took possession. The only things Turcotte swore that could be a surprise were: (1) that he put his fence on the surveyor's line—and no evidence is claimed to be available to contradict that; and (2) that he could not swear that the fence he built was the same as that when McLean took possession, though it looked to be the same. He never was even asked definitely about the position of the fence, the only important matter.

Then as to the other witnesses, the solicitor with the same looseness swears: "I was also taken by surprise by the inability of other witnesses for the defence to state positively in the witness-box facts which I had previously understood in my instructions they would prove in the box." What these facts were, we are not told, nor what the witnesses said about them—and no solicitor would think of being satisfied with an "understood." He must have "understood" from the witnesses themselves, and they must have given the instructions, as the defendant himself swears, "I never at any time deemed it necessary to procure evidence as to the fence in question." In the affidavit of the defendant, there is the same inexcusable lack of definiteness as appears in that of the solicitor—and he does not shew any diligence in seeking for evidence, although he swears in general terms to "all due diligence." The solicitor does not swear to any attempt at all, but says he relied upon the witnesses he adduced.

It must have been perfectly apparent from the beginning that the defendant must rely upon the Statute of Limitations; the plaintiff had had a survey made, and then attempted to take possession of the strip in dispute, and the defendant refused to give up possession; the plaintiff pulled down the existing fence and built it on the surveyor's line, and the defendant replaced it. At the trial, no attempt was made to shew that the survey made was at all incorrect; the surveyor was not even cross-examined—the whole defence was based upon the fence and possession up to the fence. That, even now, must be the whole defence.

This being so, the defendant swears that he never at any time deemed it necessary to procure evidence as to the fence in question—and it is perfectly plain that he did not look for any such witnesses; the solicitor does not pretend that he did; all he seems to have done was to "understand" something from those who were brought to him.

The only evidence intended to be adduced, if a new trial be granted, is that of persons who can (as they say) swear to the fence. There was no such diligence to obtain this evidence as would justify us in acceding to the motion.