

Full Court.]

GARRIOCH v. MCKAY.

[June 1.

*Fences—Obligation to keep cattle from trespassing—Boundary Lines Act, R.S.M. c. 12, s. 4—Possession as against trespasser—Right of action—Parties to action.*

Appeal by defendant from judgment of a County Court awarding damages to plaintiff for injury to his crops by defendant's cattle which broke through a defective part of the line fence between their two farms. It was not disputed that at common law the owner of cattle is liable for their trespasses except such as are due to defects in fences which the complainant is bound as between himself and such owner to keep up, but defendant contended that the common law liability has been done away with by section 4 of The Boundary Lines Act, R.S.M. c. 12, which is as follows: "Each of the parties occupying adjoining tracts of land shall make, keep up and repair a just proportion of the division or line fence on the line dividing such tracts, and equally on either side thereof." There was no evidence to shew that the plaintiff had become in any way bound to keep up any particular and defined portion of the division fence between his land and defendant's.

*Held*, following *Buist v. McCombe*, 8 A.R. 600; *Tewksbury v. Buchlin*, 7 N.H. 518; *Thayer v. Arnold*, 4 Met. 589; *Rust v. Low*, 6 Mass. 90; and *Barber v. Meusch*, 157 Pa. St. 390, that the common law rule is not displaced by a joint liability to keep up fences, but where two men own adjoining lands with an undivided partition fence which both are equally bound to keep in repair, each is bound to keep his cattle on his own land at his peril.

The injured crops were raised by plaintiff, who was in possession, but another person had a half interest in the crop and defendant's counsel argued that the co-owner should have been joined as a plaintiff in the action and that plaintiff could not recover alone.

*Held*, that sole possession by plaintiff was sufficient to support an action of trespass, and it was not necessary to make the co-owner a party or to obtain any release from him: *Star v. Rookesby*, 1 Salk 335; *Graham v. Peat*, 1 East, 246.

Appeal dismissed with costs.

*Howell*, K.C., for plaintiff. *Aikins*, K.C., for defendant.