from the company more money than he had any claim to for the wood which he had himself delivered, and that he supposed the company had made a mistake in paying it to him. He offered to give up half of the money to the plaintiff, and only gave as a reason for keeping any portion of it, that he was himself a creditor of Minty's.

As to the objection taken to the written assignment under which the plaintiff claims—namely, that it had not been duly filed according to the Chattel Mortgage Act, for want of a proper affidavit made by the assignee—nothing can turn upon that, because the provisions of that act can only create difficulty where the assignment is disputed by a person claiming under a subsequent assignment, or by a judgment creditor of the party making it.

As to the plaintiff's right to the money, the wood must have belonged in the eye of the law to Minty until the property in it had vested in the company as vendees, which it could not do until it was inspected and measured It was in the meantime so far under the control of the company, that they could and probably would have prevented its being taken out of the yard, and would have kept it till they had examined and measured it, rejecting any that did not come up to the contract; yet the wood must in the meantime belong to some one, and as it was not yet the wood of the company, it must have been the property of Minty who took it there, and who could assign it subject to the company's claim. About the company's claim to the wood there can be no difficulty, because they have got the wood and have paid for it. Minty makes no claim to the money which has thus got by mistake into the wrong person's hands, and he admits that the plaintiff is the person entitled to it, and supports his claim by his evidence.

We think the plaintiff was properly allowed to recover, and that this rule must be discharged.

Rule discharged.

HAGGART v. KERNAHAN.

Replevin—Right to recover for part.

In replevin under 14 & 15 Vic., ch. 64, the verdict is divisible, so that the plaintiff may recover whatever part of the goods he proves himself entitled to, and the defendant the rest.

"From lots 1 to 13" excludes both 1 and 13.

REPLEVIN for 277 pieces of white pine timber.

Pleas.—1. *Non cepit.* 2. That the timber was not the property of the plaintiff.

At the trial at Perth, before *Richards*, J., it appeared that on the 11th of January, 1858, a license was granted by the government to the plaintiff, under 12 Vic., ch. 30, and regulations made on the 8th of August, 1851, to cut red and white pine and all other timber upon the lands thus described, To extend from lots No. 1 to 13 in the 1st range, and 2nd, 3rd, and 4th ranges of the township of Olden, the half of adjoining road allowance included with each lot, if vacant Crown lots at this date; Canada Company, Clergy lots excepted, and Indian lots; and lots Nos. 8 and 2 in the 1st range, 9, 10, 12 and 16 in the 2nd range, west half of Nos. 1, 2 and 8 in the 3rd range, and Nos. 2, 3, 6 and 12 in the 4th range also excepted.

The license expressed that it was to be in force till the 30th of April, 1858, and that by virtue of the said license the plaintiff had right, by the Provincial Statute 12 Vic., ch. 30, to all timber cut by others in trespass on the grounds thereby assigned, with full power to seize and recover the same any where within this Province.

The plaintiff gave evidence of 277 pieces having been cut on lots which the plaintiff claimed to be within her license but 146 pieces of that number had been taken from lot 13 in the 4th range, and the defendant contended that that lot was not included in the license. The plaintiff offered to give evidence as to what was intended in that respect, but the learned judge held that such evidence was inadmissable.

The defendant's counsel also objected that the evidence was not sufficient to establish the identity of the timber seized with that which had been discovered to have been taken from the plaintiff's land; and that it was not proved that the timber had been cut within the period covered by the license, and so that it was not shewn that the plaintiff had certainly a right to it.

The learned judge left to the jury these questions of fact upon the evidence, and by consent leave was reserved to the defendant to move to enter a verdict in his favour, if the court should be of opinion that there was no proof of identity to go to the jury; or if the court should be of opinion, as the defendant contended, that 146 peices appearing to have been cut upon lot 13 in the 4th range, were not cut on land covered by the license, and that the consequence of the plaintiff not being entitled to recover for that portion of the timber claimed would be to entitle the defendant to a verdict in his favour as to all.

J. S. Macdonald, Q. C. obtained a rule *nisi* to enter a verdict for defendant, or for a new trial.

Deacon shewed cause, and cited *Provincial Insurance Company* v. *Maitland*, 7 C. P. 426; *Crawford* v. *Thomas*, 7 C. P. 63; *Mennie* v. *Blake*, 2 Jur. N. S. 953; *Neilson* v. *Harford*, 8 M. & W. 806, 823; *Sills* v. *Hunt*, 16 U. C. R. 521; Jur. July, 1858, p. 616; 14 & 15 Vic., ch, 64, secs, 1, 7, 8; 12 Vic., ch. 30, secs. 2, 7, 8.

ROBINSON, C. J.—The evidence, in my opinion, was sufficient to go to the jury, both in regard to the timber being cut within the period covered by the plaintiff's license and the identity of the timber which had been cut on that land with the timber replevied under the plaintiff's writ. Looking at the whole evidence, and at the defendant's conduct in the matter, I think the jury came to a proper conclusion upon both points.

As to the lot 13, it was not included in the license, the words "*from lots* 1 *to* 13" excluded both 1 and 13, and gave only the privilege upon lots between.

There is therefore only the question whether the plaintiff's claim is divisible, so that in this form of action the plaintiff can recover for the quantity of timber cut upon the land, rejecting the 146 pieces proved to have been cut on lot 13.

I think it cannot be held that the verdict in replevin under our statute is not divisible, since replevin is allowed to be brought generally in cases where trespass or trover would lie. If the party is intended to be favoured by having the means provided of getting the very chattels he claims, instead of damages according to their value, the effect would fall far short of the intention, if any mistake in regard to a single article among many that have been replevied, must turn the verdict against him for everything.

In a late case in this court of *Sills* v. *Hunt*, cited in the argument, we held in a case like this, where lumber had been replevied, that the plaintiff might recover for a portion which he proved had been cut off his land, though as to another portion he failed to satisfy the jury that it had been taken from his land.

The verdict must be entered for the plaintiff, for 131 pieces, and for defendant for 146 pieces.

BURNS, J.—The plaintiff is not entitled to recover for the timber cut on lot No. 13, for that certainly was not granted by the Crown license to the plaintiff. It does not appear to me the defendant can claim that the remedy by replevin cannot be sustained, because he has himself caused such a mixture of the plaintiff's property with his own that it is difficult to identify the plaintiff's property. Undoubtedly either trespass or trover would lie, notwithstanding the defendant had so acted, and it may be asked, is his conduct to free him from the specific remedy of replevin?

No doubt there must have been a possession or a constructive right to the possession of the property in order to enable the plaintiff to sue out the writ. Here the plaintiff had the right of the Crown to the timber while it was standing, and also had the right of the Crown to seize and take it after being cut any where within the Province. A plaintiff must satisfy a jury as well as he can what quantity of goods or property taken from a larger quantity of like goods or property is his.

The defendant asks for a new trial as respects the whole quantity of goods, because the verdict cannot be entered distributively, and for that the bond given contemplates a delivery back of the whole property replevied. How the plaintiff's bond may be framed we do not know; it is not before the court; but however that may be, I apprehend it can make no difference. The 4th section of the Replevin Act, 14 & 15 Vic., ch. 64, enacts that the condition of the bond is to be altered to correspond with the writ authorised by the act.

The same rule must prevail in an action of replevin as in others where the right of property is involved, namely, that the verdict may be distributive.