

1936

Kenya

No. 38259

SUBJECT CO 533/475

*Investment of Trust Funds in Land*

*Powers of Public Trustee*

Previous

Subsequent

*Sub File 1  
Miss Bright (Williams)*

1. P. 32 to P.M. ----- 1.5.36. 2  
Transmit letter from Wotton and Young on the case of  
Miss Bright Williams.
2. To Governor 312. ----- w/oi. ----- 1.5.36.  
I send this on again because some of the

remarks made by the Solicitors are of general importance  
apart from the particular question which has arisen.

The Public Trustee Ordinance was produced in  
1925 and the necessity for it arose from the fact that  
the Registrar-General had always been appointed by  
the Courts in Kenya to look after the estates of minors  
and so on. The Colony produced the Ordinance and as  
regard to the Trust work bases it on the United Kingdom  
Law. The operative section is No. 17 which says that  
subject to the Ordinance and the Rules made thereunder,  
the Public Trustee may, if he thinks fit, act as an  
ordinary trustee and be appointed trustee by a court of  
competent jurisdiction. There is nothing in the  
Ordinance which lays down what he may invest in, but  
that point is covered by rules made under the Ordinance.  
Rule 10 empowers the trustee to invest money coming into  
his hands in any investment authorised by the instrument  
or authorised by Rule 11 and Rule 11 authorises the  
Public Trustee to invest trust moneys in -

(a) Any investment authorised by law for the  
time being in England as a trust investment;

(b) Any investment in the purchase of or a  
first charge or charges secured on immovable  
property within the Colony up to one-half of the  
value thereof.

So far as I can find out the Rules were not submitted  
for examination and as the provision in question follows  
United Kingdom Law I do not think the point would have  
been taken that investment in land in Kenya is not on  
the same footing as investment in land or mortgages in

this

c.i. Land  
estates.

Orig. mins. on

SF.①

this country.

In this particular case the value of land has deteriorated considerably; at the present time it is almost impossible to sell and the unfortunate ward has lost all her money.

We have invited Kenya to consider the whole question and it may be that having regard to conditions in that Colony they will see fit to stop the Public Trustee investing in local mortgages.

So far as I can see, the only sound reason for allowing the Kenya Trustee to invest in local lands would be political. The settlers would argue that if the Public Trustee in England can invest in mortgages there is no reason why the Public Trustee in Kenya should not be allowed to do the same, in order to foster the idea that land in Kenya is a good and valuable security. Similarly, if at present Government suddenly proposes to prevent the Public Trustee investing in local land, this would be held as good evidence that Government does not trust the future of white settlement in Kenya. I don't think Government does or should, but one has never been able to say so and to say so in public would create a very bad political impression.

The remarks made by the Solicitors in the third part of their memorandum (pages 1 and 2) are, I think very sound and very practical. The remark about land in Kenya and its value, on

page

page 3, is probably not so sound. The Public Trustee would not invest in anything except a properly worked and running farm. Such a farm, having been cleared and in cultivation, would have a certain value apart from the farmer, even though that value may not be realisable at present.

The remarks as to the status of a Public Trustee on page 5 are also well worthy of consideration. There can be no doubt that in the public mind in a Colony, especially Kenya, a Public Trustee does carry a certain Government guarantee. Analogy with the Public Trustee here is hardly in point, because, with the very large sums which the Public Trustee in England controls and the very large choice available for investment, it is possible to average things out. In Kenya the Public Trustee has the choice between Trustee securities in this country or local land, and with rates of interest what they were in Kenya and what they still are, there is no doubt that investment in mortgage would be probably the most high yielding form of investment that could be thought of.

The remarks about the Agricultural Indebtedness Committee are quite interesting as showing what a non-prejudiced outside examiner thinks of the proceedings. It is also worthy of note that their opinion as to the return of better times in Kenya as regards prices compared with the 1927 level is much the same as the view which we took here. Things may be and are a little better than they were two years ago, but I think the day of the boom must be regarded as over.

The difficulty about Government financing the farmers as suggested in page 7 is that Government has not got the money to do it and that the alternative

I don't think that would be a "sound" reason.

(Sgd.) J.C.  
19.5.36.

were no assistance at all, thereby allowing the farming industry to go, or endeavouring to reach some agreement between the creditors and debtors with Government oiling the wheels. It will probably be better for private lenders and trustees to postpone their rights because, as has been pointed out above, if their rights are exercised (i.e. the right of foreclosure) they will get nothing or very little. We know that out of the funds advanced by the Land Bank about 40 per cent has been used to pay off mortgages, so that possibility is fully present to the minds of the people on the spot.

It is hardly the case, as suggested on page 8, that the idea is to put present mortgagees behind Government. That is the result, but the theory is that Government should not risk its money except with a first mortgage and therefore, if the farmer is to be assisted by Government, the existing creditors must agree to take second place.

Action has been taken to submit the case to the Governor, but in view of the wider matters involved I send on for examination as an interesting document.

(Signed) J.E.W.Flood.  
14.5.36.

It is a bad case, and I think that the right course is for the Government to pay up,  
possibly

possibly transferring the mortgages to the Agricultural Advances Account and to alter the law.

It will no doubt be said that this would be blackening the face of Kenya's credit, but that is not correct. What has blackened the face of Kenya's credit is the failure of the two mortgagors. The existing state of the law blackens the face of Kenya's Public Trustee, which is a more serious, and a different, matter.

(Signed) G.L.M.Clauson.  
14.5.36.

I would rather not express any view upon the moral obligations of the Kenya Government until one has some particulars of this farm, its history and condition when the mortgage was advanced, and whether and what enquiries the Public Trustee made, and if he obtained an independent valuation, and if so, what the independent valuer had to say.

I can well believe that mortgages on land in Kenya should not be included in investments authorised to be made by Trustees.

(Intld) H.C.B.  
16.5.36

We shall I think have to wait for the Kenya reply before any decisions can be made. It is a very bad case; and in my view land mortgages are not a suitable form of investment in Colonial territories. The reasons - apart from the conditions special to Kenya - are sufficiently obvious. I agree that the Government should compensate, on the facts as we now know them; but clearly any decision as regards that matter will depend on the practical consideration of what

what a decision in this sense would lead to, in Kenya to-day. It might involve a liability-potential - which the Government could not face.

2. Probably the first step, which would be taken now, will be to see how the law as regards this matter stands generally. We all agree that mortgages - however safeguarded - on agricultural land are not suitable investments for trust funds. I'd limit such investments to trustee securities, as defined for the United Kingdom, and to Colonial Government stocks. (The details could be settled, when we had the United Kingdom Acts before us.)

3. It might be worth while following up the despatch by a semi-official communication asking for the information Sir G Bushe refers to. Unless that is done, we may find that the official reply does not go into any detail as regards this particular transaction.  
The 19th May, 1936.

(Signed) J.Campbell.  
19.5.36.

Library (Legal).

May we, please, have a statement of the provisions of Colonial Laws generally as to the power of Trustees to invest trust money The Public Trustee (if any) in mortgages of local real estate?

(In the case of Kenya itself, there is no doubt a general Trustee Ordinance, as well as the Public Trustee Ordinance herewith).

(Intld) W.C.B.  
20.5.36

- 3
- 4
- I submit two statements herewith -
- (1) Showing the power possessed by trustees in various Colonies to invest trust funds on mortgage.
  - (2) A similar statement for Public Trustees.

Generally the trustee legislation of the Colonies is based on the Trustee Act, 1893 (56-57 Vic.C.53). This Act was repealed and replaced by the Trustee Act, 1925. The powers possessed by trustees in Ceylon, Federated Malay States and Straits Settlements with regard to investment of trust funds on mortgage are interesting. I annex herewith a copy of the Federated Malay States Enactment. Some colonies and protectorates have, as yet, no local legislation about trustees and others e.g. Mauritius the law is based on French principles.

As regards the powers of Public Trustees the Federated Malay States and Straits Settlements both have novel legislation and I attach a copy of the Federated Malay States Enactment as it has been recently consolidated. Trinidad permits the investment of funds in the hands of the Public Trustee in any mode of investment authorised by law for the investment of trust funds. In "and after the words "after due enquiry" are added in the rule authorising the investment of trust funds on mortgage.

(Signed) J.H.Thompson.  
23.5.36.

Mr. Thompson's note will be most useful. It shows at all events that Kenya is not alone,

I don't know who would have said in 1925 that real estate was more unstable in value there than elsewhere.

I like F.M.S.  
P.T.Pool.

Much wider consideration of the question will be necessary before we "slate" Kenya for its legislation.

There remains Sir G.Bushe's point.  
Dft.S.O. to Mr. Wade.

(Intld) W.C.B.  
25.5.36 at once.

- 5. To Wade.----- s/o----- 29.5.36.  
Originals of Nos.1-5 registered on 38259/1/36.
- 6. Governor No.445.----- 27.8.36.  
No.2 and comments on the legal aspects of the case of Miss Bright Williams and on steps taken to safeguard the rights of Trustees.

Has been in  
in into SE 1 below

R:07  
B.W. 7/1/37  
with 38259/1/37  
has been in  
11/1/37

Research  
has been done/rel  
to 13 on 38259/1/37  
in view of subsequent  
cases the file can be  
closed

401 v. No 29  
in (37)

998  
18/2/38  
11/1/38

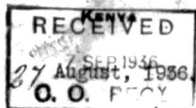
AIR MAIL

KENYA

NO. 445



GOVERNMENT HOUSE  
NAIROBI



022  
b

38259/1/36

Sir,

2

W<sup>o</sup> 20

on 38259/1/36

I have the honour to refer to your predecessor's despatch No. 312 of the 11th May, 1936, and to Mr. Wade's Air Mail despatch No. 416 of the 12th August, 1936, on the subject of the administration by the Public Trustee of the property inherited by a Miss E. Bright-Williams on the death of her father and to address you regarding the points raised in paragraph 3 of Mr. Thomas's despatch under reference.

2. As already indicated in paragraph 12 of Mr. Wade's despatch referred to above, I am of the opinion that the investment of Trust moneys in agricultural land in Kenya is undesirable and I propose to take the first suitable opportunity to amend the Public Trustees Rules so as to take away from the Public Trustee the powers conferred upon him by sub-section (b) of Rule 11 (Page 68 of Proclamations, Rules and Regulations for 1929).

3. With regard to the point raised in (b) of paragraph 3 of Mr. Thomas's despatch, viz. the position of mortgagees (and in particular Trustees including the Public Trustee) in relation to the Farmers' Assistance Ordinance (No. XVIII of 1936), it would appear that Messrs. Wotton and Young are under the misapprehension that the deferment of the mortgagee's right is compulsory under the Ordinance. It is clear, however,

from

THE RIGHT HONOURABLE  
W. CRISBEY GORE, P.C., M.P.,  
SECRETARY OF STATE FOR THE COLONIES,  
DOWNING STREET,  
LONDON, S.W. 1

from Section 17 of the Ordinance that an arrangement for the adjustment of a farmer's affairs can not be confirmed by the Farmers' Conciliation Board established under the Ordinance, unless the Board and seventy-five per cent in value of the secured creditors based on the assessed value of their security as determined by the Board, agree.

In these circumstances, unless the security was of small value, it is unlikely that a Trustee would be outvoted, and it is probable that the arrangement would be in favour of the Trustee if seventy-five per cent of the creditors did in fact vote for it.

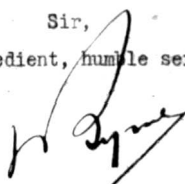
In addition to the measure of agreement indicated above the Board must also be assured of the consent of a majority in value and in numbers of the unsecured creditors present and voting who have a claim for not less than five pounds.

4. I am of the opinion that the requirements outlined in the preceding paragraph constitute reasonable safeguards for the rights of Trustees including the Public Trustee.

I have the honour to be,

Sir,

Your most obedient, humble servant.



Brigadier-General

G O V E R N O R .



AIR MAIL.

38132/46/36.

Downing Street.

29th May, 1936.

Dear Wade,

You will no doubt have seen the Secretary of State's despatch No. 312 of the 11th of May regarding Miss Bright-William's grievance against the Public Trustee. It is very unfortunate for this lady that her patrimony has dwindled, but, in considering the question of the moral obligations of the Kenya Government in the matter, we feel that it would be necessary to know the history of the farms in which her money was invested, their condition when the mortgages were advanced, whether and what enquiries the Public Trustee made, and if he obtained an independent valuation, and, if so, what the independent valuer had to say. Perhaps you would be good enough to arrange for these details to be included in the reply to the despatch.

The remarks made by the solicitors are also of general interest as showing the view of Kenya taken by some people and may be of use in arguing.

Yours sincerely,

(Signed) J. & W. FLOOD.

POWER TO INVEST TRUST FUNDS ON MORTGAGE

BAHAMAS (Trustees Act Cap. 60 Revised Edition, 1929).

5.(1) A trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest -

(a) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent.

8.(1) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report.

NOTE: These sections follow the wording of the corresponding sections of the Imperial Trustee Act, 1893 (56-57 Vic. Cap. 53).

BARBADOS

Under Section 21 of the Trustees Act (No. 25 of 1891), a trustee may invest in any stocks etc. for the time being authorised by the laws of England ..... " or in or upon real security in this Island".

10

BERMUDA

Trustees may invest funds "in mortgages of real estate in these Islands" (Trustee Act, 1876 section 54)

BRITISH GUIANA

The Imperial Trustee Act, 1893 was applied by section 13 of the Civil Law of British Guiana Ordinance (Cap.7 Revised Edition, 1930) - for provisions see Bahamas above.

BRITISH HONDURAS

Investment of trust funds may be made in any securities in which trustees may invest funds by virtue of the Trustee Act, 1893 (Trustee Ordinance, Cap. 191 Revised Edition, 1924 section 2(2))

CEYLON

Section 20 of the Trusts Ordinance (No.9 of 1917) authorises investment in various securities including (g) any other security authorised as a trust investment by the law of England for the time being (other than real or heritable securities) and (f) "On a first mortgage of immovable property situated in Ceylon or the United Kingdom. Provided that the property is not a leasehold for a term of years, and that the value of the property exceeds by one-third or if consisting wholly or mainly of buildings, exceeds by one-half the mortgage moneys".

FEDERATED MALAY STATES

Trust funds may be invested inter alia -

- (c) in or upon titles to immovable property in the Federated Malay States or the Colony, such titles being freehold titles or grants in perpetuity or leases (other than mining leases) for a term whereof sixty years at least is unexpired at the time of such investment, provided that the land to which any such title relates shall be situate within the limits of a Sanitary Board area in the Federated Malay States or of a municipality in the Colony, and that there be erected on such land, houses or other buildings, the gross rental whereof, together with the land appurtenant thereto, is at the same time of such investment not less than seven per centum of the purchase price of such land, in the case of a purchase, or of the value of such land, as ascertained under the provisions of Section 9 (1) (a).

in the

FEDERATED MALAY STATES. (Contd.)

in the case of a charge or mortgage, [Trustee Enactment Cap. 61 Revised Edition, 1935 section 4(c)].

Section 9(1)(a) of the Enactment is in similar terms to section 8(1) of the Imperial Trustee Act, 1893 or section 8(1) of the Bahamas Act supra.

FIJI.

Section 7(1) of the Trustee Ordinance, 1915 (No. 8 of 1915) provides that -

7.(1) A trustee having power to invest in real securities unless expressly forbidden by the instrument creating the trust may invest and shall be deemed to have always had power to invest -

- (a) on mortgage of property in the United Kingdom held for an unexpired term of not less than two hundred years and not subject to a reservation of rent greater than a shilling a year or to any right of redemption or to any condition for re-entry except for non-payment of rent; and
- (b) on any charge or upon mortgage of any charge made under an Act of the Imperial Parliament entitled the Improvement of Land Act 1864 and
- (c) on mortgage of freehold property in this Colony or in the Commonwealth of Australia or in the Dominion of New Zealand.

GIBRALTAR.

Section 6(1)(a) and (b) are similar to Section 7(1)(a) and (b) of the Fiji Ordinance. There is no provision corresponding with section 7(1)(c) of that law.

GRENADA

A trustee may, under section 3(b) of the Trustee Ordinance (Cap. 231 Revised Edition, 1934) invest trust funds "in real securities in this Colony and on first mortgages thereon".

HONG KONG.

Under section 4(c) of the Trustee Ordinance 1934 (No. 18 of 1934) a trustee may invest trust funds -

- (c) on mortgage of property in the Colony held under Crown Lease for an unexpired term of not less than fifty years including the term, if any, for which such Crown lease can be renewed without premium at the option of the lessee.

JAMAICA.

Section 5 of the Trustee Law, 1896 (No. 24 of 1896) corresponds with section 5(1) (a) of the Bahamas Act supra. There is no other provision with regard to the investment of trust funds on mortgage.

KENYA.

Section 7(1) of the Trustee Ordinance, 1929 (No. 28 of 1929) provides that -

- 7.(1) A trustee having power to invest in freehold securities may invest and shall be deemed always to have had power to invest on mortgage of property held for an unexpired term of not less than forty years, and not subject to a reservation of rent greater than four per centum of the unimproved value thereof, or to any right of redemption or to any condition for re-entry, except for non-payment of rent.

LEeward ISLANDS.

No power apparently is invested in Trustees to invest trust funds on mortgage - vide section 25 of the Trustees and Mortgages Act (Cap. 153 Revised Edition, 1927)

NORTHERN RHODESIA.

The Imperial Trustee Act, 1893, is in force in the territory vide section 27(2) of the Northern Rhodesia Order in Council, 1924.

FEDERATED MALAY STATES (Contd.)

in the case of a charge or mortgage. (Trustee Enactment Cap. 61 Revised Edition, 1935 section 4(c)).

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- (b) on any charge or upon mortgage of any charge made under an Act of Imperial Parliament entitled the Improvement of Land Act 1864; and
- (c) on mortgage of freehold property in this Colony or in the Commonwealth of Australia or in the Dominion of New Zealand.

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FEDERATED MALAY STATES. (Contd.)

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- (a) on mortgage of property in the Colony held under Crown Lease for an unexpired term of not less than fifty years including the term, if any, for which such Crown lease can be renewed without premium at the option of the lessee.

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LEEWARD ISLANDS.

No power apparently is invested in Trustees to invest trust funds on mortgage - vide section 25 of the Trustees and Mortgages Act (Cap.153 Revised Edition, 1927)

NORTHERN RHODESIA.

The Imperial Trustee Act, 1893, is in force in the territory vide section 27(2) of the Northern Rhodesia Order-in-Council, 1924.



ST. VINCENT.

Section 3(b) of the Trustees Ordinance (Cap. 101 Revised Edition, 1926) provides that a trustee may invest trust funds "On real securities in this Colony and in first mortgages thereon".

Section 6(1) of the Ordinance corresponds with section 6(1) of the Bahamas Act.

STRAITS SETTLEMENTS.

While section 4(c) authorises trustees to invest funds at their disposal upon freehold or certain leasehold securities in the Colony there appears to be no definite provision as regards advancing money on mortgage, although it seems clear from other parts of the ordinance that they have such power.

TRINIDAD AND TOBAGO.

The relevant provisions of the Trustees Ordinance (Cap. 50 Revised Edition 1925) are similar to those of St. Vincent supra.

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14

Orig. n. 40

PUBLIC TRUSTEE IN COLONIAS, ETC.

(Investment of Trust Funds)

BRITISH GUIANA.

There is no actual provision in the Public Trustee Ordinance (Cap. 245 Revised Edition, 1930) with regard to the investment of trust funds and no provision for making rules as in section 26(d) of the Kenya Public Trustee Ordinance. Section 8 of the Ordinance however provides that

8. The Public Trustee may, by that name or any other sufficient description, be appointed by will or by order of the Court guardian, or committee, or receiver, of the property of any infant or other person under disability, in the same manner as if he were a private person and in those cases he shall have the same powers as if he were a private guardian, or committee or receiver.

CEYLON.

Section 45(1)(h) of the Public Trustee Ordinance, 1917 (No. 11 of 1917) provides that the Governor in Executive Council shall make rules with regard to the investment of trust funds.

Section 32 of the Public Trustee's Rules (6th March 1933) provides that when trust funds in the hands of the Public Trustee exceed Rs.500 they shall be invested. No Rules however are laid down with regard to the method of investment.

Section 22 of the Ordinance however provides that the Public Trustee shall be appointed.....by the same person or court, as if he were a private trustee.

CYPRUS.

The Official Trustees Law, 1912, has no provision with regard to the investment of trust funds.

FEDERATED MALAY STATES.

Section 10(1) of the Public Trustee Enactment (Cap. 62 Revised Edition 1935) provides that "Subject as hereinafter provided all capital moneys available for investment which shall be in the hands of the Public Trustee on the 1st day of January, 1934, or which shall thereafter come into the hands shall form one Common Fund and shall be invested in any investments permitted by law for the investment of trust funds.

FEDERATED MALAY STATES (Contd.)

15

FEDERATED MALAY STATES (Contd.)

Section 13 of the Enactment establishes the Public Trustee Investment Board and section 14 lays down that no investments shall be purchased or sold without the sanction of the board.

FIJI.

Rule 9(b) of the Public Trustee Rules Provides that the Public Trustee may invest trust funds -

"in mortgage on real property within the Colony or the Commonwealth of Australia or the Dominion of New Zealand, provided that the sum so invested does not exceed two-thirds in value the estimated purchase price of the real property offered as security."

NIGERIA.

There is no reference either in the Public Trustee Ordinance 1928 (No.22 of 1928) or Rules made under it to the investment of trust funds which the Public Trustee may lawfully make. Section 5 of the Ordinance however provides for the appointment of the Public Trustee as an ordinary trustee, but so far no Trustee Ordinance has yet been passed

PALESTINE.

There is no reference either in the Public Trustee of Charities Ordinance 1925 (No.25 of 1925) or in the Rules under it to the investment of trust funds, although the Ordinance authorised the making of such Rules.

STRAITS SETTLEMENTS.

The Public Trustee Ordinance No.147 Revised Edition 1926 as amended by Ordinance No.16 of 1934 is similar to the corresponding Federated Malay States Enactment.

TANGANYIKA TERRITORY.

Under Rule 4(c) of the Rules made under the Public Trustee Ordinance (No.2 of 1930) the Public Trustee invest funds -

"Subject to the terms of the trust instrument, if any, by first mortgage on immovable property in the Territory up to an amount not exceeding three-fifths of the value thereof."

TRINIDAD.

Rule 14 of the Public Trustee Rules, 1930, made under the Public Trustee Ordinance, 1930, (No.21 of 1930) provides as follows:-

TRINIDAD (Contd.)

16

TRINIDAD (Contd.)

14. The Public Trustee may invest or retain invested money belonging to any trust or estate and coming to his hands in any mode of investment expressly or impliedly authorized by the trust instrument or (if there is no trust instrument) authorized by law for the investment of trust funds, and may, if authorized by the trust instrument or otherwise by law, retain any investment existing at the date of the commencement of the trust. Provided that he shall not invest in or hold any investment in such manner as to expose him to liability as the holder thereof, unless he is satisfied that he is fully indemnified or secured against loss.

ZANZIBAR PROTECTORATE.

Rule 7(c) of the Rules made under the Public Trustee Decree (Cap. 16 Revised Edition, 1934) provides that the Public Trustee may invest trust funds in "any investment in the mortgage of immovable property in the Zanzibar Protectorate up to three-fifths of the then value thereof after due enquiry."

Original S.F.D

Copy.

KENYA.

No. 312.

Colonial Office,  
Downing Street.

11 May, 1936.

*Amid*

Sir,

I have the honour to transmit to you a copy of a letter addressed to the Prime Minister by Messrs. Wotton and Young regarding the administration by the Public Trustee in Kenya of the property inherited by a Miss Bright-Williams on the death of her father in Kenya in 1928.

29.4.36.

2. I shall be obliged if you will furnish me with your general observations in this matter, and particularly with regard to the suggestion that Miss Bright-Williams's loss should in some way or another be made good to her on compassionate grounds.

3. Apart from the position of this lady's property, the letter from Messrs. Wotton and Young raises matters of public interest in regard (a) to the propriety of permitting the investment of Trust funds in land, of which the value may be subject to violent fluctuations, and (b) to the position of mortgagees (and in particular trustees, including the Public Trustee) in relation to the proposed measures for the relief of agricultural indebtedness. The opinions expressed by the firm are, I think, worthy of serious consideration and you will no doubt furnish me with your comments separately.

GOVERNOR

I have, etc.,

BRIGADIER GENERAL

(Signed) J.H. THOMAS.

SIR JOSEPH BYRNE, G.C.M.G., K.B.E., C.B.,

etc.,

etc.,

etc.

Orig. on St. ①

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Copy.

10, Downing Street,  
Whitehall.

1st May, 1936.

Dear Tom,

I think the enclosed is for  
the Colonial Office. I have sent an  
acknowledgment to Messrs. Wotton and Young  
saying that their letter will receive  
attention in the appropriate quarter.

Yours sincerely,

(Signed) G.S. DUNNETT.

T.W. Davies, Esq.,  
Colonial Office.

Copy.

WOTTON & YOUNG.

Solicitors.

EW/ME

28, Cavendish Street;

RAMSGATE, Kent.

29th April, 1936.

Sir,

We enclose herewith a summary in duplicate of a matter which concerns our client, Miss Bright-williams, resident in England, whose case appears to us to call for the sympathy of the Government and practical assistance. It is, we think, one of the hardest cases we have ever come across, and we trust that after reading the enclosed, the Government of this country will find that it is possible in some way to bring about an amelioration of our client's financial position.

As stated in the enclosed summary, we make no allegation of improper conduct against the Public Trustee, but the very fact that it is possible for a person under age, without having any control by herself or her advisers over the events, to be put to the loss of practically her whole fortune amounting to seven or eight thousand pounds, when that fortune is in the hands of a Colonial Government Department, is a matter which is appalling to contemplate, and even if nothing can be done to assist our client, (we believe, however,

Rt.Hon. Stanley Baldwin, M.P.,  
Prime Minister,  
House of Commons,  
Westminster,  
London, S.W.1.

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however, that the Government of England will not allow this blot to remain), we suggest that steps should be taken so that the same thing cannot legally happen in the future to others.

We are, etc.,

(Signed) WOTTON & YOUNG.



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1. Miss Bright-Williams's father died in Kenya, and under an Order of the Kenya Court dated 20th December 1928 Miss Bright-Williams's share of the estate was passed into the hands of the Kenya Public Trustee. This amount was £7,800 odd, or, in Kenya money, Shs. 156,000.

2. The Public Trustee of Kenya has power to invest in all the usual investments available to trustees under English law, comprising some thirty or forty Government and Colonial Government securities, including one or more Kenya Government securities. He also has power, under Kenya Ordinances, (which are as it were local Acts of Parliament approved, we believe, by the Colonial Office), to invest on mortgage of irremovable property up to one half of the value thereof as estimated after due enquiry, and the Kenya Ordinances appear to fully protect the Public Trustee in respect of any losses etc. due to bona fide errors of judgment. We are not imputing or alleging any impropriety on the part of the Public Trustee.

3. It appears to us that the Colonial law which obtains in this Colony, and also, we believe, in other Colonies, which enables a Trustee to advance trust money upon mortgage of land after a valuation, is adapted from English law, as a great many of the Colonial Ordinances respecting other matters are, but we submit that this adaptation is wrong

wrong in principle and should be altered. There is no comparison between land in England, of which generally speaking the value is more or less stable, and the millions of acres of land available in Africa. In our opinion the right of Trustees in Colonies to advance trust funds on land should be hedged about with more protection for the persons to whom the money belongs; for instance, land comprising a substantial building in the middle of the town of Kenya would possibly be one thing which might be permitted, but even farm land with good farm buildings within easy reach of the railway by road should not be permitted, so long as there is known to be any practical difficulty (such as local feeling) in exercising a mortgagee's rights of sale, even should a close watch be kept on its value and a stipulation that the money lent should be spent on specific improvements be imposed, (neither of which appears to have been the case here). In the case of the larger mortgage of £5,500, the Public Trustee informs us that £800 of the amount advanced was used for payment of arrears of ground rent and survey fees and £2,200 was used to pay off an existing mortgage. It looks as if the Borrower were not very sound, although of the two he appears to have been the better. Also there is apparently no reason why in the case of a Trustee, such as the Public Trustee having numerous funds in his hands, he should not split up each fund into quite small amounts.

4. In this case the Public Trustee split the amount in two only, namely, £5,500 and £2,000, and advanced the £2,000, together with some other trust moneys in his hands, on a mortgage of a farm now long since abandoned. He also invested £5,500 on the mortgage of another farm, and both the amounts are irrecoverable, although reduced interest is being paid on the latter mortgage. The original interest in both cases was seven per cent., and this might be noted as indicative of the value of the security.

5. We are informed by a party other than the Public Trustee and believe that in any case no buyers would be found in the Colony for mortgaged property put up for sale by mortgagees, apart from the question of value. The Public Trustee cannot find a transferee of the larger mortgage although the farmer in that case is still carrying on - in the other case the farm has long since been abandoned but neither does the Public Trustee attempt to sell the property, although in his letter to us of 27th November 1934 he says, in reply to our question as to the present value of the farm, that it is estimated at £10,000. The mortgage is only £5,500, so this bears out our information as to the impracticability of a sale.

6. The trade figures, so far as one can ascertain, of the Colony, especially in regard to domestic exports, which include farm produce, appear to have risen from approximately nothing in 1910 to their

their peak in 1925. There was a fall between 1925 and 1927, and there was little recovery in 1928. The mortgages were made respectively in March and June 1929. The Public Trustee would have been able to obtain the Government's statistics, and in our opinion had no right to suppose that the boom could be regarded as anything else but a boom, especially as ten or twelve years before the farm lands in question were probably bush land and entirely valueless. In fact, there is so much land available in Kenya to-day that the land per se without the farmer who is working it is still practically valueless, we believe. The Public Trustee denies that he was influenced in any way by the Government to appropriate moneys in his hands to these mortgages which contributed to the advancement of the Colony, but on the other hand it is obvious that he might have been unconsciously influenced, being a member of a colonial community and which would possibly have little chance of obtaining mortgage money from the home market. In this connexion, we venture to point out that we have noticed recently in the "Times" newspaper an advertisement by some private agent asking for money for investment on mortgage of farm lands in Kenya, and we were somewhat astonished.

7. Moreover, the Public Trustee declines to give us statistics of the money in his hands for investment during the years 1926, 1927 and 1928 and the proportions of the amount which were invested

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on mortgages of farm land and the proportions of the amount which were otherwise invested in the more usual type of trustee securities, such as Government loans. There are, however, we believe, other cases than that of our Client, and a substantial amount of money must be involved.

8. We have applied to the Government of the Colony through the Governor and have fully summarised this case for him, but the Government of the Colony declines to suggest any remedy or to take any steps.

9. At the time these investments were made by the Public Trustee Miss Bright-Williams was under age, and, as we have mentioned, had no option in the matter. She has since attained twenty one, and the Public Trustee offered to transfer the mortgages to her as soon as she was twenty one. He was no doubt anxious to get rid of them. We advised Miss Bright-Williams to refuse to take over the mortgages, and we wrote to the Public Trustee on her behalf that she wished for her capital. The mortgages, therefore, are still being administered by the Public Trustee.

10. The Public Trustee is a body corporate in whom the Public are invited to put their trust, and although in this case he is protected by legal barriers from action which in any case our Client has no money to further, we consider that the Public Trustee made an investment which trustees in England properly

properly advised would have hesitated over. Even in England, where the value of farm lands has been stable for years, an investment of trust money would not easily be made without providing for conditions as to how the money was to be used, so as to increase the value of the security, and without subsequent surveys, we think, as well as having great regard to the financial standing of the borrower.

11. There is something more to the idea of a Public Trustee than there is to the bare legal idea of a private trustee. As in the case of the Public Trustee in England, a body corporate in which the public have the utmost confidence, so in the cases of Colonial Public Trustees that public confidence should at all costs be maintained. The public without technical knowledge of the law undoubtedly consider that a Public Trustee is a Government guaranteed institution, that he can never run away with the money, and in this they are right, but by the same process of thought they undoubtedly think that the security of their capital is also guaranteed and it would not occur to them that this public institution could make an investment of their money in anything but the soundest possible security, or if the money were lost that the Government would not replace it. We consider that this case, and others like it which undoubtedly exist, will reflect adversely upon the status of these colonial Government institutions, and to a certain extent even upon the very large Public Trustee's Department in England in the minds of the public. In our opinion the

feeling which exists that any sort of Public Trustee, whether in the Colonies or in England, not only has the weight of the Government behind him but also the weight and experience of the Government in the exercise of his powers of investment, is one which it would be a pity to destroy. In any case, we humbly suggest that this poor young lady's money, which is, we believe, her sole fortune, should in some way or other be made good to her upon compassionate grounds. The Colonial Government in question is undoubtedly indirectly controlled to some extent by the home Government, and we feel that this astonishing loss, compulsorily thrown upon a child under twenty one, should not be allowed to remain without something being done to remedy it quite promptly. We have confidence that the Government of this country will not allow it to so remain unremedied.

12. We must add that we believe the Colonial Government in question has set up an Agricultural Indebtedness Committee. We enclose herewith the interim report of this Committee which we have obtained, and it will be seen from page 2 that a large number of witnesses were seen, most of whom were probably farmers. From a perusal of this book, it appears that this Committee is recommending that the farmers should be further assisted by further loans to be made by the Land Bank and that the rights of existing lenders on mortgage are to be postponed by a stay order for a period up to

five years in order to facilitate further advances by the Land Bank on the security of farms. In other words, if the Government on the spot, as might appear possible, accedes to this suggestion, our Client's legal rights, for what they are worth, are to be taken away, and quite possibly this will end in their being entirely cancelled in the long run. It may be true, as the report says, that our Client's legal rights are of no value as regards the principal or capital, for no farmer, we understand, is likely to buy a property put up for sale by the mortgagees, even if it were worth the money required to discharge the mortgage principal. But if that is the position, no money should have been advanced on mortgage.

13. It seems from this interim report that the people on the spot undoubtedly contemplate in their minds that a return to better times is inevitable, and by better times they are thinking of the times and prices which obtained in 1927 and 1928, whereas we think that the correct business view to take is that there is no visible ground which enables us to contemplate a return to those prices within any practical period, that whilst one may hope one cannot calculate, and that, therefore, the financial position must be dealt with upon the basis that no very great improvement is going to come about within the next five or ten years. One must also contemplate that there may be disturbing factors, and that so far from there being an  
improvement



improvement in the future there may even be a  
worsening. Upon this basis, we think that the  
attempt to deal with existing mortgages in the way  
in which this interim report deals with them is  
basically wrong. At any rate, as regards invest-  
ments made by the Public Trustee, we think money  
advanced on mortgage by him should be excepted from  
any such scheme unless the assistance to farmers to  
be financed by the Government of the Colony is  
in such form as to reimburse the persons who have  
put their trust in the Public Trustee.

14. In other words, we think that the Govern-  
ment should finance the farmers, and that private  
lenders and Trustees should not be legally compelled  
to finance the farmers by the postponement of their  
rights.

15. The procedure indicated on pages 19 and  
20 of the interim report seems to us to contemplate  
a postponement of the mortgagee's remedies in order  
to enable Government funds to be advanced to the  
farmers. We do not think that the Government should  
consent, and that if Government funds are used for  
all, they should be used to pay off the mortgages  
before anything else is done, and to assist the  
farmers in that way.

16. The impression we have got of these  
proposals is that the farmers want more money, which  
they hope to get from the Government (Land Bank),  
that it would not satisfy them to only have the

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existing mortgages paid off by the Government (even though, as might in our opinion happen, the Government were willing to accept a much reduced rate of interest), and they therefore conceive this plan of putting the original lenders in the position of second mortgagees for five years (and perhaps much longer) so that they can offer the Government a first mortgagee's rights and security. Equitably we think the Government should take only second mortgagee's place and the security subject to the first mortgages, unless of course the Government has such confidence in the future that it will take over the first mortgages as well as make a further advance of cash to meet the present emergency. If the Government has no such confidence in the future, then it has no moral right, we submit, to postpone the first mortgagees' rights to its own rights as second mortgagee.

17. We would say that we have confidence that this plea of ours on behalf of our impoverished Client will receive the careful consideration which is in justice due to it by the Government of this country, in whose principles we are proud to have confidence.

18. In case it should be thought that the proper remedy of our Client is to take proceedings against the Public Trustee, we would point out that even if she had several hundred pounds to spare, which we believe she has not, she would probably not win her case, after taking it through, as she would

would most likely have to, the Lower Court of Kenya, the Court of Appeal in Kenya and the Privy Council in England. We think she would take the view that it would be throwing good money after bad. Section 24 (6) of the Public Trustees Ordinance of 1925 of the Colony and Protectorate of Kenya provides in general that the Public Trustee shall not be liable for any act done by him bona fide in the supposed or intended performance of his duties, unless it shall be shown that such act was done not only illegally but wilfully or with gross negligence.