MAXWELL-ANDERSON, C.J.—In the view which I take of this case it becomes unnecessary to decide the true interpretation of s. 17 of the Native Lands Ordinance. The correspondence between the legal advisers of appellant and the Crown shows clearly that rightly or wrongly appellant held that she had become a tenant from year to year and despite the fact that she was pressing for further compensation I must hold that her claim was made bona fide and accordingly could only be determined in this Court. It is not clear how the Secretary for Native Affairs was brought into the matter but it is to be observed that while the notice or warning issued by him is headed under the Native Trespass Ordinance it speaks of steps being taken for " your ejectment " and does not appear to conform to the provisions of the Ordinance.

Apart from this I am of opinion that the Native Trespass Ordinance which is in effect a special extension to native lands merely of s. 62 of the Summary Convictions Offences Ordinance[1] does not apply to cases such as that now before the Court where a question of title is involved but is intended to deal with what I term a " squatter trespasser."

It is perhaps somewhat unfortunate that this case in the first instance was heard before a District Commissioner who was largely concerned in the negotiations *ab initio* and who had himself ordered the appellant to leave the land, but that was perhaps unavoidable. I have come to the conclusion that there was a bona fide dispute as to title which ousted the jurisdiction of the Magistrate and further that the provisions of the Native Trespass Ordinance do not apply in this case. I desire to make it clear that it is within the jurisdiction of the Magistrate to decide whether or not a claim of right is made bona fide and his decision on that point is appealable as any other decision. This appeal will therefore be allowed and the conviction and sentence set aside. In deference to the argument of the learned Attorney-General I wish to make it clear that I decide this case solely on the grounds above stated and I decide nothing as regards the construction of s. 17 of the Native Lands Ordinance (the meaning of that section must be decided, if necessary, in other proceedings) nor do I express any opinion on the validity or otherwise of the appellant's claim to a tenancy.

SIUKALIA *v.* PALLARD.

[Civil Jurisdiction (Maxwell Anderson, C.J.) March 22, 1934.]

Registered proprietors as tenants in common in equal shares—small proportion of purchase price contributed by one registered proprietor—whether registration conclusive as to proportions—transfer of moiety by one registered proprietor in possible contemplation of fraud on his creditor—how far transferee's title affected by fictitious consideration in transfer—one registered proprietor in sole occupation and with custody of certificate of title—adverse possession.

In 1917 Pallard and his brother Debi agreed to purchase a piece of land for £500. The deposit of £50 was subscribed by them in equal shares but the balance of purchase price was paid off in instalments by

[1] *Vide Editorial Note.*

Pallard alone. The purchase was completed in 1921, Debi having paid £25 of the purchase price and Pallard the balance of £475. As from the date of the agreement Pallard occupied the property and Debi and his wife were only occasional visitors by invitation of Pallard. The transfer from the vendor on completion of the purchase in 1921 was to Pallard and Debi, who became registered proprietors as tenants in common each as to one undivided moiety. In 1924 Debi transferred his undivided moiety to his wife Siukalia, the transfer being duly registered and the Certificate of title being produced for this purpose by Pallard. This transfer purported to be in consideration of £275 paid by Siukalia to her husband Debi but was in fact effected by Debi in anticipation of trouble with one of his creditors and without consideration from Siukalia. On one occasion Pallard endeavoured to obtain Siukalia's signature to a document reciting that in consideration of a payment of £25 from Pallard she relinquished all claim to the property ; the document was never signed. Debi died in 1933.

In 1933 Pallard lodged a caveat claiming to be the owner in fee simple of the whole of the land on the ground that he had paid the whole of the purchase price and had been in sole possession since 1918. This caveat was removed by the Registrar of Titles on the application of Siukalia after due notice to Pallard. Pallard however applied to the Registrar of Titles for a vesting order, against the granting of which Siukalia lodged a caveat. Siukalia then claimed in the present action a declaration that she was tenant in common with Pallard of the land and entitled to joint possession thereof and that Pallard had not, by adverse possession or otherwise, acquired her interest as tenant in common.

Pallard counterclaimed for a declaration that he had acquired a title by adverse possession or, alternatively, that he and Siukalia were tenants in common in unequal shares on the basis that he was entitled to nineteen twentieths and Siukalia to one twentieth and for accounts and an order that Siukalia contribute one twentieth of all charges etc. paid by him, including the cost of buildings erected by him on the land.

HELD.—(1) A registered purchaser upon a genuine dealing (by which is meant genuine between the parties thereto) obtains an indefeasible title except upon proof of fraud, misrepresentation, or adverse possession, and the fact that no consideration actually passed or that both parties may have jointly contemplated a fraud on a third person does not affect the genuineness of the transaction between the parties.

(2) The facts that a certificate of title showing on its face a tenancy in common as to one moiety has been held by one of the registered proprietors without comment thereon and that such registered proprietor has produced the title for registration of dealings involving the exercise of rights of ownership by the other registered proprietor are evidence that the occupation of the land by the registered proprietor holding the certificate of title is not adverse to the possession of the land by the other tenant in common.

(3) Without proof of fraud or misrepresentation registration as tenants in common in undivided moieties is conclusive and indefeasible that the registered proprietors are tenants in common in undivided equal shares.

Cases referred to :—

(1) *Doed. Groves v. Groves* [1847] 10 Q.B. 486 ; 16 L.J.Q.B. 297 ; 116 E.R. 185 ; 21 Dig. 311.

(2) *Doed. Pritchard v. Jauncey* [1837] 8 C. and P. 99 ; 18 Dig. 135.

(3) *Rigden v. Vallier* [1751] 3 Atk. 731 ; 26 E.R. 1219 ; 38 Dig. 686.

(4) *Lake v. Craddock* [1733] 24 E.R. 1011 ; 38 Dig. 686.

(5) *Gibbs v. Messer* [1891] A.C. 248 ; 38 Dig. 753.

(6) *Evans v. Smallcombe* [1868] 37 L.J.Ch. 793 ; 19 L.T. 207 ; L.R. 3 Eq. 769 ; 21 Dig. 333.

(7) *McVity v. Tranouth* [1908] A.C. 1 ; 58 Dig. 753.

(8) *Assets Co. v. Mere Roihi* [1905] A.C. 176 ; 92 L.T. 397 ; 38 Dig. 753.

(9) *Caldwell v. Mongston* [1908] 1 Fiji L.R.

ACTION FOR A DECLARATION OF TITLE. The facts fully appear from the judgment.

S. H. Ellis, for the Plaintiff.—Plaintiff's title is clear—it is indefeasible. (S. 14 of Ordinance 14 of 1933[1] which is as in the old Ordinance). (*Groves v. Groves*, and *Pritchard v. Jauncey*).

G. F. Grahame (with him *D. M. N. McFarlane*), for the defendant.—No acts of ownership by plaintiff or her husband. Defendant has always been in possession and therefore adverse possession is complete. But if not there is a tenancy in common in unequal shares and a resultant trust—*Rigden v. Vallier* ; *Lake v. Craddock*, s. 14, Ordinance 14 of 1933, deals only with genuine transfers and this transfer is not a genuine dealing. We did not acquiesce in the transfer, for to acquiesce one must know every fact. The transfer therefore is not genuine and there is no estoppel. (He referred to s. 182, Ordinance 14/1933, and quoted *Gibbs v. Messer*).

S. H. Ellis in reply.—Fraud has not been alleged. As to acquiescence, see *Evans v. Smallcombe*. The transfer from Debi to Siukalia did not affect the defendant but he knew of it. (He quoted *McVity v. Tranouth*, *Assets Co. v. Mere Roihi* and *Caldwell v. Mongston*).

MAXWELL ANDERSON, C.J.—In this case it will be convenient if I first set out the facts as found by me on the evidence adduced by the parties.

In April, 1917, the defendant and his brother Debi, husband of the plaintiff Siukalia, purchased for £500 from one Henry Marks a plot of land in Toorak upon terms which included *inter alia* the payment of a deposit of £50 and the balance of the purchase price to be paid by instalments. The whole of the purchase price to be paid by instalments. The land was thereupon duly transferred to the purchasers. I am satisfied on the evidence before me that the defendant and Debi each paid one-half (£25) of the deposit and I am satisfied further that the whole of the balance (£450) of the purchase price was in fact paid by the defendant Pallard out of his own monies.

The transaction was opened in the books of Henry Marks as one with Pallard and Debi, receipts for the various balance payments were given on that account and both the contract note and transfer of onwership were made out as to Pallard and Debi.

[1] (*Revised Edition Vol.* II *page* 1215).

On the evidence I find that Pallard was in undisputed possession of the property from April, 1917, until August, 1924, that the occasional residence thereon of Debi and his wife the plaintiff were in no way a claim to or exercise of ownership but were on all occasions at the invitation of and with the leave and licence of Pallard.

In August, 1924, Debi purported to transfer to the plaintiff all his rights and interests in one undivided moiety of the property (for a consideration of £275) and the certificate of title is endorsed accordingly. At the same time he purported to transfer for a consideration of £190 to Pallard all his rights and interests in a propetry at Colo-i-Suva.

I do not accept the plaintiff's evidence that any consideration for the transfer was in fact paid and I accept the defendant's evidence that as regards the Colo-i-Suva transaction no consideration was in fact paid. I am satisfied that Pallard's evidence is to be accepted when he states that these two transactions took place because Debi was in difficulties over a lease of property in Rodwell Road and that they were effected to the joint knowledge of Debi Pallard and Siukalia with the object of defeating any claims which the lessor of the Rodwell Road property might have against Debi.

I accept Pallard's evidence that when the danger was over he retransferred the Colo-i-Suva property to Debi for no consideration because it was his (Debi's) property and that he fully expected that there would be a retransfer to Debi of Siukalia's interest in the Toorak property.

I hold further that whatever may be the effect of the transfer from Debi to Siukalia (a point with which I shall deal later) Siukalia knew that such was Debi's intention and she knew also that Debi had never put more than £25 into the purchase of the Toorak property.

I accept in its entirety Pallard's version as against Siukalia's of what took place on the occasion of the marriage of her daughter. Pallard went to that ceremony with a document which Siukalia was to execute and which stated that in consideration of a payment of £25 she was to relinquish all claim on the Toorak property and I further believe Pallard when he states that both Siukalia and her son said that she would sign the document after the wedding ceremonies were over.

It follows that I do not believe that Pallard ever offered to pay Siukalia £5 a month as rent and in general I accept as the true account of all that has happened to be that of the defendant and not of the plaintiff.

On these facts it becomes unnecessary to consider the position before 6th August, 1924, when plaintiff became the registered owner of one undivided moiety of the property in dispute. A somewhat similar question for decision arose in the case of *Caldwell v. Mongston* wherein the learned Chief Justice dealt fully with the effect of a registered title. Almost similar considerations arose in the case of *Assets Co. Ltd. v. Mere Roihi* and in my view the question is now concluded beyond all doubt. The sections of the Land (Transfer and Registration) Ordinance dealing with the position of a registered owner are clear beyond dispute. A registered purchaser upon a genuine dealing (by which is meant genuine between the parties thereto) obtains an indefeasible title except upon proof of fraud, misrepresentation or adverse possession,

and I am of opinion that the fact that no consideration actually passed, especially as between a husband and a wife, does not effect or destroy the genuineness of the transaction as between the parties. Counsel for the defendant has urged upon me that *Gibbs v. Messer* shows that a registered title may not be indefeasible, but that in a case of fraud and forgery. In this case no question of fraud or misrepresentation can arise, except the possible fraud which is irrelevant to the issue, in contemplation against the Rodwell Road lessor and to which both plaintiff and defendant were parties.

As regards adverse possession it is clear from the evidence that the defendant did not himself consider that his title was clear ; he clearly recognized some interest therein of the plaintiff at least to the extent of one-twentieth of the whole, since he was offering beyond doubt to buy out her interest at the amount originally contributed by her husband Debi. I hold accordingly that the claim of adverse possession fails, the defendant having acquiesced in the exercise of rights of ownership by Debi at the time of the transfer to the plaintiff in August, 1924, and he having held in his possession from 1924 and without comment thereon until 1933, the certificate of title showing plaintiff's interest in the land to extend to one moiety thereof.

There will accordingly be a declaration that the plaintiff and the defendant are tenants in common in equal undivided shares of the Toorak property as and from 6th August, 1924.

As regards paragraph (2*c*) of the counterclaim I am of opinion that the defendant is entitled to an account between himself and the plaintiff but not to the extent claimed.

The order will be that such an account be taken and that the plaintiff shall pay to the defendant one-half of all rates, taxes, charges and assessments paid by defendant in respect of the said land during a period limited to six years prior to the commencement of proceedings in this matter, such date of commencement to be taken as June 12th, 1933, the date of the first caveat, i.e., an account as and from June 12th, 1927. Such being the order of the Court I have given careful consideration to the incidence of costs. Having regard to all the circumstances and exercising my discretion after a review of the decided cases I think that justice will be done if I direct the defendant to pay one-half of the plaintiff's taxed costs. I make no order as to the remaining half.