

respect of particular plots and that those which already exist will expire within a given time; it is no doubt possible that the Japanese authorities would be prepared to forego such strict rights as they can claim under the Anglo-Japanese Commercial Treaty.

Should this however not be the case, Sir John Simon is inclined to think that, if the views expressed above are sound, it may be necessary for the Government of Kenya to pass an ordinance removing the restrictions imposed on Japanese subjects as a consequence of the private contracts referred to above, even if this should constitute a breach of these contracts and render the Government liable for damages. Possibly legislation might also be passed exempting the Government from such liability. The Board of Trade suggested,

however, as regards Article 3 of the Convention, that if a claim were taken to arbitration under Article 12, the Court would be likely to hold that the right to acquire was intended to mean the right to acquire and occupy. In ordinary circumstances, in the case of an international instrument of this kind, which was intended to confer equality on all parties, it appeared to the Board that a Court might well hold that it was so intended, but the Board gathered that in the present instance it must, at the time when the Convention was negotiated, have been within the knowledge of the parties that the circumstances in Kenya were, in fact, peculiar, and that the reservation of certain residential areas for Europeans was at that time

83  
an established practice. In these circumstances, it appeared to the Board that it might well be argued, in the absence of any specific reference to the question of occupation, that Article 3 did not annul this right to reserve areas in accordance with existing practice, since no specific reference was made to occupation.

No 3  
2312 P/124  
The Foreign Office seriously doubted the soundness of the Board's arguments. The Foreign Office view is that in the absence of any indication to the contrary, the right to acquire property must in all probability include the right to occupy it. It seems indeed, evident that a right to acquire, differing from a right to occupy on the same terms as Nationals, would be an empty right, and it is most probable that an International Court would so decide. The fact that the Anglo-Japanese Commercial Convention of 1911, which was bi-lateral, actually specified the right of occupation, is hardly sufficient to affect the interpretation of a general international covenant such as the Convention of St. Germain.

Mr. Howard (the Attorney General of the Gold Coast) and Mr. Duncan, support the Foreign Office views. Mr. Freeston has minuted that logically we can only save the White Highlands policy by denouncing (in respect of Kenya) both the St. Germain Convention and the Anglo-Japanese Treaty. Reaffirmation (by Order-in-Council) of the White Highlands policy is a cardinal point in the Kenya Land Commission's proposals, and the Order, from that point of view, should be made very soon. The issue is therefore likely to be brought to a head in the course of a few months.

The Law Officers have been asked to advise on a complicated series of conundrums relating to the St. Germain

St. Germain Convention, but it is feared that their decisions will not be made in time to save us from embarrassment as regards the "European Highlands Order-in-Council".

*C. J. ...  
24/1/24*

19 in  
17173.

B

*C. J. of minutes on 20/9/35* 84

The question at issue, in the broadest terms, is how far the maintenance of Government restrictions on the ownership and/or occupation of land-plots in Mombasa and other townships in Kenya is consistent with the declared policy of His Majesty's Government as expressed in the White Paper of 1923.

The position as it existed in June 1931 is comprehensively reviewed in the memorandum (which recites the relevant paragraph of the White Paper) flagged A. I annex a précis of the essential subsequent correspondence.

Had it not been for the Japanese complication the way would now be clear for sending the I.O. a copy of the despatch of 5th September hereon and saying that, subject to I.O. concurrence, Secretary of State proposes to arrange with the Government of Kenya for a 'public announcement' to the effect that, the Kenya Government, while feeling obliged to maintain the existing restrictions on the occupation of certain township plots, will not enforce them in respect of ownership.

But, in view of the Japanese position, the last thing wanted at the moment is any form of publicity. It was the existing restriction on occupation which particularly annoyed Mr. Kuga, and any public announcement that Government proposes to maintain such restrictions would inevitably lead him to press the Treaty claims.

16  
40 47 3082/31

The only course possible, therefore, seems to be that I.O. should be sent a copy of the despatch, in a letter drawing their attention to paragraph 2 (which really gives them all they want) and saying that Secretary of State sees no reason at the moment for any public announcement, which might only serve to reaffirmate controversies which at present are fortunately dormant. If the Secretary of State for India agrees, the Governor of Kenya will be so informed.

Copy the above to Governor, Kenya.

L.B. Freeston.

17.7/34

No action yet taken

17173/31.

20. 15th July, 1931. Government of Kenya invited to consider how far abandonment of restrictions on ownership ("the sole issue now remaining") could be sustained in law.

23. 20th July, 1931. Government of India ask whether C.O. have any objection to public announcement that (a) Government of Kenya will postpone for the present further sale of plots with restrictions, (b) question of restriction of ownership is receiving attention of C.O. and Kenya Government.

26. 19th August, 1931. Governor of Kenya deprecates any such announcement; promises despatch.

18112/32.

4. 28th April, 1932. Government of Kenya seeks advice on certain legal points.
8. 29th June, 1932. Colonial Office advice tendered. In respect of areas not yet sold, and areas sold (or leased) without restrictive covenant, restrictions on residence and occupation should be maintained, but should not be extended to ownership. Governor is asked to put forward proposals for revised lay-out of unalienated areas in Mombasa and certain other townships, to ensure that ownership and occupation of such areas by Asiatics would not affect adversely the amenities of plots already sold. Proposals should be in a form suitable for transmission to Government of India.

5th September, 1933.

Governor of Kenya agrees

that restriction on ownership of township plots cannot properly be enforced in respect either of future or of existing leases. All future sales will therefore be unrestricted as to ownership; racial restriction on occupation will, however, be maintained.

Revised lay-out for Mombasa, and proposals regarding other townships, submitted. Governor asks to see the terms of any public announcement before it is made.

2A  
86

Mr Duncan

I agree with the view taken by the Foreign Office that the argument advanced by the Board of Trade is unavailing and that a real distinction cannot be drawn between the wording of article 3 of the Convention and that of article 1 of the Treaty of Saint-Germain and that of article 1 of the Anglo-Japanese Commercial Treaty. In other words both the Convention and Treaty formulate that equal rights in regard to occupation must be accorded to Japanese as to British subjects. If however policy in regard to land reclamation in Kenya provides that certain areas shall be occupied only by ~~European~~ ~~European~~ ~~European~~ Europeans, would it be an improvement of the Convention and the Treaty if Japanese subjects who were not Europeans were excluded provided also that British subjects not Europeans were treated in similar manner? I am afraid that in view of the fact that Japan does not have European subjects such an argument would be unavailing. To adopt it would vitiate the whole purpose of the Convention and the Treaty. Some indication of how the Convention and Treaty would appear to be necessary.

X

Y

J.C. Stewart  
20/9/34

In any further communication  
on this subject, please quote

No. F 4990/2805/23

and address—

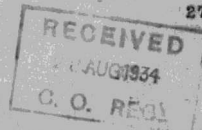
and to any person by name.

"The Under-Secretary of State,"  
Foreign Office,  
London, S.W.1.

FOREIGN OFFICE.

S.W.1.

27th August, 1934.



Sir,

I am directed by Secretary Sir John Simon to inform you that he has had under consideration the terms of the letter, No.C.R.P.1253/33, of the 13th instant, addressed to you by the Board of Trade respecting the rights claimed under treaty by the Japanese Consul at Mombasa to purchase and occupy plots in areas which have been administratively reserved for occupation by Europeans.

*No. 1*

2. Sir John Simon feels serious doubt as to the soundness of the argument advanced by the Board of Trade in the second paragraph of their letter, in accordance with which, under Article 3 of the St. Germain Convention, Japanese subjects might justifiably be precluded from occupying, though not from acquiring, property in the reserved areas. It appears to him that, in the absence of any indication to the contrary, the right to acquire property must in all probability include the right to occupy it. It seems, indeed, evident that a right to acquire, divorced from a right to occupy on the same terms as nationals, would be an empty right, and it is most probable that an international court would so decide. The fact that the Anglo-Japanese Commercial Convention of 1911, which was bilateral, actually specified the right of occupation, is hardly sufficient to affect the

interpretation/

The Under-Secretary of State,

Colonial Office,

interpretation of a general international convention such as the Convention of St. Germain. Sir John Simon doubts, moreover, whether it is usual, even in ordinary bilateral Commercial treaties, necessarily to specify the right of occupation, though this is no doubt often done. A very normal phrase used in the Commercial treaties concluded by His Majesty's Government (for example in those with Germany, Latvia, Roumania, Turkey, Yugoslavia, Siam and Spain) is: "acquire and possess", and, though possession may come nearer to the idea of occupation, it does not necessarily include occupation and is certainly not identical with it. Yet it is probable that His Majesty's Government would take the view that these treaties conferred the right to occupy.

3. Sir John Simon also has difficulty in accepting the suggestion that since the Japanese authorities, at the time when the St. Germain Convention was negotiated, must probably have been aware that the reservation of residential areas for Europeans in Kenya was an established practice, it follows that in the absence of any specific reference to occupation in the Convention, Article 3 may be regarded as not having annulled the right so to reserve certain areas. According to the accepted principles of international law, if the wording of a treaty is reasonably clear, an appeal to extraneous or contemporary circumstances cannot be made for the purpose of altering what would otherwise be the normal meaning of the treaty. There are several decisions of the Permanent Court of International Justice to this effect. Even, however, if it were possible to appeal to such extraneous circumstances, there does not appear to be any general principle of law whereby parties entering into a treaty are deemed to do so subject to, and acquiescing in, the

status quo at the time of the treaty. It is, indeed, in many cases demonstrable that the true position is the exact reverse. There may, admittedly, be instances in which contemporary circumstances may properly be taken into account in order to arrive at what was the true intention of the parties, but the present case does not appear to be an instance of this kind.

4. In the light of the foregoing examination Sir John Simon considers that it cannot safely be assumed that denunciation of the Anglo-Japanese Commercial Convention in respect of Kenya would suffice to relieve the Kenya Government from their obligation to respect the equal rights of Japanese subjects.

I am,

Sir,

Your obedient Servant,

C. W. Oude

Any further communication should be addressed to—

**THE ASSISTANT SECRETARY,**

at the address given opposite.

The following letters and number should be quoted:—

**C.R.T. 1353/33.**

Telegraphic Address:

**COLASTA, PARL, LONDON.**

Telephone No.: Whitehall 5140.

2  
89  
**COMMERCIAL RELATIONS AND TREATIES  
DEPARTMENT,  
BOARD OF TRADE,  
GREAT GEORGE STREET,  
LONDON, S.W.1.**



RECEIVED  
14 AUG 1934  
C. O. H.L.G.

13th August, 1934.

Sir,

23  
NOTY  
in 3092/33

I am directed by the Board of Trade to refer to your letter (3092/33) of 22nd June, on the subject of rights claimed under Treaty by the Japanese Consul at Mombasa for Japanese subjects to purchase and occupy plots in areas which have been administratively reserved for occupation by Europeans.

In reply, I am to state, for the information of Secretary Sir Philip Cunliffe-Lister, that the Board feel some doubt as to whether the right of occupation is so clearly governed by Article 3 of the Convention of St. Germain-en-Laye as it is by Article 1 of the Treaty of Commerce and Navigation between the United Kingdom and Japan of 1911. This latter Article provides that

Copy attached

"The subjects of each of the High Contracting Parties shall ..... in the territories of the other ..... be permitted to own or hire and occupy houses ..... in the same manner as native subjects."

As was indicated in their letter of the 15th March, 1933

No 5  
in 3092/33.  
The Under-Secretary of State,  
Colonial Office,  
S.W.1.



(C.R.T.1353/33), the Board concur in the views expressed with regard to the legal effect of this Article in the Foreign Office letter to your Department of the 21st February, 1933 (F.454/454/23). On the other hand, *Not in 302/33* Article 3 of the St. Germain Convention does not contain the word "occupy", but provides only that the nationals of the signatories:-

"..... shall subject only to the limitations necessary for the maintenance of public security and order, enjoy without distinction the same treatment and the same rights as the nationals of the Power exercising authority in the territory with regard to ..... the acquisition and transmission of their moveable and real property."

If the Board understand the position correctly, Japanese subjects are not precluded from acquiring property in Kenya in the areas reserved for Europeans, but are only precluded from occupying it. In these circumstances, the question arising under the St. Germain Convention is whether, if a claim were taken to arbitration under Article 12, the Court would be likely to hold that the right to acquire was intended to mean the right to acquire and occupy. In ordinary circumstances, in the case of an international instrument of this kind, which was intended to confer

90  
equality on all parties, it appears to the Board that a Court might well hold that it was so intended, but the Board gather that in the present instance it must, at the time when the Convention was negotiated, have been within the knowledge of the parties that the circumstances in Kenya were, in fact, peculiar, and that the reservation of certain residential areas for Europeans was at that time an established practice. In these circumstances, it appears to the Board that it might well be argued, in the absence of any specific reference to the question of occupation, that Article 3 did not annul this right to reserve areas in accordance with existing practice since no specific reference was made to occupation.

If this view can be sustained, a point on which Sir Philip Cunliffe Lister will no doubt wish to consult the Foreign Office further, the question arises whether in order to be in a position to maintain existing covenants in operation he would be prepared in the last resort to give notice of the withdrawal of Kenya Colony from the Anglo-Japanese Treaty, which on this assumption alone stands in the way of their maintenance.

If in fact he would be prepared to do so the Board venture to suggest for his consideration that a reply might

(G.R.T.1353/33), the Board concur in the views expressed with regard to the legal effect of this Article in the Foreign Office letter to your Department of the 21st February, 1933 (F.454/454/23). On the other hand, Article 3 of the St. Germain Convention does not contain the word "occupy", but provides only that the nationals of the signatories:-

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90  
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If this view can be sustained, a point on which Sir Philip Cunliffe Lister will no doubt wish to consult the Foreign Office further, the question arises whether in order to be in a position to maintain existing covenants in operation he would be prepared in the last resort to give notice of the withdrawal of Kenya Colony from the Anglo-Japanese Treaty, which on this assumption alone stands in the way of their maintenance.

If in fact he would be prepared to do so the Board venture to suggest for his consideration that a reply might

be returned to the Japanese Consul on the following lines:-

After explaining the difficulties described in your letter of the 14th January, 193<sup>23</sup>, it might be stated that, had the Japanese Government represented at the time of the granting of the covenants that in their view the terms of the covenants were contrary to the Treaty, their representations would of course have been carefully and sympathetically considered; but His Majesty's Government regret that at this date, even were they able to agree with the Japanese Government that the covenants are contrary to Article 1 of the Treaty, they are unable to waive covenants made without protest over a period of years and now relied upon by persons residing in Kenya. His Majesty's Government would be reluctant to be obliged to withdraw Kenya Colony from the scope of the Treaty and they hope therefore that in the circumstances described, and having regard to the fact that the policy of restrictive covenants of this kind has now been abandoned so that no new restrictive covenants will be imposed, the Japanese Government will be willing to let the matter rest.

A copy of this letter has been sent to the Foreign Office.

I have the honour to be,  
Sir,  
Your obedient Servant,

*L. Bennett*

No 22 in  
18112/32  
- copy c. 6/11  
in No. 1-3092/33

be returned to the Japanese Consul on the following lines:-

After explaining the difficulties described in your letter of the 14th January, 193<sup>3</sup>, it might be stated that, had the Japanese Government represented at the time of the granting of the covenants that in their view the terms of the covenants were contrary to the Treaty, their representations would of course have been carefully and sympathetically considered; but His Majesty's Government regret that at this date, even were they able to agree with the Japanese Government that the covenants are contrary to Article 1 of the Treaty, they are unable to waive covenants made without protest over a period of years and now relied upon by persons residing in Kenya. His Majesty's Government would be reluctant to be obliged to withdraw Kenya Colony from the scope of the Treaty and they hope therefore that in the circumstances described, and having regard to the fact that the policy of restrictive covenants of this kind has now been abandoned so that no new restrictive covenants will be imposed, the Japanese Government will be willing to let the matter rest.

A copy of this letter has been sent to the Foreign Office.

I have the honour to be,

Sir,

Your obedient Servant,

*L. S. Brown*

N<sup>o</sup>. 22 in  
18112/32  
- copy c. 1/1  
in N<sup>o</sup>. 1-3092/33

In any further communication  
on this subject, please quote

No. F 3805/3805/23.

and address—

not to any person by name.

but to—

"The Under-Secretary of State,  
Foreign Office,  
London, S.W.1.

91 /

FOREIGN OFFICE.

S.W.1.

End July, 1934.

Sir,

With reference to your letter No. 3092/33 of the

21st ultimo respecting the rights claimed under treaty by  
the Japanese Consul at Mombasa for Japanese subjects in Kenya  
to purchase and occupy plots in areas which have been  
administratively reserved for occupation by Europeans, I am  
directed by Secretary Sir John Simon to inform you that he  
concurs in the view, expressed in Paragraph 3, that the  
position is governed by the terms both of the Anglo-Japanese  
Commercial Convention of 1911 and of the St. Germain  
Convention of 1919.

2. As regards the effect of Article I of the  
Anglo-Japanese Commercial Convention I am to refer to the  
views expressed in paragraphs 3 and 4 of Foreign Office  
letter No. F 454/454/23 of the 21st February 1933 and by  
the Board of Trade in their letter of the 15th March 1933.  
The effect of Article III of the St. Germain Convention is,  
Sir John Simon is advised, similar to that of Article I of  
the Anglo-Japanese Convention. As regards the case under  
consideration and mutatis mutandis the observations made in  
the letters referred to in the preceding paragraph apply to  
this convention. Under the former article Japanese subjects  
are entitled to the same treatment and the same rights as

British

<sup>22</sup>  
No. 1 in 3092/33.  
No. 2 in 3092/33.

The Under-Secretary of State,  
Colonial Office.

British subjects in Kenya in respect of ..... " the acquisition and transmission of their movable and real property ....." In this connexion Sir John Simon is advised that no reliance can be placed on the use in the article in question of the word "their", which is, in fact, meaningless in connexion with the acquisition of property since a person does not acquire his own property. The word "their" would consequently appear to possess meaning only in connexion with the word "transmission". It also does not appear to be possible to invoke the reservation made by the article of limitations necessary for the maintenance of public order and security, since it would be difficult to maintain that public security and order in Kenya could not be ensured if Japanese subjects were granted the same rights as British subjects in regard to the acquisition of real property.

*no. 1 in Jaga 63.*

3. In the circumstances set forth above Sir John Simon regrets that he sees no alternative but to offer, for Secretary Sir Philip Cunliffe Lister's consideration, the suggestions made in paragraphs 5 and 6 of Foreign Office letter No. F 454/454/23 of the 21st February 1933.

4. A copy of this letter is being sent to the Board of Trade.

I am,  
 Sir,  
 Your obedient servant,

*C. W. Oude*