ment of damages. According to *Burnside* J. the defendant has for a very long period been in possession of the plaintiff's property and no reason or excuse is given. Further, an inconsistent position is taken up at the bar—not improperly by counsel, but very improperly from the standpoint of seeing that injustice is not done to the plaintiff. It is said that the defendant ought to be allowed to show that he did not authorize the acts complained of, and yet when asked whether he is prepared to disavow them, counsel says that he is not. I think that a defence on the merits ought to be shown where the judgment is regular. That is a position which ought to weigh very strongly with this Court when asked to grant leave to appeal. I therefore agree that leave should be refused.

Leave to appeal refused.

Solicitors, for the appellant, *Leibius & Black* for *W. Clarke-Hill*, Broome, W.A.

B. L.

[HIGH COURT OF AUSTRALIA.]

CRAINE . . . . . APPELLANT;
DEFENDANT,

AND

THE AUSTRALIAN DEPOSIT AND MORTGAGE BANK LIMITED . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Practice—Appeal to High Court—Decision on question of fact—Reversing finding of fact—Weight of evidence—Action for possession of land—Adverse possession.

Where a Judge in deciding between witnesses has given credence to verbal testimony which turns out, on more careful analysis, to be substantially incon-

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sistent with itself, or with indisputable fact, a Court of Appeal will reverse his findings based on such verbal testimony.

In an action to recover possession of land, the defence being possession for over fifteen years, the whole case turned on the particular time at which a certain fence was erected on the land. The Supreme Court having found that it was not erected before a certain date,

Held, by *Griffith* C.J. and *Isaacs* J. (*Barton* J. dissenting), that the indisputable evidence established that the fence was erected before that date.

Decision of the Supreme Court of Victoria (*Madden* C.J.) reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by the Australian Deposit and Mortgage Bank Ltd. against Thomas Henry Craine claiming possession of a certain block of land of which one Andrew Harper was the registered proprietor, and which had been mortgaged to the plaintiffs by Harper by a mortgage registered on 21st February 1902. It was further alleged that default had been made in payment of the mortgage moneys and that the defendant was in possession of the land.

The defence was that the defendant was in possession of the land by himself or his tenant.

The action was heard before *Madden* C.J., who directed judgment to be entered for the plaintiffs with costs.

From this decision the defendant now appealed to the High Court.

The appeal turned wholly on a question of fact, and the facts are sufficiently set out in the judgments hereunder.

Bryant (with him *Latham*), for the appellant.

Irvine K.C. and *Starke*, for the respondents.

Cur. adv. vult.

Oct. 2.

GRIFFITH C.J. The question for determination on this appeal is entirely a question of fact. The action was for recovery of land and the plaintiffs have the paper title. The defence is possession for 15 years before December 1906 or January 1907, when the plaintiffs made an entry. Incidentally, an attempt was made

to prove that in 1902 the defendant became tenant to the plaintiffs, but the evidence only established a negotiation with that view which came to nothing.

The onus is, of course, on the defendant to establish his possession. His case is that before December 1891 he took possession of the land and enclosed it with a fence, and that he afterwards retained actual possession of it until the plaintiffs' entry at the end of 1906. The land in question has a frontage of 122 links to a street called Washington Street, by a depth of 139 links. The defendant has lived since 1885 on land immediately adjoining it on the west. At a time about 20 years before the trial, which was in November 1911, the defendant put a fence across the front and back of this piece of land and opened a gate leading into it from his own premises. After that he used it for various purposes, including the keeping of a foal, a cow, horses and fowls, and sometimes cultivated part of it.

We all know that, when it is necessary to fix the date of an event which took place many years ago, little or no reliance can be placed on memory, unless it is aided by some contemporaneous or nearly contemporaneous event, the date of which can be fixed by independent testimony, and which is itself connected with the event the date of which is in controversy, so that the memory recalling one event naturally recalls the other also. In weighing evidence of such a kind, the greatest reliance is placed upon testimony of matters as to which the witnesses are least likely to be mistaken.

The defendant called a number of witnesses who fixed the date of the fencing of the land at a period not later than September 1891 by reference to events of which they had an independent memory, and the date of which could in some cases be fixed by reference to documents. The plaintiffs, in answer, relied on the evidence of two ladies who fixed the date as being not earlier than the end of 1893. The learned Chief Justice accepted the evidence of those two ladies, and it is contended by the respondents that, as he saw the witnesses, we are not in a position to differ from him. But our task is not so simple as that. In the case cited by Mr. *Irvine* of *Khoo Sit Hoh* v. *Lim*

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Thean Tong (1), Lord *Robson*, who delivered the opinion of the Judicial Committee, commenting on the duty of a Court of Appeal on the hearing of an appeal from a decision of a Judge founded upon oral testimony, and pointing out that as a rule it is very difficult to reverse it, said:—"Of course, it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony." This is, in my opinion, one of those rare cases, as I will proceed to show.

Some facts are established beyond all doubt. Before the fences were put up the land was open to Washington Street, and was used as a short cut by people in the neighbourhood. The land at the back must therefore have been open also, as has, indeed, been assumed. There is also positive evidence that it was so used as a short cut up to the time when the fences were put up, whenever that was. The defendant says that he fenced the land in 1889, and some of the witnesses to whom I will afterwards refer support him in that statement. But it is quite certain that after —possibly soon after, possibly a year or two after, but certainly after—the fence was erected, the defendant brought a young foal to the land which he had enclosed, and kept it there for at least eighteen months, so that the fences were erected before the bringing of the foal. The defendant says that the foal was born in March 1891, that its mother died almost immediately, and that the foal was carted into Melbourne and put upon the land. The learned Chief Justice, applying his knowledge of equine affairs, thought that it was in the highest degree improbable that a foal the sire of which was a stallion for whose service a fee of seven guineas was paid, should be born at that time of the year. That may be so. But there was no apparent motive to induce

(1) (1912) A.C., 323, at p. 325.

the defendant to fix March as the date of the foaling rather than a later date—the only relevant fact being that the foal was born in 1891, the precise month, whether March or September, being quite irrelevant. The learned Chief Justice seems to have thought that this inaccuracy in the defendant's evidence destroyed his whole case. That is very much like what the Judges whose judgment was appealed from in *Khoo Sit Hoh* v. *Lim Thean Tong* (1) had done. They thought that the defendants having been guilty of falsehood in a particular matter, their whole case was discredited. The Judicial Committee pointed out that that was an entirely erroneous principle.

So much for the undisputed facts. I will now refer to the evidence relied upon to fix the date, premising that, so far as can be discovered from the judgment of the learned Chief Justice, the integrity and honesty of those witnesses is not disputed, and that the worst that can be said is that they may have been mistaken. It is important, as I said, to remember that greater weight should be given to the testimony of witnesses who depose to matters as to which they are not likely to be mistaken than to that of those who are likely to be mistaken.

The first witness to whom I will refer is Walsh. He says that between 2nd July 1890 and 22nd September 1891 he took the defendant's foal to the Maori Chief Hotel, South Melbourne, that the foal was born at Brannigan's, Oatlands, and was about a fortnight old when he took it from there to South Melbourne, from which place it was taken to the land in question. It is not suggested that he did not take the foal from the one place to the other. The way in which he fixed the date was this:—Up to 2nd July 1890 he had kept an hotel, and on that date he gave it up and went to live at the Maori Chief Hotel, where he remained until he was married, which, as shown by his marriage certificate, was on 22nd September 1891. He verifies the date of leaving the hotel he had kept by reference to a book containing a record of each day's takings up to the last day. So that, if he is at all reliable, there is no doubt that he took the foal to South Melbourne between 2nd July 1890 and 22nd September 1891, which

(1) (1912) A.C., 323.

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is sufficient to establish the defendant's case. There is no room for doubt as to the date of those contemporaneous facts.

Another witness, named Schrœder, had in 1885 sold to the defendant the land on which he now lives. He himself lived in the neighbourhood. He says that he saw the land fenced as long ago, at any rate, as 1891. He fixes the time as 1889, and fixes it by reference to his wife's death which occurred on 4th March 1899, she having been bedridden for fully nine years before her death, that is, from 1890. He says that he remembers the last time he took his wife for a drive before she became bedridden, and that on that occasion they both noticed and commented upon the fence in question. The only room for error is as to the length of time during which his wife was bedridden. It is impossible to doubt the rest of his story, if he is a witness of truth.

Another witness, named Thompson, also fixed the date as early in 1891. He says that he started business in Toorak on 26th July 1889, and began to deliver goods in Washington Street at the beginning of 1890, and that when delivering goods he used to make a short cut over the land and had to get through the fences. He is not likely to be mistaken about the time he commenced business. That would establish the existence of the fence before the end of 1890.

Another witness, Eliza Cowan, lived in that neighbourhood for a long time. She had a son named Walter, who was born in 1890, and she says she saw the fence there before he was born. She went away from the neighbourhood, and came back again in 1891, and again observed the fence when her son Walter was about 11 months old. Unless she is entirely wrong, the fence must have been there before the end of 1891. Her husband, George Cowan, who was also a witness, says that he saw the fence first in 1891. He had lived in that locality before, and came back in 1891, and then saw the fence there.

Another witness, Robert Cowan, their son, fixes the date of the erection of the fence by the fact that when he was a boy he was a cripple and had an operation performed on him by Dr. Fitzgerald. He used to cross the land up to 1891. After the operation he had a tricycle and could not cross the land with it

because of the fence. He is quite certain about the date because he went to school in that year and won a prize which he now has.

There is still another member of the same family, William George Cowan, who recollects the land as fenced in 1889 before they left the locality. He crossed it almost daily. He went away and came back in 1891, when the land was still fenced.

One other witness for the defendant I will mention on this particular point, Albert Rhodes, a coachbuilder, who fixes the date by reference to his apprenticeship which expired in October 1890. Up to that time he used to go through the land, and he says that it was then fenced.

That is a tremendously strong body of evidence in support of the alleged fact that the fence was there in 1891. Besides that there is the evidence of four witnesses, whom I need not name, who fix the time by contemporaneous events, of the dates of which they are perfectly certain, so that there is practically no room for error. All of them show that the fence must have been there before 1893.

The only case set up in answer to this is practically the evidence of two ladies who say that the fence was put there in 1893. The first is Miss McComas, who kept a school on what must originally have been the same block of land. Her house does not face Washington Street but a street which runs North and South to the East of the land in question. The back of her premises looks on to a piece of land at the back of the land in question, and which must then have been vacant land. She says that the fence was put up at the end of 1893. She fixes the year because her sister was married in that year. No doubt she was speaking to the best of her recollection. One of the reasons she gives for being sure that there was no fence then is that the boys at her school used to play on the land from 1887 to 1893, and occasionally afterwards. She says they played what she calls football matches on the land in the winter of 1893, and that it was not fenced then. But there is nothing to distinguish football matches or other games played by little boys in that year from those played in other years. She fixes the date by connecting it with her sister's wedding in this way: Her sister, Mrs. Anderson, lived immediately to the West of the defendant's

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house in Washington Street, and Miss McComas says that, for the purpose of the wedding, which took place on 18th July 1893 at Miss McComas's house, Mrs. Anderson sent her some cheese, butter, and crockery across the land from her house. It appears clear that at that time there was a vacant piece of land at the back of Mrs. Anderson's, Miss McComas's, and the land in question. Miss McComas herself said that the boys at her school used to play cricket just outside the wire fence upon vacant land. So that when Miss McComas says that the cheese, butter and crockery were "brought across the land by the back way" to her house, it is obvious that they must have been brought across the land at the back described as vacant land by all the witnesses. It is suggested that she meant that, having direct access across that vacant land from Mrs. Anderson's premises, the bearer of the goods went out of Mrs. Anderson's front gate, along the street, across the land in question and the vacant land at the back of it, and then in at Miss McComas's back gate. That is the only fact Miss McComas relies on to fix the date. It is obvious that, if the land at the rear was vacant, there was no necessity to go over the land in question. So that its supposed condition of being unfenced could not have been brought under her notice by the suggested fence. The circumstances on which Miss McComas relies to fix the date are therefore quite irrelevant to the date of the actual fencing.

The other witness was Mrs. Anderson, who admits that she has a defective memory for dates. She gave evidence which strongly corroborates the fact that the land at the back of the land in dispute and her land was open. She says that she was afraid she would be called upon to pay half the cost of a dividing fence, which could only mean that she was the owner of the adjoining land at the back. She has nothing by which to fix the date when the land in dispute was fenced except a conversation about this land, which she said she had with Professor Harper at the beginning of 1891, and which turned out to have been not with him, but with someone else. She thinks the fence was put up in 1893 and also that it was nearly three years after that conversation. Nothing could be more vague. She had no interest in the

land, and had nothing to connect the fencing of it with any event in her life.

Under these circumstances it appears to me that the evidence of those two witnesses is entirely displaced, and that there is nothing in it upon which the learned Chief Justice could rely. In the words of Lord *Robson* (1), he gave weight to testimony "which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact."

Under these circumstances it seems to me that we are thrown back upon the positive evidence of the defendant's witnesses, the honesty of which is not questioned, and the weight of which is very great.

It appears, however, that the defendant in his attempt to get possession of this land has not got it all. The frontage of the land to Washington Street is a steep bank, and in order to make his fence secure it had to be put back some distance from the line of frontage. The learned Chief Justice found that the fence was 2 feet 6 inches back from the street. To that strip, therefore, the defendant has acquired no title. If a person having title to land includes within his fence less land than he owns, he may nevertheless be held to retain possession of the whole. But that does not apply to a person who has taken possession of the land of another. He can only keep that which he has had in his actual possession. So that the plaintiffs were entitled to recover in the action the strip of land which is outside the fence, and the defendant is entitled to retain the remainder.

BARTON J. I regret that I am unable to agree that this appeal should be allowed. The case was narrowed down in argument to this question: When did the defendant fence the front and back lines of the land in dispute? If he did so 15 years before December 1906, he gained a title by possession. If, however, he fenced less than 15 years before that date, then it is clear that the acts done by Russell on behalf of the plaintiffs, which amounted to a dispossession of the defendant, prevented the plaintiffs' title from being barred by lapse of time, and their documentary title remained valid.

(1) (1912) A.C., 323, at p. 325.

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Both parties seem to have virtually decided to treat the question of fencing as dependent on the time when a foal of the defendant was brought to the land in question. The foal was kept there, and a cow was brought in so that he might be fed with her milk, his mother being dead. The foal then must have been a young one when brought to Toorak, and the fencing was evidently put up to keep the two animals in. Now, of the witnesses who were called, there were two whose evidence was the chief subject of argument on the appeal. They were Michael Walsh, testifying for the defendant, and Miss McComas, for the plaintiffs. It must be borne in mind that on the real issue in the case—that of possession—the onus of proof rested on the defendant. The evidence as to possession was purely oral, although certain writings were referred to in refreshment of memory. If Walsh's account is to be accepted, the foal was brought to a hotel in South Melbourne where Walsh was staying, between 2nd July 1890 and 22nd September 1891, and, if so, the fencing was erected between those dates—in which case the defendant would have been entitled to his Honor's judgment. On the other hand, if Miss McComas's evidence is correct, the fencing was not erected until September 1893 or later. In that case the defendant's possession, when broken by the re-entry of the plaintiffs through their agent, had not endured for 15 years, and the plaintiffs were entitled to judgment. The case was, in respect of all the witnesses on the question of possession, a test of memory, and, in respect, at any rate, of the testimony upon which the case mainly depends, there is no reason to question the desire of the witnesses to tell the truth. The question is which of them best stood the memory test, and, particularly, which of them best stood that test on the materials before the learned Chief Justice on the hearing. His Honor found for the plaintiffs, and before further discussing the case I will refer to the decision of this Court in *Dearman* v. *Dearman* (1), within which I think this case falls. *Griffith* C.J. said (2):—"If the Judge has found in favour of the party upon whom the burden of proof lies the Court of Appeal may review the case with greater freedom, for instance, in the case of an application to

(1) 7 C.L.R., 549.

(2) 7 C.L.R., 549, at p. 553.

enter a non-suit on the ground that, though there was some scintilla of evidence, there was nothing upon which reasonable men ought to act. But if the tribunal of first instance, having seen and heard the witnesses, comes to a conclusion in favour of the party upon whom the burden of proof does not lie, it is almost hopeless to try to induce a Court of Appeal to interfere with that finding unless it has clearly proceeded upon a wrong principle." In respect of the issue of possession the plaintiffs were the persons upon whom the burden of proof did not lie, and the decision of *Madden* C.J. was in their favour. In dealing with the same question I quoted from the often cited case of *Coghlan* v. *Cumberland* (1), the following passage, which I will repeat:—"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen." Then I said for myself (2):—"An instance of the last mentioned state of affairs would be where, apart from any question of

(1) (1898) 1 Ch., 704.

(2) 7 C.L.R., 549, at p. 558.

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manner or demeanour, there were undoubted documents turning the scale in favour of one witness, who might seem not to be all that could be desired, as against another witness considerably more plausible." *Isaacs* J., after quoting from *Riekmann* v. *Thierry* (1), and *Coghlan* v. *Cumberland* (2), said (3):—"So that the position is clearly laid down by the very highest authority that the primary duty, and in fact the whole duty, of every Court of Appeal is to give the judgment which in its opinion ought to have been given in the first instance. But there are natural limitations, that is to say, in some cases, where the evidence below is solely upon written documents, if for instance it is upon affidavit as it used to be in the old Court of Chancery, the appellate Court is in as good a position as the primary Judge to say what ought to have been the decision; but where *viva voce* evidence is taken there is a large amount of material upon which the primary Judge acts that is altogether outside the reach of the appellate tribunal. The mere words used by the witnesses when they appear in cold type may have a very different meaning and effect from that which they have when spoken in the witness-box. A look, a gesture, a tone or emphasis, a hesitation or an undue or unusual alacrity in giving evidence, will often lead a Judge to find a signification in words actually used by a witness that cannot be attributed to them as they appear in the mere reproduction in type. And therefore some of the material, and it may be, according to the nature of the particular case, some of the most important material, unrecorded material but yet most valuable in helping the Judge very materially in coming to his decision, is utterly beyond the reach of the Court of Appeal. So far as their judgment may depend upon these circumstances they are not in a position to reverse the conclusion which has been arrived at by the primary tribunal. Now, it may be that in some cases the effect of what I call the unrecorded material is very small, indeed insignificant, and utterly outweighed by other circumstances. It may be, on the other hand, that it guides, and necessarily guides, the tribunal to the proper conclusion. If that is the case, as I have

(1) 14 R.P.C., 105.

(2) (1898) 1 Ch. 704.

(3) 7 C.L.R., 549, at p. 561.

said before, the Court of Appeal cannot say that the conclusion is wrong without disregarding the material which it knows must have been existent before the tribunal below, and is necessary to a just conclusion." That embodies the principle upon which the Court acted in *Dearman* v. *Dearman* (1). Now I have said that this case mainly rests upon the time when the fences were erected, and the bringing of a particular foal to the land in question was used by a number of witnesses to fix that time. There is evidence of witnesses for the defendant that the fences were erected before 1891—which is the year upon which the defendant rests his case—namely as early as 1889. Having given attention to that evidence, I am not disposed at all to say that the learned Chief Justice was wrong when he considered, as he must have done, that that evidence was too vague and indefinite as to memory and date to rest any conclusion upon.

But, as I have said, the two witnesses upon whom, as it seems to me at any rate, the case mainly rests, are Michael Walsh and Miss McComas. It does not matter for the purpose of this case whether the month in which the foal was born was March or September; what is important is the year of its birth. Walsh referred to an entry in his book of takings as to the last day of his lease of the Criterion Hotel, which is 2nd July 1890, and he says he has his marriage certificate which is dated 22nd September 1891. He goes on to say that he helped to bring the foal from Oatlands to the Maori Chief Hotel in South Melbourne at some time, which he cannot fix, between those dates, and if that is correct the fences must have been erected some time between those dates. He does not give any particular reason why the bringing of the foal should have been between those dates, but he says it was. The Court has to give that evidence all due weight. It may or may not have impressed the learned Chief Justice very deeply. Miss McComas, who is supported by Mrs. Anderson, says that the fences were not there in September of 1893, and that the school children played football there in the winter of that year. It is common knowledge that the season for playing football is winter, and, if the boys played football there, it is not likely that the land was then fenced, especially as

(1) 7 C.L.R., 549.

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the fence was erected for the purpose of keeping in the cow and the foal, and it is not likely that Craine would have permitted football while a young foal and a cow were there in an enclosed paddock or yard. During the same winter Miss McComas's sister was married at Miss McComas's house, and Mrs. Anderson, being a near neighbour, sent cheese, butter and crockery for use on that occasion. Miss McComas says "they were brought in the back way. The only way they could have been so brought was across the land." It must be remembered also that she says she saw the foal there tethered by a rope, and that at the time the foal came the land was not fenced. She also says that she had a cricket pitch at the back of her house, and outside the wire fence. It does not appear whether the land at the back of the land in question was occupied by anybody, but that is a matter upon which his Honor, no doubt, fully informed himself before he gave judgment. I have said that the evidence of Miss McComas is supported by that of Mrs. Anderson, into the details of which I do not propose to go.

This was clearly a matter of accuracy of memory; it was a case of credibility in the sense, not of the truthful intent, but of the reliability, of the witnesses. It may be assumed that all the witnesses who testified in this part of the case were actuated by the best motives, and gave their evidence to the best of their ability. In that sense all were credible. But whether a witness was credible in the sense of being reliable was a question which the learned Chief Justice had to solve in each instance. He heard the witnesses examined and cross-examined. Evidently they were put to every test to which witnesses are commonly put, both to see whether they were telling the truth, and also to see whether they were accurate in their recollections. His Honor compared the witnesses together and contrasted their evidence, remembering that the human memory is fallible. He gave due weight to every circumstance which was used by the witnesses in support of their memory, and also gave attention to the way in which they gave their evidence—and in questions of memory as well as of credibility that is of considerable moment. Then, after taking advantage of all the opportunities he had for weighing the evidence—evidence which cannot be said to be anything but con-

flicting—his Honor came to the conclusion that the defendant had not discharged the onus which was upon him, the onus of establishing possession by him commencing at the latest before December 1891. The question now is whether we should disturb his finding. Upon the principles I have already referred to, and having regard to the difficulties of arriving at a decision on a question of memory—difficulties which are infinitely greater before a Court of Appeal than before a Judge of first instance—especially where, as in this case, little, if any, assistance is afforded by documents, and considering also the advantages which the learned Chief Justice, who tried the case, had in seeing and hearing the witnesses, I cannot bring my mind to the conclusion that the judgment at which he arrived ought to be reversed. Consequently, as I understand my brother *Isaacs* agrees with the Chief Justice, I find that the conclusion which commends itself to me is not that at which in their wisdom my brothers have arrived.

ISAACS J. read the following judgment:—The case resolves itself into a pure question of fact, namely, whether the appellant fenced in the greater part of the land in dispute not later than about November 1891. The burden of proof as to this rested on the appellant at the trial; and it rests on him now still more heavily, because he has to get rid of an adverse finding. His position as a claimant by way of statutory title to another man's land is not one which invites a benevolent attitude on the part of any tribunal. But he is entitled to all the advantage which the law as applied to the actual facts accords him. And the question is, has he on the whole satisfied the burden he has assumed. I acknowledge the force of the argument of learned counsel for respondents that the finding of the trial Judge should not be disturbed without our being completely satisfied of the appellant's right. The recent Privy Council case of *Khoo Sit Hoh* v. *Lim Thean Tong* (1), was relied on. It is not said in that case that the Court of Appeal is to blindly accept the primary judgment even though based on verbal testimony—that would be an abdication of its statutory

(1) (1912) A.C., 323.

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functions. In *The Glannibanta* (1), to which I referred in *Dearman* v. *Dearman* (2), *Baggallay* J.A., in delivering the judgment of the Court, after referring to *The Julia* (3) and *The Alice* (4), said:—"Now we feel, as strongly as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a Judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on question of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect." Their Lordships of the Privy Council in *Khoo Sit Hoh* v. *Lim Thean Tong* (5) say that as a general rule the Court of Appeal will hesitate long before it disturbs such findings. In other words it must be extremely cautious and will require to be thoroughly satisfied by the appellant that the decision is wrong. But it is pointed out that sometimes less hesitation is expected—where for instance the primary Judge "in deciding between witnesses has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence."

In the present case, with the utmost respect for the learned Chief Justice from whom this appeal comes, and whose knowledge of men and affairs makes it difficult to differ from him on the question in dispute, it appears to me that that expression applies to more than one portion of the testimony. I do not propose to do more than indicate them very briefly. I put aside all the witnesses stated to be, for some personal reason, not to be relied on, and yet there are left many witnesses for the defendant who are stated by his Honor to be respectable people, whom he

(1) 1 P.D., 283, at p. 287.
(2) 7 C.L.R., 549.
(3) 14 Moo. P.C.C., 210.
(4) L.R. 2 P.C., 245.
(5) (1912) A.C., 323, at p. 325.

had no reason to distrust as to credit, and who gave evidence well. On the other hand, the plaintiffs' witnesses were also commended as being candid and truthful. The point relied on by the learned Judge for preferring their recollection is stated to be that their reasons for remembering what they swear to were well established, and seem natural, and in cross-examination they readily recalled other distant or contemporary occurrences as well as those material. Whether the reasons and contemporary occurrences so given have the decisive force assigned to them, is an inference the value of which is as much within the power of this Court to estimate as at the trial. Then the non-production of Brannigan and Burns and the lad who helped to bring the foal to the Maori Chief Hotel is independent of any demeanour or other unrecorded event. In some other respects the grounds of the conclusions reached by the learned Chief Justice—such as the bearing and effect of McKinley's testimony upon that of Clara Craine, and the likelihood of the mare being served at the time deposed to or later—are equally independent of any special advantage possessed by the trial Judge.

Consequently, when the matter comes to be fully sifted, there is no substantial reason why, consistently with well established principles applicable to appeals, and aided by the learned Judge's clear statement of the way he arrived at his findings, and the almost photographic presentment of his impressions as to the personal value of the several witnesses, an appellate Court should not be able to satisfy its own mind as to the merits of this case. In the decision cited, the Privy Council said (1):—"Their Lordships, after carefully reviewing all the probabilities of the case, are not prepared to say he" (the trial Judge) "was wrong." But that indicates, if the probabilities of the case had made a clear and contrary impression on their Lordships' minds, their decision would have been different.

In the present case there is no doubt that Miss McComas is the chief support of the learned Judge's finding. Mrs. Anderson, who is specially associated with her, admits having a bad memory for dates, and is not really positive in her statement as

(1) (1912) A.C., 323, at p. 232.

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to 1893. If Miss McComas is not decisive for the plaintiff, no one else is. Now her memory is as to a negative circumstance—namely, the absence of a fence. She has no positive fact which links itself necessarily to the erection of the fence. And it is plain from the evidence—even her own, without saying more about other evidence placing the fact beyond controversy—that she relies on a wedding to fix the date.

A wedding is a family event and at once impresses itself on the mind; and, as a rule, its date is revived yearly. But when another person's fence was erected is a vague circumstance to begin with, and offers no occasion for reminder. There is no circumstance which ties the wedding to the fenced or unfenced condition of the land. Miss McComas does not say the things must have come over the land in dispute, or could not have come over if it were fenced. Mrs. Anderson says she does not know which way they came. The football matches, as they are termed, went on for years before and apparently after 1893. So that there is no definite landmark which delimits the contested event. On the other hand, Schroeder deposes to a circumstance which, assuming honesty, does not easily permit of error. His evidence was entirely discarded simply because he spoke of palings and wires. After many years, the mind may positively intermingle the wires and posts of the fences in question with the palings of other fences in close proximity. But the main fact is as to an enclosing fence at all, and his wife, who died not later than March 1900, drew his attention to the fence in 1891 at latest. The Cowans, as the learned Judge said, gave their evidence well; Mrs. Cowan moved to Grange Road in 1891 and saw the fence then. So did her husband. So did her son Robert, who says he has a clear memory of it, and had a special reason for recollecting the date in connection with an infirmity which compelled him to use a tricycle, and he remembers he could not cross the land with the tricycle on account of the fence. But he got rid of the tricycle soon after 1891—needing it no longer. I do not repeat the details which have just been stated by the learned Chief Justice, but viewing the evidence as a whole, I am clearly of opinion the case made by the defendant greatly preponderates, and that the

appeal should be allowed as to all but the 2½ feet strip of frontage.

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Appeal allowed with costs. Judgment varied by limiting it to the recovery of a strip 2 feet 6 inches wide along Washington Street. Judgment for the defendant as to the residue without costs.

Solicitors, for the appellant, *Croft & Rhoden.*
Solicitors, for the respondents, *Davies & Campbell.*

B. L.

[HIGH COURT OF AUSTRALIA.]

PRESIDENT &c. OF THE SHIRE OF TUNGAMAH . . . . . } APPELLANTS;

AND

MERRETT AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 8, 9, 10, 14.

Griffith C.J., Barton and Isaacs JJ.

Local Government — By-law — Validity — Traction Engine — "Vehicle — Local Government Act 1903 (*Vict.*) (*No.* 1893) *secs.* 197 (23), (29), (34), 495, 594.

By sec. 197 of the *Local Government Act* 1903 (Vict.) it is provided that a municipality may make by-laws for the following purposes (*inter alia*) :—

"(23) Regulating the hours during which and conditions on which locomotive engines or rollers impelled by steam or electricity may proceed over any road."

"(29) Prohibiting or regulating the use on any road of any vehicle not having the nails on its wheels countersunk in such manner as may be specified