



576

EAST AFR. PROT
44709

C.O
44709
REC
SEP 15

Governor
Belfield
Conf
85

CROWN LANDS ORDINANCE

1915

26th August

Enclosed with observations petitions from the Mombasa Chamber of Commerce and from a number of the land owners of Mombasa and District expressing surprise at certain clauses of the Ordinance.

Last previous Paper.

Gov
31440

Send Conf copy to each of Gov
and Conf copy 2 Sept 16
35 Oct 16

Mr. Tennyson
Mr. Read.

This is almost entirely a legal matter. You will notice that a Bill is in progress to protect titles awarded by the Recorder of Titles and to deal with the overlapping registration, & that the Government does disavow any policy of grant. The people who have got their titles from the Recorder are all right, but those who are still waiting may be apprehensive as to what time the ⁱⁿ future production.

The Gov. deals fully with the simple estate given, and it remains fairly certain that the registration has been done & manufactured - the opportunity has been seized to find all sorts of flaws in the 1908 Ord. which we did not know of before. But in light

Next subsequent Paper.

Gov
45084

ask the Gov^t whether there is any
provision for the complaint that cost was
incurred?

It cannot possibly result the view
that the matter should be the Gov^t responsibility
of the large concession which we have
granted or to which we are committed?

As to the criticism of Part III - i.e. the
Governor's veto - there is something in this, and
it might be necessary to go through the titles
already issued & remove the anticipations
where necessary with a statement that
the original grant was ^{Part II} ~~Part I~~. It should not
be a difficult matter now - a query
might be sufficient 20 years hence. If
any future anticipations would have to give
reminiscence info. I suppose increased land
have Part III off by itself cover - whether
of original Crown Grant or other.

6.11.15

We read

[The paper has travelled about between
the Printing Dept & me & the ^{Dept} ~~Dept~~
since the middle of January, when
you asked us to look at it,
and I can assure that I have
not found time for it since.
There appears to be no urgent
urgency about these petitions
however.]

It cannot be denied that the

objections taken to sec 140 cases of the Crown
lands are: -
1. at any rate on paper -
certain amount of force
sec 140 on the Gov^t himself ^{practically} ~~practically~~ (para 19)
is more applicable to the title outside the coastal
strip than the latter; but sec 140 was
deliberately inserted for the coastal strip.

In practice the objections of the petitioners are
discounted in two ways:

1. Sec 140 & 141 are not intended to operate
when titles have actually been granted by
the Recorder of Titles under the ~~law~~ ^{the}
1862 Act and a Bill is being introduced
to make some other (para 19)
2. In the case of land in respect of which no
title has yet been granted there is no
intention on the part of the Gov^t to
make oppressors use of the presumption
in the Statute; and a beneficial
assurance has been given on this
point (para 10)

I do not know what are the facts as to land
in the Coastal area. According to para 7
of the Chamber of Commerce the settlements (sic)
of the Coast Titles has practically ceased
to exist. The headmaster's petition, on
the other hand, states that a large
number of certificates of Title have already
been issued by the Recorder of Titles
under the 1862 Act & 1905 to private
landholders (sc. in the coastal strip)
It is not therefore clear whether many

Top of p. 24 of
provision memo

ask the Gov. what time is any
provision for the complaint that costs are
to be given?

We cannot possibly accept the view
that the matter should be the Court's duty
to belong to the Gov. - what course become
of the large Commission which we have
granted or to which we are committed?

As to the contents of Part VII - i.e. the
Governor's veto - there is something in this, and
it might be necessary to go through the titles
already issued & send over the certificates
where necessary with a statement that
the original grant ^{was by} Gov. It should not
be a difficulty with Gov. - a query
might be difficult 20 years hence. Of
course future certificates would have to give
similar info. I suppose we could at least
have Part VII off by itself - whether
of original Gov. Grant or other.

6th Dec. 1890

We had

[The paper has travelled about between
the Printing Dept & us & the title
since the middle of January, when
I was asked to look at it,
and I can assure that I have
not found time for it, & so
there appears to be no great
urgency about these petitions
hitherto.]

It cannot be denied that the

objections taken to see us over of the Crown
lands etc. have, at any rate, on paper, a
certain amount of force. ^{practically}
see 140 - the Gov. himself, ^{advised} (para 19)
is more applicable to the facts outside the Court
ship than the latter, but see 140 was
deliberately reserved for the Court's staff.

In practice the objections of the petitioners are
discounted in two ways:

1. See 140 & 141 are not intended to operate
when titles have actually been granted by
the Recorder of Titles under the Land & Title
Act 1890, and ^{the} ^{land} ^{being} ^{intended}
to make this clear (para 19)
2. In the case of land in respect of which no
title has yet been granted there is no
intention on the part of the Gov. to
make oppression use of the presumption
in these sections, and a beneficial
assumption has been given in this
point (para 19)

I do not know what on the facts is to be done
in the Court's area. According to para 7
of the Charter of Commerce "the settlements (and)
of the Court Title has practically served
its purpose." The handover's petition, on
the other hand, states that "a large
number of certificates of Title have already
been issued by the Recorder of Titles
under the L.T. Ord 1890 to private
landholders" (sc. in the Court's staff)
It is not therefore clear whether necessary

Top of p. 44 of
Memorandum

on the landholders are already protected, as
under the survey, but with respect to 2
supra, we shall do our best. If there
are hard cases in future as a result
of the Court departing from its present
benevolent policy.

There seems to be no need to interfere with
the operation of these sections at present.

As to the costs under the hand titles and the
unsuccessful claimant has to pay as
court fees such sums as the Recorder of
Tilfer may think fit not exceeding 2%
of the value of the property claimed

This provision is incorrectly summarized
on p. 2 of the Morrison memo and I
have not been able to check the statement
as to fees on appeal from the
Recorder's Court to the High Court.
We might perhaps enquire about
this.

How we cannot pursue the general
or vague allegations of bad things
or inconsistency between this Order
and the hand titles etc.

The Ch. of Commerce should have sent
two objections forward in the
concrete form of proposed amendment
when asked the Govt. to
introduce legislation on
those lines.

As it is the Govt. Bill (para 7)

will presumably deal with the objection
taken in the last 2 pages of the Morrison
memo (p. 4)

Apparently it has not yet been received
and I should be inclined to await
the receipt before taking any action
on these petitions.

J.A. 7/3/16

Mr. Reid

You brought this case. We have no particulars of
the work of the Court. The figures for acreage which I
attach give some indication of the number of cases
dealt with, but the acreage (which comes over to
a length less than 14 miles by the straight line
side) is rather misleading. Both when
before their holdings were most crowded, and then
on large areas (e.g. the bulk of the E. Afr. Estates
Commission of 8250,000 acres) which should
give little trouble.

I think we can safely wait, but I suggest
that we should tell the Govt. we are waiting for
the Bill and ask when it may be expected?

W.C. 7.3.16

at once
J.A.
10/7/16

Room 3

Very uncertain
position as far
as possible
A maximum
£20 court fee
of £1000 or
more, not
more

late as
top

East lead survey - East Africa Protectorate

	1911-12	1912-13	1913-14	1914-15
		NE scans	NR	NR - scans
			238	188
		9,335	6	11,317
		123	17,701	-
		no stumps	55	129
			137	865
				152
				24
				635
				39,257
		9,335		36,315

Trachypogon
Recurvus
Pomarine Skua
Boomerang

Some work
 - no particulars

Total 84,907

44709

44709



GOVERNMENT HOUSE, NAIROBI, BRITISH EAST AFRICA.

EAST AFRICA PROTECTORATE.

CONFIDENTIAL No. 85.

August 26th, 1915.

580

6568-10

Sir,

Petitions
2.

I have the honour to enclose two petitions on the subject of the Crown Lands Ordinance, 1915, one from the Mombasa Chamber of Commerce and the other from a number of the land owners of Mombasa and District. The former petition is in pursuance of the Cable No. 208 from the Mombasa Chamber of Commerce sent to you on the 14th June, 1915. The latter petition is a statement in support of the Cable No. 239 sent to you on the 6th ultimo.

See
No. 208
20868
76

2. Both petitions in dealing with the provisions of the Crown Lands Ordinance, 1915, express surprise at certain of its clauses

and

THE RIGHT HONOURABLE
ANDREW BONAR LAW, P.C., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON, S. W.

Not returned

and criticism is centered on Sections 140 and 141.

3. That there is no foundation for the surprise or ignorance of the provisions of the Crown Lands Ordinance, 1915, expressed in the Petitions is evidenced by the fact that Section 140 appeared in the Bill which passed the Legislative Council as long ago as 1909 (vide Section 105 of that Bill) and that Section 141 appeared in the draft Bill of 1911 and was published in the draft Bill of 1913 which eventually became law in 1915. The Community at the Coast has had, therefore, ample time to discover any features of the ordinance which in its opinion were objectionable.

1. Apart from the opportunity for the expression of an opinion on the contents of the Ordinance given by the long interval between its publication as a Bill and the date on which it was ultimately read a third time in the Legislative Council the Special Committee of that body appointed to inquire and report on the Bill sat at Mombasa on the 5th June, 1914, after the Provincial Commissioner, Seyidie, had been instructed to give information of the meeting to those persons or bodies who were interested in the Bill and he was furthermore specifically

and criticism is centered on Sections 140 and 141.

3. That there is no foundation for the surprise or ignorance of the provisions of the Crown Lands Ordinance, 1915, expressed in the Petitions is evidenced by the fact that Section 140 appeared in the Bill which passed the Legislative Council as long ago as 1909 (vide Section 105 of that Bill) and that Section 141 appeared in the draft Bill of 1911 and was published in the draft Bill of 1913 which eventually became law in 1915. The Community at the Coast has had, therefore, ample time to discover any features of the Ordinance which in its opinion were objectionable.

4. Apart from the opportunity for the expression of an opinion on the contents of the Ordinance given by the long interval between its publication as a Bill and the date on which it was ultimately read a third time in the Legislative Council the Special Committee of that body appointed to inquire and report on the Bill sat at Mombasa on the 5th June, 1914, after the Provincial Commissioner, Seyidie, had been instructed to give information of the meeting to those persons or bodies who were interested in the Bill and he was furthermore specifically

specifically instructed to apprise the Mombasa Chamber of Commerce of the meeting. As a result Mr. P. H. Clarke, then Chairman of the Chamber and Mr. Byron, two of the signatories to the memorandum on the law appended to the Chamber's petition appeared with others before the Committee. The only matter of importance discussed by the above gentlemen was the advisability of establishing a Registry of Crown Lands at Mombasa and in accordance with their representations the Bill was amended in order to give power to establish such a Registry and one has, in fact, been established.

5. It is, in view of the above facts, idle for the Chamber of Commerce or individual land owners to state that they have been surprised and that the provisions of the Ordinance have been enacted without giving them an opportunity of making any protest they thought fit with regard to any of its provisions. From the foregoing it will be seen that paragraph 5 of the Chamber's petition is not in accordance with the true facts of the case.

6. The statement in paragraph 8 of the Chamber's petition is inaccurate. The policy adopted by the Government is not to get by any means as much of the Coast lands as possible

into

into their hands but rather not to oppose in the Recorder's Court claims to titles which have any substantial foundation in fact.

7. Comment on the last four paragraphs of the Chamber of Commerce Petition is scarcely necessary. No definite instance has been cited giving reasons why any of the provisions of the Ordinance should be amended and it is clear from paragraph 11 that the effect of the provisions governing sub division have not been understood.

64-94

8. The statement in the memorandum accompanying the Chamber's petition that where applicable the lex loci rei sitae is Mohammedan law is well founded. As the memorandum states, the Indian Transfer of Property Act has been applied.

See

9. With regard to the criticism in the memorandum on the Land Titles Ordinance, 1908, I fail to see how any course other than the one laid down in the Ordinance could be made practicable. If the onus of ascertaining the real owner were thrown on the Recorder of Titles it is obvious that an enormous responsibility would lie on the Government, a responsibility which it could not possibly undertake, and it would be impossible to give an indefeasible title to any property

property.

584

10. The proclamation of Sir Arthur Hardinge of 1st September, 1898, is in the opinion of many lawyers of doubtful legality. It does not purport to be a Queen's Regulation under the East Africa Order-in-Council, 1897, and the terms of the Proclamation itself limit its application to Native Courts. The High Court has, however, adopted its provisions as having the force of law and the Judges of that tribunal have been obliged to follow the dictum already pronounced. Its legality has never, so far as I am aware, been in issue before the Court of Appeal.

11. Mr. Justice Bonham Carter held in the case cited in the memorandum that the proclamation was an English Proclamation and therefore did not bind the Crown. Assuming that the proclamation has any legal effect I submit that Mr. Justice Bonham Carter's decision is sound. The fact that the Court of Appeal dismissed the appeal of the Zanzibar Government on other grounds does not necessarily make that part of the judgment dealing with the proclamation obiter dictum.

12. It must further be remembered that the Indian Limitation Act 1877 was applied by
the

the East Africa Order-in-Council, 1897, to the Protectorate and its provisions govern all those who are subject to it i.e. all persons other than natives. Under such Act the period of limitation prescribed for any suit by or on behalf of the Government is 30 years. Thus if the Crown has any right to land in the possession of a non-native before the enactment of Section 141 of the Crown Lands Ordinance, 1915, the person in possession would have to shew a 30 year title.

13. I do not think it has been fully realised that the provisions of Section 141 of the Ordinance are only applicable to cases in which the Crown or the Government is a party.

14. The note of the Attorney General on a similar Section contained in the 1911 draft Bill runs as follows:-

"Under Mohammedan law as interpreted in the Courts of this Protectorate a person can acquire title to any waste or abandoned land by clearing and planting the land.

"Title so acquired prior to the administration of the Sultan's Mainland Dominions by the British Government has been recognised by the Government. So far as I am aware the Imperial British East Africa Company did nothing

*by the Act
the person will be
in possession of the*

*But this was
not the intention
of the Ordinance
in regard to
title*

*such as cases
of title
by claim*

nothing in the matter of regulating the acquisition of land on the Coast Strip and it would, therefore, appear to be right that this Government should recognise as valid any title to land acquired before the administration was taken over by the British Government, which would have been recognised by the Sultan.

"The British Government has made laws declaring the manner in which title to land in this Protectorate may be acquired from the Government, and it would, in my opinion, be right to declare that no title to land which became vested in the Crown could be acquired except under and in accordance with such law.

"The Section under consideration in effect preserves all titles to lands which were privately owned, under and in accordance with Mohammedan law, before December 14th 1895, but prevents any person claiming to have acquired a title to land which was waste or Crown land at that date by occupation alone".

And the Secretary of State in his confidential despatch of the 7th November, 1914, states:-

CLAUSE 141

"The reasons for this Clause are

fully

fully explained in the marginal note on page 31 of the 1911 draft. It recognises Mohammedan law titles by occupation acquired prior to our administration but lays down that after that date new titles shall only be acquired under the Protectorate law".

(The marginal note referred to is Mr. Combe's note cited above).

15. It will thus be observed that the policy of which Section 141 of the Ordinance is an expression was clearly sanctioned by the Secretary of State.

16. I do not think it necessary in this despatch to deal with the legislation defining and giving the Government power to control public land in His Highness the Sultan of Zanzibar's dominions.

17. I have little doubt that the provisions of the Crown Lands Ordinance, 1915, do not affect titles granted by the Recorder of Titles but in order to remove all possible doubt and cause for unrest on the point among native and other classes of land-holders I have caused the introduction at the sittings of the Legislative Council held on the 23rd instant a Bill to remove all such doubt and at the

same time to deal with questions due to any overlapping of the registration provisions of the Crown Lands Ordinance, 1915, and the Land Titles Amendment Ordinance, 1910.

18. I have, in dealing with the Chamber of Commerce Petition, touched on the principal points raised in the land owners' petition, which seems to have arisen from a sense of unrest caused by an idea that the Crown was intending to use harshly the provisions of Section 141 of the Crown Lands Ordinance, 1915, to grab all the land it possibly could. An assurance that such is not the intention has been given and has, I think, gone far to allay any anxiety on the matter.

19. Section 140 of the Ordinance appeared in the 1909 Bill and also in the 1911 draft. The provision is a useful one and the arguments brought against it are not very cogent. The Crown should, in my opinion, be in a position in an action brought by the Crown in respect of an unlawful occupation, use of or trespass upon Crown land to throw the onus of proof that the occupation or use was authorised on the defendant.

This is especially the case outside the Coast area where the presumption is that the land

land is Crown land in the absence of a Crown grant and when the Recorder of Titles has completed his work there will be no material difference between Coastal lands and other lands.

The part of the Section dealing with averments is also reasonable and the last part of the Section dealing with maps, plans, etc. is necessary and usual.

I have the honour to be,

Sir,

Your humble, obedient servant,

Always, Sir,

GOVERNOR.

land is Crown land in the absence of a Crown grant and when the Recorder of Titles has completed his work there will be no material difference between Coastal lands and other lands.

The part of the Section dealing with averments is also reasonable and the last part of the Section dealing with maps, plans, etc. is necessary and usual.

de
I have the honour to be,

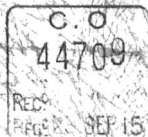
Sir,

Your humble, obedient servant,

H Conway

GOVERNOR.

Mombasa Chamber of Commerce,
AND AGRICULTURE.



590

To the

Right Honble The Secretary of State for the Colonies

Whitehall. LONDON.

Through

HIS EXCELLENCY THE GOVERNOR.

NAIROBI.

SIR,

I have the honour to confirm my wire to you of 10th inst. forwarded to His Excellency the Governor of the Protectorate for transmission as follows :

Please transmit to Secretary of State following wire in terms of resolution unanimously passed at a meeting of this Chamber yesterday. Colonial Secretary, London, Mombasa Chamber of Commerce unanimously request you to veto Crown Lands Ordinance 1915 pending enquiry as to applicability to Coast area. Many provisions inequitable particularly sections 140 and 141, which are retrospective and invalidate many good titles acquired under existing twelve years limitation.

2 I also enclose herewith a Memorandum as to the law existing before the Crown Lands Ordinance 1915 prepared by a special sub-Committee of this Chamber.

3 The technical legal points which arise have been dealt with in the enclosed Memorandum but I am directed by the Chamber to express the strongest condemnation of this Ordinance and in particular sections 140/1 upon the following general grounds :

4 It is a surprise to the Members of the Chamber and the Public generally to find provisions affecting private property to such an extent inserted in an Ordinance dealing with Crown Land which was understood by the Public to be concerned with Crown Lands alone.

5 It is true that the original Draft of the Ordinance was published some years ago with these preposterous sections but it was understood that the whole Ordinance was to be re-drafted. This I understand was in fact done. No copy of the new Draft was sent to the Chamber or published generally and until the publication of the Ordinance the general public of Mombasa had no idea that such provisions could or would become Law.

6 The Chamber represents a large number of Land holders in the Coast whose interests are affected. Most of the Titles on the coast held by Indians or Europeans have been bought in reliance on the 12 years' limitation. Owing to the absence of all records in 1895 the facts required to be proved by section 141 would have to be proved by ignorant native evidence which any Barrister could easily prove to be unreliable.

The Government for many years have declined to define their rights to Land on the Coast. Purchases of native Titles have been made for years past and the Purchases have been registered so that the Crown had full notice of the transactions and yet until the passing of the Lands Titles Ordinance

nance no attempt whatever was made by the Crown to define their right. The Recorder of Titles was appointed in or about the year 1906 and yet so dilatory have the proceedings been owing to the neglect to supply an adequate staff of surveyors that a large sum of public money has been wasted without any adequate results and the settlements of the Coast Titles has practically scarcely begun.

8 It is apparently the policy of the administration to get by any means as much of the Coast lands as possible into their hands and to take advantage of every circumstance favouring that object. If in 1895 or in 1905 the Administration had defined the Crown Land claimed by the Government it would have been comparatively easy to disprove their claim but now when the slaves who knew the boundaries have been dispersed the whole country can be successfully claimed for the Crown by the help of the presumptions now enacted.

9 The executive has full control of legislation and is subject to no effective control by public opinion it also controls to a great extent the Land Registration Court. In these circumstances presumptions should favour the Public and not the Crown which needs no indulgence or protection by law. It is a general rule everywhere else in the world that possession is a good title and that the Plaintiff seeking to recover possession should prove his Title. The special reasons which make this inapplicable up-country as regards the Crown do not in any way apply to the Coast area.

10 We have been advised by the legal Members of the Chamber that the Ordinance is exceedingly defective in many technical points with regard to conveyancing and it would be difficult if not impossible for ordinary transactions such as a sale of a portion of a plot to a Purchaser who is finding part of the Purchase money by a simultaneous Mortgage to be carried through at all.

11 In ordinary cases a Vendor does not part with his Title Deeds until he receives the money and a purchaser does not part with his money until he receives the Title Deeds. The Draftsman who provided for a surrender of the overlease and an issue of two new Leases to be prepared by the Land Office at their leisure can have had no experience of the way in which ordinary business is conducted.

12 The Chamber asks therefore that the Ordinance in its present form be deleted; that it be not applied to the Coast at all until it has been radically altered so as to fit in with the existing Law of the coast strip and that it be submitted to a competent Draftsman acquainted with ordinary conveyancing practice and the manner in which ordinary business is conducted. The retrospective portions should be excised.

13 The whole Policy of the Ordinance in so far as it affects the value of a Title to Crown Lands for the purpose of securing an advance from Bankers in the Protectorate or in London should be carefully considered and competent advice obtained. In the opinion of the Chamber legislation of this sort will have the effect of keeping capital out of the country and will seriously affect the development of the Coast area as private owners will find it difficult to raise capital for development on the security of their property.

I have the honour to be,

Sir,

Your most obedient servant,

E. A. BROWN,

Secretary.

to
ly

MEMORANDUM.

With regard to the Land Law in East Africa particularly the Coastal area before the passing of the Crown Lands Ordinance 1915.

The Crown Lands Ordinance 1915 is a general Ordinance which has been drawn with particular reference to the condition of affairs in the parts of the Protectorate outside the dominions of the Sultan of Zanzibar and has been applied generally to the Protectorate including the Mainland Dominions of the Sultan of Zanzibar without the Draftsman having made any successful effort to make it applicable to the conditions obtaining in the Coast area.

Outside the dominions of the Sultan of Zanzibar all the Land belongs to the Crown. The natives have no rights to the land enforceable in a Court of Law as it is always open to the Crown by Political action to deal with any Land claimed by natives and such Political action on the part of the Crown cannot be reviewed by the Courts of the Protectorate. That this is so is clearly shown by the Judgment of the Court of Appeal for Eastern Africa in what is known as the Masai Case. Therefore when the ordinance provides as it does provide that a mere avowment by the Crown that any land is Crown Land is sufficient without proof, until the contrary is proved, such provision is quite reasonable and is a presumption in favour of the Crown. The facts of the case so long as such Land is outside the Mainland Dominions of the Sultan of Zanzibar. Outside these dominions natives are forbidden to alienate their Land without the consent of the Administration and this consent is practically never given.

Accordingly the only Land to be registered or transferred is Crown Land and the Crown Lands Registry established by the Ordinance is in fact a general Registry applying to all Land in that area.

The state of affairs with regard to the Mainland dominions of the Sultan of Zanzibar is entirely different. In that area the Law of the Land is Mohamedan Law and under the well known Judgment of the Privy Council in the case of "The Secretary of State v. Charlesworth Pilling & Co." Mohamedan Law is declared to be the Law applicable when the Land is held by Europeans. Since that decision the Indian Transfer of Property Act has been applied to the Country generally and applies to Europeans and Indians but not to natives. It has been held to affect only those subject to it, and where the Law of the *locus rei sitae* is applicable such Law is Mohamedan Law.

The Mainland dominions of the Sultan of Zanzibar have supported a numerous population for many hundreds of years past. The Sultan of Zanzibar first obtained a footing in the Mainland in 1825 and never claimed to be owner of the soil except in so far as he purchased, or in particular cases confiscated, property. The native custom with regard to Land is of the most elastic description. As the Land is in the tropics bush and grass grow with exceptional rapidity and it is the general habit to clear a patch of bush and burn it without removing the stumps. The usual native crops would be sown during that year and the next during which cultivation would be comparatively easy, but grass which would be entirely absent the first year and making its appearance the second year, would, in the third entirely overrun the cultivation so that the shamba would be abandoned and the bush grow up again. The bush after one year's abandonment would reach to a height of about 12 feet. To an unexperienced eye such bush land would appear to be entirely uncultivated and to be waste or abandoned land but every few years it is cut and burned and its general character is entirely different from the thick forest that has never been cleared for years past.

Most of the Land was held by large slave owners whose slaves usually kept in the same locality and on the bush and planted in the manner already described. There were of course no definite boundaries to these shambas but each man knew where he could cultivate without interference. There was a small class of poor men, freed slaves and others, who cultivated where they felt inclined usually

without interference from the owner unless the owner himself wished to cultivate in that portion of the Land. Near each town or village was a large area occupied in rotation by the cultivation of the inhabitants and it was usual and courteous for any stranger to get permission from the Headman or Wazee before cultivating in the area from time to time occupied by the townspeople.

During the disastrous war arising out of the rebellion of Sheikh M'baruk about 1896 and 1897 the whole coast was laid bare and waste and a large number of slaves ran away and escaped and an incredible number of plantations were destroyed. Slavery, was by that time a dying institution and has since become entirely extinct. Owing to the loss of slaves by desertion and finally by operation of the Law the Landowners have been deprived of their labour, are very much impoverished, and have very generally ceased to cultivate their Land.

Owing to the original indefiniteness of boundaries added to the general cessation of cultivation, titles on the coast became most intricate and confused and when to this was added the loss of slaves who alone knew such boundaries as there were, it was seen that special steps had to be taken to meet the difficulty and to restore that certainty of title which is a necessary condition for the progress of the country. Proposals were accordingly made by the Protectorate Government for the establishment of a Registry of Title with regard to coast Lands and for the guaranteeing of all such titles by law as should be registered after enquiry had been made, with reference to an accurate survey of each plot of Land. The original scheme would, without doubt have been a great advantage to the coast area, and would have introduced certainty of title and boundaries and greatly increased the facility with which Land could be dealt with or transferred.

The Ordinance passed in order to carry out the scheme, and its subsequent administration have entirely failed to realise the promises of the first proposal. As the register was to be made dependent upon an accurate survey a large staff of surveyors was required, for each judicial officer could have employed to advantage from 15 to 20 Surveyors. Owing to the uncertainty with regard to original boundaries and the difficulty of establishing facts which were difficult to prove technically but which any officer of experience could easily have arrived at, the officer making the enquiry should have had power to assign the boundaries and to award certificates to those people whom he found entitled after proper enquiry. There should have been no appeal from his decision, but a time should have been limited in which people dissatisfied could have taken legal proceedings in the ordinary course to establish their rights.

Instead of this, the Ordinance has been used to obtain Land for the Government which never belonged to the Sultan at all.

The Officer appointed to enquire into the title is called the Recorder of Titles and instead of the onus being on the Recorder of Titles to ascertain the real owner of any land, the onus is thrown on the claimant and in the absence of any claim, or in default of such proof of claim as the Recorder may be pleased to accept, the Land becomes the property of the Government.

As part of what appears to be a deliberate policy to secure by any means as much Land as possible for the Government the Fees in the Recorder's Court are preposterously high.

If a claim is rejected, even if brought bona fide and on reasonable grounds a fee of 3% on the whole value of the property is charged, and there is no limit as there is in the case of fees in the High Court as to the maximum amount which may be charged.

For the same reason the fees on appeal from the Recorder's Court to the High Court are also preposterously high and are similarly without the maximum which is laid down in the case of other appeals to the High Court or Appeals to the Court of Eastern Africa. In what is known as the "Tanganyika" case the unsuccessful applicants were ordered to pay £400 Court costs and on their appealing to the High Court the fee on the appeal apart from the costs of the record was £400. The appeal was unsuccessful and the taxed costs of the Crown amounted to less than £100. In another undoubted case the Recorder has assessed the Court fees payable in the event of unsuccessful appeal and has ordered the Applicants to find security for the amount before proceeding with the case. In another case the land was forfeited to the Crown because the Applicant, an illiterate native, had neglected to put his mark on his application which had never the less been accepted.

The Original Ordinance provided that the Recorder of Titles should be a Barrister of not less than five years standing but this provision was subsequently repealed, and an Officer of the Adminis-

tration appointed as Recorder. In the natural course of things one does not expect this officer to oppose what appears to be the deliberate policy of the Administration to obtain as much Land as possible on the Coast for the Government.

Sections 140/1 of the Crown Lands Ordinance 1916, from this point of view, would appear to be a stupid the coping alone of an edifice which has been gradually erected for some years, but they are in fact an infringement of private rights of ownership greater than anything that has gone before.

In the confusion of titles on the coast the historical reasons for which have already been explained—the one sheet anchor on which the Courts and Purchasers have relied is the 12 years limitation resting on a declaration of the Sultan of Zanzibar the full meaning and effects of which will now be considered more particularly.

In the Arabic year 1308 His Highness Khalifa-bin Seyid as a result of a Fetwa from Mecca declared that any claim which had lain dormant for 12 years should be held to be void. There was apparently some doubt whether this instruction was applicable outside the Island of Mombasa and a proclamation was consequently issued in 1898 by Sir Arthur Hardinge declaring it valid in all portions of the Mainland dominions of the Sultan. This Declaration has been acted on ever since in all Land Cases in the Coast area and no doubt was expressed as to its general application until the recent case known as the "Zanzibar Government Case," in which in the High Court Mr. Justice Bonham Carter held that the Proclamation was an English Proclamation and must be construed as such so as not to bind the Crown which was not expressly mentioned. In the Court of Appeal Counsel for the Zanzibar Government was stopped by the Court when arguing against the learned Judge's finding on this point, and the case of the Zanzibar Government was dismissed on other grounds.

The finding of Mr. Justice Bonham Carter has become therefore a mere *obiter dictum* and would seem to be incorrect as the following grounds.

The Proclamations of Sir Arthur Hardinge not being in the form required by the Order in Council for legislation depends for its validity on the existing Law that is to say on the original decree of the Sultan. Now the English maxim "*Rex non est in per ascun Statute nisi il ne soit expressis verbis notum*" is logically based on the form which legislation takes in England, which is historically the assent of the King to a Petition presented by the Representatives of the People. It is a technical rule resting on historical grounds applicable to England and not applicable elsewhere. His Highness the Sultan on the other hand cannot in any way change the Law. There is no one to stop him breaking it if he chooses to do so but he cannot alter it. As IMAM, or Spiritual Head of the Community he can give, as in this instance, authoritative interpretations of the Law, but when so given they bind him as much as anyone else.

In the Coast area H. M. Government hold Sovereignty delegated by H. H. The Sultan of Zanzibar and this 12 years' limitation accordingly binds the Crown. Section 141 which appears to be retrospective accordingly invalidates a very large number of Titles which have been recognised by the Courts as valid previous to the passing of this enactment.

There is no presumption whatever that any Land on the Coast belongs to the Crown. It is therefore most inequitable to enact that such should be the presumption at Law.

It was contemplated by the Lands Titles Ordinance that when once a Certificate of Title of absolute ownership was issued that such title should be indefeasible except in case of fraud as provided in the Ordinance and should pass by entries in the register. Purchasers who bought on the footing of the entries in the register were to be absolutely protected and had no obligation to enquire further than the register established under the Ordinance. The Certificate of Title however is only evidence of title of the Holder at the time of granting the Certificate. It is no evidence of the Title in 1896.

In 1896 the title may have been in some person who was not the predecessor in title of the holder in as much as the holder's Title may have been obtained against such person by limitation. In such a case the Land would be forfeited to the Crown.

Part VIII of the Ordinance must have been drafted by someone entirely unacquainted with titles on the Coast area.

In some cases the holder of Crown Land has been granted a Certificate of Title, accordingly a Purchaser of any Land on the coast to which a Certificate of Title has been granted will not be safe unless he enquires into the previous title as in case it should be an original Crown grant the Land will be liable to forfeiture under part VIII of the Ordinance. Thus there will be no saving of expense in investigation of title as intended by the Lands Titles Ordinance as instead of the state of title as shown by the Register being conclusive, the old title will still have to be examined just as before.

The Draftsman who is responsible for the part of the Ordinance dealing with registration seems to have entirely forgotten the provisions as to registration in the Lands Titles Ordinance 1908 and the amending Ordinances and has created a state of chaos which no effort on the part of the Registration Officials will enable them to avoid. Two distinct independent systems of registration seem to be now in force for the Coast area involving in many cases double registration and double searches.

(Sd.) A. MORRISON.
R. M. BYRON.
P. H. CLARKE.

608 n
33

INCLOSURE *202*

Cont
In the ... No. 85 *1st August 26th 1915*

Mombasa,

594

3rd July, 1915.

To the

Right Hon'ble The Secretary of State for the Colonies.

Whitehall, LONDON.

Through

HIS EXCELLENCY THE GOVERNOR.

NAIROBI.

The humble petition of the undersigned European, Indian, Arab and Swahili land holders of Mombasa and District.

RESPECTFULLY SHOWETH,

That your petitioners are owners of or otherwise interested in lands within the dominions of the Sultan of Zanzibar.

That your petitioners learn with regret and surprise that the Crown Lands Ordinance 1915 contains among others, provisions injuriously affecting private lands within the said Coastal Area.

That it was known that a Crown Lands Ordinance was under consideration but in the discussions various upcountry bodies with regard to it as reported in the press attention was drawn to the general question only as to the terms upon which Crown Lands should be granted, and your petitioners are entirely unaware that the Ordinance affected anyone except holders or intending holders of Crown Land. Recently by the action of the Mombasa Chamber of Commerce public attention has been directed to several provisions in this Ordinance drastically affecting your petitioners' rights as private landholders and they therefore take this opportunity to now respectfully submit their humble protest against the said Ordinance for the following reasons:

That the said Ordinance is unjust and tends to deprive private land holders of lands over which their title had never before been questioned.

That in as much as a large number of Certificates of Title have already been issued by the Recorder of Titles under the Land Titles Ordinance 1908 to private landholders, the provisions of the Crown Lands Ordinance 1915 generally and Section 140, 141, in particular, create unexpected difficulties, confusion and unnecessarily give rise to questions touching the said Certificates of Title already issued and those to be issued on adjustment of Claims already filed in the Recorder's Court.

That the Crown Lands Ordinance 1915 serves to frustrate the primary object of the Land Titles Ordinance 1908, and in some measure conflicts with the provisions thereof.

That it does not fit in with the Coast conditions.

That if the Government of the Protectorate desire to legislate for the Coast, a separate Ordinance should be made embodying such provisions therein as may be consistent with the provisions of the Land Titles Ordinance 1908 and do not conflict with the existing vested rights of private landowners.

[2]

That the Ordinance destroys all feeling of security and your petitioners realise that there is nothing to prevent the local Government confiscating all private lands if in every case the presumptions created in favour of the crown by the Ordinance are strictly applied.

Your petitioners therefore respectfully pray that the Crown Lands Ordinance 1916 be not applied to the Coast Area pending further full inquiry.

*Thomas
Fred Whitton
Juanje*

*John
Parents*

*Blair
Agenda*

**ON BEHALF OF
EAST AFRICA CORPORATION, LIMITED,
General Managers**

*John
William A. Bowen
Louisa Junior
Felicie*

*Quatorji
East Africa Industries Ltd
Board
General Managers*

*W. H. Morrison
Plantations
1917*

*Andrews
Whitton*

THE NAIROBI BOARD OF EXECUTORS & TRUST CO., LTD.
*James
Gordon
W. McQuay
Admiral
Society*

*Suliman
Maddalady
D. Brown
Rashid bin*

*W. H. Morrison
Plantations
1917*

علي بن محمد بن جهم
 محمد بن عبد الرحمن
 محمد بن خنيس بن علي بن
 علي بن محمد بن علي بن
 علي بن فروع بن علي بن

(Ali bin Mahomed bin Juma)
 (Sayed bin Abdurahman)
 (Mahomed bin Khamis Kilifi)
 (Ali bin Syed bin Haji)
 (Abdulla bin Rithiwani)
 (Ali bin Rafui)
 (Ali bin Omar)

Ali bin Umar

محمد بن علي بن عبد الرحمن
 محمد بن موي
 صالح بن احمد

(Mahomed bin Ali bin Abdurahman)
 (Mahomed bin mweni Muye)

عبد الرحمن بن سعيد بن صالح

(Saleh bin Ahmed)

احمد بن طاهر

(Abdurenman bin Said)

بكر بن محمد بن احمد

(Ahmed bin Taher)

محمد بن معلم

(Baker bin Mahomed bin Ahmed)

محمد بن علي الكندي

(Khamis bin Muallim)

محمد بن نصيب

(Mahomed bin Ali ElKindi)

موسى بن احمد

(Mahomed bin Nasib)

كثيران بن محمد بن كثيران

(Musa bin Ahmed)

شكوة بن محمد

(Asman bin Mahomed bin Asman)

رashed بن لالا

(Shakue bin Omar)

عبد الرحمن بن نصيب

(Rashid bin Lalla)

محمد بن سعيد

(Abdurenman bin Nasib)

عمر بن شهاب

(Mahomed bin Said)

احمد بن صالح

(Omar bin Shhabad)

احمد بن محمد بن جهم

(Ahmed bin Saleh)

محمد بن محمد بن جهم

(Ahmed bin Mahomed bin Juma)

جهم بن خنيس

(Mahomed bin Mohamed bin Kassim)

عبد الرحمن بن جهم

(Juma bin Khamis)

سعيد بن قاسم

(Abdulla bin Salim)

احمد بن شلال

(Said bin Kassim)

كثيران بن خنيس

(Ahmed bin Shalu)

مبارك بن محمد

(Asman bin Khamis)

سالم بن محمد

(Mbaruk bin Mahomed)

(Salim bin Omar)

خيام بن شهاب

(Khamis bin Shab)

مبارك بن ماجد

(Mbarak bin Majid)

خيام بن سالم

(Khamis bin Salim)

خيام بن خلفان

(Khamis bin Khalfan)

سعيد بن شيخ

(Said bin Sheikh)

سعيد احمد بن سعيد اثماني

(Said Ahmed bin Said Athman)

علي بن شيخ بن علي

(Ali bin Sheikh bin Ali)

عبد الله بن محمد

(Abdulla bin Mahomed)

محمد بن علي

(Mahomed bin Ali)

شيخ تاهير

(Sheikh bin Tahir)

تاهير بن علي

(Tahir bin Ali)

احمد بن علي

(Ahmed bin Ali)

مwenye بن علي

(Mwenye bin Ali)

بكر بن مزا

(Baker bin Mza)

عبد الوهاب بن خيام بن البلق

(Abdull Wahid bin Khamis El Baluchi)

عبد الله بن تومس بن عبد الوهاب بن البلق

(Abdulla bin Thome)

مwenye كومبو بن عبد الله بن البلق

(Mwenye Kombo bin Abdulla Kilindini)

علي بن محمد بن علي بن البلق

(Ali bin Mahomed bin Ali Mandri)

رشيد بن سالم بن رشيد بن البلق

(Rashid bin Salim bin Rashid Mandri)

علي بن رشيد بن البلق

(Ali bin Rashid Jinebi)

عبد الوهاب بن سامما بن البلق

(Abdul Wahid bin Samma El Baluchi)

عزيز بن جمعة

(Aziz Bin Jumma)

سالم بن عبد الله

(Saleh bin Abdulla)

محمد بن مبارك بن البلق

(Mahomed bin Mbaruk Bahami)

أبراهيم بن افوا

(Abdurehman bin Afua)

شيروتي بن عبد الله

(Shiruti bin Abdalla)

علي بن محمد

(Ali bin Mahomed)

محمد بن اثماني

(Mahomed bin Athman)

سعيد بن محمد

(Said bin Mahomed)

محمد بن خيام

(Mahomed bin Khamis)

محمد بن ابراهيم

(Mahomed bin Abdurehman)

محمد بن محمد

(Mahomed bin Mahomed)

محمد بن علي بن خنيس الكندي

(Mahomed bin Ali bin Khamis)

سليمان بن ماج

(Sheika bin Maj)

عبد الوهاب بن محمد بن عبد الوهاب

(Mahomed bin Wahab)

سليمان بن سلطان

(Mahomed bin Ali Timanf)

عبد الوهاب بن سلطان

(Mbaruk bin Sultan)

عبد الوهاب بن سلطان

(Omer bin Ahmed)

عبد الوهاب بن سلطان

(Famao bin Ahmed bin Stamboul)

عبد الوهاب بن سلطان

(Sani bin Mahomed)

عبد الوهاب بن سلطان

(Bara Shingo bin Flusi)

عبد الوهاب بن سلطان

(Salah bin Mirza El Baluchi)

عبد الوهاب بن سلطان

(Haji Jangi Khan El Baluchi)

عبد الوهاب بن سلطان

(Tarish bin Falla Baluchi)

عبد الوهاب بن سلطان

(Abdulla bin Abed)

عبد الوهاب بن سلطان

(Naman bin Juma)

عبد الوهاب بن سلطان

(Ali bin Dadi Karama)

عبد الوهاب بن سلطان

(Nasser bin Mahomed)

عبد الوهاب بن سلطان

(Mze Kombo bin Makifundi)

عبد الوهاب بن سلطان

(Shenga bin Makandi)

عبد الوهاب بن سلطان

(Babu Dao bin Makandi bin Gao)

عبد الوهاب بن سلطان

(Mahomed bin Ali bin Suddi)

عبد الوهاب بن سلطان

(Ahmed bin Mahomed)

عبد الوهاب بن سلطان

(Salah bin Hussein)

عبد الوهاب بن سلطان

(Mahomed bin Omar bin Bana Komba)

عبد الوهاب بن سلطان

(Ali bin Khamis)

عبد الوهاب بن سلطان

(Mahomed bin Rajub)

عبد الوهاب بن سلطان

(Mahomed bin Hassan)

عبد الوهاب بن سلطان

(Nasser bin Jumma)

عبد الوهاب بن سلطان

(Nasser bin Sulisni)

(Mahomed bin Hussein)

(Mahomed bin Omar)

(Mahomed bin Khamis bin Omar)

(Mahomed bin Khalid)

محمد بن علي بن خنيس الكليلي

(Mahomed bin Ali bin Khamis)

شيخ حجاج

(Sheika bin Haj)

محمد بن محمد بن عبد الله بن علي بن ابراهيم

(Mahomed bin Waha)

محمد بن علي بن ابراهيم

(Mahomed bin Ali Timani)

عبد الله بن احمد

(Kbaruk bin Sultani)

فواز بن احمد بن سبطون

(Omer bin Ahmed)

نائب احمد بن محمد

(Famao bin Ahmed bin Stamboul)

نائب احمد بن محمد

(Sani bin Mahomed)

صالح بن احمد بن ابي الوثني

(Bara Shingo bin Flusi)

Hamid bin Mustafa Blicher

(Saleh bin Mirze El Baluchi)

محمد بن عبد الله بن جني حالي البالي

(Haji Jangi Khan El Baluchi)

طارق بن عبد الله البلوخي

mdyfa bin mnyald

عبد الله بن ابي

(Tariq bin Malla Baluchi)

نهار بن محمد بن احمد

(Abdulla bin Abed)

محمد بن علي بن عبد الله

(Naman bin Juma)

محمد بن احمد بن محمد

(Ali bin Daq Karawa)

محمد بن احمد بن محمد بن احمد

(Nasser bin Mahomed)

محمد بن احمد بن محمد بن احمد

(Mza Kombo bin Makifundi)

محمد بن احمد بن محمد بن احمد

(Shenga bin Makandi)

محمد بن علي بن سعود

(Babu Dao bin Makandi bin Gao)

احمد بن محمد

(Mahomed bin Ali bin Suddi)

صالح بن حسين

(Ahmed bin Mahomed)

محمد بن احمد بن محمد بن احمد

(Saleh bin Hussein)

محمد بن احمد بن محمد بن احمد

(Mahomed bin Omar bin Bana Kombo)

محمد بن احمد بن محمد بن احمد

(Ali bin Khamis)

ناصر بن محمد

(Mahomed bin Rajub)

ناصر بن بلوش

(Mahomed bin Hassan)

محمد بن حسين

(Nasser bin Jumma)

محمد بن احمد بن محمد بن احمد

(Nasser bin Bulishi)

محمد بن احمد بن محمد بن احمد

(Mahomed bin Hussein)

محمد بن احمد بن محمد بن احمد

(Mahomed bin Omar)

محمد بن احمد بن محمد بن احمد

(Mahomed bin Khamis bin Omar)

(Mahomed bin Khalid)

Amhusun Nazareally
 van Duffe Co
 Anji Mawji + Sons
 Bhai Mohamed Bhai
 Abdulhusen Mulla Manooji
 Nanji Esmaelji
 Mulla Noorhai Jiffiji
 Mulla Ahmed Alhadi
 M. Ibrahimji Adami & Co
 Mulla, Suleman Banjar

Handwritten notes and numbers including "333" and "3333" with various scribbles and symbols.

Handwritten notes including "Jing ellegji & sons", "Khan & Sons", "Kister Viji & Co", and "Stahdro Co".

- (Memon Haji Jusub Nithuani & Sons)
- (Salmanji Yusufji & Co.)
- (Memon Omer Abdulkarim)
- (Merali Nanji & Sons.)
- (Karmali Shivji & Co.)
- (Rajan Nanji & Sons.)
- (Noormahomed Suleman)
- (Ibhran Nanji & Sons.)
- (Sharafalli Mahomedali)
- (Walji Bhanji & Co.)
- (Shah Hirji Kara & Co.)
- (Sheikh Esaji Mulla Bhaiji & Sons.)
- (Mussaji Jivanji)

Yaffer. Abdhomed Kooed
Y. M. Kooed

Y. M. Kooed

(Mulla Dawoodji Jivanji)

Y. M. Kooed

(Musaji Dawoodji)

Y. M. Kooed

(Abdulla Mulla Dawoodji)

Y. M. Kooed

Y. M. Kooed

Y. M. Kooed

Y. M. Kooed

Y. M. Kooed

Y. M. Kooed

Y. M. Kooed

Y. M. Kooed

Y. M. Kooed

(Molu Dharansi)

Y. M. Kooed

Y. M. Kooed

Y. M. Kooed

Y. M. Kooed

Y. M. Kooed

Y. M. Kooed

(Merali Janmahomed.)

Y. M. Kooed

(Abdulali Datu Mussa)

44709

Gov. PAP
44709

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6471-20

C. D. #615
14 MAR.
14



14th March 1916

Su.
Ans d 23

DRAFT.

P.A.P. (Confidential)

W. H. C. Belfield

MINUTE.

- Mr. Jewell 10/3/16
- Mr. Bottomley 18.3.16
- Mr.
- Mr.
- Sir G. Fiddes.
- Sir H. Just.
- Sir J. Anderson.
- Mr. Steel Maitland.
- Mr. Bona Law.

I have the honour of to
advise you that I have had under my
consideration
~~the~~ ~~rest~~ of your confidential

despatch no 85 of the 26th of
August, enclosing two petitions
a the subject of the Crown Lands
Ordinance, 1915, ^{addressed to} ~~one of~~
by the
Mombasa Chamber of Commerce,
by a number
and the other from some of the
European, Indian, Arab, and Swahili,
land owners of Mombasa and
District, respectively.

Left this to be done that
had not an effect as to
publishing of registration
provision. Addressed
from the date of 8/15/24/15.
This is not in print.)

Rescindable

44709
* No. 1032

- 2. ~~propose to amend~~
- 2. ~~observe for line: 17~~

the receipt of the Ordinance,
and I shall be glad to learn
when it may be expected.

If you desiderated that a Bill
had been introduced which would
make it plain that the provisions
of sections 140 and 141 of the Crown
Lands Order do not affect titles
granted by the Recorder of Tiller, and
would thus remove much of the uncertainty
which prevails as to the effect of those
provisions. ~~Should~~ As at present
advised, I propose to defer my reply
to the two petitions, until the new
Order is before me and I shall be
glad to be inf^d when I may expect
to receive it.

I have
I am, &c

(Signed) JONAS LAW.

the receipt of the Ordinance,
and I shall be glad to learn
when it may be expected

If you departed that a Bill
had been introduced which would
make it plain that the provisions
of sections 140 and 141 of the Crown
Lands Order do not affect titles
granted by the Recorder of Titles and
would thus remove much of the uncertainty
which prevails as to the effect of those
provisions. ~~But~~ As at present
a bill I propose to defer my reply
to the two petitions until the new
Order is before me and I shall be
glad to be inf^d when I may expect
to receive it.

Yours
J. J. de

Signed J. J. de LAW.