

S. C.]

NOTES OF CASES.

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New Brunswick.]

SWIM V. SHIREFF.

Contract to cut lumber—Vesting of property—Writ of replevin—Justification—Pleading.

In November, 1874, one Arbo agreed in writing with one Muirhead to get logs off land under Muirhead's control, and that they should be Muirhead's property as cut down. In December following one Maroney agreed with Arbo to cut and haul logs for him from the lands specified in the agreement between Arbo and Muirhead, Arbo agreeing to furnish Maroney with supplies to get the logs. Maroney cut logs under this agreement, and hauled them to the landing. In November, 1875 (the logs not having been driven, and Arbo not having furnished sufficient supplies), he and Maroney rescinded their agreement, Maroney giving his note to Arbo for the supplies delivered. The logs remained on the landing, and in February, 1876, they were seized as the property of Arbo (who had become insolvent), under a writ of attachment issued under the Insolvent Act of 1875. In May, 1876, Maroney sold the logs to the plaintiff, who drove them to the boom of the S. W. Miramichi river, where they were replevied by the assignee of Arbo's estate. The plaintiff put in a claim of property in them, and the Sheriff returned the writ of replevin with such writ, to the attorney who issued the writ. No writ *de prop. prob.* having been issued, the Sheriff kept possession of the logs, and the plaintiff (appellant) brought an action of trespass against the Sheriff, alleging that he had seized and taken the plaintiff's goods, to wit, certain timber, and disposed thereof to his own use.

The defendant pleaded—1 Not guilty. 2. That the said goods were not nor were any of them the plaintiff's, as alleged. 3. That the goods in question were the goods of Ellis, assignee in insolvency of one Arbo, an insolvent, and that the defendant did what is complained of by the authority and permission and license of such assignee. 4. That the goods in question were the goods of one Muirhead, and that the defendant did what is complained of by the authority and permission and license of said Muirhead. 5. That the goods in question were not the goods of the plaintiff, but the same were the property of the defendant.

Issues were joined on these pleas. As there was no dispute as to facts, the parties entered

into an agreement at the trial whereby it was agreed that a verdict should be entered for the plaintiff for \$1,554.81, the full value of the logs at \$5.50 per M. and 15 cts. survey, and that, if the Court should be of opinion that the plaintiff was not entitled to recover the Maroney logs—that is certain logs cut by Maroney, then the verdict was to be for 63 M., calculated at the same rate.

Held, [FOURNIER and HENRY, JJ., dissenting] that the logs having been cut off lands under Muirhead's control by Maroney, as servant of Arbo, Maroney was not the proprietor of the logs, and therefore that plaintiff, who claimed through Maroney, was not entitled to recover the value of the Maroney logs.

Sir W. J. RITCHIE, C. J., was also of opinion that the judgment appealed from should be affirmed, but solely on the following ground:—It having been proved on the trial without objection and made part of the case, that the logs in question were seized by the defendant as Sheriff under a writ of replevin issued in the Supreme Court of New Brunswick directing him to take the logs in question, the Sheriff was justified in taking the logs thereunder, and that as against the plaintiff it was no wrongful taking or conversion. That this defence could be given in evidence under the pleadings in the cause; or, if it could not be so given, this being a strictly technical objection, and this defence having been put forward on the trial without objection, and no such technical point reserved on the trial, if necessary the record should be amended.

Per GWYNNE, J.—That under the issue joined under the 2nd plea, the defendant could have proved all matters alleged in the 3rd and 4th pleas, and that it was unnecessary to decide whether joinder in issue being filed to these pleas, put in issue anything but a *jus tertii* for that the parties plainly, by what took place at the trial, and the reservation then made for the consideration of the Court, rested the case solely upon the question of property without regard to any question as to whether defendant acted under such authority.

The appeal was dismissed with costs.

Barker, Q.C., for appellant.

Weldon, Q. C. for respondent.