

SECOND DIVISIONAL COURT.

DECEMBER 27TH, 1918.

*HUBBS v. BLACK.

Cemetery—Right of Burial in Plot—Agreement between Owner and Near Relation—Consideration—Part Performance—Erection of Monument—Presumption—Admission of Oral Evidence—Statute of Frauds—Grant of Land—Possession for Ten Years—Occupation—Limitations Act—Easement or License.

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Hastings dismissing an action for trespass to a cemetery plot, and to compel the defendant to remove the body of her late husband from the plot, and to restrain the defendant from further trespassing on the plot.

The defendant claimed to be the owner of the eastern part of the plot and to have been in possession thereof for 15 years.

The appeal was heard by CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

E. G. Porter, K.C., for the appellant.

H. H. Davis, for the defendant, respondent.

CLUTE, J., in a written judgment, said that both the plaintiff and the defendant claimed title through William Babcock (now deceased), who was the brother of the defendant and the uncle of the plaintiff. The plaintiff claimed as devisee under the will of Babcock. Babcock, in or before 1904, purchased the plot for \$10. His sister, the defendant, being then also about to buy a plot in the same cemetery, was informed by William Babcock that she need not do so; that he would give her the eastern part of the plot for the purpose of the burial of herself and husband. Thereupon the defendant refrained from purchasing a plot, and purchased a monument, and, with the consent and in the presence and with the assistance of William Babcock, proceeded to erect it on the easterly part of the plot, where it had ever since remained. At the time of the erection, the names of the defendant and her husband were inscribed upon the monument and so remained. In this way the defendant had been in possession of the easterly portion of the plot ever since.

The fact of the monument having been so erected by the defendant with the consent of Babcock raised a strong presumption of some agreement or arrangement existing between Babcock and the defendant sufficient to let in oral evidence of an agreement between the parties. The agreement was fully proven by the