

Q. B.]

DUNDAS V. JOHNSTON - vs. GREAT WESTERN R.W. CO.

[Q. B.]

or river frontage or other causes, renders this impossible, and then there are broken lots. The grants from the Crown are also very frequently for less than the lots as surveyed, sometimes, as in the present case, for a half lot, sometimes for a quarter lot, and sometimes a certain number of acres, part of a lot, is granted. As a rule these grants are of land in the natural state, not cleared or improved; at least such is generally the assumed condition when the Crown first agrees to dispose of it to individuals. Even where the grants were preceded by mere locations, subject to the performance of settlement duties, it is notorious that these duties were oftentimes not made at all or made in a very perfunctory manner, and no part of the land was in fact either cleared, fenced or settled upon, and notwithstanding the previous condition to perform such duties the grantee had not, in the language of the 3rd section of Con. Stat. U. C. ch. 88, "taken actual possession by residing upon or cultivating some portion thereof."

When therefore a person without any title, or without any real or *bonâ fide* claim of title, (though erroneous) entered upon any such lot, clearing and fencing only a portion thereof. I do not understand upon what principle this wrong doer can be deemed to have taken and to be in possession of the whole of such lot,—for example, of 200 acres, if the lot was originally surveyed to contain that quantity, or of the half or quarter lot, if such had been the division by the original survey; or that his cultivation and fencing of a small part puts him into possession of as much (be it the whole or fractional part of a lot) as the proprietor of the part trespassed upon owns. In cases of what is well understood in the country by the term "Squatters," I have always thought, that as against the real owner they acquire title by twenty years occupation of no more land than they actually have occupied, or at least over which they have exercised continuous and open notorious acts of ownership, and not mere desultory acts of trespass, in respect of which the true owner could not maintain ejectment against the trespasser as the person in possession.

We agree with the learned judge who tried this cause, that it must depend upon the circumstances of each case whether the jury may not, as against the person having the legal title, properly infer the possession of the whole land covered by such title in favour of an actual occupant, though his occupation by open acts of ownership, such as clearing, fencing and cultivating, has been limited to a portion less than the whole. And we think evidence such as was given in this case must be submitted to the jury as legally sufficient to warrant such an inference; and no question upon the evidence, beyond the true character and nature of the possession in point of extent, has been raised.

Upon the question of the competency of the defendant Johnston we are not able to concur in the ruling at the trial. He is tenant in possession of the premises under Wilson, who as landlord is admitted to defend. As such tenant he comes within section 5, of the Evidence Act, (Con. Stat. U. C. ch. 32,) which provides that the previous enactment, that interest shall not disqualify, shall not render competent or autho-

rize or permit "any claimant or tenant of premises sought to be recovered in ejectment" to be called as a witness. His not appearing to defend does not make him the less a tenant of the premises, having a direct interest to prevent a change of possession, and not rendered incompetent by the act to support that interest by his testimony; but we are of opinion that without his testimony the verdict ought to have been as it was, and we are glad to find in the case of *Doe v. Tyler*, 6 Bing, 561, which is recognised in *Hughes v. Hughes*, 15 M. & W. 701, an authority for upholding the verdict.

We are of opinion this rule should be discharged.

Rule discharged.

DATES V. THE GREAT WESTERN RAILWAY CO.

*Common carriers—Special conditions.*

Action against defendants as common carriers for delay in carrying goods.—*Plea*, setting up special conditions, on which the goods were received, exempting defendants from liability. *Held*, good on demurrer.

Remarks as to the necessity and justice of legislative redress in such cases.

[Q. B., T. T., 1865]

The declaration stated that the defendants, being common carriers by their railway, received from the plaintiff certain cattle to be carried from Ingersoll to Toronto; and the breach of duty alleged was that they negligently and improperly detained the cattle at Ingersoll, and kept them in an open and exposed place, owing to which two of them died on the journey, and that by the unreasonable delay in the carriage and delivery of the others the plaintiff lost a market, &c.

*Plea*, that the said oxen and cows in the declaration mentioned were delivered by the plaintiff to and accepted and received by the defendants to be carried and conveyed under a special contract, and subject to the following conditions:—

That the plaintiff undertook all risk of loss, injury, damage and other contingencies in loading, unloading, conveyance and otherwise, whether arising from the negligence, default or misconduct, criminal or otherwise, on the part of defendants or their servants; and that they, the defendants, did not undertake to forward the animals by any particular train, or at any specified hour, neither were the defendants responsible for the delivery of the animals within any certain time, or for any particular market.

And the defendants further say, that the loss and injury sustained by the plaintiff in respect of the said oxen and cows in the declaration mentioned, as well by the keeping and retaining of the same at the said Ingersoll station as by the delay in the conveying and delivery thereof, were a loss and injury within the true intent and meaning of the said conditions, and was and is part of the loss or damage so agreed to be borne by the plaintiff as aforesaid, and not any other loss or damage.

The plaintiff took issue on so much of the plea as relates to the said two cattle alleged in the declaration to have died in consequence of the negligence of the defendants. And as to the residue, he demurred, on the ground that the