

until the termination of the lease. The defendant cannot now be heard to allege otherwise and he must convey to the plaintiff whatever interest he had. It would be inequitable to allow the defendant to contract to sell the lease, to put the plaintiff in possession, and then to refuse to the plaintiff that, which by the act of the defendant himself, he already has. It would be inequitable not only by reason of these facts but also having regard to the terms of the reference which show quite clearly that the plaintiff was in possession and was to remain in possession.

There will therefore be judgment for the plaintiff, and a decree for specific performance of the contract except in so far as lease 32/270 is concerned as to which the defendant will execute an assurance conveying to the plaintiff that interest in the land which the defendant has, which I hold is possession of the land. This assurance will be of no avail of course as against the owner of the lease whoever he may be, if the latter wishes to obtain possession of the land, but it will be effective against the defendant. The balance of purchase price will of course require to be paid. The defendant will pay the costs of the action.

RAM MUNNI *ats.* RAM SINGH.

[Appellate Jurisdiction (Thacker, C.J.) April 23, 1936.]

Marriage Ordinance 1918¹ s. 45—unlawfully harbouring—Meaning of unlawful harbouring—Onus of proof.

A case stated by the Chief Police Magistrate on dismissal of a charge of "unlawful harbouring" was as follows:—

- "Upon the hearing of the said charge the following facts were proved before me:—
- "(i) That the appellant was lawfully married at Suva to Vedkumar on the 12th day of October, 1935, a certified copy of the marriage certificate having been produced before me which is attached herewith.
- "(ii) That the appellant and his wife Vedkumar lived together from the date of their marriage till the 14th January, 1936.
- "(iii) That during this period the appellant maintained his wife according to his means and did not give her any cause to leave him.
- "(iv) That on the morning of Tuesday, the 14th day of January, 1936, at about 9.30 a.m. the appellant allowed his wife to go and stay at the house of the respondent situate in Bridge Street, Suva, for a day or two, and in fact himself took her to the doorstep of the respondent's house.
- "(v) That on the morning of Thursday, the 16th January, 1936, at about 9.30 a.m. the appellant went to the said house of the respondent, in the absence of the respondent, to fetch his wife back but the latter refused to return to and live with him.
- "(vi) That on Tuesday, the 21st day of January, 1936, Sergeant-Major Indar Singh of the Fiji Constabulary was deputed to execute a warrant issued under s. 14 of Ordinance 2 of 1889 at the instance of the appellant authorising him the said Sergeant-Major Indar Singh to search for Vedkumar at the house of the respondent in Bridge Street and produce her before me.
- "(vii) That the said Sergeant-Major Indar Singh before he proceeded to search at the said house of the respondent went to the business premises of the respondent where he saw the respondent and explained to him the nature of the search-warrant and that he was going to his house to search for Vedkumar. The respondent told him to take the girl away.
- "(viii) That on Tuesday the 21st day of January, 1936, the said Sergeant-Major Indar Singh went to the house of the respondent at Bridge Street and having found Vedkumar therein he brought her before my court from where she went back to the respondent. On the part of the respondent it was contended that there was no case to answer and the respondent did not elect to lead any evidence. The fact that the woman Vedkumar did stay at the house of the respondent was not denied but his counsel, *Mr. Crompton, K.C.*, argued that there was no unlawful harbouring within the meaning of s. 45 of the Marriage Ordinance No. 2 of 1918. He argued that the wife Vedkumar was at liberty to live apart from her husband and unless the prosecution proved that the wife was influenced by the respondent to leave her husband so that her will was overborne by the stronger will of the respondent, which in this case had not been done, it must fail. He further argued that there was no evidence to show that the wife had left the appellant without just cause. He read extracts from an unreported case of the Supreme Court of Fiji decided by Chief Justice Young in 1925 and submitted that the present case fell within the purview of the said case.

¹ Now s. 46 of the Marriage Ordinance (*Revised Edition page 1189*).

" On the part of the appellant it was contended that the prosecution had amply made out its case. *Mr. Hasan*, on behalf of the appellant, argued that if the wife was staying away from her husband without his consent and a third party harboured or sheltered her under those circumstances, he will be harbouring her unlawfully within the meaning of s. 45 of the Marriage Ordinance No. 2 of 1918. He pointed out that from and after the 16th January, 1936, when the wife, who was allowed by the appellant to stay at respondent's house temporarily, refused to return to live with the appellant, her staying away was unlawful. He admitted that a wife could live apart from her husband but a third party had no right to harbour her if she was so living without her husband's consent. He did not agree that it was necessary for the prosecution to prove that the wife had been influenced in any way by the third party to leave her husband. He further argued that the prosecution had led evidence to show that the wife left the appellant without any just cause, and that that evidence stood unchallenged. The defence ought to have led evidence in rebuttal to prove that there was just cause for the wife to leave the appellant and this the defence had failed to do. He drew my attention to paragraph 957 of the *Laws of Halsbury* (new edition), p. 611.

" My attention was called to the reported cases hereinafter set out:—

" On behalf of the respondent:—

" *Sanderson v. Hudson*, [1923], Times, January 29.

" *The Queen v. Jackson*, [1891], 1 Q.B. 671.

" On behalf of the appellant:—

" *Griffiths v. Teetgen*, English Reports Vol. 139, p. 456.

" OPINION.

" I formed the opinion that although the girl Vedkumar did remain at the house of the respondent Ram Singh, without her husband's consent, there was no proof of unlawful harbouring within the meaning of s. 45 of the Marriage Ordinance No. 2 of 1918, inasmuch as there was no evidence that the respondent had in any way influenced the girl Vedkumar to leave her husband, or to remain away. The respondent had been the girl's guardian and had maintained her since infancy and she is his wife's sister. Her father is dead.

" I accordingly dismissed the charge.

" I was influenced also by the judgment of His Honour Chief Justice Young referred to by the respondent's counsel and by the fact that the girl is 15 years and 9 months of age, and she eloped with her present husband and that she refused to return to him.

" The question upon which the opinion of the said Court is desired is whether I, the said District Commissioner, upon the above statement of facts came to a correct determination and decision in point of law, and if not, what should be done in the premises."

HELD.—Following judgment in *Joseph v. Appana* [1925] 3 Fiji L.R.—that the prosecution must prove interference on the part of defendant or some influence used by him to prevent the wife returning to her husband.

Cases referred to:—

- (1) *Joseph v. Appana* [1925] 3 Fiji L.R.
- (2) *Place v. Searle* [1932] 12 K.B. 497.
- (3) *Philip v. Squire* [1791] Peake 114; 170 E.R.; 27 Dig. 81.
- (4) *Sanderson v. Hudson* [1923] Times, January 23.
- (5) *Winsmore v. Greenbank* [1745] 125 E.R. 1330; 27 Dig. 81.
- (6) *R. v. Tolson* [1889] 23 Q.B.D. 168; 58 L.J.M.C. 97; 60 L.T. 899; 5 T.L.R. 465; 16 Cox. C.C. 629; 15 Dig. 743.
- (7) *Griffiths v. Teetgen* [1854] 139 E.R. 456; 24 L.J.C.P. 35; 34 Dig. 172.

APPEAL by case stated by a private prosecutor. The facts are fully set out in the stated case.

Said Hasan for appellant.

R. A. Crompton, K.C., for respondent.

THACKER, C.J.—To constitute the offence of "unlawful harbouring" within the meaning of s. 45 of the Marriage Ordinance No. 2 of 1918, there must be evidence "that the defendant used some influence against the wife returning to her husband."

These are the words of Chief Justice Sir Alfred K. Young in *Joseph v. Appana*, unreported in the Fiji reports.¹ We have however a copy of the learned Chief Justice's judgment. I see no reason why I should not adopt this view of the law. In the case before me on appeal, there

¹ Reported in this volume.

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.

JOHN GRAHAM TAYLOR v. ERNEST PICKERING.

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

Land (Transfer and Registration) Ordinance 1933¹—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 1933.¹

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

¹ Vide *Land (Transfer and Registration) Ordinance Cap. 120.*