

There was an inconsistency in the statement of claim: if the action was in trespass, the value of the wood on the shore of Lake Superior is not the measure of damages: *Union Bank v. Rideau Lumber Co.* (1902), 4 O.L.R. 221; but it was contended that the effect of the order made in the replevin proceedings was to make the money represent the wood, so that the contest was in reality what it would have been in form if the claim had been for conversion in refusing to give up the logs when they were demanded. Upon the pleadings as they stood, there was no room for a suggestion that the defendants were taken by surprise by evidence as to the value of the logs at the lake, and the evidence was admitted. At the close of the case counsel for the plaintiffs asked leave to amend so that an award of the higher value might be made; and he should have such leave.

It was said that the reason why the plaintiffs were not allowed to take possession of their logs was that these logs had been mixed with the defendants' own logs, and that it was impossible to identify the plaintiffs' property. In those circumstances it was, no doubt, better that the order for security should be made than that the plaintiffs should be allowed to take from the whole lot an equivalent in number and quality to those cut on their location: see *McDonald v. Lane* (1882), 7 S.C.R. 462, 466; particularly as they claimed so many more than the defendants thought had been taken; but the plaintiffs were not responsible for the mixing; and the fact that they framed their statement of claim in trespass ought not to stand in the way of their being put now as nearly as possible in the position in which they would have been if, when the demand was made, the defendants had been able to say, and had said: "Here are your logs which we have kept separate from our own; take them."

Accordingly the amendment should be allowed, and there should be judgment for 130 cords at \$10 a cord—\$1,300.

The amount recovered being less than the amount paid into Court by the defendants, the plaintiffs should have their costs down to the time of the payment in, and the defendants their costs subsequent to payment in, and the money in Court should be paid out accordingly.