

was no evidence given by the prosecution that the defendant used any influence or interference to prevent the wife returning to her husband. The onus is on the prosecution to prove that influence or interference. Indeed the evidence is that the defendant first of all sent her back to her husband, but that she later returned. The defendant's conduct may amount to "harbouring" but it has to be more than that—it must be "unlawful harbouring." I cannot find in the facts that there was any such unlawful harbouring if I adopt, as I do, the view taken by Sir Alfred Young in his judgment, *supra*.

Appeal dismissed with costs.

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## JOHN GRAHAM TAYLOR v. ERNEST PICKERING.

[Civil Jurisdiction (in Chambers) (Thacker, Acting C.J.) May 15, 1936.]

*Land (Transfer and Registration) Ordinance 1933<sup>1</sup>—Application under part XXII to show cause why order for possession should not be made—Applicant registered owner of land—Defendant unregistered equitable owner by virtue of transfer made 22 years previously—defence of adverse possession.*

Upon the hearing of a summons for recovery of possession of land, it appeared from affidavits that the defendant was in possession by virtue of a written transfer of the land and had equitable ownership.

**HELD.**—That possession under colour of a title granted by the registered proprietor is not "adverse possession in another for the prescriptive period" within the meaning of s. 14 of the Land (Transfer and Registration) Ordinance 1933.<sup>1</sup>

Cases referred to :—

(1) *Warren v. Murray* [1894] 2 Q.B. 648 ; 64 L.J.Q.B. 42 ; 71 L.T. 458 ; 10 T.L.R. 573 ; 32 Dig. 453.

(2) *Butler v. Fairclough* [1917] 23 Commonwealth Law Reports 91.

(3) *Waimiha Saw Milling Co. v. Waione Timber Co.* [1926] A.C. 10.

SUMMONS TO SHOW CAUSE under Part XXII of the Land (Transfer and Registration) Ordinance, 1933.

*D. M. N. McFarlane*, for applicant.

*Said Hasan*, for defendant.

THACKER, Acting C.J.—This is a summons brought by James Graham Taylor of Udu Kacu Taveuni under Part XXII of the Land (Transfer and Registration) Ordinance, No. 14 of 1933, calling upon Ernest Pickering of Vatukali in Vanua Levu to show cause why he should not give up possession to the applicant of certain freehold land of which the applicant is the registered proprietor and which is comprised in certificate of title No. 841 and known as Vatukali in the province of Cakaudrove in the island of Vanua Levu. The defendant has refused to give up possession of this land. By virtue of s. 189 of the above mentioned Ordinance the onus is on the defendant to prove a

<sup>1</sup> Vide *Land (Transfer and Registration) Ordinance Cap. 120.*

right to the possession of the land. On the hearing of the summons the only evidence submitted by the parties was contained in the three affidavits, viz.:—

- (a) Affidavit in support of summons by the applicant.
- (b) Affidavit of Ernest Pickering the defendant.
- (c) Affidavit of the applicant in reply to (b).

Looking at these affidavits, there is no dispute as to the relevant and material facts.

The applicant Taylor is now the registered proprietor of the freehold land in question, having purchased it in 1935 for valuable consideration free from encumbrances. After becoming the registered proprietor, notice to quit was given to the defendant by the applicant but the latter has refused to vacate the land. Pickering claims in his affidavit to be the unregistered owner of the land by virtue of a contract made between him and his brother Harry on the 1st January, 1914. By this agreement the defendant purported to exchange a certain piece of land—that is his one-fourth share in certain land known as Navuni, for 150 acres of the Vatukali land of which the brother Harry was then the registered proprietor and it is the latter piece of land which is now in dispute. As evidence of this contract the defendant has sworn to the contents of a certain letter, dated 1st January, 1914, which he sets out as follows:—

“ Navuni, 1st January, 1914.

“ Dear Ernest,

“ I agreed to let you have Waicilicili on a exchange with your 145 acres on Navuni estate Waicilicili a 150 acres.

I am your affect, brother,  
(Sd.) HENRY PICKERING.”

Since 1914 Ernest Pickering has been in possession of the land in dispute, and has erected, so he says, certain buildings and has done other work of cultivation and improvement on the land. These facts are not disputed. The issue arises as to whether this possession which the defendant has had since 1914 is “adverse possession in another for the prescriptive period.” S. 14 of the Land (Transfer and Registration) Ordinance No. 14 of 1933 is as follows:—

“The instrument of title of a proprietor issued by the Registrar upon a genuine dealing shall be taken by all courts of law as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof and the title of such proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to have been a party or on the ground of adverse possession in another for the prescriptive period.”

No question of fraud or misrepresentation has been raised on this summons either by evidence or on argument and the defendant must perforce rely on the only other way of challenging the registered title otherwise indefeasible left to him by the Ordinance viz. “adverse possession in another for the prescriptive period.” Now this court has to interpret the meaning of these words and to decide whether or not the respondent's possession comes within the section.

*Stroud's Judicial Dictionary* to which the applicant's counsel referred defines "adverse possession" as "designating a possession in opposition to the true title and real owner; and implies that it commenced in wrong and is maintained against right." Now accepting this definition the facts as it seems to me do not show any "adverse possession in another" that is, in the defendant "for the prescriptive period."

The facts show on the respondent's own affidavit that he was from 1st January, 1914, in equity at least, the owner of the land in dispute when he took the transfer from his brother. If Harry Pickering had at any time from 1914, January 1st, attempted to eject his brother, Ernest, the defendant, the latter could have clearly resisted such proceedings by setting up the fact of his possession and the letter of 1st January as evidence of his equitable ownership. Harry Pickering had at no time from 1st January, 1914, any right of re-entry or ejectment and it therefore follows that the Statute of Limitations did not run against him, because the prescriptive period only runs from the time when the right of re-entry accrues (see *Warren v. Murray*, 2 Q.B. 1894, 648, and see the Real Property Limitations Acts 1874 which is applied to the Colony by virtue of Ordinance No. 15 of 1933).

The possession was not adverse to Harry Pickering's interest for possession was taken by the defendant under colour of title and Harry Pickering could not have thereafter effectively re-entered or sued for the recovery of the land. The right man on January 1st, 1914, went into possession and not the wrong man. The possession did not commence in wrong nor was it maintained against right, for Harry Pickering had no title in equity and was not the real owner. The respondent's counsel argued that he need only prove 12 years' possession and that the doctrine of adverse possession no longer exists. That submission hardly states the English law completely. It is true that under the Imperial Statutes of Limitations in force with regard to land or rent the chief question is whether 12 years have elapsed since the claimant's right accrued, whatever be the nature of the present holder (see *Halsbury* 1st Edition, volume 19, para. 193).

The Real Property Limitation Act, 1833,<sup>1</sup> put an end to the doctrine of adverse possession in reference to questions arising under that Act, and, except in relation to landlord and tenant, mortgagors and mortgagees, advowsons, and trusts, the only question under the Statutes of Limitation in force with regard to land or rent is whether twelve years have elapsed since the claimant's right accrued, whatever be the nature of the possession of the present holder but the prescriptive period, namely 12 years, must date from and follow a right of effective re-entry and as I have said Harry Pickering had no right of effective re-entry. As to the doctrine of adverse possession being abolished by the Real Property Limitations Act 1833, that is true generally speaking of English law, but it is irrelevant to the issue this court has to try. Paragraph 202 of *Halsbury's Laws of England* volume 19, was also cited by the defendant's counsel in support of defendant's case. It is as follows:—

"If a person claiming land, or some person through whom he claims, has been in possession or in receipt of the profits of such land, and has, while entitled thereto, been dispossessed or has discontinued such possession or receipt, his right is to be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits were received."

<sup>1</sup> 3 & 4 Will. 4 c. 27.

This also states a correct principle of law but again I repeat a necessary condition before the 12 years can run is that there must be the right to re-entry. Without this right of re-entry existing, the statute does not run.

Paragraph 292 of *Halsbury's Laws of England*, also cited by defendant's counsel, is not so far as I can see in any way relevant to the issue before me. The applicant's registered title is indefeasible unless the defendant can succeed in upsetting it by any of the three ways of challenge permitted by s. 14 of the Land (Transfer and Registration) Ordinance 1933. Whether or not the applicant knew ever since 1914 all the circumstances of Pickering's possession is immaterial and will not help the defendant. (See s. 29 of the Land Transfer Ordinance 1933). There are three ways of challenging the registered title given by s. 14 of the Land Transfer Ordinance 1933 and only three. The words "adverse possession in another for the prescriptive period" are there in the Ordinance and have to be defined, and they are the only grounds open to the defendant or on which the defendant can succeed. The definition of these words clearly to my mind is not applicable to the facts as they are disclosed in the defendant's own affidavit. It may be added also that the intention of the legislature was that parties should protect whatever rights they have by lodging the prescribed caveat; if they choose to omit so to do, they cannot afterwards complain of the consequences of their own negligence. The Land (Transfer and Registration) Ordinance No. 14 of 1935 has provided by s. 123 the means whereby any person claiming to be interested under any instrument of transfer or transmission or under any unregistered instrument or otherwise howsoever in any land may lodge a caveat to protect his interest. The defendant has not seen fit to take advantage of this power and he has only himself to blame for the results of his negligence.

The respondent has not therefore shown cause why he should not give up possession of the land and there must be an order for possession to be given up to the plaintiff.

## FILIMONE VATUSERE v. JAIMAL AND ORS.

[Civil Jurisdiction (Corrie, C.J.) November 20, 1936.]

*Dwelling erected by lessee under Crown Lease—term of lease that building erected by lessee shall be the property of the lessee and removable by the lessee (on certain conditions) before or within a reasonable time after the expiry of the lease—whether dwelling house is a chattel which may be lawfully seized and sold under writ of seizure and sale.*

Filimone was lessee under a lease from the Commissioner of Lands of land at Toga in the Rewa province. The lease provided *inter alia* :—

- "(a) And it is expressly declared that this lease is a protected lease under the provisions of the "Crown Lands Ordinance of 1888", that is to say:  
 "Such lease except with the written consent of the lessor cannot be lawfully transferred  
 "or sold or mortgaged or hypothecated or pledged nor except at the suit or with the  
 "written consent of the lessor can any such lease or sublease be dealt with by any  
 "Court of Law or under the process of any Court of Law.