

and not intended connivance—in other words as meant “to secure complete freedom for the woman and place her in the position of an unmarried woman as the English form does” it seems to be desirable to add a few observations.

I emphatically reject the suggestion that the English form in any way has the same effect as the covenant now under discussion. I have explained above what the English form does mean, and need only repeat that the words therein used do not constitute a licence to commit adultery. The local form does, in effect, constitute such a licence and if the words are really intended to meet the provisions of s. 45 of the Marriage Ordinance, they appear to me not merely clumsy but also ineffective in many cases which will come readily to the mind. If it be necessary, which I doubt, to insert in a deed of separation some provision safeguarding a party against possible proceedings under the Marriage Ordinance there is no difficulty in drafting a suitable form of words which, while having the desired effect, will not leave a party in a divorce action open to the charge of connivance and perhaps deprive him of desired relief.

It is further to be observed that although this covenant is stated to be inserted in the deed to provide against possible consequence arising out of the Marriage Ordinance yet there also appears another covenant as follows: “The husband will not institute or consent to the institution of any proceedings under s. 45 of the Marriage Ordinance No. 2 of 1918.” If Counsel’s argument is correct then this further covenant is a mere redundancy. I need not pursue the matter other than to repeat that the deed in form—and as I am told commonly in use—is objectionable and should be revised. Admittedly the presumption of law is against the existence of connivance but such presumption is rebuttable and when the deed of separation is produced to the Court, as it always should be if in existence, the circumstances of time and conduct surrounding its execution will have to be considered.

JAINAB *ats.* POLICE.

[Appellate Jurisdiction (Maxwell Anderson, C.J.) February 7, 1934.]

Prosecution under Native Trespass Ordinance¹—Claim to title by defendant—whether a claim to title ousts Magistrate’s jurisdiction in proceedings under the Native Trespass Ordinance.

Jainab, who was the lessee under a lease for 21 years of certain native land, which expired on January 18, 1933, applied for an extension in June, 1932—six months before the date of expiration of the lease—under s. 15, Native Lands Ordinance, 1905. A valuation of the improvements was made in December, 1932, shortly before the expiration of the lease, and the value was fixed at £68. Jainab continued to occupy the land after the expiration of the lease, but the native owners refused to give an extension of the lease. On March 20, 1933, the Governor in Council made an order for the native owners to pay £68 compensation within four months. On July 5, 1933, Jainab ten-

¹ Cap. 87.

dered £5 1s. 3d., a year's rent, to the District Commissioner, Rewa. On July 17 the native owners paid £68, the valuation of the improvements, to the District Commissioner, who then applied £2 10s. 8d. of Jainab's payment for six months' rent, returning £2 10s. 7d., and told Jainab she must leave the land, offering her at the same time the said £68. Correspondence then ensued between the appellant, the Commissioner of Lands and the Acting Attorney-General in course of which Jainab claimed that by virtue of s. 17, Native Lands Ordinance,¹ she was a tenant from year to year, that the compensation paid was inadequate and by a last letter dated 20th October, 1933, it was suggested by Jainab that the question of title should be determined by the issue of a writ for ejectment.

On 28th October 1933 the Secretary for Native Affairs issued to Jainab an order purporting to be issued under the authority of s. 2 (c), Native Trespass Ordinance.² Jainab did not comply with the order and proceedings were taken against her under the aforesaid s. 2 (c). At the hearing before the District Commissioner, Rewa, Jainab contended that she was in occupation of the land by virtue of a bona fide title or claim to such and that accordingly the jurisdiction of the Magistrate was ousted. The Magistrate rejected this contention and convicted appellant. She was fined £3 5s. od., or in default of payment two weeks imprisonment with hard labour and ordered to vacate the land within four weeks, failing which she would be removed by force.

HELD.—(1) The Magistrate's jurisdiction in criminal proceedings is ousted where there is a bona fide claim to title.

(2) The provisions of the Native Trespass Ordinance do not apply to cases where a question of title is involved.

[EDITORIAL NOTE.—The Native Lands Ordinance, 1905 has suffered many amendments since this judgment. S. 17 of the Ordinance, on which the appellant's claim to title was founded was as follows :—

“ In the event of any lease the extension of which is desired
 “ expiring prior to or during any negotiations for its extension insti-
 “ tuted under this Ordinance then and in such case the lessee
 “ thereof shall be deemed to be and shall enjoy all the privileges
 “ of a tenant from year to year upon the terms and conditions
 “ contained in the expired lease until the conclusion of any such
 “ negotiations so instituted as aforesaid.”

The section does not appear in Cap. 85 (Native Lands Ordinance) or Cap. 86 (Native Land Trust Ordinance).

The judgment does however determine the nature of proceedings under s. 2 of the Native Trespass Ordinance (Cap. 87) which is substantially the same as s. 2 of the Native Trespass Ordinance, 1889. In the judgment this section is referred to as “ in effect a special extension to native lands merely of s. 62 of the Summary Conviction Offences Ordinance ”. S. 62—(1) of the Summary Conviction Offences Ordinance, 1876 (Repealed) was as follows :—

“ (1) Every person shall be liable to a penalty not exceeding
 “ twenty pounds and in default of payment to be imprisoned with
 “ or without hard labour for any period not exceeding three months

¹ *Vide Editorial Note.*

² *Cap. 87.*

“ if he shall unlawfully persist in coming or remaining upon any
 “ plantation land or premises after being warned not to come
 “ thereon or to depart therefrom.

“ (2) Any person found in any dwelling-house or in any veran-
 “ dah or passage attached thereto or in any yard garden or other
 “ land adjacent to or within the curtilage of such dwelling-house
 “ with intent indecently to insult or annoy any female inmate of
 “ such dwelling-house shall be liable on conviction to imprisonment
 “ not exceeding twelve months with hard labour and may further
 “ be ordered to be privately whipped. Provided that no such
 “ whipping shall take place without the previous consent in writing
 “ of the Governor.”

This type of criminal trespass is recognised by the Penal Code—*vide*
 Cap. 5 s. 209.]

Cases referred to :—

R. v. Stimpson [1863] 32 L.J. M.C. 208 ; 9 Cox C.C. 356 ; 8 L.T.
 536 ; 122 E.R. 472 ; 33 Dig. 339.

G. F. Grahame for appellant, after outlining the facts submitted that
 the lower Court had no jurisdiction. The claim to title was bona fide
 and made under s. 17 of the Native Lands Ordinance. Negotiations
 were still proceeding under s. 17. Criminal proceedings could not lie
 where there was a bona fide claim to title. He cited *R. v. Stimpson* 32,
 L.J. M.C. 208.

The Attorney-General (*R. S. Thacker*), for respondent.—There was
 no bona fide claim to title. Appellant merely wanted more compensa-
 tion and so remained on the land after her title was extinguished. The
 only law that can be applied to her rights is s. 17, Native Lands Ordi-
 nance, which says that a tenant shall enjoy privileges of a tenant from
 year to year until the negotiations are completed. The negotiations
 finished with the offer of the compensation in July, 1933.

The Court.—The section says “ shall be deemed to be and shall enjoy
 all the privileges,” &c.

The Attorney-General.—That is only until negotiations cease—then
 there is no need of a six months’ notice, the tenancy ceases with the close
 of the negotiations. The Magistrate was right in deciding that there
 was no bona fide claim to a title, the whole crux of the situation was a
 demand for more money and the magistrate so decided after hearing
 both sides. It is clear that if more money was paid appellant would
 have left the land.

The Court.—That might merely amount to waiver. But can a person
 holding over be liable for criminal trespass ? Is not the remedy and
 action for ejectment ?

The Attorney-General.—The procedure in this case may be unusual
 but it is quite legal. Appellant was a trespasser from the expiration
 of the negotiations and can be properly prosecuted under the Native
 Trespass Ordinance. Every step taken was perfectly valid and the
 conviction is good.

Grahame (in reply).—The argument of the learned Attorney-General
 depends on his interpretation of s. 17. We do not agree with that
 interpretation and there arises our claim. The dispute is bona fide in
 regard to a title to land, and accordingly criminal jurisdiction is ousted.

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 ejection” 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 Ordinance¹ 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.*