

Q. B.]

GUSTAVUS DUNDAS V. JOHN JOHNSTON AND JOHN WILSON.

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UPPER CANADA REPORTS.

QUEEN'S BENCH.

(Reported by C. ROBINSON, Esq., Q.C., Reporter to the Court.)

GUSTAVUS DUNDAS V. JOHN JOHNSTON AND JOHN WILSON.

Ejectment—Title by possession—Possession of part only—Effect of—Competency of witness—New trial refused.

Remarks upon this possession necessary to obtain a title as against the true owner, and the effect of such possession when extending only to part of a lot.

It must depend upon the circumstances of each case whether the jury may not, as against the legal title, properly infer possession of the whole land covered by such title, though the occupation by acts of ownership, such as clearing, fencing and cultivating, has been limited to a portion; and *held*, that in this case there was evidence legally sufficient to warrant such inference.

Subje. that a "squatter" will acquire title as against the real owner only to the part he has actually occupied, or at least over which he has 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.

A, being sued in ejectment, suffered judgment by default for want of appearance, and B was admitted to defend as landlord. *Held*, that A. was not a competent witness, but that, as the verdict was warranted by the other testimony, his reception was no ground for interference.

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

Ejectment for the east half of lot number ten, in the tenth concession of North Monaghan. The writ was addressed only to the defendant Johnston. Wilson was admitted to defend as landlord by a judge's order, and appeared for the whole. Johnston entered no appearance, "whereupon the said Gustavus Dundas ought to recover against him."

The trial took place at Peterborough, in May last, before Adam Wilson, J.

It appeared that a patent from the Crown, dated the 28th of November, 1833, issued, granting the premises in fee to the plaintiff. He also proved the execution of a deed, dated the 1st of February, 1860, from himself to one Edward Chamberlain, of the premises, for an expressed consideration of £150. A witness swore that about forty years ago, the plaintiff, who represented himself to be a discharged soldier, offered to sell him his right to 100 acres of land, and that the witness accepted the offer, and let the plaintiff have a keifer for it, and got a writing from the plaintiff, which, in moving house many years ago, he lost. He said the meaning of the writing was to secure the witness a right to the land which the plaintiff was entitled to get from the Government. The plaintiff also gave him the location ticket for the 100 acres, being No. 10, in the 10th concession of Monaghan, now North Monaghan. About two years afterwards defendant Wilson bought this right from the witness. The location was subject to settlement duties, and Wilson performed them. The Crown patent was taken out, and the witness believed that Wilson brought it to him to keep until he (Wilson) should pay the witness what he had agreed to pay. He made the payment, and the witness gave up the patent to Wilson.

It was proved that Wilson had a house on the 100 acres adjoining these premises, and cleared from 20 to 30 acres of the premises, a con-

siderable portion of the 100 acres being drowned land, which apparently could not be cultivated.

About the year 1835 the plaintiff asked another of the witnesses for the defence if he knew the lot on which Wilson was living, and said that he had sold that lot. The evidence shewed that Wilson had by himself or his tenants used the cleared land ever since; the uncleared portion had never been fenced in. Evidence was given that the taxes according to the former Treasurer's books had been paid, and the present Treasurer proved that defendant Wilson had paid them in 1846, or for some years afterwards.

The defendant also called John Johnston as a witness, who was objected to, as being the defendant named in the writ of summons. It was answered that he had not appeared to defend, and that judgment was signed against him. The learned judge received his testimony. The most material statement he made was, that the plaintiff, who lived within two miles of these premises, told him that he owned these hundred acres at one time and had sold them.

The learned judge left to the jury whether the plaintiff had knowledge of Wilson being in possession of this land for a period of twenty years or more before action brought, stating that the possession of a part of the 100 acres might import possession of the whole, depending upon circumstances: that Wilson took possession as a purchaser of the whole, according to the evidence, which also shewed that nearly all of the 100 acres which remained uncleared was swampy and not very fit for profitable cultivation, and that the taxes for the whole had been paid.

Exception was taken to that portion of the charge relative to possession of part affording evidence of possession of the whole. The jury found for the defendant.

In Easter Term *C. S. Patterson* obtained a rule, calling on the defendant to shew cause why there should not be a new trial, on the ground of the improper reception of the evidence of Johnston, and for misdirection, in ruling that the evidence of the defendant's possession was sufficient without shewing that such possession was continuous, and in ruling that "there was sufficient evidence of the possession of the wild land which the defendant did not occupy;" and on the law and evidence, the possession on which the defendant relied not having been proved. He cited *Tay. Ev.* 4th ed. sec. 1662.

S. Richards, Q.C., shewed cause during this term, and cited *Doe dem. Lord Trynham v. Tyler*, 6 Bing. 561; *Hughes v. Hughes*, 15 M. & W. 701; *La Frombois v. Jackson*, 8 Cowen, 589; *Calk v. Lyn's Heirs*, 1 Marshall, 346; *Jackson dem. Hasbrouck v. Vermilyea*, 6 Cowen, 678; *Farley v. Lemoz*, 8 Serg. & Rawle, 392; *Hunter v. Farr*, 23 U. C. Q. B. 324.

DRAPER, C. J., delivered the judgment of the court.

The question of title by possession without paper title as against a paper title, often presents peculiar features in this country, and is not always a matter of easy solution. Land is generally divided by the Government surveyors into uniform lots in each township, except where the irregular formation of the ground, owing to lake