

Sup. Ct.]

NOTES OF CANADIAN CASES.

[C. P. Div.]

MCDONALD V. LANE ET AL.

*Replevin—Possession as against wrong doer—  
Chattels, title to—Co-mingling of logs.*

This was an action of replevin for 1,440 logs cut on a lot of land known as the Johnston lot, in Horton Township, N.S. L. *et al* claimed title to the land in question under a paper title, and claimed that they had been cutting logs on the lot in question since 1875, and had built a barn on the lot, and also a camp. In 1877 the plaintiffs cut some 900 logs from the Johnston lot, and put them on the ice within a boom from an island from the main land. McD. claimed title under S. P. B. In 1873, at a town meeting it was resolved, without any authority, that certain persons appointed by the meeting be empowered to sell and give a warranty deed of lands called vacant lands, and under that authority sold to S. P. B. a certain tract of land. The deed of sale was accompanied by a power of attorney empowering S. P. B. *et al.* to ask, demand and receive compensation and damages from all persons liable for trespasses committed on the lot described in the deed. In 1877, McD., claiming under S. P. B., cut on this tract of land upwards of 2,000 trees, 500 of which were cut on the Johnston lot, which he also put on the ice outside and inside L. *et al.*'s boom, and then claimed the whole as his own, and resisted attempts of L. to remove them, thereupon L. took out a writ of replevin, under which, being unable to distinguish them all, they took all they could identify, and enough to make up the number cut on the Johnston lot and by themselves elsewhere.

*Held*, That McD. had shown no title in S.P.B. to the Johnston lot, and that acting under him he was a wrong doer; and that L. *et al* being in actual possession of the Johnston lot, the title to the logs cut by them as well as by McD. rested as soon as cut in L. *et al*, who were therefore entitled to cover the whole of the logs in this action of replevin.

Per STRONG, J.:—That 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.

Per HENRY, J.:—That where the goods of two persons are so intermingled that they cannot be distinguished, the law gives the entire property,

without any account, to him whose property was originally invaded, and its distinct character destroyed.

*Rigby*, Q C., for appellant.

## COMMON PLEAS DIVISION.

### EASTER SITTINGS.

THE QUEEN V. O'ROURKE.

*Criminal Law—Selection of jurors—Demurrer  
—Case reserved—Writ of error.*

To an indictment for murder the prisoner pleaded a plea challenging the array of the panel, which plea was demurred to and judgment given in favor of the Crown by the learned judge holding the Court of Oyer and Terminer, who, at the request of the prisoner, reserved a case for the consultation of the Common Pleas Division.

*Held*, that this was not a matter to be reserved under C. S. U. C. ch. 112, and the case was therefore directed to be quashed.

*Semble*, per WILSON, C.J.:—That a Writ of Error was the proper remedy, and that it would lie to either the Queen's Bench Division or Common Pleas Division, and not to the Court of Appeal.

By the Dominion Act, 32-33 Vict., ch. 29, sect. 44, the relation of jurors in criminal cases is authorized to be in accordance with the Provincial laws, whether passed before or after the coming into force of the B. N. A. Act, subject, however, to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with the B. N. A. Act.

By the Provincial Acts, 42 Vict., ch. 14, and 44 Vict., ch. 6, the mode of selecting jurors in criminal cases as provided for by 26 Vict., ch. 44, the Act in force before and at the time of Confederation was changed by excluding the Clerk of the Peace as one of the selectors, and requiring the selection to be made only from those qualified to serve as jurors whose surnames began with certain alphabetical letters, instead of from the whole body of those competent to serve as previously required. The jury in question were selected under these Provincial Acts.

*Semble*, that the 31-32 Vict., ch 29, D., was not *ultra vires* of the Dominion Parliament,