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*Nov. 2, 3.
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*Feb. 1.

BRUCE W. CLARKE AND LORNE H CLARKE (DEFENDANTS) ..... } APPELLANTS;

AND

RICHARD C. BABBITT (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

*Real property—Title by possession—The Limitations Act, Ont. (R.S.O., 1914, c. 75) s. 5—Nature of use and occupation—Nature and extent of enclosure—Evidence as to length of time—Trial judge's estimate of witnesses—Reversal of findings.*

It was held that plaintiff had acquired title by possession to a strip of land covered by the paper title of defendants, adjoining land owners; that the planting and care of a hedge which, for a part of its length, encroached on defendants' land, the construction and main-

tenance of a walk on plaintiff's side of the hedge and partly on said strip, the cultivating with flowers, lawn and terracing up to the hedge, and the continuous general use and enjoyment, by plaintiff or his predecessor in title, of said strip along with the other land occupied by him, there being no fence or other construction (except the hedge) to indicate a boundary, constituted a use and occupation which, if exclusive and continued for the statutory period, established a right by possession under s. 5 of *The Limitations Act,* R.S.O., 1914, c. 75 (*Marshall* v. *Taylor* [1895] 1 Ch. 641 at p. 646); that the user in question could not be deemed an exercise of a mere right of way; and that, on the evidence, continuous exclusive actual occupation by plaintiff or his predecessor in title, for over ten years, was established.

Possession may be none the less sufficient to warrant the application of s. 5 of *The Limitations Act,* even though there is no real enclosure (*Seddon* v. *Smith* 36 L.T.R. 168 at p. 169). The hedge in question, though not continued to the rear boundary of the land, had the strongest evidential value as marking the extent or area of occupation and showing adverse possession.

The trial judge's estimate of witnesses loses much of its weight when he gives for such estimate reasons which, upon examination, are found unconvincing and unsatisfactory.

Judgment of the Appellate Division of the Supreme Court of Ontario (57 Ont. L.R. 60), reversing judgment of Widdifield Co.C.J. affirmed, Duff and Newcombe JJ. dissenting.

*Per* Duff and Newcombe JJ. (dissenting):—The hedge was not intended to be definitive of any line, or to mark the limit of any occupation; it included nothing and excluded nothing; it had an obvious purpose explaining its existence and use, namely, to buttress a walk along a side hill; in the circumstances it was meaningless as evidence of exclusive possession of the soil; the evidence as to the beginning of construction of the improvements relied on was not clear or definite, and was unsafe to be regarded as initiating a period of prescription for the title; there was nothing pointing to an intention to exclude, within the principle stated in *Littledale* v. *Liverpool College* ([1900] 1 Ch. 19 at p. 23). The time of the existence of the hedge was not satisfactorily established, and the trial judge's findings thereon, his estimate of the witnesses forming a substantial part of his reasons, should not have been set aside (SS. *Hontestroom* v. SS. *Sagaporack et al,* 136 L.T. 33 at p. 37 *et seq.*).

APPEAL by the defendants from the judgment of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment of His Honour, Judge Widdifield, of the County Court of the county of York, dismissing the plaintiff's action.

The action involved the question of title to a strip of land which formed part of lot 40 on the north side of Roxborough St. East, Toronto, as shown on registered plan no. 528. The paper title to lot 40 was in the defendants, but

(1) (1925) 57 Ont. L.R. 60.

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the plaintiff, who owned lot 41, lying immediately to the west of lot 40, claimed title to the strip in question by virtue of *The Limitations Act*, R.S.O., 1914, c. 75, s. 5.

The formal judgment of the Appellate Division declared that the plaintiff was the owner in fee simple, as against the defendants, of the strip in question, and vested the same in the plaintiff, and ordered the defendants to remove so much of a stone wall as they had erected thereon, and enjoined them from interfering with or lessening the plaintiff's lateral support, and ordered them to restore the same so far as they had disturbed it, and also awarded damages, to be ascertained by a reference.

The material facts of the case are sufficiently stated in the judgments now reported. The appeal was dismissed with costs, Duff and Newcombe JJ. dissenting.

*W. N. Tilley K.C.* and *G. T. Walsh* for the appellants.

*J. Jennings K.C.* for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Mignault and Rinfret JJ.) was delivered by

RINFRET J.—The issue involved is the title to a strip of land on lot 40 on the north side of Roxborough street east, in the city of Toronto.

In 1909, Arthur Bollard purchased lot 41 adjoining lot 40 on the west. He erected thereon a residence which was completed and into which he and his family moved in October, 1911. Bollard having died, his widow sold and conveyed the property to the respondent. The deed is dated the 30th September, 1919.

The appellants acquired lot 40 on the 15th May, 1923.

The lands comprised in lot 41 rise very rapidly from the street line to the rear of the lot. In order to gain access to the residence, the owner terraced the lands between the street and the front of the house and erected two flights of steps separated by a little plateau, from which at the top a pathway curved off to the house. This was at first a wooden walk and later a flagstone walk. Alongside it was planted a hedge beginning about 50 feet north of the street line and extending in a curved line to a point about 18 feet south of the northerly boundary of the lots.

Such was the layout, in 1923, when the appellants purchased. The hedge was then more than three feet high, about a foot and a half wide, and fairly thick. There was nothing to distinguish from the residential property of the respondent the strip of land lying immediately next to the hedge and which is now in dispute. It was occupied, used and enjoyed as one property. "It was terraced right out: a flower bed along the verandah and then terraces and the walk laid along the lower terrace beside the hedge." There was no "sign of any boundary or break between the house and the hedge." The adjoining lot 40 was vacant, rough and uncultivated. Mr. Speight, an Ontario Land Surveyor, described it as being "in a state of nature." Looking upon the property one would naturally infer that the strip in question and the hedge belonged to lot 41. The dividing line between this and lot 40 does not run at right angles to Roxborough street. The ground was very uneven and contained no indication of the true boundary. These additional features helped to induce the belief undoubtedly entertained by respondent Babbitt and apparently by his predecessor, that the "hedge was well within the line."

The first act of the appellants, after their purchase of lot 40, was to have a survey made. Then only was it discovered that the respondent's occupation encroached beyond the true line. To this the attention of the respondent was drawn and he was given the opportunity of purchasing the land, but he insisted that he owned it by right of possession. The appellants then informed him by letter, dated 28th November, 1923, that "unless the encroaching hedge (was) removed," they intended "to cut it down." This threat was later carried out and the appellants excavated part of the lands claimed by the respondent, destroyed about 60 feet of the hedge and tore up the flagstone walk throughout the whole distance from where it crossed the line.

Thereupon the respondent brought this action claiming a declaration that he was "the owner of the lands and premises within and to the west of the hedge," an injunction restraining the appellants from entering upon and excavating these lands, a mandatory order directing them to restore them to their previous condition, and damages.

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Whether these remedies should have been granted—as they were by the Appellate Division—must be determined from the character and length of the occupation by the respondent and his predecessor in title. It is not disputed that the possession was continuous and without any interruption between Bollard, the first owner, and Babbitt, the present respondent.

Now if the character of the occupation be first examined, it will be found that a general use was shown of the disputed strip of land by the owners of lot 41. The following is the description given by the witnesses:

*Thomas B. Speight*

Q. Then inside the flag stones and between it and the true boundary line what was there?—A. Between the flags, there was—it was sodded.

Q. Trimmed and cared for?—A. Oh, yes.

Q. Was that evident that had been part of the land pertinent to house?—A. Every indication it had been, yes.

Mr. WHITE: Now, now.

The WITNESS: Indication it had been used, I suppose.

Mr. JENNINGS: Q. Did anything divide that sod to the east of the true boundary line and between it and the flag stones walk from the rest of the land belonging to house 256?—A. How do you mean?

Q. Was there anything at all to separate the land within and to the west of the true boundary line from the land to the east of the true boundary line up to the flags?—A. No, nothing.

Q. All one lawn?—A. Yes.

The COURT: Q. That is, the lawn between the verandah and the flag stones was continued?—A. Yes, oh yes.

* * *

It was good hedge, there is no doubt about that.

Q. Did it very clearly limit the lawn?—A. Yes.

*Mrs. Mary Bollard*

Q. Well then, between your verandah and the flag stone walk what did you have?—A. Flowers, wide bed of flowers.

Q. And then?—A. Sidewalk and then the hedge.

Q. Now, flowers and the sidewalk; did the flower bed come right up to the sidewalk or——A. Well, alongside the verandah.

Q. And then between the flower bed and the walk was there——A. This was long since.

Q. Well then, what about the space between the verandah and the walk, what did you do with it?—A. What did we do with it?

Q. Yes?—A. I do not quite understand.

Q. Did you leave it alone or did you trim it?—A. Hedge was always trimmed.

Q. And the ground between the walk and the verandah and the hedge?—A. We attended to our own, we did not go outside the hedge.

Q. But between the verandah and the hedge, did you have it attended to?—A. Yes.

Q. Clipped and cut and cultivated with flowers?—A. Yes.

* * *

Q. If you think this is wrong, stop me—do not answer this for a moment. Am I right in saying that the land within the hedge was used and cultivated and enjoyed by you with the rest of your property?—A. Inside of the hedge?

Q. Yes?—A. Yes, sir.

*Mrs. McPherson, daughter of first owner:*

Q. What was the means of access to 256 in the fall of 1911?—A. Steps going up the front, then little plateau, and then up again.

Q. And from the top of these steps?—A. Then the sidewalk.

Q. Wooden walk?—A. Yes, wooden walk.

Q. Where was it?—A. It was next to the—well, there was terrace between that and the verandah and then flower bed afterwards and then of course verandah.

Q. Where was that wooden walk with regard to the location of the flag stone walk that was there last year?—A. Last year?

Q. I mean the flag stone walk that was subsequently put down?—A. Well, it was next to the hedge.

Q. But was there any difference between the location of the flag stone walk and the original wooden walk?—A. No, not that I know of.

* * *

Q. Then between the walk, first wooden and then flag stone, and the verandah in the rear of the house, what was there?—A. There was grass there.

Q. There was no boundary, no indication between the walk and the verandah, from the house?—A. Just where do you mean?

Q. Here is your walk as shown on exhibit two?—A. Yes.

Q. And here is verandah, and the back part of your house?—A. Yes.

Q. Was there any obstacle or obstruction or boundary between?—A. No, not at all.

THE COURT: Supposing we get at it shorter.

Q. Was there ever at any time anything indicating the boundary between 40 and 41?—A. Just the hedge.

Q. Here, this red line shows what is really on the survey, true line between the two lots; was there ever anything in the way of fence or anything to show that true line there?—A. Just hedge.

Q. Nothing but the hedge?—A. No.

Mr. JENNINGS: Q. Nothing in the shape of a fence?—A. No, nothing at all.

*Richard C. Babbitt*

Q. Then what was the nature of the land within and to the west of this hedge?—A. It was terraced right out, flower bed along the verandah and then terraces and the walk laid along the lower terrace beside the hedge.

Q. Any sign of any boundary or break between the house and the hedge?—A. None whatever.

* * *

Q. Was there any cultivation of the land west of the hedge?—A. There is lawn kept cut and flower beds.

Q. And?—A. Terraces kept trimmed.

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The above acts must be considered in addition to the construction and maintenance of the flagstone walk and the planting of the hedge. Such a user cannot be treated as the exercise of a mere right of way. It constitutes an assertion of ownership. Laying flagstones across another's land may sometimes be regarded as done for the mere purpose of a passageway; but, in this instance, when we consider the continuity of the lawn and the general use made of the strip within the hedge, when we come to see that there was in fact nothing to distinguish the enjoyment of that strip of land from that of the balance of the residential property, we are constrained to the conclusion that any occupation the respondent and his predecessor in title had of part of lot 40 was not "for the sole purpose of going to and coming from the dwelling house on lot 41," which was the view held by the learned trial judge.

In a very similar case (*Marshall* v. *Taylor* (1) ), Lord Halsbury, after referring to the setting out of rose beds and the laying down of a cinder walk and of cobble stones, and treating the disputed lands as part of the adjoining garden, stated:

It seems to me about as strong an aggregate of acts of ownership as you can well imagine for the purpose of excluding possession of anybody else.

In holding a contrary view, the learned trial judge appeared to have been rather impressed by the fact that, at the rear of the property, the hedge did not curve back so that an opening was left between it and the dividing line of the lots; and he referred to *Griffith* v. *Brown* (2), where, he said,

the judgment in appeal proceeds largely on the ground that the plaintiffs did not have exclusive possession of the way, that there, as here, there was no gate or bar to prevent the defendant or any one else, from travelling over it. In short, it was not an exclusive possession.

Possession may be none the less sufficient to warrant the application of *The Limitations Act* (R.S.O., 1914, c. 75, s. 5) even although there is no real enclosure (*Seddon* v. *Smith* (3) ). The hedge, in this case, though not continued to the boundary at the rear, has the strongest evidential value as marking the extent or area of occupation and

(1) [1895] 1 Ch. 641, at p. 646. (2) (1880) 5 Ont. A.R. 303.
(3) (1877) 36 L.T.R. 168, at p. 169.

showing adverse possession. In fact, there was not on behalf of the appellants the slightest attempt to prove that they, at any time, had made use of the strip in question, even by crawling through the hedge (*Littledale* v. *Liverpool Coolege* (1) ). The respondent and his predecessor actually had a peaceful, exclusive and unquestioned enjoyment. Although the hedge was a " very marked feature of the property," wide, thick " very clearly limiting the lawn " and there was no other indication of a boundary, Mrs. Bollard says she never heard of any difficulty about it.

This is not therefore, as was thought by the learned trial judge, a " claim. . . to any way or other easement " falling under section 35 of the Act, but a case for the application of section 5 and the ten years' limitation. Whether the respondent is otherwise within the section in respect of the continuity of his possession and the statutory period of occupation remains to be examined.

We must first ascertain the date when the hedge was planted by Bollard, for the evidence shows that, from that time on, the lay-out of the strip remained pretty much the same throughout, or, at least, was not so different as to change the mode of occupation and the nature of the use made by the owner. Mrs. Bollard, when shown the sketch (exhibit two) made by the surveyor Speight, on the 17th December, 1923, said it represented the property " exactly as it was since 1912." The condition remained the same as she described it during the time she and her husband occupied it " from 1912 to 1919." Mrs. McPherson said there was no " time, to (her) knowledge, when that hedge was not there in this same position." Mr. Speight did not show it on his plan made in 1917, but this is satisfactorily explained by the fact that he was not then concerned with Bollard's property. He had received his instructions on behalf of Mr. McPherson for the survey of the property east of Bollard's. He did not likewise show the flights of steps, which everybody agrees were built before Bollard moved into his house in 1911.

The critical question, however, is whether the respondent has established ten years' pedal possession. The answer

(1) [1900] 1 Ch. 19, at p. 25.

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is found in the evidence of Mrs. Bollard and her daughter, Mrs. McPherson. Mrs. Bollard is an elderly woman and her memory proved to be defective in some minor particulars. However, the trial judge thought that she "was giving her evidence to the best of her recollection," and some discrepancies upon unimportant matters are not sufficient to discredit her entire testimony. Asked about the date when the terracing was done and the hedge was started, she answered: "It was either one or the other, I could not say for sure, it was either 1912 or 1913."

The year when this work was done is undoubtedly very material in this case. Evidence of that character is clearly indecisive and would, if it did not go beyond that, leave the question undetermined. But, while Mrs. Bollard hesitates between 1912 and 1913, she is most positive in saying that the terracing was done and the hedge was started "in the year following (our) entering the house."

Now the record establishes beyond the shadow of a doubt that Mr. Bollard and his family moved into their house in October, 1911.

The effect of Mrs. Bollard's evidence is that the hedge and terracing were made in 1912. This is further strengthened by her recollection of an incident in connection with the death of her grandchild, Mrs. McPherson's daughter. It is common ground that the death occurred in July, 1913, and Mrs. Bollard recalls having picked some white flowers from the hedge and put them on the coffin. She adds: "That is what brings it to my memory." She is quite sure the hedge had then been planted for some time.

Later in her testimony, she is asked whether she looked up any records about these dates or whether she had to rely entirely on memory. In her reply, she refers again to the same incident. Her answer is: "On my memory and what occurred that year."

The learned trial judge discarded altogether the evidence of Mrs. McPherson, which agrees on all material points with that of Mrs. Bollard. His ground was that "she has been discussing the matter with her mother and relies on her mother's memory for dates." That can only refer to

two passages of Mrs. McPherson's testimony, where she says:

Q. Did you look up any records that you might have?—A. No, not at all.

Q. So that you just talked it over with your mother, I suppose?—A. Yes.

Q. And you agreed with her, or who was it put it at 1912, would it be you or your mother?—A. I think we both put it because we both knew.

Q. Well, you both knew; you agreed that was the date?—A. Absolutely.

* * *

Q. You did not speak about that at all with your mother, it was just question of the putting out of the hedge and this walk up here that you and your mother discussed?—A. Yes, we discussed that.

Q. And you cannot tell us who it was, which one of you first fixed date of 1912? Your mother says 1912 or 1913, she won't be sure which one it was?—A. Well, I am just going by what I told you, the circumstances.

Q. You are quite clear—I do not want to be unfair—you are quite clear that flowers, white flowers were picked from that hedge?—A. No, I am not clear about that, my mother believed that she picked them but I know hedge was there.

Q. Your mother told you?—A. I know hedge was there.

Like the Appellate Division, we are unable to find in the above passages and upon the ground put forward by the learned trial judge any justification for disregarding the evidence of Mrs. McPherson. The trial judge's estimate of the witnesses must of necessity lose much of its weight when, as here, he gives for such estimate reasons which, upon examination, are found unconvincing and unsatisfactory. Mrs. McPherson makes it distinctly clear that she speaks from her own recollection. Earlier in her deposition she had so stated:

Q. Then when was the hedge set out?—A. I should say 1912.

Q. Do you remember your father doing the terracing?—A. Yes.

Q. What year was that with relation to the year you went into the house?—A. Well, I should say year after.

Q. And were the hedge and the terracing done in different years or the same year?—A. I should say same year, one may have been started in the spring and the other in the fall, I do not know about that, but I should say it was 1912.

* * *

Q. And would you say—why did you say it was 1912?—A. Well, I could say it was 1912 because my little girl died in 1913 and it was put in before that.

Q. You have distinct recollection of that, have you?—A. Yes.

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Unexpected corroboration of Mrs. Bollard and of Mrs. McPherson comes from the appellant's expert witness Brown. The grandmother testified that she plucked from the hedge white strays of spiraea to lay them on the coffin of the little girl. Brown stated that normally spiraea finished blooming by the end of June, but that the year 1913 was abnormally backward and it was possible for Mrs. Bollard to have picked those flowers in July, 1913.

If, therefore, as the learned trial judge rightly remarked, the respondent's possessory title "rests entirely on the evidence of Mrs. Bollard and her daughter, Mrs. McPherson," it follows that actual occupation by the respondent and his predecessor in title was conclusively established for more than ten years, for we do not find in the record any reason why their evidence should not be given its full weight on this point. The opinion of Brown, the expert nursery man, as to the age of the hedge, cannot overcome the evidential value of the testimony of eye-witnesses, otherwise unimpeachable, and who deposed to actual facts, as to which they were in no wise contradicted.

We are for these reasons, in accord with the Appellate Division. We find in the circumstances of this case the conditions which call for the application of s. 5 of *The Limitations Act*. Throughout the statutory period, the strip of land in dispute was continuously occupied by Bollard and his successor, the respondent, and, during that period, there was a discontinuance of possession by the predecessors in title of the appellants. Before the appellants purchased lot 40, the possession of the respondent, open and visible, unequivocal and exclusive, had already ripened into a possessory title.

The judgment appealed from should be confirmed with costs.

The judgment of Duff and Newcombe JJ. (dissenting), was delivered by

NEWCOMBE J.—The action was begun on 7th December, 1923, claiming a declaration that the plaintiff (respondent) was the owner of the land in question, also an injunction and damages. The land consists of the narrow edge or strip, lying between the east line of the plaintiff's lot, no. 41

on Roxborough Street East, Toronto, and that part of a hedge planted by Mr. Bollard, the plaintiff's predecessor in title, which is on no. 40, the adjoining lot to the eastward; the plaintiff claiming merely what he describes as a squatter's title.

Mr. Bollard built his house on lot 41 in 1910 and 1911. At that time the owners of lot 40 did not use it, either by themselves or by any person claiming under them. The possession in law, of course, was theirs, but it was not active or visible possession, and there is no evidence that the owners were in the neighbourhood. The land was in a rough condition; it is said to have been in a state of nature; there were surveyors' marks from which the lines could be traced, but there were and are no fences on either lot, except to the eastward of lot 40. The paper title, both of Bollard and the plaintiff, is confined to lot 41 as described in the survey, and does not include the land in dispute, or anything beyond the boundaries of the lot. When Mr. Bollard built, he had to provide access to his house from Roxborough Street on the south, that being the only highway contiguous to the property. The ground is steep, and, going northward from Roxborough Street, the grade increases. The house was located on the northeastern part of the lot, not far from the eastern line, and there were two entrances, one, the front, on the easterly, and the other, the rear, on the northerly, side of the house, from which the ground slopes gradually to the southeast. In constructing the approach, Mr. Bollard surmounted the grades at the foot by a flight of steps laid on the ground and leading up from the street, and, to avoid the steeper acclivity, which would otherwise have been encountered, he directed the path from the head of the steps at an abrupt angle to the northeast, crossing the line of lot 41, and, continuing northerly on lot 41, for a distance somewhat in excess of the length of the house, in a curve diverging slightly to the eastward as it advanced northward, whence, opposite the entrances to the house, he constructed two flights of steps, leading to the westward, whereby to reach the entrances, and he laid some boards on the path to provide better footing, which, after the plaintiff acquired the property he replaced by flags. The whole purpose and appearance of the

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structure was that of a footway of access and egress from and to the street. Later, at a time which is not definitely fixed by the proof, Mr. Bollard set out a hedge, of the variety known as bridal wreath, close to the path on its lower side, extending from a point on lot 41, below where the path intersected the line of the lot, northward, to the end of the path, somewhat beyond the steps leading to the rear entrance. The practical purpose of this hedge was protection to the path which ran along the face of a declivity; it served as a sort of baluster, and perhaps to stiffen and uphold the soil. It was moreover ornamental. The south end of the path was on the plaintiff's lot, the north on the defendants'. It did not terminate at any boundary, and made no enclosure. The hedge is described by the plaintiff's surveyor as "thick shrubbery—quite thick; I should say it would be about two or three feet high, * * * about a foot and a half wide at the top when it was clipped off."

As to the time when the hedge was planted, there is the evidence of Mrs. Bollard, who lived in the house from October, 1911, to 1917, when her husband died, and continued to live there until 1919, when she sold to the plaintiff, and of her daughter, Mrs. McPherson, who lived in the house, with her mother, for the first four or five months, or until January or February, 1912, when she moved into her own house, which had been built on the same lot to the westward, and where she resided until 1919. These two ladies were called to prove the possession. Mrs. Bollard had looked for documents or records by which to refresh her memory, but could find none, and she says that she did not know what her husband or Mr. McPherson, her son-in-law, did. Mrs. McPherson says that she did not look for any records, but talked the matter over with her mother. In the conclusion, Mrs. Bollard thinks the hedge was planted in 1912 or 1913. Mrs. McPherson thinks it was planted in 1912. The reason influencing this conclusion, as given by Mrs. Bollard, is that the shrubs of the hedge bore a small white flower; that a child of Mrs. McPherson died in July, 1913, and that she, Mrs. Bollard, picked some white flowers and put them on the coffin. Therefore she concludes that the hedge was there before July, 1913. Mrs.

McPherson also fixes the date by reference to the death of her child, but when asked, in cross-examination, if she were quite clear that the flowers were picked from the hedge she answered "No, I am not quite clear about that. My mother believed that she picked them, but I know the hedge was there." There is evidence that terracing was done somewhere between the wooden walk and the verandah, and that there were flowers growing by the verandah. At the time of the trial the boards on the path had been replaced by the flags. Mrs. Bollard thinks these were put down two or three years after the laying of the boards. She says that "the wooden sidewalk went sagging and my husband thought he would rather have the other (meaning the flagstones), and he put it here in this place exactly where the wooden sidewalk had been." Mrs. McPherson, in her direct examination, referring to the flagstone walk, says that it was in the same location as the wooden walk; that between the walk, first wooden and then flagstone, and the verandah, there was grass, and that there was nothing to indicate the boundary between lots 40 and 41, except the hedge. In her cross-examination she says she thinks the boards were there when her mother sold to the plaintiff in 1919, but does not know anything about that. In fact, as already told, the boards were taken up, and the flags put in their place, by the plaintiff, after he bought the place, in 1919.

As illustrating the manner in which the evidence of these ladies was elicited at the trial, the following conversation took place on the re-examination of Mrs. Bollard; Mr. Jennings for the plaintiff, Mr. White for the defendants:

Mr. JENNINGS: Q. Then following the entry in the house on October, 1911, when was it your husband began to terrace up the property?—A. In 1912, I think, they started.

Q. Then was the hedge set out in the year of the terracing?—A. Yes, I think they did the whole work, as far as I can remember, I think the terrace started first.

Q. And then in what year was the hedge, with reference to the terracing of the property?—A. Well, 1912 or 1913, I can not just exactly say.

Q. Terracing was done in the year following your entering the house?—A. Yes, was started.

Q. And I think you said—I want you to be quite accurate—the hedge was put out in the same year?—A. Yes.

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Mr. WHITE: My learned friend should be fair with the witness, the witness said she could not say, 1912 or 1913, and the witness is perfectly fair and my learned friend is trying to pin her down to 1912.

The COURT: She said before it was in '13.

Mr. JENNINGS: No, Your Honour, she said it was same year in which the terracing was done, year following their occupation of the house. Perhaps Your Honour would ask her?

The COURT: Oh, no.

Mr. WHITE: I just want to ask a question about the terracing. Q. You will not say, will you, whether the terracing was done in 1912 or 1913?—A. It was either one or the other, I could not say for sure, it was either '12 or '13.

On the other hand the plaintiff's surveyor, who made a survey and plan of the locality for the purposes of the action, and had previously, in 1917, also made a survey and plan of lot 41 for Mrs. Bollard's son-in-law, McPherson, did not show the hedge on the latter plan, although he says he thinks it likely that he would have shown it if it were there. His impression is that the hedge was not there. It is observable however, as affecting the inference to be drawn from this circumstance, that the plan of 1917 did not show the steps or the path, although these evidently were there when that survey was made. Mr. Brown, a landscape gardener, connected with the nursery business, in which he had had twenty-three years experience, examined the hedge in June, 1924, and produced a sample of it at the trial; he says that, having regard to the nature of the soil, the number of clippings and the condition and size of the wood, he considered the hedge to be about six years of age, if, according to the usual practice, it had been planted at three years growth. The learned County Judge was much impressed by the evidence of this witness, whom he found both capable and honest.

But assuming the hedge to have been planted in 1912 or 1913, what follows? The hedge is not, and was not, intended to be definitive of any line, or to mark the limit of any occupation. It runs diagonally across the surveyor's line, part of it is on the plaintiff's land, though the greater part of it is on the defendants' land. It includes nothing and it excludes nothing. It is, as I see it, of even less value to prove possession of a part of the defendants' land than a single tree would have been, if planted there by the plaintiff and allowed to grow for ten years, because the hedge had an obvious purpose explaining its existence and use.

It was made to buttress the walk along the side hill, and that was the useful purpose for which it was maintained. It is, in the circumstances attendant upon its situation and use, meaningless as evidence of exclusive possession of the soil.

To the west of the footpath there was still a narrow margin belonging to lot 40. The evidence is to the effect that there was grass growing there, and that Mr. Bollard used to trim it and also the hedge, but the time is not fixed. The surface must have been in a somewhat rough condition during 1912 and 1913 when, according to the case, the terracing and improvements were going on. The evidence is not clear or definite, and it would, I think, be unsafe to regard it as initiating a period of prescription for the title during either of those years. What Lord Lindley said in *Littledale* v. *Liverpool College* (1), may fairly be repeated with respect to the owners of lot 40.

> They could not be dispossessed unless the plaintiffs obtained possession themselves; and possession by the plaintiffs involved an *animus possidendi* —i.e., occupation with the intention of excluding the owner as well as other people.

There is nothing which points to an intent to exclude.

The learned County Judge, who delivered a carefully considered judgment, found that the time of the planting of the hedge had not been established to his satisfaction; that Mrs. Bollard's memory was defective, and that Mrs. McPherson, who had been discussing the matter with her mother, had relied upon the latter for her dates; that the hedge was not planted as a boundary line, but, in his view, for ornamental purposes only, and that Mr. Bollard must have known that he was a trespasser; that the use of the footpath was evidence only of prescription for a right of way, and that the user had not been sufficiently prolonged to establish it. He accordingly dismissed the action.

The Appellate Division reversed this judgment upon a review of the evidence, and held that the plaintiff had obtained title to the land lying to the west of the centre of the hedge by possession; relying upon the evidence of Mrs. Bollard and Mrs. McPherson with regard to the picking of the flowers as conclusively establishing the existence of the hedge prior to that date. But, with all due respect, I am unable to accept this view. It would be natural, and

(1) [1900] 1 Ch. 19, at p. 23.

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I do not doubt, that Mrs. Bollard picked some white flowers for her granddaughter's funeral, but that she picked these from the hedge is nowhere stated in the evidence, although perhaps she thought she did, and not improbably she would have said so if she had been asked; but there were flowers growing on the premises nearer to the house, and I do not think that Mrs. Bollard's memory as to the plucking of the flowers ought to be accepted as proving the existence of the hedge at that time. It is as little conclusive as the rest of her evidence. The old lady's recollection was admittedly at fault, and the trial judge gained the impression that her daughter, having less opportunity to know or to observe, was influenced by what her mother told her. It cannot be denied that the learned judge's estimate of the witnesses forms a substantial part of his reasons for judgment, and, if so, the observations of Lord Sumner in the House of Lords in the recent case of *SS. Hontestroom v. SS. Sagaporack and SS. Durham Castle* (1), become very apposite to the case. His Lordship, in addressing the House, said:

> What then is the real effect on the hearing in a court of appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute; Order LXVIII, r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone.

In the result, I do not think a case has been made out to justify the setting aside of the findings.

*Appeal dismissed with costs.*

Solicitor for the appellants: *George T. Walsh.*

Solicitors for the respondent: *Jennings & Clute.*

(1) (1926) 136 L.T. 33, at pp. 37 *et seq.*; [1927] A.C. 37.