

ing that adverse possession for the statutory period had not been proved, he gave judgment for the plaintiff. The defendant now appeals.

It cannot be successfully argued, although it was urged, that, upon the evidence given at the trial, the learned Judge was not right: it is said also that the defendant was taken by surprise by the evidence of his witnesses, and especially his main witness Turcotte, and that material evidence could have been given by three persons named, whose evidence, it is said, the defendant did not know of and could not with reasonable diligence have discovered before the trial.

At the trial the defendant swore that he had bought his lot in April, 1907, and that the fence was then in its present position—also that his house had been on the four feet in dispute and close against the fence, but he had moved it back, gardening and planting flowers and shade trees on the strip. McLean, Johnston's vendor, swore that the fence was placed as the defendant said, when he sold, and when he had bought the lot himself from Ferguson. Ferguson cannot fix this date accurately, but "it must have been in the latter part of the eighties." McLean was not asked, but the deed is produced, and the date is actually 1903. Ferguson says there was an old fence, a poor fence, for a line fence at the time, but does not say whether it was placed as the present fence is, nor for how long it had been so placed.

The defendant called Turcotte, who had bought lot 30 from Ferguson before the McLean deal, and 17, 18, or 19 years ago. He swears there was no fence when he took possession at all, but that he built the fence which was on the premises when McLean took possession, or "it looks like the same fence"—he sold again to Ferguson about 12 years ago, never having got his deed.

At the time he built the fence, there was no fence existing, but he found the surveyor's posts and laid his fence on the line so marked out, and this 17 or 18 years ago.

The learned Judge in giving judgment at the close of the trial says: "The only possible evidence as to the adverse possession is that of Johnston himself, and that only extends back to a period of approximately 5 years, more exactly 4 years in April last. The location of this fence is not at all definitely fixed by any other witness, nor the period for which it was there. Unless Turcotte was wrong when he said that he built his fence along the line of the surveyor's posts, or those surveyor's posts were incorrectly placed, it is evident that there must have been some alteration in the fence since its construc-