supreme Court was right in its interpretation of sec. 6 of the *Trustee Act* 1898, but I am not so strongly of that opinion as to formally dissent from the conclusion arrived at by the other members of the Court.

RICH J. read the following judgment:—The only question with which I propose to deal on this appeal is the construction of sec. 6 of the *Trustee Act* 1898. That Act is a consolidating Statute including, amongst others, the original *Trust Property Act* of 1862, sec. 63 of which is, with some additions, reproduced in sec. 6.

The question at issue is as to how far an appointment under sec. 6 is operative to vest property in the new trustee. The language of the section is clear: it says that all the trust property shall become legally and effectually vested in the new trustee. In my opinion, a proprietary right in the nature of a chose in action is just as much property in the sense in which the word is used in the section as a proprietary right to land. *Primâ facie*, therefore, an appointment under the section would vest a chose in action in the new trustee.

It is suggested, however, in effect that a restricted operation should be given to the section, and that when the legislature says that all the trust property shall become vested it should be deemed to have meant that only such property should become vested as would have been vested by an assurance, or, in other words, that its Act should have no greater effect than an assignment or conveyance by a private individual. The only internal evidence which can be suggested for this view is the presence of the words "and without other assurance." I think, however, that the obvious intention of this phrase was to make it clear that an assurance such as was necessary under *Lord Cranworth's Act* should not be required under the local Act; and that no such inference as is contended for can fairly be drawn from it.

I am unable to conjecture any reasonable ground for a desire on the part of the legislature to make the vesting provisions of sec. 6 subject to any such self-denying ordinance as is suggested by the respondent; and if such a desire were present it has, in my opinion, not been expressed.

When sec. 63 of the Act of 1862 is contrasted with *Lord Cranworth's Act*, from which it was adapted, the matter becomes reasonably clear. The local legislature deliberately departed from the provisions of its English model; and it evidently did so with the object of facilitating the transfer of the property from the old trustee to the new.

I can see no reason for giving to the language of the legislature a construction which appears to conflict with its apparent intention. I am also unable to draw any inference adverse to the appellant's case from the absence from sec. 63 of the Act of 1862 and sec. 6 of the *Trustee Act* 1898, of any express provision that the new trustee may sue for or recover any chose in action. The phrase "chose in action" is used in different senses, but its primary sense is that of a right enforceable by an action. It may also be used to describe the right of action itself, when considered as part of the property of the person entitled to sue. A right to sue for a sum of money is a chose in action, and it is a proprietary right. In the view which I take of the section an appointment in pursuance of it has the effect of vesting in the new trustee any such right which existed in the old trustee. No express reference to choses in action or rights to sue was necessary, and I do not think that any inference can be drawn from the absence of such a reference. The right of action is sufficiently comprehended in the general word "property."

I agree that the demurrer should be allowed.

Ralston K.C. applied, on behalf of the respondent and of R. J. C. Maddrell and P. Douglas, that R. J. C. Maddrell and P. Douglas should be substituted as plaintiffs in place of James Moir. Secs. 36 and 37 of the *Common Law Procedure Act* 1899 authorize the Supreme Court to add parties, and that includes substituting parties: *Hughes* v. *Pump House Hotel Co. Ltd.* [*No.* 2] (1).

(1) (1902) 2 K.B., 485.

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[ISAACS J. No application was made to the Supreme Court to amend.]

It was not necessary. If the Supreme Court had decided as this Court now decides, they could have made the amendment; and this Court may make any order that the Supreme Court should have made. It is not too late to make the amendment. In *Duckett* v. *Gover* (1) an amendment was permitted after a demurrer had been allowed.

[RICH J. In *Clay* v. *Oxford* (2) it was held that sec. 222 of the *Common Law Procedure Act* 1852 (15 & 16 Vict. c. 76), which gave a general power of amendment at any time, did not authorize the substitution of the representatives of a dead man in whose name an action had been instituted.]

THE COURT refused the application.

Appeal allowed. Judgment appealed from discharged. Judgment for the defendant upon the demurrer to the declaration. Respondent to pay the costs of the appeal.

Solicitors, for the appellant, *McCarthy & Maxwell.*
Solicitors, for the respondent, *Norton, Smith & Co.*

D. G. D.

(1) 6 Ch. D., 82.

(2) L.R. 2 Ex., 54.