1881
*Nov. 8.

DONALD McDONALD.....APPELLANT;

AND

1882
*Mar. 29.

JOSEPH N. LANE *et al*.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Replevin—Possession as against wrong-doer—Mixture of logs.

L. et al., claiming certain lands in the township of *Horton* under a paper title, built a barn and camp in 1875, commenced and continued logging all that winter and in subsequent years.

In 1877 *McD.*, setting up a title under certain proceedings adopted at a meeting of the inhabitants of the township in 1847, held for the purpose of making provision for the poor, by which

*PRESENT.—Sir W. J. Ritchie, C.J.; and Strong, Fournier, Henry and Taschereau, JJ.

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certain commissioners were authorized to sell vacant lands, entered upon and cut on the lands in question some 500 trees, which he put on the ice outside and inside *L. et al's* boom mixing them with some 900 logs already in said boom and cut by *L. et al*, in such a way that they could not be distinguisded. *McD.* then claimed the whole as his own, and resisted *L. et al's* attempt to remove them. On an action of replevin brought by *L. et al* for 1,440 logs cut on said lands.

Held, that *L. et al's* possession of the lands in question was sufficient to entitle them to recover in the present action against *McD.* who was a wrong-doer, all the logs cut on the lands in question.

Per *Strong*, J.: When one party wrongfully intermingles his logs with those of another, all the party whose logs are intermingled can require is, that he should be permitted to take from the whole an equivalent in number and quality for those which he originally possessed.

APPEAL from a judgment of the Supreme Court of *Nova Scotia*. This was an action of replevin (brought by the respondents in the Supreme Court of *Nova Scotia*, against appellant,) for 1,440 spruce and pine logs cut on lots 315 and 316 in the township of *Horton*, in the County of *King's*, chiefly known as the *Johnston* lot. The writ contained, besides the first count in replevin, two other counts in trover, but the verdict for the plaintiffs was taken only on the first count. Plaintiffs claimed and had actual possession of the land under an agreement, under seal, made in 1873, with one *Moore*, to whom the lots had been conveyed by deed in 1854. In 1875 having built a barn and also a camp on the land, plaintiffs commenced and continued logging all winter and cut 1,700 trees, and so also in subsequent years. In 1877 defendant, claiming title under one *Benjamin*, cut 500 trees on the disputed lot, and put them partly inside and partly outside of the plaintiff's boom, mixing them with some 900 logs cut by the plaintiffs in such a way that they could not be distinguished. As to *Benjamin's* title, it consisted in a deed dated 2nd March, 1872, by which certain parties, who had been authorized at a

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meeting of the inhabitants of the townships held in 1847 for the purpose of making provision for the poor, conveyed to him and others a certain tract of land situate in *Horton* township and known as vacant lands, containing seven thousand acres. This deed was accompanied by a power of attorney, empowering *Benjamin* and the other grantees, to ask, demand and receive compensation and damages from all persons liable for trespasses committed on the lot described in the deed. The defendant then claimed the whole of the logs as his own, and resisted the plaintiffs attempt to remove them, whereupon the plaintiffs took out a writ of replevin, under which they took all they could identify and enough to make up the number cut on the *Johnston* land and by themselves.

The cause was tried before the Hon. Mr. Justice *Des-Barres* and a jury at *Kentville*, and resulted in a verdict for the respondents. The appellant having taken out a rule *nisi* to set this verdict aside, the Supreme Court of *Nova Scotia* after argument gave judgment discharging the rule *nisi* with costs, from which judgment the present appeal was taken.

The appeal was argued *exparte* by Mr. *Rigby*, Q.C., for appellant:

This was an action of replevin with counts in trover, and although the Judge at the trial directed a verdict to be entered on the replevin count alone, I contend this does not remedy the defect and that the jury have found on a bad writ (1). This was taken as one of the grounds in the motion for non-suit.

Appellant having entered upon the lands described in his deed, was in possession with color of title and had a legal right to the trees, all of which were cut upon those lands, as against the respondents, who were trespassers without right other than could be obtained

(1) See Rev. Stats. N. S., 4 series, p. 447, sec. 25.

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by the mere act of cutting them. *Washburn* on Real Property (1).

But admitting respondents to be entitled to the trees cut by them, these only amounted to 930, whereas they replevied 1443, or over 500 that had been cut by appellant.

The alleged admixture by appellant of his logs with those cut by respondents, (a point taken for the first time in the judgment of the Court below) is not sufficient to justify the verdict for the following reasons:

The fact of the admixture or confusion was not submitted to the jury, and was not found by them, it is a question of fact, and cannot be set up by the Court as a matter of law, as it has been in this case.

The appellant having intermixed the logs innocently, and under a claim of right, believing that those placed within the boom by respondents had been cut upon his land and were his property, the whole quantity became the common property of the appellant and respondents, and the latter had no right to take more than their own property, *i. e.*, 930 trees.

In any case, admitting that the admixture was wilful and wrongful, yet still the respondents have got 209 trees at least more than they were entitled to. They placed all that they had cut within the boom, and while appellant placed some that he had cut with these, within the boom, he also placed 209 on the landing outside the boom where they were not commingled with any logs of the respondents, but these latter were taken under the replevin and the respondents right to them confirmed by the verdict, whereas, at least as to them, there should have been a judgment *de retorno habendo*. *Spence* v. *Union Marine Ins. Co.* (2); *Ryder*

(1) 4th Edit., vol. 3, p. 137, 150 to 151.

(2) L. R. 3 C. P. 427, 439.

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v. *Hathaway* (1); *Lawrie* v. *Rathbun, et al.* (2); *Waterman* on Trespass (3).

I also submit there was evidence improperly admitted

The alleged plan of the township of *Horton*, most material evidence for respondents, upon which their whole title rested, was admitted, in the face of the objection of appellant's counsel, upon the evidence of a clerk from the Crown Land Office that he got the plan in that office where it had been since he first became a clerk there eleven years previously, and that he had been told it was the plan of *Horton* township. No evidence of any partition or survey was given.

RITCHIE, C.J.:

The plaintiffs were in actual possession of the property in dispute, and, neither party showing title to it, the party in possession, as against the wrong doer, was entitled to claim for trespass. In my opinion the mixing of the logs is not important in this case, it has no bearing upon the case in any way.

STRONG, J.:—

I think this appeal ought to be dismissed, but not for the reasons given in the judgment of the court below. The mixing by the defendant of the 500 logs cut by him with the 930 cut by the plaintiffs did not entitle the plaintiffs to replevy the whole 1,430, as held by the Supreme Court of *Nova Scotia*.

The question of title to chattels caused by one party wrongfully commingling his own property with that of another, has frequently arisen with reference to chattels of the description of those in question here, and it is well settled that all that the party whose logs are intermingled can require, is that he should be permitted

(1) 21 Pick. 298. (2) 38 U. C. Q. B. 255.
(3) Vol. 1, sec. 405, 406, 497.

to take from the whole lot an equivalent in number and quality for those which he originally possessed.

Mr. Justice *Cooley* thus states the results of numerous authorities on this point in *Michigan* :—

> This rule has been applied to the case of quantities of saw logs belonging to different parties but commingled together, and it is held that to give the party whose logs are lost the option of taking from the mass an equivalent in quantity or quality, or of demanding the value, is all that in justice he can require (1).

For another reason, however, I am of opinion that the plaintiffs were entitled to recover. It is apparent from the evidence that whether the true boundaries of lot 315 were or were not those contended for by the plaintiffs, they were in possession constructively of all the land claimed by them to be lot 315, upon which their own 930 logs as well as the 500 logs of the defendant were cut. The possession of the plaintiffs was not of course such possession as would be had of cultivated land, but it would have been sufficient, in the course of time, to have conferred upon them a title to this land under the Statute of Limitations, supposing they had not a title under the agreement in pursuance of which they took possession. The plaintiffs claimed the whole of this land, by the description of Lot 315, under a paper title. Therefore, when they took actual possession of part and built a barn upon it, they were, on the authorities under the Statute of Limitations, constructively in the possession of the whole. Then the defendant had not any possession, for mere occasional acts of trespass cannot constitute a possession, and he had no title, it being absurd to call that a title, which was derived from the pretended authority of the town meeting held in 1847. The consequence is that the plaintiff's possession being *primâ facie* evidence of seisin in fee, the title to the logs cut by plaintiffs as well as by

(1) Cooley on Torts, p. 54.

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defendant, vested as soon as cut in the plaintiffs, who were therefore entitled to recover the whole in this action of replevin, and for that reason this appeal must be dismissed with costs.

FOURNIER and TASCHEREAU, JJ., concurred with *Strong*, J.:

HENRY, J.: —

For the reasons given by the learned Chief Justice when delivering the judgment of the court in the court below and in the charge of Mr. Justice *Des Barres*, before whom the issues in this case were tried, I think the respondents entitled to recover. They were in possession of the lands upon which the greater number of the logs were cut for several years under a purchase from *Daniel Moore*, and, for three or four or years previous had been in the sole occupation of it, and each year had cut logs on it and hauled them off it. They had also erected upon it a barn. While so in possession they cut during the winter of 1878 930 trees and hauled them out to a lake on the same land upon which they had been cut, where they placed them on the ice protected by a boom which they placed around them to prevent their being floated away when the ice should break up. Some few of the logs were marked, but the far greater number were not. Some time shortly afterwards, the appellant placed five hundred and thirteen logs, cut on the same land as those cut by the respondents, unmarked, inside the respondents boom and mixed up with those of the respondents. The respondents subsequently attempted to distinguish their logs from those of the appellant and mark them, but were prevented from doing so by the appellant's servants and the appellant claimed all the logs in the boom placed there by both parties. The respondents then commenced the present action by a writ containing the

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with the law as laid down by the learned Chief Justice of the court below. It is clear that the unmarked logs of the two parties in the boom could not be distinguished. The law in such a case gives the right of selection, without any account, to him whose property was originally invaded, and its distinct character destroyed (1.)

I am of opinion the appeal should be dismissed, and the judgment below affirmed with costs.

Appeal dismissed with co ts.

Attorneys for appellant: *Chipman & Borden.*

Solicitor for respondent: *W. E. Roseve.*

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*May. 7.

*Nov. 14.

JAMES CORBY *et al*.....APPELLANTS;

AND

GEORGE E. WILLIAMS.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Vendor and purchaser—Jus disponendi—Delivery.

W., a commission merchant residing at *Toledo, Ohio*, purchased and shipped a cargo of corn on the order of *C. et al.*, distillers at *Belleville*, and drew on them at ten days from date for the price, freight and insurance. This draft was transferred to a bank in *Toledo* and the amount of it received by *W.* from the bank, and the corn, having been insured by *W.* for his own benefit, was shipped by him under a bill of lading, which, together with the policy of insurance, was assigned by him to the same bank. The bank forwarded the draft, policy, and bill of lading

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(1) See 2nd Stephen's Commentaries, 85, and Kent's Commentaries, 9th Ed. 454.