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which, assuming that it had "arisen," could properly be referred to the Governor in Council under the proviso. His contention, for which I can find no ground, was that it had not been, but ought to have been, so referred. It was further conceded that if we were of opinion, as we are, that it had been referred to and had been decided by the Executive, the appeal must fail. That concession accords with my view of the meaning of the section, and as I am of the opinion that the question has been referred and decided, I am bound to hold that the judgment appealed from must be affirmed.

Many interesting questions were discussed in the argument, and particularly the construction of sec. 12. I offer no opinion upon any of them, because the points on which I have expressed my opinion are sufficient for the decision of the case.

As the Crown did not begin to allot the appellant a pension until after the delivery of his petition, and as it has to that extent admitted the justice of his claim, we are all of opinion that we should not grant costs of this appeal against him.

The judgment of GAVAN DUFFY and RICH JJ. was read by

GAVAN DUFFY J. In this case we are asked to determine the rights of the parties as they existed at the time of the hearing before *McMillan* J., and not as they existed at the time this litigation began. At the time of the hearing the petitioner had been granted a pension, but a smaller one than he claimed, and the only question between the parties was this:—How long had the petitioner served in an established capacity in the permanent Civil Service of the Colonial Government within the meaning of sec. 1 of Act 35 Vict. No. 7? It is admitted that that question was a proper one to be referred to the Governor in Executive Council under the provisions of that section, and that, if it was so referred, the decision of the Governor in Executive Council would be final. In our opinion the question was in fact referred to the Governor in Executive Council and decided by him, and that disposes of the petitioner's case. In the circumstances it is not necessary to consider the effect of sec. 12 and the other sections of Act 35 Vict. No. 7 which were discussed before us, and in the judgment of *McMillan* J.

The judgment of the Supreme Court should, in our opinion, be affirmed.

As the Crown has abandoned the position which it assumed when the litigation commenced, and has, in effect, conceded a considerable portion of the petitioner's claim, we think there should be no costs of this appeal.

Appeal dismissed. No order as to costs.

Solicitor, for appellant, *S. W. Curtis.*

Solicitor, for respondent, *F. L. Stow,* Crown Solicitor for Western Australia.

N. McG.

[HIGH COURT OF AUSTRALIA.]

MAGUIRE . . . . . APPELLANT; DEFENDANT,

AND

BROWNE AND ANOTHER . . . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

PERTH, *Oct.* 30, 31; *Nov.* 3.

Barton A.C.J. Gavan Duffy and Rich JJ.

Land—Action to recover possession—Adverse possession—Dispossession of Owner—Real Property Limitation Act 1833 (*Imperial*) (3 & 4 *Will. IV. c.* 27), *secs.* 3, 34—*Acts Adoption Act* 1836 (*W.A.*) (6 *Will. IV. No.* 4)—*Real Property Limitation Act* 1878 (*W.A.*) (42 *Vict. No.* 6).

A person in possession of land is not entitled to the protection of the *Statute of Limitations* as against the owner of the paper title where the latter and his predecessors in title have not been kept dispossessed or have not abandoned possession of the land for the statutory period.

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MAGUIRE v. BROWNE.

Decision of the Supreme Court of Western Australia (*Rooth J.*), affirmed.

APPEAL from the Supreme Court of Western Australia.

An action was brought in the Supreme Court by Lilian Harriet Browne and Charles Algernon Sweeting against James Maguire to recover possession of certain land near Malvern, Western Australia, of which the plaintiff Lilian Harriet Browne was the holder of the certificate of title, and which she had, by agreement dated 1st January 1912, agreed to sell and give undisturbed possession of to the other plaintiff. At the hearing of the action evidence was given for the defence that the defendant had entered on the land in question in the year 1890, being put into possession thereof by one Mitchell, since deceased, who pointed out the boundaries of the allotments, which the defendant then proceeded to mark by blazing trees, &c.; that from about the year 1898 he had resided there permanently; that he had erected a house and stockyards, cleared the land of noxious weeds, and put up notices warning trespassers off the land; that from 1904 (that being the first year in which rates were struck) he had paid the rates on the land, and that in 1908 he put up fences along the boundaries. On the other hand, there was evidence of acts of ownership having been done in the meanwhile by or on behalf of the plaintiff Lilian Harriet Browne and her predecessors in title. *Rooth* J., who heard the case, found in favour of the plaintiffs, and gave judgment accordingly.

From this decision the defendant now appealed.

Haynes K.C. and *A. G. Haynes*, for the appellant. It is not necessary in order to gain possession of land to fence it. So long as it is defined by marks or otherwise it is sufficient. The appellant delineated the boundaries by blazing the trees; and the notices warning off trespassers were notices to the world that the appellant was in possession of the land. As to abandonment by plaintiffs' predecessors in title: See *Doe d. Corbyn* v. *Bramston* (1); *Seddon* v. *Smith* (2).

[RICH J. referred to *Trustees Executors and Agency Co.* v. *Short* (3).]

(1) 3 A. & E., 63. (2) 36 L.T., 168. (3) 13 App. Cas., 793.

Plaintiffs' title is barred by the *Statute of Limitations*, as time runs against them from the first discontinuance: *Lightwood on Possession of Land*, pp. 196, 197.

Keenan K.C. and *Ackland*, for the respondent. To constitute title by adverse possession there must be (1) *animus possidendi*; (2) physical possession, and (3) exclusive possession. There was some evidence as to *animus possidendi*, but no evidence as to exclusive possession; while the acts of physical possession were too trivial: *Trustees Executors and Agency Co.* v. *Short* (1); *Littledale* v. *Liverpool College* (2). [They were stopped.]

Cur. adv. vult.

Nov. 3.

The judgment of the Court was read by

GAVAN DUFFY J. This is an appeal from the judgment of *Rooth* J. dated 25th September 1913, by which it was ordered that the plaintiffs, the respondents to this appeal, should recover possession of the whole of the land comprised in Certificate of Title registered Volume 407 Folio 82. The action was brought by the plaintiffs against the defendant to recover possession of this land. The statement of claim alleges:—

1. On the 1st day of January 1912 the plaintiff Lilian Harriet Browne was seized in fee and in possession of all those portions of Wellington Location 1 known as Ironpot Farm containing 2,978 acres situated near Brunswick in Western Australia and being the whole of the land comprised in Certificate of Title under the *Transfer of Land Act* 1893 registered Volume 407 Folio 82.

2. By an agreement in writing dated the 1st day of January 1912 the plaintiff Lilian Harriet Browne agreed to sell the said land to the plaintiff Charles Algernon Sweeting and thereby agreed to give to him undisturbed possession of the said land.

3. The plaintiff Lilian Harriet Browne is the registered proprietor of the said land and is entitled to the possession thereof and the plaintiff Charles Algernon Sweeting is entitled to possession of the said land by virtue of the said agreement.

(1) 13 App. Cas., 793. (2) (1900) 1 Ch., 19.

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4. The defendant has wrongfully taken possession of the said land.

The defendant limited his defence to part of the land—lots 51 and 52, comprising about 200 acres. He did not deny the allegations contained in the statement of claim, but said that the plaintiffs' right of action was barred by the *Real Property Limitation Act* 1878, and their right and title to this part of the land were extinguished by virtue of that Act and the Imperial Act 3 & 4 Will. IV. c. 27, sec. 34, adopted in Western Australia by 6 Will. IV. No. 4. It is not easy to understand how the defendant could succeed on these pleadings, but at the trial his case is said in the judgment of *Rooth* J. to have been based on the ground that since the year 1898 the defendant had had such possession as is contemplated by the *Statute of Limitations*, and that therefore the right of the plaintiffs to recover in the action was barred. In the year 1890 he had gone to the land with a Mr. Mitchell who then occupied the whole of the land contained in the plaintiff Browne's certificate of title, and on information received from Mitchell had blazed trees along the lines of lots 51 and 52, and put in pegs which were intended to mark the boundaries of those and other lots. We have no information as to what conversation with respect to the land took place between the defendant and Mitchell; so that all that was then done may have been done in pursuance of a licence from or of an agreement for tenancy with the then owner of the land. About 1898 the defendant again visited the land, and according to his evidence in cross-examination he then "started to get the right of possession." The question which the learned judge set himself to determine was this: Had the defendant proved a discontinuance of possession by the plaintiffs and their predecessors in title for a period of twelve years between this second visit and the bringing of the action? He held that the evidence showed repeated acts of ownership by the plaintiff Browne and her predecessors in title which were quite inconsistent with such a discontinuance, and we agree with him. This is enough to justify a judgment for the plaintiff, but it does not follow that a contrary finding would justify a judgment for the defendant. The proper test as to the plaintiffs' right to recover is supplied by sec. 3 of 3 & 4