

1936

Kenya

No. 38005/3

SUBJECT

CO 533/462

Land Commission Report

The White Highlands

Position of Indians and Natives

Previous

1935

Subsequent

1937

Gov. Byrne - No. 149 Conf - 9.12.35

Trs., with comments, a memo submitted by the Federation of Indian Chambers of Commerce & Industry expressing their no O.I.C. to define the Highlands should be made. (2) that existing rights of the Indian Community should be fully maintained. Enclosed view in No. 29 on 38005/2/35 - states that Europeans will press for complete fulfilment of the Commission's recommendations

2 Gov. Byrne - No. 156 Conf - 23.12.35

The Federation makes two requests:-

(1) That no O.I.C. defining the Highlands shd. be issued.

In view of the announcement in the White Paper of the intention of Govt. to accept the recommendation of the Commission on this point, & (b) the subsequent discussion with the 30 members on 38005/3A dated, this request does not require any comment.

(2) That the existing rights of the Indian Community in the Highlands shd. be maintained to the fullest extent. It is requested that this means that the White Paper shd. be applied only to land intended for agricultural purposes & not to land intended for residence in townships or for industrial purposes. It is represented that on a recent occasion the date was cancelled against the transfer of land intended for industrial purposes, though in fact from the covering doc. it appears that the land in q. was intended for agricultural purposes.

and 4550

and 1922

The q. of the interpretation of the White Paper of 1923, in cases where a change of use in land is involved, was discussed - Kemp doc. of 4/7/35 (No. 40 on 38005/3/35) on the assumption that the O.I.C. wd. define the privileges wh. were to be enjoyed by Europeans in the Highlands. That is

However not now the intention.

Nevertheless as indicated in
M 40 on 38005/3/25 there are differences
of opinion in Kenya, & considerable
uncertainty on the part of the Govt of
Kenya, as to the intention of
H.M.G. as expressed in the White Paper of 1923,
& this will chiefly have to be gone
into. It is however not a matter
of immediate urgency & in any case
the Govt has promised a further rep.
as to the certain representations etc. are
likely to come from the present
essence of the veto referred to.

In the case, the only action
at present seems to be required for the
present is to ask the Govt. to inform
the Federation that the S. G. has reserved
his views.

J. J. Packer
19/1/36

The Kenya Highlands policy is not
likely to be settled for some time to come, but
it is generally admitted that an Order-in-Council
of some kind is the minimum that will satisfy
the European settlers, and we owe a duty to the
Europeans just as much, if not a great deal
more than we owe to the Indians. The
Federation of the Indian Chambers of Commerce
request an official announcement that no Order-
in-Council to define the Highlands will be
passed, that the existing rights of the Indian
community will be maintained and they ask for an
assurance

assurance that Government has no intention of
imposing any further legal or administrative
restrictions on Indians in regard to the Highlands.
They cannot have an assurance that there won't be an
Order-in-Council because there has got to be one.
And the rest of it is probably due to the case
mentioned in paragraph 15 of the Memorial with which
the Governor deals in paragraph 4 of his despatch. We
have not heard about it otherwise and it is quite
likely that it may become a major incident. Looking
at this and the further memorial enclosed with the
later despatch No. 156 of the 23rd December, I think
that the Governor's exercise of his veto in regard to
the proposed transfer of the farms, is probably the
exciting cause of both memorials. They ask for
assurances and they certainly cannot have them. I
think the only reply can be as per draft herewith.
Copies should go to India Office.

The question of industrial area has not
yet come formally before us for discussion &
we must wait for the detailed report from
Governor's promises.

W.C.S.
6.2.36.

[The Order in Council, if it were to place
it, will be a bold definition of
boundaries, without any reference to
private land position, administrative
provision, or other considerations.]

As proposed
VJ 61436
at once

3

To Kenya Com. (General) 12. 2. 36.

512

Vol 1.9 (cont. 2. cont. 3) 18/11 20/2/36

14

Original on 38032/5
36 Kenya.

5. Note of Discussion between Captain Schwartz and Lord Plymouth on the 7th. March, 1936.
6. Schwartz.-----s/o-----6th. Mar. 1936.
Details views of Lord Francis Scott on the White Highlands, Imperial Conference &c.,.
7. Minute by Sir C. Bottomley.-----
8. To Capt. Schwartz.-----6 ansd.----- 12.3.36.
9. To Byrne. tel. Personal,----- 6.4.36.
10. Governor No. 32 Conf.----- 25.3.36.
Reports the position as regards the transactions of certain lands at Simou; encloses copies of memos. by the Attorney General and asks for the views of the Legal advisers.
11. Anti-Slavery and Aborigines Protection Society.----- 12 May, 36.
Protest against suggested Order in Council to prohibit any British coloured subject from legal title to land in the White Highlands, and requests assurance that no such Order will be issued until after the debate on the Colonial Office Vote.

DESTROYED UNDER STAT.

No. 10. This raises in acute form a point which must be considered in connection with the preservation of the White Highlands policy, i.e. the possibility of Asians obtaining transfer of land in the Highlands, in the name of a limited liability company.

The case of the Limuru Tanning Extract Company is set out fully in the Attorney-General's memorandum. Briefly it is this: A Company registered in Kenya in 1935, with a Board consisting of three European Directors, acquired a factory site

and

and buildings at Limuru. Three months later the Company, was reconstituted. Two of the European Directors resigned and were replaced by Indians and two additional Directors, both Indians, were also appointed. As reconstructed, the capital of the Company was Shs. 200,000. Shares to the value of Shs. 199,800 were held by Indians and out of five Directors four were Indians.

The Company had entered into agreement with a Company (registered at Glasgow) to purchase two freehold farms at Limuru for £7,500, but before concluding the agreement the Limuru (Indian Company) applied to the Commissioner of Land for information as to its legal position. The upshot was that on the advice of the Attorney-General the Governor vetoed the transfer of the farms. This particular case has, however, been settled satisfactorily. The Limuru Company will not acquire the farms but has been granted the right to cut and market the wattle standing on the land for a period of 21 years. Actual ownership of the farms will be vested in Messrs. A. Baumann and Company, a firm of merchants whose head office is in London.

Legal advice is desired on the arguments advanced by the Attorney-General on whether a Company could have racial status.

Legislation on the lines of the Transvaal Asiatic Land Tenure Act, 1932, cannot presumably be introduced in the projected Highlands Order-in-Council, but perhaps the legal advisers will give their views on the possibility of amending the Crown Lands Ordinance to render impossible the manipulation

of

of company directorates by Indians in an attempt to defeat the Highlands policy.

No. 11. I submit a draft for con-
son.

A.G. Smith

15.5.36.

No. 10

The question whether the A.G. is right in his view that, for the purposes of §§ 71 & 73 of the Crown Lands Ord., the Gov. in Council is entitled to regard a company, in which the control is in Asian hands, as an artificial person of Asian race, is a matter for the legal advisers. I have however ventured, in No. 12, to draw attention to certain points in the A.G.'s argument.

If the A.G.'s view is right, there seems no need to appear to be any need for legislation to preserve the position in so far as concerns transfers (to a company in which the control is Asian at the time when the transfer takes place, because (as was done on this occasion) the Gov. in Council can veto the transfer.

If however ~~the A.G.'s view is~~

5
at the time of transfer the control of the company were European (i.e. the veto were not exercised), & if subsequently the control of the company got into Asian hands, there would not seem to be any means under the existing law to deny the continued enjoyment of the land by the Asian interests. An amendment of the law would therefore seem to be imperative.

Of the two alternative courses suggested (i.e. by a clause in the proposed Highlands O.-i.-C., or by an amendment of the Crown Lands Ord.) I should imagine that the former would be quite sufficient.

(v. No. 9)
No. 11. The fact that the O.-i.-C. is to deal only with boundaries, & not with what is to happen within those boundaries, has been disclosed to Capt. Schwartz, but there has not been any public statement to this effect, & a reply to a letter from the Anti-Slavery Society, & on an appropriate occasion to make me. I see no alternative therefore

to reply on the lines suggested -
Mr. Grossmitt's off.

Get off reply to No 11, then
refer to legal advisers to consider
No 10.

J.J. Parnell
15/5.

13. India Office - 5/0 - 19/5/36.

Enc. copy of letter from Anti Slavery &
Abyssinian Protection Society, together
with the draft of the proposed reply.

The Society's letter is in very
similar terms to No 11.

We can cover in J.J.'s proposed
reply Draft herewith

C. Brown with
2/5/36

Sir C. Bottomley

I think we can write to the Society &
the A.P.S. as proposed. In fact it is not intended
to make legal advice dissemination.

J. J. Parnell
25.5.

W.C.S. 25.5.36

14 To Anti Slavery Socy (11 lines)
- above year Socy }
15 To S.F. Silver (P.A.) (12/11 + 14) 3/0 } 28 MAY 1936

DESTROYED UNDER STATUTE

Mr Boyd
Sir C. Bottomley

Mr. Flood

Would you please consider
how the Secy of State might
reply to the attached letter from
Mr. Cable regarding Kenya.

16.

Mr. Cable 3/6

Mr. Cable has got a bit mixed up. It is
possible to agree with him that white farming in
Kenya is a failure, though I would not put it quite
so definitely myself, and I am sure that the present
settlers would not admit for a moment that farming
cannot be made a success in Kenya. My own view
is that in the long run it is doomed to failure but
that is neither here nor there. At present it is looking up

As regards the highlands of Kenya the
policy from the earliest time has been that the
country in question shall be developed as a European
area. The administrative practice for the last 30
years has been consistent in that direction and it
must always be remembered that the European
settlement is on land that was definitely unoccupied
at the time that the administration of the country
came under Govt. That fact alone differentiates
Kenya from what might happen in Abyssinia because if
the Italians proclaimed an area in that territory as
available only for whites they would have to
dispossess the native population. That is not the

The economists
would largely
agree with Mr
Cable. But
because do
without European
farming till
other production
has been
developed.

Japan. Have
led in the
draft.

Mr. Flood.

Would you advise that a further reply should be sent to the attached letter from Mr. Cable? If so, perhaps you would not mind advising in what terms it should be.

W.Davis 1/6

18 Mr. Cable comments further on the C.C.C. 4/6/36

Mr. Cable's letter is quite sensible and sound. It is, however, possible to issue an Order-in-Council simply defining boundaries of an area and to leave the practice of the last thirty years in regard to the alienation of land within that area unaltered and that is what has to be done. It is, therefore, to be hoped that Mr. Cable will not take any steps to raise the issue which is not really involved.

When he talks about the foolish politicians of Kenya he is probably right, but the trouble is that the people in Kenya who are not foolish politicians and do not see eye to eye with them remain absolutely silent. As a result, the settlers of Kenya are represented by the politicians and there is a complete absence of any indication that the politicians do not really count for as much as they pretend. Draft herewith.

J.S.P. Flood 12-6

Sir J. Hobbs
I agree, but I think you should see because of A in the draft. I have indicated on this point on 38248/36 P.O.

W.D.S. 12-6

19 To Mr. Cable 13/6 he 18 and 15.6.36

case in Kenya.

In any event there are a certain number of European planters in Kenya and surely H.M.G. owes to them a duty just as much as to other sections of the community. The Land Commission was appointed to settle the various vexed questions and recognised that the European community was entitled to some degree of consideration. Accordingly they recommended that the boundary of the area to be known as the White Highlands should be declared by Order-in-Council and that will have to be done. When the boundary is declared conditions within the area will not be altered in the slightest and Govt. will be able to maintain its administrative practice just as hitherto.

Draft reply herewith.

J.S.P. Flood 4/6

I received previous correspondence with Mr. Cable on 16035/36 (the Flood's case). We are dealing with an aspect in Kenya matter though his point of view has rather changed.

I have made some alterations with the draft.

W.D.S. 5.6.36.

17 To Cable - 16 and - 8.6.36

~~Mr. Flood's comments on the draft of the Order-in-Council are being dealt with by Mr. Cable.~~

Mr. Wominal

19 A. Cable — So. — 19th June.

The S. of S. has intimated
that he does not wish
to continue this case.
with Mr. Cable or to see
his letter again.

It can therefore be
put by.

J. P. Quinn

24/6

at once

Secretary of State

M.B. 711

In my talk with Lord Francis Scott today
he mentioned two points which he asked me to look
into:-

(a) The situation as regards the settlement of
the boundaries of the White Highland area. To his
disappointment he had gathered that progress had not
been made. It seemed to him that the Government of
Kenya might have kept on with this, and he asked me
if anything could be done to expedite matters.

(b) He asked whether the Tana Valley electric
scheme had been brought to a final settlement or not

Wells to Board
at (4)

11/6

Sir John Maffey.

I am sorry that I have not been able to
return this to you earlier. Taking (b) first, the
reply is "No". You saw the papers just after
Lord Francis Scott called on you. There is a dang-
erous local unofficial obstruction may lead to a
breakdown, with the result that the opportunity of
putting Nairobi's electric supply on a satisfactory
permanent basis may be lost. There is, or was, a
lot to be said on both sides but most of it must
have been said already.

As regards (a), except for what is to be
gleaned from the various adjustments recommended in
the Report, the Land Commission's conclusions as to

the

the definition of the Highlands are to be gathered from a small scale map on which the breadth of the boundary line represents about half a mile on the ground. A detailed boundary can only be prepared locally and it must be provisional until the adjustments in question are complete. We know that in one of these adjustments the arrangements recommended by the Commission had to be varied and there are no doubt similar cases.

As regards the rest of the Order a first draft has been prepared here but neither Mr. Flood nor I like it. We have to choose between a form which would be regarded as giving statutory effect to the administrative practice regarding European land-holding and a form which would be absurdly bald.

The only way in which we can make progress is indicated in the draft telegram which I annex. We can then discuss with legal advisers the general form of the Order.

As regards the enquiry in the draft telegram as to the Order of date of the European and the Native Orders, the main question is whether there would be criticism in the House of Commons and elsewhere in this country if the Europeans came first. I do not think that there is much danger of criticism so long as we are able to say that the European boundary has taken into account all the necessary reservations of land for natives, but one

never

never knows. It is quite certain that there is nothing whatever to be gained by hurrying the formulation of the Native Land Order-in-Council - it is by far the more difficult of the two.

15/6/36

20.6.36.

I think it would be a good thing to get the draft telegram off before I see Lord Curzon back in Thursday. It is a bit too late to do that.

21/6/36

Mr. Boyd

I got your revised telegram.

Ed. Boyd
24/6/36

Mr. Curzon says that we subsequently he would that his own view is that the issue of the two Orders-in-Council should be synchronized. He does not wish to commit himself to broadcast at the present stage.

Ed. Boyd
24/6/36

States that the provisional definition of the boundary is being prepared and will be forwarded at early date. States objections to the issue of the Highlands Order in Council before the Native Land Order in Council is considered they should issue simultaneously.

The Govt. reserves are sound, & this gives us a clear line for the future.

2 P. 4.

J. J. Packer
9/7

Yes: but when we get the new definition we shall have to get very busy on both Orders. The Native one may be very difficult to work.

The point raised in No 10 is whether a company can have a race, i.e. can a British company be described as Jew, Arab, Indian, Negro or what? I don't think it can but that is for legal minds. Also I don't think it would be politically possible: but that is not a legal matter.

S.S. 4. 7. 36

15.7.

At the present time I know nothing whatever about these Orders in Council, but I have considerable doubt about the advice given by the Attorney General in 10. To begin with the Interpretation Ordinance says that unless the contrary intention appears "person" shall include "Company". In my opinion in section 71 of the Crown Lands Ordinance the contrary intention does appear,

and

and what is being referred to there is an individual. No one would refer to a company as being of a different race.

Apart from that I think the Dunlop case is a very dangerous one upon which to rely. It was concerned with the payment of a large sum of money which if paid would have found its way to enemies, and the decision was clearly mixed up with the proposition that a company registered in England, but of which all the directors and the control were in Germany, resided in Germany, and was therefore an enemy just as a British subject residing in Germany during the war was an enemy.

If the matter is to be dealt with, it will have to be dealt with by legislation and the legislation will be rather elaborate. It must be remembered that a company does not know from day to day how its shareholding is held and cannot control it, so that you have got, in addition to other things, to enable companies to have special clauses in their memorandum and articles. The whole thing was worked out during or after the war between the Board of Trade and us and model clauses and memoranda and articles were drafted. All this is on record somewhere in the office.

21.7.36

Ray may thought that substance was void under the Highlands. What does it mean if a ...
...
...?

The minutes of
C.C. 29/7/16
are found in
Volume 10
K209

This paper was held up for search for the papers indicated in the last sentence of Sir G. Bushe's minute of the 21st July and has been put aside owing to pressure of work.

I annex a copy of a Circular dated the 15th of July, 1916, which includes a model of the Articles of Association which companies were required to adopt where the shares of such companies were mainly owned by enemy subjects and where it was desired that the British character of the company should be maintained.

I am not sure whether this is the paper that Sir G. Bushe has in mind and if so, what the effect would be of attempting to introduce legislation requiring companies registered in Kenya to adopt Articles of Association designed to maintain the European (Asian or African) character of such companies.

A.S. Smith
29/7/16

22. Polak.-----s/o-----10.7.36.
Expresses appreciation of statement made in the House of Commons regarding the Order in Council.

DESTROYED UNDER STATUTE
23. Byrne.-----s/o-----3.7.36.
Transmits with comments press cuttings from the East African Standard regarding the White Highlands.

24. To Byrne.-----ansd.-----15.7.36.

M & G
Rings

25. Extracts from minute by Sir J. Maffey recording discussion between the Secretary of State and Major Cavendish on the 9th October, 1936.
Orig. on 3/175/6/36.

Nominal(?) 26. WOMEN'S INTERNATIONAL LEAGUE 30.1.36.
Expresses appreciation of statements made in the Debate on July 9th.

50 (4)
38005/135

This does not call for a
long reply - an act of
courtesy
Draft here with
C.H. Smith
13.11.36

27. Women's Int'l League - 18/1/1936
DESTROYED UNDER STATUTE (No. 26 Annex)

28. Women's International League (revised) 24/1/36
Expresses appreciation of statements made in the Debate on July 9th and is concerned at Major Maffey's criticism of the quality of the land to be reserved for the natives.

Act. as in Draft here with
C.H. Smith
13.11.36.

29. Women's Int'l League (revised 24/1/36 and) - 3/2/36
DESTROYED UNDER STATUTE

See 75102/9/36 Palestine

regarding Legal opinions on Copying
of O. in C. in draft before Parliament.

24. XI. 1936

28

to the Rt. Hon. W.G.A. Ormesby - Gore,

M. P. 7 E 1936
C. O. REG!

R

Dear Sir,

The Leicester Branch of the Women's International League has been considering the land settlement in Kenya especially as it affects the native races.

It welcomes your statement in the Colonial Office Debate of July 9th that there is to be no legal disability imposed against Indians or against any person on the ground of race, colour or creed. On the other hand it is much concerned at ~~Mr. Milner's~~ Major Milner's criticism of the quality of the land to be reserved for the natives, when he said that half the land marked out for them to meet the future needs of an expanding native population consisted of arid or semi-arid desert.

This is contrary to the words of the Duke of Devonshire, when Secretary of State for the Colonies, quoted in the same debate 'that the interests of the African native must be paramount, and that if and when their interests and the interest of the emigrant races should conflict, the former should prevail'.

Yours

yours faithfully

M. W. Peach

Chairman Leicester Branch of the W.I.L.

38005/3126

Women's International League

BRITISH SECTION OF THE WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM

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Mrs. K. E. INNES.

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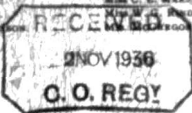
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Dr. ETHEL WILLIAMS, I.P.

October 30th. 1936.

The Rt. Hon. W. G. A. Ormsby-Gore, M.P.,
The Colonial Office,
Downing Street, S.W. 1.

Dear Sir,

Kenya Colony.

We write to you on behalf of the National Executive of the Women's International League, which has from its foundation taken a keen interest in the relations of the various races in the British Empire, believing that seeds of strife and even warfare are frequently sown in the unjust treatment of the weaker races by the strong.

We wish to express our appreciation of your statements made in the Debate on July 9th. on the Colonial Office Vote to the effect, with reference to the projected Orders in Council for Kenya Colony, that "there is to be nothing in either Order imposing any legal disability against Indians or against any persons on the ground of race, colour, creed or anything else..... There will be no legal colour bar." We were further gratified to observe that some at least of the Morris Carter recommendations as to land to be offered to the Kikuyu in replacement of lands they had lost in years past were now recognised as unsatisfactory, and were to be disregarded.

Handwritten notes and signatures in the bottom left corner, including names like "H. G. A. Ormsby-Gore" and "The Secretary".

We trust, for example, that this means that the land to be offered to the Kikuyu Tribe will not include areas which are almost waterless (except in the rains), hot, malarial and at a general level of some 1,000 feet below that of the best Kikuyu country, but that on the contrary some of the land which admittedly formed the traditional home of the Kikuyu people will be reacquired and returned to them as a recognition of past error and an act of present-day justice.

We hope that the major State forests will not be declared an area of exclusive "white" privilege as the Report suggests, and that the permanent "European Highlands" will not extend beyond the area at present alienated. We ask this in view of the fact that official publications of the Kenya Government indicate that of the land so far alienated some 6,000 square miles are lying unused for arable, fallow, pasture, residence, or any other use. We submit that this large area of unused land constitutes a sufficient reservoir of "holdings for new settlers", and that all that is necessary is for government to institute some control over the prices that may be asked for it.

We have the honour to be,
Your obedient servants,

Robertson

Chairman.

Isabel Ross,

Hon. Secretary, Native Races
Committee, Women's International
League.

Extract from Minute by Sir John Maffey recording discussion between the Secretary of State and Major Cavendish-Bentinck on 9th October, 1936.

(Original on 38173/6/36. Secret).

x x x

Major Cavendish-Bentinck said he hoped that some unofficial method could be devised for the discussion of land questions arising in the White Highlands so that they could be ventilated before the decisions of the Executive Council were reached. He further asked how the position stood in regard to the definition of "agricultural land", in which matter a ruling of the Attorney-General had created difficulties.

x x x

AIR MAIL

3870/56
COLONIAL OFFICE,

DOWNING STREET.

15th July, 1936

PERSONAL
PRIVATE

My dear Byrne,

A line to acknowledge your letter of the 3rd of July. I am glad that the editor of "The Standard" is not making too great a fuss over the Order-in-Council matter. But whatever fuss is made on your side it would be insignificant compared with the trouble we should have here and elsewhere if the Order-in-Council took the other form.

I am sorry to hear about Kisumu. Certainly I did not think much of the Senior Commissioner's house when I was there. It seemed a gloomy place to live in, but I did not notice any signs of approaching dissolution. However, a good deal may happen in nine years.

I do not look forward to another Building Loan for Kenya but, at all events, you have broken the news to us,

What you say about gold mining prospects seems quite satisfactory. We have given up hoping for anything very spectacular from Kenya in this line.

Yours sincerely,
W.S.

BRIGADIER GENERAL

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

PERSONAL AND PRIVATE.

AIR MAIL.

RECEIVED

4 SEP 1936

O. O. REGY

GOVERNMENT HOUSE,
KENYA,

EAST AFRICA

3rd July, 1936.

My dear Bottomley,

The enclosed cuttings from this morning's East African Standard may be of interest to you.

You will recollect that some time ago you informed me by cable that Schwartze had been informed of the general lines on which the Order-in-Council would be drafted. Geographical definition coupled with a statement that the present administrative practice would continue.

Shortly after this I had a conversation with the Editor of the Standard who was full of blood and thunder saying that the Settlers would never accept this. I warned him to be sensible and not to stir up public feeling and today's Leading Article indicates that they are becoming more reasonable. My own opinion, for what it is worth, is that ten years will see the end of this rigid restriction of the White Highlands and the demand for the withdrawal of these restrictions will come from the Settlers themselves. Therefore the continuance of the administrative practice is a wise measure.

I have...

I have just returned from a trip to Kisumu and the
 Minefields. Kisumu is a changed place, town planning and
 building being much in evidence. This return to prosperity
 is very welcome but there was one matter that worried me.
 When the last building loan was allocated this Town was
 completely neglected: it was looked upon as moribund.
 Now the number of officials has been increased and many of
 the quarters allotted to Europeans and Asiatics are in a
 really deplorable state: a state which cannot be remedied
 except by complete rebuilding.

I enclose a photo of a typical house riddled by
 white ants and full of bats whose droppings are most
 offensive. It is not right for married families to be
 compelled to live in such buildings especially in a hot
 and relaxing place like Kisumu. I merely tell you this
 to give warning that we shall before long have to submit
 for the Secretary of State's consideration proposals for
 a "Public Scandals" loan.

I was quite satisfied with what I saw in the mining
 areas. The Kimingi people are pleased with the find
 of....

of the reef below the 400 feet level. Hosterman have
 practically completed their installation and in a very
 short time should be producing. Risks (now Kavirondo
 Gold Fields) are being ^{increasing} ~~completely~~ re-organised under the
 able guidance of John Taylor & Sons, the competent London
 firm.

There are also some promising propositions in No.
 2 Area. We need not expect anything big but I was con-
 vinced that mining has come to stay on such a scale that
 will materially help the Colony.

I hear the "trusted Ambassador" Francis Scott is
 on his return journey. I sincerely hope he will keep
 quiet and not disturb the very peaceful atmosphere that
 has prevailed since his departure.

Yours sincerely,

Sir W. C. Bottomley,
 K.C.M.G., C.B.E., C.B.E.
 The Colonial Office,
 LONDON, S.W.1.

NB The photo is not quite ready, I will send it
 by next mail HB

The
East African Standard

FRIDAY JULY 3, 1936.

THE HIGHLANDS

The Coming Order in Council

The inquisitiveness of the East African Standard's London Correspondent regarding the exact meaning of an answer given by Mr. Ormsby-Gore, Secretary of State for the Colonies, to a question on the White Highlands put to him in the House of Commons by a Liberal Member has revealed what may be regarded as the main lines of the forthcoming Order-in-Council. Various Indian opponents of the recommendation made by the Carter Commission that the same security should be given to settlers in respect of the reservation of the Highlands as is proposed for the African in relation to his land, frequently pointed out what they thought to be an anomaly (but was mainly a political argument) in the fact that while they, as British subjects, were denied land rights in the Highlands the same ban did not exist in regard to non-British Europeans. Mr. Mander, the Liberal Member who asked a question based on this contention, sought to pin Mr. Ormsby-Gore down to an assurance that foreigners would not have a privileged position *vis à vis* the Asiatics. Mr. Mander got no answer in the affirmative from which it appeared that the intention of the Secretary of State was to reach a decision which would make no distinction between British subjects and foreigners. But when he elaborated the answer in the correspondence published to-day Mr. Ormsby-Gore revealed that the Imperial Government will stick to the direct issue of stating a policy of reservation of the Highlands in the proposed Order-in-Council. The purpose of the Order will merely be to define the boundaries of what in future will be known officially as the Highlands. The Secretary of State however went further. He indicated that the Imperial Government will maintain the present administrative practice. That is to say the Highlands will for all

practical purposes, be reserved and any land transfers will be subject to the veto of the Governor of the Colony who will consult the representatives of European interests. It would be unwise of course, to assume too much before the text of the Order-in-Council has been published and before it has been discussed in the House of Commons but, presenting the indications of policy to be carried (and we have every reason to believe that continuance of the present practice for purposes of "Administrative convenience" will be the decision) there are several important conclusions which can be reached. The decision will not entirely satisfy the country but it will be realised that recognition of the practice of over thirty years is a distinct gain. The system which has existed for three decades on the basis of disputed pledges, will henceforth become a matter of Imperial Policy embodied in an Order-in-Council or perhaps, at least, in a memorandum accompanying that Order. The "White Highlands" clearly defined as to their boundaries, will then have a definite meaning in Kenya policy. There will be an implied recognition by the Imperial Government that it is necessary to set apart a special area in the Colony for special treatment and particularly as a home for white settlers. That, logically, will in time if not now also imply official recognition of white settlement itself as part of the Imperial Government's policy in Kenya. Till now it has been largely taken for granted and the Colonial Office has adopted the attitude that until settlement is proved to be economically sound, it is difficult for the Imperial Government to take the responsibility of "encouraging" it to the extent of advising British people to take the risks of settling in Kenya. It is true that the argument may be advanced that as the Order-in-Council does not specifically reserve an area for settlement, and does not clearly bar Asiatics, no decision has been taken which cannot be upset by a future Government in Britain. But the fact that official promises and pledges are replaced by the admission that a desirable "Administrative practice" exists, and is to be observed, takes Kenya a considerable step forward and permits the community to turn to the task of proving over a period of years that settlement

is economically sound and Imperially necessary. When the Order-in-Council has been published it will require close study. It will be important to obtain a clear assurance that the practice it admits will not be enmeshed by official action and that every case of land transfer of whatever kind and for any purpose will be referred by the Kenya Government to the representatives of the European community for advice and that the advice given will be respected. The difficulties of the Imperial Government in committing itself to a written policy in the light of the influential interests and opposition of the Governments of India are obvious and though the country may not be completely satisfied by what is offered all a compromise based on lack of courage and absence of honest appreciation of the special needs of Africa, it will be important to weigh the advantages of that compromise before objections, if any, are taken.

E. A. Standard

NAIROBI, FRIDAY, JULY 3, 1936

White Highlands to be Reserved

PRESENT PRACTICE TO BE MAINTAINED

Colonial Office Explains

ORDER-IN-COUNCIL WILL HAVE A LIMITED PURPOSE

According to a letter written to the "East African Standard's" London Correspondent by the Colonial Office, there is no intention of making any change in the present administrative practice of reserving the White Highlands for Europeans. The main purpose of the Order-in-Council will only be to "define the boundaries."

[STANDARD CORRESPONDENT.]

London, June 26.

Ten days ago, Mr. G. L. Mander, Liberal M.P. for Wolverhampton, asked a question in the House of Commons on the Kenya Highlands.

The intention of the question was to obtain an assurance that no "foreigners" would be allowed to hold land there merely because they were Europeans if such a right were denied to "British subjects", meaning Asiatics.

To clarify the issue I addressed a letter to Mr. Ormsby Gore in the following terms:

"I was very much interested to-day in your answer to Mr. Mander's question as follows:—

"To ask the Secretary of State for the Colonies if he will give an assurance that no approval will be given to any measure granting to foreigners in any part of Kenya rights withheld from British subjects."

"When this question appeared on the Papers I was rather puzzled myself as to what it meant and I saw Mr. Mander who explained that under the Reservation of the Highlands he wanted to ascertain whether the restriction of such lands to a white population would be solely confined to British subjects or whether it would be possible for Americans, Germans, or French, for instance, to settle

there. His point was that these nationalities ought not to be allowed to settle there unless equal privileges were given to British subjects who, of course, in his mind were Indians. You replied to that question "Yes, Sir," thus indicating, I imagine, that the Highlands would be solely reserved for British and that no other white people whatever would be allowed to settle there.

Could you let me know whether this ruling is quite correct?

To which I have received the following reply dated from the Colonial Office, June 25 and signed by Mr. E. B. Boyd:—

"Mr. Ormsby Gore has asked me to thank you for your letter of the 17th June and to explain that in answer Mr. Mander's assurance for which he asked that no measure would be approved which would give foreigners rights withheld from British subjects. The Secretary of State does not wish this statement to be taken as meaning that the Highlands would be reserved for white British subjects. What it does mean is that no such possibility will be laid down: the present practice can be altered will be maintained but no measure will be enacted. There will be an Order-in-Council to define boundaries, but it cannot discriminate."

Telegram from the Governor of Kenya to the Secretary of State for the Colonies.

Dated 9th July, 1936. Received 10-48am 9th July, 1936.

No. 162. Confidential.

20

Your telegram No. 159 Confidential.

Provisional definition of the boundary is in course of preparation and will be forwarded as early as possible probably within a month but important adjustments and surveys have not yet been completed vide sections 968 1067 1068 1178 referred to in half yearly progress reports.

I have

strong objections to the issue of Highlands Order in Council before the Native Land Order in Council on the following grounds.

(a) Natives were informed the reason for the appointment of Land Commission was to settle the boundaries of native reserves and if the first legislative outcome of the Report were to be the Order in Council to secure the rights in the Highlands to Europeans misgiving on the part of the natives would be intensified and political capital made by the agitators with possibly serious repercussion in the Reserves.

(b) It is hoped that the Order in Council will be regarded by all parties as final.

The issue of an amending Order in Council to include the present outstanding adjustments, if it followed closely on the original Order in Council, would defeat this and would provide incentive for the continuance of agitation with a view to further amendments.

For these reasons I am of the considered opinion that it is desirable that both Orders in Council should issue simultaneously.

C. O.

Mr. C
 24 JUN
 Mr. W
 Mr.

*Corrected Sent
 4.15 pm
 24.6.36
 1049D*

Amend 21

Sir C. Parkinson.

Sir G. Tomlinson.

X Sir C. Bottomley X 20/2

Sir J. Shuckburgh.

Perms. U.S. of S. 22/6

Parly. U.S. of S.

X Secretary of State *24.6*

No. 189 Confidential.

Your

Confidential despatch 4 July No 92 A

DRAFT. TELEGRAM.

GOVERNOR,

NAIROBI.

for

*10/24
 3/20/35*

I am anxious that no unavoidable delay should occur in preparation of Highlands Order-in-Council and while I recognise that adjustments of Native areas under Land Commission's proposals should first be completed I should be glad if you will have provisional definition of boundary prepared and send it to me with your observations as to any points remaining in doubt.

Reat^d Order will be drafted here and you will be consulted.

Is there any objection from point of view of Kenya to Highlands Order-in-Council being

issued

FURTHER ACTION.

13
-19 A

PL
J.E.
27/11/56
J

Golfers Club,
Whitehall Court,
London.S.W.I.
June 19th 1976

Dear Ormsby Gore,

(17)

Thank you for your letter of the 15th. I had heard on very good authority that your predecessor in office did contemplate issuing an Order in Council in the sense I assumed. I am very glad to know that you are not proposing to do this, and perhaps you will allow me to pay you the tribute offered you by both political friends and foes to whom I have spoken when they said that they relied on your known liberal sentiments as the best bulwark against such a break with our traditions as the feared Order in Council would have involved. I will, of course, treat the information you have given me as strictly confidential; but it will enable me to cease from further canvassing of the question. I am a member of a Committee which is drafting a remonstrance to the Colonial Office on the Kenya and other African questions, but as I have 'sealed lips' I must go forward and append my signature to a document, which, in so far as it relates to Kenya, tilts at windmills.

The largely non-representative character of the Elected Members in Kenya to which I alluded is, I believe, in fact, and is a consequence of local circumstances to which I referred in my evidence to the Royal Commission. Roden Buxton, who spent some months in Kenya living among the settlers, strongly supported my opinion on this. A certain minimum population is necessary to support efficient representative government. The number is not a priori definable, but the population must be of such a number and

quality as to support two parties, and at least two newspapers, otherwise there arises an unbalanced and unstable outlook on public affairs reflecting the effects of one-sided propaganda on a small politically-conscious group which pretends to mirror the public sentiment of the country, coupled with profound apathy on the part of a large section of the community, who having no outlet for the expression of other views ignore politics and 'get on with their jobs'.

Yours sincerely,

Mable

P.S. I visited the National Gallery the other day. The Stationery Office has now moved; catalogues are on hire and have proved a success.

Mr. Flood.

Mr.

Mr.

Sir C. Parkinson

Sir G. Tomlinson

Sir C. Bottomley

Sir J. Shuckburgh

Permi. U.S. of S. 13/6

Parly. U.S. of S.

X Secretary of State. WJ 15.6

DOWNING STREET.

14th June, 1936.

Dear Cable,

Thank you very much for your further letter of the 9th of June. I quite agree with you that it would be most inadvisable to have an legal enactment which would recognise the existence of a colour bar and it is not proposed to do anything of the kind. For your ^{study} confidential information I may tell you that what is intended is to define the area which is to be regarded as highlands but leave it at that. Then, as you say, matters will be left vague where vagueness is highly politic.

I note what you say about the politicians of Kenya and that the settlers in the background are more sensible than the people who appear in the limelight as representatives of

DRAFT.

A. CABLE, ESC.,

OTHER ACTION.

unofficial opinion, but the trouble is *or*
that the people in the background remain
so much in the background. If they really
take opposite views to their ^{*elated*} politicians
it would be a great help if they would
only say so now and again. As it is,
there is the ~~only~~ element with an
unfortunately large publicity value and
nothing ^{*available*} on the other side to ~~accountance~~
it. That does not make matters any easier
for the Governor in Kenya, or for ~~the~~ *whichever*
Secretary of State in Downing Street.

~~Very sincerely,~~

10
26

Golfers Club,
Whutehall Court,
London, S.W.1.

June 9th 1936

Dear Mr Ormsby Gore, -

I thank you for your letter of June 8th. It was very kind of you to find time to send it to me in spite of the heavy press of work that must have crowded on you.

In my letter I did not raise the question of the justice of the original white settlement of the highlands. Personally I think it involved a large seizure of "Commonage", and that the treatment of the Masai tribe was shameful. I fully endorse your sentiment that in order to be pro-native it is not necessary to be anti-white. Refusal to reserve the present white-occupied areas for the exclusive use of Europeans may offend a certain number of settlers whom the foolish politicians of Kenya are able to goad into protest, but it will not damage white settlement. The issue of an Order in Council reserving the areas for Europeans only, I submit, be deplorable. It would involve the Imperial recognition of the colour-bar, and a discrimination against a coloured-born British Subject in favour of white foreigners. A Polish or Italian peasant would be eligible under the British Crown as a settler, whereas for example an Indian officer, subject of His Majesty, who fought for us in the War, or the son of an Indian High-Court Judge would be ineligible. Is this to be approved by the Imperial Parliament as sound doctrine? I am doing my best in a quiet way to let this issue be realized. I would respectfully suggest that the Order be shelved, and at least no

such
doctrine put on formal record. I foresee retaliatory measures by the Indian Government if it is promulgated. Would it not be possible to define the Native Reserves, and state simply that all other land not reserved under the Trusteeship was available for non-native settlement and colonization? That would leave matters vague where vagueness is highly politic.

I hope things are getting better in Kenya. I lost all my savings there. The man with whom I was associated died in his sleep a year ago and his estate proved insolvent. He dropped some £75,000 in Kenya. Farms of his which were valued by the Banks some few years ago at £25,000 are now, I am told, being bought in at £2500. Further reports and letters I have had paint a terrible picture.

Once again I would express the hope that you will not allow the doctrine of the colour-bar to be embodied in any law or Order issued from Great Britain. There might be some violent talk in Kenya, but that would pass. Tropical politics are not temperate. The settler in the background is much more sensible than the foolish people who often profess to represent him.

Yours sincerely,

J. M. Noble

Q. O.

Mr. Flood.

Mr.

Mr.

Sir C. Parkinson.

Sir G. Tomlinson

Sir C. Bottomley 5/6

Sir J. Stuckburgh.

Perms. U.S. of S.

Party: U.S. of S.

Secretary of State.

W.S. 6-6

For Secretary of State's signature.

Downing Street,

8 June, 1936.

Dear Mr. Cable,

Thank you for your

congratulations on my appointment as Secretary of State.

With regard to Kenya, I

think you do not altogether look at the situation as I see it. ^{A large part of} The

^{is and will remain in} highlands of Kenya, ~~or rather that~~ ^{is their occupation. Not part} part of them which is open to

European settlement, was not in native occupation but was derelict land ^{with only some small patches} apart from the ~~hills~~ ^{which were}

~~or at any rate the greater part of it~~ ^{made for the benefit of the tribe and have} ^{long increased the area which it had eyes} ^{was} There was therefore no reason

^{to leave} why it should not be settled by

Europeans since it was in fact suitable

for white settlement. There has been

no question of dispossessing the

native population to make room for

Europeans

DRAFT.

J.A. GABLE, ESQ.

FURTHER ACTION.

Europeans and that constitutes the *fundamental*

difference between what has happened in

Kenya and ^{your} the suggested possibility of Italian

action in Abyssinia. If there was a large

area of uninhabited and unclaimed country in

Abyssinia I do not think anyone could blame

the Italians if they said it was to be

reserved for white occupation.

I do not agree with your pessimistic

view of European farming in Kenya. Settlers

there have had to go through an extraordinarily

^{difficult} bad time and the fact that they are beginning

to pull round again is to my mind very good

evidence that European farming, in many directions

at any rate, is not only not a failure but must

be regarded as definitely hopeful. *Some individual failures that will be, as in many farming areas in every country.*

The policy in regard to the Highlands

of Kenya has been maintained for 30 years and I

see no reason why it should not be maintained.

After all, we do owe a duty to those of our own

race as well as to those who are natives of

Africa or Indians. *The Land Commission was*

designed to settle the question of land. It is not a question of claiming but of treating all communities on a basis of equity. As I wrote in my East African report in 1924. In order to be progressive it is not necessary to be anti-white.

C. O.

Mr.

Mr.

Mr. Parkinon.

Mr. Tomlinson.

Mr. C. Bottoquley.

Mr. J. Shuckburgh.

Permt. U.S. of S.

Party, U.S. of S.

Secretary of State.

DRAFT.

the outstanding questions
of native rights over land and
the question of that land
should be regarded as
coming within the European
Highlands, and I see no
reason why a settlement on
the lines of its report
should not be satisfactory.

Yrs. sincerely

W. H. Murray

16

Golfers Club,
Whitehall Court,
London.S.W.I.
June 3rd 1936.

Dear Mr Ormsby Gore,

Allow me to offer you my congratulations on your appointment as Secretary of State for the Colonies.

In regard to the proposed issue of an Order in Council for the purpose of defining the Native Reserves of Kenya, I would express the hope that while it will protect the Native Territories from alienation until the time when Parliament shall consider that the natives are able to face the strenuous conditions of the modern world, it will not at the same time reserve the highlands for exclusive occupation by white settlers. The former reservation is fully justified as a means for protecting inexperience; the latter would be an unjustified entrenchment of privilege, and be a deplorable violation of British democratic ideals.

From an economic point of view, Kenya has been developed ahead of time. White farming, for the most part, and for this reason mainly, has been a disastrous failure. The failure has been masked for some 30 years because Kenya farming was largely supported by external supplies of private capital. Further Imperial grants in aid will, in my opinion, simply be subsidies to a bankrupt concern.

If the so-called White Highlands are by Order in Council made a close preserve for whites only, what is the British Government going to say if Mussolini should cap his other crimes against the Abyssinians by reserving their highlands for occupation by whites only? And how would such a measure tally with the government's repeated statements that

'Mandate' policy would be applied in Kenya no less than in Tanganyika.

I can hardly believe that this Government will be false to the age-long traditions of our race on account of the clamour of 2500 settlers on farms in Kenya. Many of these who pretend they would not be able to endure the proximity of a native purchaser of land in the White Highlands consider the contiguity of a farm to a native reserve an invaluable asset.

Yours sincerely,

A handwritten signature in dark ink, appearing to be 'J. M. O. O.', written in a cursive style. The signature is positioned below the typed text 'Yours sincerely,' and above the P.S. note.

P.S. Since writing this letter I see that Olivier has made in the Times the point about Abyssinia.

Mr. Grossmith. 15 5.36.

38005/3/36. Kenya. 14 30

Mr. *Parkin* 1575

Mr. *Flood* 23

Sir C. Parkinson.

Sir G. Tomlinson.

X Sir C. Bottomley. 255 *f*

Sir J. Shuckburgh

Permt. U.S. of S.

Party. U.S. of S.

Secretary of State.

Downing Street.

28 May, 1936.

Sir,

insert
I am ~~plea~~ to acknowledge

the receipt of your letter of the 12th of May regarding the provisions of the projected Kenya Highlands Order-in-Council.

2. As observed in your letter, Mr. Thomas has given an assurance that the Order-in-Council will not be approved until Parliament has had an opportunity of discussing the matter. He has also stated that the debate on the Colonial Office Vote would no doubt be a convenient opportunity for the discussion. In the ^{meantime} ~~circumstances~~ *of the urgent prospects* ~~he thinks it preferable to defer any~~

DRAFT. for consen.

THE SECRETARY,

THE ANTI-SLAVERY AND ABORIGINES PROTECTION SOCIETY.

15
30 (3/2)

(See No 10 P. 216)

FURTHER ACTION.

Recive. for No 12

Mr. Grossmith. 15.5.36.

38005/3/36. Kenya. 14 30

Mr. Parkin 1575

Mr. Howard 23

Sir G. Parkinson.

Sir G. Tomlinson.

X Sir C. Bottomley. 285 f

Sir J. Shuckburgh

Permt. U.S. of S.

Parly. U.S. of S.

Secretary of State.

Downing Street.

28 May, 1936.

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hired
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DRAFT for Conson.

THE SECRETARY,

THE ANTI-SLAVERY AND ABORIGINES PROTECTION SOCIETY.

copy to J.O. (9/6) (15)

(See No 10 P.O. File)

FURTHER ACTION.

Recd. for No 12

comment on the views expressed in your
to which due attention will be paid.
letter, ~~in the belief that the discussion~~

in the House will afford the best opportunity
of explaining the accepted policy in this
matter.

I am, etc.

Signed J. E. W. FLOOD

INDIA OFFICE,

WHITEHALL, S.W.1.

19th May, 1936.

P. & J. 1911/36

Dear Flood,

8th May,
1936.

I send herewith copy of a letter received from the Anti-Slavery and Aborigines Protection Society about the proposed issue of an Order in Council regarding the Highlands area in Kenya together with a copy of a draft reply to it. Could you kindly let me know as soon as possible whether there is any objection to the terms of our proposed reply from the Colonial Office point of view.

I ought perhaps to explain that the reference in paragraph 1 of the Society's letter of the 8th May is to an interview which Mr. Charles Buxton and Sir John Harris had with Mr. Butler on the Highlands question early in April. Also, though as you will see our draft reply is at present in the form of a formal official letter, it may possibly be considered preferable to send it in the form of a letter signed by Mr. Butler's Private Secretary in which case it will need minor adaptations. But this will not, of course, affect its substance.

J&W. Flood Esq., C.M.G.,
Colonial Office.

Yours sincerely,

Butler

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THE ANTI-SLAVERY AND ABORIGINES PROTECTION SOCIETY.

Denison House,

296 Vauxhall Bridge Road,

London, S.W.1.

8th May, 1936.

To: -

The Under-Secretary of State,
India Office,
King Charles Street,
S.W.1.

Sir,

At the Committee meeting of this Society held in the House of Commons yesterday, it was decided to write to thank you for the interview which you so kindly gave to the Vice-Chairman and myself, and to put before you the views of the Committee upon the question of the Highlands of Kenya, which we trust you, in turn, will place before the Secretary of State for India.

As the Committee understand, it is proposed to follow up the Report of the Morris Carter Commission by an Order in Council, under which the area of the Highlands would be largely increased. We have reason to fear that the terms of this Order in Council will make it impossible in future for any coloured British subject - colour and race being the sole test - to possess legal title to any land in that area. It will, we understand, be permissible to grant legal title to German, French, Italian, American, Russian, Polish or Scandinavian subjects, but not to British coloured subjects, even though these be the original inhabitants of the country, or the most eminent of His Majesty's Indian

subjects.

The Committee would deplore any such Order in Council, not only as striking at one of the main objects for which the Society exists, but as violating a British principle frequently found in British overseas engagements and so well set forth by Queen Victoria in words drafted by Lord Derby:-

"There shall not be in the eye of the law any distinction or disqualification whatever founded upon mere distinction of colour, origin, language or creed, but the protection of the law in letter and in substance shall be extended impartially to all alike."

It is because the Committee fear that this great principle is now threatened that they venture to approach you. The Committee is resolutely opposed to racial discrimination in British territories, especially where such territory is directly administered by the Crown and the discrimination is levelled against its natives.

Questions concerning land in the Highlands of Kenya first arose when grants were made to the Europeans who were invited there. When British Indians also sought to acquire land in that area, whether originally or by transfer, the matter was referred to Lord Elgin, who held that it was impossible to discriminate legally against British subjects. Lord Elgin agreed to the making of an administrative order for purposes of convenience, and the Governor was free to grant titles only to Europeans, and any transfer had to be subject to the Governor's approval. That, as we understand it, has been the practice hitherto.

In 1921 the Joint Parliamentary Committee on Indian Affairs accepted "the general principle which the Government of India have laid down, namely, that there is no justification in Kenya for assigning to British Indians a status inferior to any other class of His Majesty's subjects." (H. of C. Paper, 1921 No. 177).

In 1923, to reassure the Government of India that a legal bar against Indian ownership of land in the Highlands of Kenya was not contemplated, His Majesty's Government made the following declaration in the Duke of Devonshire's Memorandum (Cmd. 1922) :-

"It cannot be claimed that they (the provisions of the Crown Lands Ordinances) amount to legal discrimination against Indians, for it would be possible for the Executive Government to grant land in the Highlands to an Asiatic or to approve of the transfer of land from a European to an Asiatic without any alteration in the existing law."

It is submitted that such statements of policy apply with even greater force to the natives of the Colony.

Several Members of Parliament who are also members of our Committee have repeatedly urged the Secretary of State for the Colonies that permission should be obtained to lay a draft of the proposed Order in Council upon the Table of the House of Commons. In the very exceptional circumstances of so grave and fundamental a departure from traditional British policy being contemplated, such a request does not seem extravagant. The Secretary of State for the Colonies has not felt able to take this step, but the reply of Mr. Thomas to Sir Archibald Sinclair holds out some hope that Parliament will be given full knowledge of the proposals. It is not yet clear if these proposals will introduce for the first time a "racial bar" into British

legislation.

In these circumstances, the Committee trusts that it may receive an assurance from the Marquess of Zetland that the Government of India will have adequate opportunity for considering the proposals before they are incorporated in an Order in Council.

I have, etc.,

(Sd.)

JOHN HARRIS,
Secretary.

May, 1936.

Draft Reply

Sir,

I am directed to acknowledge the receipt of your letter of the 8th May, 1936, on the subject of the recommendations contained in the Report of the Morris Carter Commission relating to the issue of an Order in Council regarding the Highlands area in Kenya and the conclusions of His Majesty's Government on the Commission's Report published as a White Paper in May, 1934, (Cmd.4580) and to inform you that your letter has been laid before the Secretary of State for India. In reply I am to say that representations have already been made to His Majesty's Government on behalf of the Government of India with regard to this question and that the matter has received, and will continue to receive, the closest attention of the Secretary of State in consultation with the Government of India.

2. As regards the request made in the last paragraph of your letter I am to say that the question whether such an assurance could be given to the Government of India would appear to be one for the Secretary of State for the Colonies. With regard to the preceding paragraph I am to refer to the undertaking given by the Secretary of State for the Colonies in reply to a question in the House of Commons on the 7th May, 1936, of which you are, no doubt, aware, that an opportunity will be afforded for the discussion of the matter in the House and that the debate on the occasion of the Colonial Office Vote will, no doubt, be a convenient opportunity.

I am, Sir,

Your obedient Servant,

The Secretary,
Anti-Slavery and Aborigines
Protection Society,
Denison House,
296, Vauxhall Bridge Rd.,

In his memo. of 10/9/35, enclosed
in No 10, the A.G. refers to various decisions
in the U.K. Courts, which show that, in certain
cases where the criterion is nationality, the
Courts may disregard the fact that a
Company is British (by virtue of its registration)
& to have regard to the fact that the control
of the Company is in alien hands.

By analogy he argues that, for
the purposes of §§ 71 & 73 of the Crown
Lands Ordinance (where the criterion is real),
the Gov. in Council is entitled to regard
a Company, in which the control is in
alien hands, as an artificial person
of alien ~~race~~ race.

Whether this opinion is valid is
a Q. for the legal advisers.

It may however be permissible
on my part, without undue presumption,
to observe that the A.G. appears, quite
unnecessarily, to have complicated the
issues by fallaciously confusing the
conceptions of British nationality & British
race.

Thus in paras 9 & 13 he states that
the Kenya registration makes the Company
British, & then in para 18 he says that
"British" is included in "European".

But surely the correct view is that it
is the nationality of the Company which is
British, not that the Company might have
to be regarded as "European". British nationality

has nothing to do with race. In fact
there are more British Asians than
British Europeans. A company
registered in H.K., & in which the
controlling interests were H.K. born
Chinese, wd equally be "British",
but equally it wd not be European.

It seems to me that the fact
that the Company is British (by virtue
of its registration) is entirely irrelevant.

at the same time however
it does not appear that this irrelevancy,
& the fallacies wd. have been built
upon it, have been introduced in
such a way as to invalidate the
general line of the A.G.'s argument.

J.P.
15/7/36

Telegraph:
30 CITIZENRY, CHURTON, LONDON
Telephone:
VICTORIA 6063

The Anti-Slavery and Aborigines Protection Society

(in which are incorporated the British and Foreign Anti-Slavery Society and the Aborigines Protection Society)

Joint Presidents:

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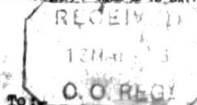
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DENISON HOUSE,
296 VAUXHALL BRIDGE ROAD,
LONDON, S.W.1.
(CLOSE TO VICTORIA STATION)

12th May, 1936.

To
The Under-Secretary of State,
Colonial Office,
Downing Street,
S.W.1.

Sir,

At a Committee meeting of this Society held in
the House of Commons on Thursday last, it was decided to
approach you again upon the question of the Highlands of
Kenya, with a view to elucidating one or two points upon
which there appears to be some ambiguity.

As the Committee understand, it is proposed to
follow up the Report of the Morris Carter Commission by
an Order in Council, under which the area of the High-
lands would be largely increased. We have reason to
fear that this Order in Council would make it impossible
in future for any coloured British subject - colour and
race being the sole test - to possess legal title to any
land in that area. It will, we understand, be permissible
to grant legal title to German, French, Italian, American,
Russian, Polish or Scandinavian subjects, but not to
British coloured subjects, even though these be the
original inhabitants of the country, or the most eminent
of His Majesty's Indian subjects.

As already stated, this Committee would deplore
any such Order in Council, not only as striking at one of
the main objects for which the Society exists, but as
violating a British principle frequently found in British

(14)
J.P.
15/7/36
(15)

overseas engagements and so well set forth by Queen Victoria in words drafted by Lord Derby:-

"There shall not be in the eye of the law any distinction or disqualification whatever founded upon mere distinction of colour, origin, language or creed, but the protection of the law in letter and in substance shall be extended impartially to all alike."

It is because the Committee fears that this great principle is now threatened that they venture again to approach you. The Committee is resolutely opposed to racial discrimination in British territories, especially where such territory is directly administered by the Crown, and the discrimination is levelled against its natives.

Questions concerning land in the Highlands of Kenya first arose when grants were made to the Europeans who were invited there. When British Indians also sought to acquire land in that area, whether originally or by transfer, the matter was referred to Lord Elgin, who held that it was impossible to discriminate legally against British subjects. Lord Elgin agreed to the making of an administrative order for purposes of convenience, and the Governor was free to grant titles only to Europeans, and any transfer had to be subject to the Governor's approval. That, as we understand it, has been the practice hitherto.

In 1921 the Joint Parliamentary Committee on Indian Affairs accepted "the general principle which the Government of India have laid down, namely, that there is no justification in Kenya for assigning to British Indians a status inferior to any other class of His Majesty's subjects." (H. of C. Paper, 1921, No. 177).

In 1923, to reassure the Government of India that a legal bar against Indian ownership of land in the Highlands of Kenya was not contemplated, His Majesty's Government made the following declaration in the Duke of Devonshire's

● Memorandum (Cmd. 1922):-

"It cannot be claimed that they (the provisions of the Crown Lands Ordinance) amount to legal discrimination against Indians, for it would be possible for the Executive Government to grant land in the Highlands to an Asiatic or to approve of the transfer of land from a European to an Asiatic without any alteration in the existing law."

It is submitted that such statements of policy apply with even greater force to the natives of the Colony.

Several Members of Parliament who are also members of the Committee have repeatedly urged that permission should be obtained to lay a draft of this proposed Order in Council upon the Table of the House of Commons. In the very exceptional circumstances of so grave and fundamental a departure from British traditional policy being contemplated, such a request does not seem to the Committee extravagant.

The Secretary of State for the Colonies has not yet felt able to take this step, but in a reply to Sir Archibald Sinclair he undertook that Parliament should be given full knowledge of the proposals. It is not yet clear to the Committee whether these proposals will introduce for the first time a "racial bar" into British legislation.

The Committee has noted with satisfaction that in a reply to Mr. de Rothschild on the 7th instant, the Secretary of State for the Colonies gave an assurance that no issue of the Order in Council would take place until after the debate on the Colonial Office Vote, and it ventures to express the hope that it will then be possible for the Secretary of State to remove the anxiety felt in many quarters upon the points raised in this communication.

I have the honour to be,

Sir,

Your obedient Servant,

Burton
Secretary.

KENYA



GOVERNMENT HOUSE
NAIROBI
KENYA

NO. 32 CONFIDENTIAL

20 APR 1936

25 MARCH, 1936.

C. O. REGY

Sir,

I have the honour to refer to my Confidential despatches Nos. 149 and 156 of the 9th December and the 23rd December, 1935, respectively, and to your Confidential despatch of the 12th February last, on the subject of the European Highlands.

2. Reference was made in paragraph 4 of the earlier despatch and in paragraph 3 of the later one to transactions in respect of certain land at Limuru. An area of 14.3 acres, portion of L. R. No. 148, has been used for some years for the purpose of a Wattle Bark Extract Factory. This land, together with buildings erected thereon, was transferred on the 20th May, 1935, by the Bakau Tanning and Extract Company, Limited (registered in Liverpool) to a Limited Liability Company named the Limuru Tanning Extract Company, Limited, registered in Kenya. At the date of the transfer the Directorate of the latter Company consisted of three Europeans. The shareholders were at that time Indian in respect of 1,996 shares of £5 each and European in respect of 4 shares of £5 each. Soon after the transfer was registered Indian Directors were substituted for two of the Europeans and two additional Indian Directors were appointed.

3. This transaction came to the notice of Government when a formal notification of the proposed transfer of two adjoining farms Nos. 4966 and 1967, comprising

THE RIGHT HONOURABLE,
J. H. THOMAS, P.C., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON, S. W. 1.

862/.....

862 acres, from the Bakau Tanning and Extract Company, Limited to the Limuru Tanning Extract Company, Limited was submitted on the 6th August, 1935. These farms were used as a feeding ground for the factory. At the date of the notification the Directors of the latter Company were two Indian and one European, and the control and management were in the hands of Indians.

4. Part VIII of the Crown Lands Ordinance provides for the exercise of veto only in respect of inter-racial transactions. In this case, however, both parties were Limited Liability Companies. The legal question to be decided then was whether a Company could have a racial status. The Attorney General, after giving very full consideration to the matter, recommended that, although the subject was not free from doubt, Government was entitled to look behind the form to the substance of the Company, which in this particular instance was admittedly Indian, and that consequently the transaction should, in accordance with the policy of Government, be vetoed. This advice was accepted in Executive Council and the proposed transfer was formally vetoed. Subsequently the position in regard to the factory site was considered in Executive Council which advised that, as no formal notification had been given, the right to veto the transfer at any subsequent date was not impaired and that for the present no further action should be taken by Government in the matter. This advice I accepted.

5. After the promulgation of the veto in respect of these two farms an agreement was contemplated under which the Limuru Company would be granted the right to cut and market the wattle now and hereafter standing on the land for a period of 21 years. The full purport of the agreement is indicated in a letter from Messrs.

Delany/.....

----- Delany and Stratton, Solicitors, a copy of which is enclosed. Since wattle is self-sown this agreement would virtually have given the Indian Company full control over the agricultural development of the farms throughout the term of the agreement: and as the farms are held under the Crown Lands Ordinance, 1903, the provisions of Section 39 of the Crown Lands Ordinance (Cap. 140) do not apply. This proposal has now been dropped and I am informed that Messrs. A. Baumann and Company will purchase the farms in their own name and that no other firm or Company will have any interest in them.

6. These transactions brought into prominence the possibility of Asians evading the policy of preserving the Highlands for the use and ownership of Europeans only by the simple method of taking transfer in the name of Limited Liability Companies. This point was brought to my notice by the Commissioner for Local Government, Lands and Settlement in a Memorandum dated the 9th July, 1954, and is discussed at length in the Attorney General's Memorandum dated the 10th September, 1955. Copies of these Memoranda are enclosed herewith. The matter is of such importance in its bearing on future policy that I should be grateful if you would inform me of the views of your legal advisers on the subject. The feasibility of introducing legislation, either in the projected Highlands Order in Council or by way of an amendment to the Crown Lands Ordinance, on the lines of the South African provision referred to in the concluding paragraphs of the Attorney General's Memorandum requires consideration: for without some such legal provisions it is clear that by a manipulation of Company Directorates the Highlands policy can be defeated with impunity.

I have the honour to be,

Sir,

Your most obedient, humble servant,

A handwritten signature in dark ink, appearing to be 'H. Byrnes', written in a cursive style.

BRIGADIER-GENERAL
GOVERNOR

STRICTLY CONFIDENTIAL

19th September, 1955.

The Honourable,
The Colonial Secretary.

RE: THE LIMURU TANNING EXTRACT COMPANY

In view of the further information which has been made available since last I advised on this matter, I have carefully reconsidered the whole question from every aspect.

2. I understand the facts of the case to be as follows:- The Limuru Tanning Extract Company Limited was incorporated in Kenya in February, 1955, with a Board consisting of three European directors. In May the Company acquired from the Baku Tanning and Extract Company Limited a factory site at Limuru of fourteen and a half acres, together with certain buildings thereon. The Baku Tanning and Extract Company Limited is, I am informed, a British Company with registered offices in Glasgow.

3. In July, 1955, the Board of the Limuru Tanning Extract Company Limited was reconstituted. Two of the three European directors resigned and were replaced by Indians, and two additional directors, both Indians, were also appointed. The position in July was that out of a total capital of Shs. 800,000/-, shares to the value of Shs. 190,800/- were held by Indians and out of five directors four were Indians. These details as to the constitution of the Company were quite frankly supplied to the Commissioner for Lands in July by the

Company/

together with an intimation that an agreement by correspondence had been entered into between the Company and the Bakau Tanning and Extract Company Limited of Glasgow for the purchase from the latter of two farms at Limuru held on freehold tenure with a total acreage of 862 acres. The Solicitors to the Company informed the Commissioner for Lands that the full consideration passing was £7500 and that, while no formal agreement had been concluded, a first instalment of £2500 of the purchase price had been paid by the Limuru Tanning Extract Company. The Solicitors further stated that in view of the considerable sum of money involved they wished to have the legal position placed beyond doubt before completing the agreement; they maintained, however, that as the proposed purchaser of the land was a corporation, the provisions of section 71 of the Crown Lands Ordinance (Chapter 140 of the Revised Edition) did not apply, and that consequently the veto under section 75 of that Ordinance could not be exercised.

4. The relevant sections of the Crown Lands Ordinance are sections 71 and 75 which read as follows -

"71. Whenever any land to which this part applies is sold, transferred, mortgaged, assigned, leased or subleased, whether by or under the orders of a court or otherwise howsoever, if the person or persons or any of them to whom such land is sold, transferred, mortgaged, assigned, leased or subleased is or are of a different race to the person by whom such land is sold, transferred, mortgaged, assigned, leased or subleased, then it shall be the duty of the purchaser, transferee, mortgagee, assignee, lessee, or sublessee to notify the Commissioner of Lands in writing of the transaction within one month of the completion thereof and to furnish the Commissioner of Lands in the form and manner prescribed with full particulars of the nature of the transaction, of the land affected and as to the parties to the transaction or interested therein."

"75.(1) It shall be lawful for the Governor in Council to veto any sale, transfer, mortgage, assignment lease or sublease to which the provisions of section 71 of this Ordinance apply:

Provided that the consent of the Governor to such sale, transfer, mortgage, assignment, lease

or sublease has not previously been given and provided further that whenever notice of such sale, transfer, mortgage, assignment, lease or sublease has been given and the required particulars furnished as in this part provided the right of veto shall not be exercised except within three months of the receipt by the Commissioner of Lands of the notice and particulars of the transaction.

(2) Whenever the Governor in Council shall exercise the right of veto in respect of any sale, transfer, mortgage, assignment, lease or sublease notice that such right has been exercised shall be published in the Gazette and from the date of such publication the sale, transfer, mortgage, assignment, lease or sublease in respect of which such veto has been exercised shall be null and void.

(3) The Principal Registrar shall cancel or cause to be cancelled the registration of every document evidencing or purporting to evidence any transaction in respect of which the veto has been exercised under this section.*

5. The important words in section 71 would appear to be -

"whenever any land is transferred ... if the person or persons, or any of them, to whom such land is transferred ... is or are of a different race to the person by whom such land is transferred ... then it shall be the duty etc.*"

6. The use of the word "race" at once creates difficulties in respect of the application of the section to corporations. "Race" is defined in section 5 of the Crown Lands Ordinance as meaning persons of European, Asiatic or African origin, as the case may be.

If it were not for that definition we should be thrown back on the academic meaning of "race", possibly with embarrassing results, though I am by no means sure that the use of the word in the Ordinance is not, in any case, unfortunate.

7. Avoiding, for the moment, the difficulties arising from the use of the word "race", what is the position of the company in question as we know it? It is a British Company, since it is registered in Kenya, and apparently the vendor Company is also British (for the purposes of this memorandum it is assumed that

"British" is included in "European", while the actual Board and shareholders of the transferee Company are almost entirely Asian. In the case of individuals as opposed to corporations that would be sufficient to bring the matter within section 71 of the Crown Lands Ordinance.

8. In section 2 of the Interpretation Ordinance (Chapter 1 of the Revised Edition) the word "person" includes any "company" or "body of persons corporate or unincorporate"; can it be said then that section 71 applies to a corporation as it would to an individual? Prima facie I do not think so, for difficulties arise at once in regard to the word "race".

9. The first objection is that, in law, a company is regarded as having no race at all, and no nationality, apart from that conferred by its registration. The Kenya registration of the transferee corporation means, as we have seen, that it becomes to all intents and purposes a British company. The shareholders may be of various races, but the ordinary rule of law is that regard will be had only to the entity - the company - and not to the shareholders, and that once a company is incorporated it becomes an artificial person independent of and altogether different from the incorporators i.e. the subscribers to the memorandum and the shareholders.

10. Although, however, it is well settled that the character of a corporation is decided by its place of registration, there is some authority for the proposition that in certain cases, and for certain purposes, the character of the incorporators may be looked at when it is necessary to ascertain where the real control and management lies. It is important to remember that control in this sense is capable of several meanings. It must depend in most cases on the Articles of Association of

the particular corporation. Does the real power lie with the shareholders? The power of the latter, where it exists, may be exercisable in various ways; that of the former may mean control by the directors as apart from control arising from preponderance of votes as in De Beers Consolidated Mines vs Howe (1906) A.C. 455. Where the power follows the shareholding, the test of control is the ownership of a controlling share interest, as in such cases as St. Louis Breweries vs Anthonpe (1898) 79 L.T. 551, and Anthonpe vs Peter Schoenhoren Brewing Company (1899) 80 L.T. 395. It is interesting to note that in the latter case an English Company, registered in England, was held by reason of its shareholding, to have a controlling interest in an American Company in the United States, and to be carrying on business (for the purposes of Income Tax) in America by reason of such control.

11. If the principle is once admitted - despite the fact that a corporation is an entity distinct from its incorporators - that regard may be had to the real controlling interest, a breach is immediately made in the rule that registration alone determines the character of a corporation. Undoubtedly the principle was admitted, and carried into practical effect in the leading case of Continental Tyre Company vs Daimler Company Limited (1915) 1 K.B. 895. On an appeal from a Judge in Chambers the Court of Appeal held (Buckley L.J. dissenting) that the English character of a company registered in England, was not changed by the fact that its directors and shareholders were Germans who became - on the outbreak of war - enemy aliens. But this decision was reversed in the House of Lords (1916) A.C. 507. The judgment of the House of Lords involved a confirmation of the principle that investigation into the predominating and controlling interests of the Company and its management was permissible, together

1112

with an enquiry as to the character of its directors and shareholders. To that enquiry the nationality of such persons was obviously most germane.

13. How far can a parallel be drawn between these facts and an enquiry into the race of persons in de facto control of a transferee company under section 71 of the Crown Lands Ordinance? The question was considered in 1932 by Mr. Davies, Crown Counsel and he was apparently of opinion that the principle established in the Continental Tyre Company case might be applied.

15. I have already stated that, in my opinion, it is doubtful whether any particular racial status can be assigned to a company, and it follows therefore that the racial status of shareholders does not ordinarily confer their race upon the company. But I incline to the view that Mr. Davies was right in respect to the application of the principle of Continental Tyre Company vs Daimler Company in so far as it affects the importance to be attached in certain cases to the character of the persons having the de facto control of a company. Therefore, while I must adhere to my opinion that section 71 of the Crown Lands Ordinance is not framed to apply to companies, I have thought it advisable carefully to examine the authorities dealing with the legality of taking into consideration the character of the persons having a controlling interest in a company. It is necessary to consider whether such a procedure, if authorized, may be applied to the transferee company in the present case with a view to the exercise of the veto under section 75 of the Crown Lands Ordinance.

14. The proposed transferees in this case have placed the question of the race of their Board and shareholders beyond the need of any enquiry by their honesty

in admitting that there is an overwhelming preponderance of Asiatics on the Board and among the shareholders of their company. In relation to this information regard must be had to the words "if the person^{or} persons or any then to whom such land is transferred" in section 71 of the Crown Lands Ordinance.

15. It is apparent from the established rule of law that, once a corporation has been created in Kenya in accordance with the requirements of the law, it becomes a British company even though its shareholders may be foreign. It follows, therefore, from the fact of registration, that the company in question, despite its Asian directors and shareholders, is prima facie a British company like the vendor company in Glasgow. But the law as it is administered in modern practice is inclined always to pay regard to substance rather than form. It is submitted, therefore, that in proper cases one may look behind the form of a transaction and have regard to its substance and to the facts of the case. Here, in this registered British company, the Asian directors and shareholders are clothed in the dress of an incorporated company but the directors and shareholders are the real "persons" carrying on the business. It is to be remembered in this connection, that, as Lord Cairns said in

Ferguson vs Wilson (1863) L.R. 3 Ch. 77. 82 -

"The directors of a company are merely agents of a company. The Company itself cannot act in its own person, for it has no person; it can only act through directors."

16. It is true therefore that while a corporation is distinct from its incorporators, it can only act through its agents and in the case under consideration the agency must necessarily be Asian in character. If the whole thinking power of the company is Asian, the corporation is, in effect, Asian and the whole control

and management must abide in persons of that race irrespective of the European status conferred on the corporation by the Kenya registration.

17. At page 915 of the report of the Continental Tyre Case in the Court of Appeal Buckley L.J. in his dissenting judgment says -

"The artificial entity created by incorporation under the Companies Acts is a legal person existing apart from its corporators. On the other hand the corporation cannot exist without corporators. Corporators are essential to the existence of but form no part of the corporation. The artificial person called the corporation has no physical existence. It exists only in contemplation of law. It has neither body, parts, nor passions Apart from its corporators it can have neither thoughts, wishes nor intentions, for it has no mind other than the minds of the corporators.

This corporation is one which, as a corporation, has in law an independent legal existence and that legal person is British. But on the other hand all its directors are Germans ... The holders of its 26000 shares, except one share, are Germans ... The artificial legal thing is British ... but its corporators who can have thoughts, wishes or intentions are Germans

Again at page 918 the learned Lord Justice says -

"The proposition that it is the British corporation and not the corporators which as a matter of legal intentment comes into Court is true, but for the relevant purpose it is not true. The artificial legal entity has no independent power of motion. It is moved by the corporators. It is the German corporator who, under the corporate name, but still German for the relevant purposes ... is the person who comes. He is German in fact although British in form."

18. In considering these quotations it is necessary only to remember that for the purposes of race "British" is included in "European", and to substitute "Asian" throughout for "German" and to read the intention to carry out the proposed land transfer in place of the intention of coming before the Court; the points of similarity then become strikingly apparent.

19. Apart from the Continental Tyre Company Case there is admittedly an almost complete absence of

English authority on the point under consideration. The only decision referred to in that case is that in City of London vs Wood, 12 Mod. 669 which goes back to the reign of William the Third. There, on an objection to the jurisdiction of the Court based upon the character of certain individuals who were on the relevant dates members of the Corporation, the judges unanimously held that they were entitled to look beyond the corporate names and to note the character of the individuals. The case of Janson vs Driefontein Consolidated Mines (1901) 2 K.B. 419 is however not without interest although, in its main aspects, it might be said to be against the contention which it is sought to uphold. The question at issue was whether during the Boer War it was against public policy for English underwriters to indemnify a company registered in the Transvaal. It was argued that such action could not be against English public policy, as many shareholders were not subjects of the South African Republic but were subjects of various European States. The character of the shareholders, therefore, necessarily became a matter for enquiry, despite the registration; it is obvious from the report that Sir A.L. Smith M.R. did not permit the fact of registration to be erected as a screen between the company, qua company, and its shareholders.

20. Despite the paucity of English authorities there are several American cases which are in point and which were subjected to close scrutiny in the Continental Tyre Company ^{case}, both in the Court of Appeal and in the House of Lords. The most important of these is Bank of United States vs Devaux (1809) 9 U.S. (5 Cranch) 61. 61. which was described by Marshall C.J. as "an action by aliens suing in a corporate name". In the course of his judgment the learned Chief Justice said -

"The corporate name cannot be an alien or a citizen; but the persons whom it represents may be the one or the other."

The Chief Justice proceeded upon the assumption that for certain purposes a Court must look behind the artificial person - the corporation - and take account of and be guided by the personalities of the natural persons, the incorporators. The Court admittedly had only jurisdiction to decide cases between "citizens" of different States but - as an artificial person could not be a citizen for that purpose - it took cognizance of the incorporators. The Court found them to be all citizens of the State which had incorporated the plaintiff Bank, admitted jurisdiction, treated the Bank (the corporation) like a citizen of that State, and entertained the suit.

21. This principle was followed in other American cases, notably in St. Louis and San Francisco Railway Company vs James (1896) 161 U.S. 505, where the Court, instead of limiting the enquiry to the place of incorporation, fixed its attention on the citizen incorporators.

A further reference to the Bank of United States decision is to be found in Society for the Propagation of the Gospel vs Wheeler & Call, 105, 158 where Story

J. says -

"But in the character of its members as aliens we have incontestable authority to enforce the corporate rights; and it has been solemnly settled by the Supreme Court (i.e. Bank of U.S. vs Deveaux) that for this purpose the Court will go behind the corporate name, and see who are the parties really interested. And if, for this purpose, the Court will ascertain who the incorporators are, it seems to follow that the character of the incorporators may be averred, not only to sustain, but also to bar an action brought in the name of the corporation."

22. It is true that Lord Reading C.J. in the Court of Appeal sought to cast some doubts on the enduring authority of the principle established by these cases in

view of certain subsequent expressions of disapproval in America. But it does not appear that the decisions have ever been reversed, and the House of Lords in the Continental Tyre Company case had a proper regard to their significance since, as Lord Parker said "it is plain that great judges trained in the principles of the English Common Law have not found it contrary to principle to look, at least for some purposes, behind the corporation and consider the quality of its members".

25. I wish to conclude this survey of the law by referring to certain passages in the very lengthy judgment of Lord Parker in the Continental Tyre Company vs Daimler Company Limited. They are relevant both as to the question of control and as to the propriety of going behind the separate entity of a corporation and looking at its incorporators.

At page 358 of the report Lord Parker says -

"No one can question that a corporation is a legal person distinct from its incorporators ... but I do not think it is a necessary corollary of this reasoning to say that the character of its incorporators must be irrelevant to the character of the company its impersonality can hardly put it in a better position than a natural person."

And at page 359 -

"It would seem that in transferring the application of the rule against trading with the enemy from natural to artificial persons, something more than the mere place or country of registration or incorporation must be looked at. My Lords, I think that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance and is very well understood in commerce and finance. The acts of a company's organs, its directors, managers, secretary and so forth, functioning within the scope of their authority are the company's acts and may invest it definitely with (enemy) character. It seems to me similarly that the character of those who can make and unmake those officers, dictate their conduct, mediate or immediately, prescribe their duties and call them to account, may also be material in a question of the (enemy) character of the company. If not definite and conclusive, it must at least be prima facie relevant, as raising a presumption that those who are purporting to act in the name of the company are, in fact under the control of those whom it is their interest to satisfy, certainly I have found

no authority to the contrary. Such a view reconciles the positions of natural and artificial persons in this regard"

And again at page 540 -

"But the character in which property is held and the character in which the capacity to act is enjoyed and acts are done, are not in pari materia. The latter character is a quality of the company itself and conditions its capacities and its acts. It is not a mere part of its energies or acquisitions, and if that character must be derivable, not from the circumstances of its incorporation, which arises once for all, but from qualities which are attributable only to human beings. I know not from what human being that character should be derived if resort is not to be had to the predominant character of its shareholders and corporators."

24. It would appear to be within the scope of reasonable argument to maintain that, in the case under consideration, while the character of the company derived from incorporation is British, the act of taking a transfer of land is a matter concerning the character in which acts are done and which therefore conditions the acts and capacities of the company and which must be related "to the predominant character of its shareholders" which we know to be Asian.

25. Upon the whole case, in view of the principles as above enunciated, I am prepared to advise the application of these principles to the case under consideration. But I wish it to be clearly understood that I do so with considerable hesitation; my advice is not given upon general lines or for universal application in such cases, but solely in view of the peculiar circumstances of this particular transaction and to enable the veto under section 73 to be employed. This has only been made possible by the action of the Company in disclosing its Asian character. I must point out, further, that on any future occasion they, or others, could alter the whole position by constituting themselves, for the time being, as a company with a majority of European directors and shareholders. The whole issue would thus be avoided.

and in the present state of the law this device would always succeed. In respect of their earlier acquisition of the factory site at Limuru this procedure was followed by the Company. There is a further distinction which should be noted between that transaction and the present one. The area of the factory site was not agricultural land and therefore - in view of Government's interpretation of the reservation of the European Highlands - was outside the scope of the White Paper; the present case, on the contrary, concerns undoubted agricultural land in the European Highlands.

26. To sum up the matter, while I think it is clear that a company cannot have any race, I am prepared to accept the conclusion to which the authorities, doubtful as they are, appear to point, namely, that there are circumstances in which one can go behind the entity of a company and look at the shareholders for the purposes of ascertaining in whose hands lies the actual control of the Company. There is no difficulty in applying that principle in this case since it has been disclosed to us that the persons in control are Asians. As Asians are persons of a different race within the meaning of section 71, I therefore advise that the veto under section 73 be exercised in respect of this Company.

27. I am assuming of course that on the same principles an enquiry into the character of the vendor company would show undoubted European control. For it must be obvious that if the transferee company can have no race, neither can the vendor company; a point which emphasizes the difficulty of applying section 71 to corporations.

28. Finally I wish to lay stress on the fact that in following, for the particular purposes of this

case, the decisions in the Continental Tyre company and the other authorities quoted, I am, in my opinion, adapting to the needs of the moment conclusions of law as to whose general soundness there must remain a considerable element of doubt. The American authorities were severely criticised by a very distinguished Bench of the Court of Appeal, with only one dissentient, while the House of Lords in its decision failed to secure the support of two eminent Law Lords. It is imperative to give due weight to the fact that the Continental Tyre case was a war-time case concerned with enemy persons and decided under the impulse of grave national emergency and urgent public interest. Lord Parker himself, though his was a supporting judgment, embodied in these most significant words "the truth is that considerations which govern civil liability and rights of property in time of peace differ radically from those which govern enemy character in time of war".

29. In view of the doubts and difficulties to which I have referred and of the ineffectiveness for practical purposes of the existing law it is interesting to note the means adopted in South Africa to deal with the problem of preventing transfers of land to Asiatics.

By the provisions of the Transvaal Asiatic Land Tenure Act, 1952, no Asiatic company may hold any fixed property, and an Asiatic company is defined as "any company wherein a controlling interest is held by an Asiatic". There is furthermore in the Act a comprehensive definition, setting out in the following words that "controlling interest" in relation to any company means -

"A majority of the shares, or shares representing more than half the share capital, or shares of a value in excess of half the aggregate value of all the shares in such company, or shares entitling the holders thereof to a majority or preponderance of votes, or debentures for an amount in excess of half the share capital of such company, or the power to

exercise any control whatsoever over the activities or assets of such company."

A practical test is thus provided for ascertaining what is an Asiatic Company, while the absolute prohibition against Asiatic ownership, of land prevents any evasion of the law by setting up a dummy European Board. This latter expedient which, as I have pointed out, would enable the present Kenya law to be circumvented at any time, could obviously not be employed in South Africa: for there the prohibition would come into immediate operation whenever the company was reconstituted with a view to giving Asian control, and the property of the company would pass to the State.

50. I trust that I have been able in this memorandum to make apparent the complications of the situation and the very real difficulties which must inevitably arise in the future. Having regard both to legal and political considerations I would strongly urge upon Government the desirability of bringing the whole question to the notice of the Secretary of State. I should point out, however, that the veto under section 75 must be exercised within three months of the receipt of notice by the Commissioner for Local Government, Lands and Settlement.

W. H. A. T. H. E. N

ATTORNEY GENERAL

Copy.

DEPARTMENT OF LOCAL GOVERNMENT,
LANDS AND SETTLEMENT.

PERSONS OF CONFIDENTIAL.

Nairobi. 9th July, 1934.

Ref.No.LND.29/1/9/6.

The Hon. Colonial Secretary,
Secretariat,
Nairobi.

Thro' the Hon. Attorney General.

RE: TRANSFER OF LAND IN THE "HIGHLANDS" FROM
EUROPEAN TO ASIATIC COMPANIES.

I have been informed by a member of a European firm of Advocates practising in Nairobi that the sale of a small Coffee farm in the "Highlands" to a Limited Liability Company, formed with Indian capital, is about to take place, and that this sale, if it is successfully carried through without Government intervention, will be the forerunner of several similar transactions. It is said that a sum of £100,000 is ready for investment in this manner.

I understand that, although the capital will be subscribed by Indians, the Directorate will consist in the first instance of Europeans, which will have the effect of placing the transaction beyond the reach of Section 71 of the Crown Lands Ordinance.

2. The Crown Lands Ordinance recognises three races only, viz: European, Asiatic and African (Section 5). So far as I am aware there is in the Colony no enactment which would determine the racial status of a Limited Liability Company. When this subject was under consideration in 1923, Mr. Gower gave it as his opinion that "a Company acquires its national or racial status from the country of registration". (Attorney General's reference No. M.786/23 of the 6th June, 1923).

In 1932, however, Mr. Davis, Crown Counsel, tendered the following advice:-

"I ...

"I have been unable to find any authority directly in point with the question submitted. From the Authorities I have perused, however, particularly the case of Daimler Company Limited versus the Continental Tyre and Rubber Company (1916/5A.C), it would appear that the question would probably be decided upon the character and nationality of the persons de facto in control of the Company".

3. I understand that the question whether legal control of a Company vests in the Directorate or in the Shareholders is dealt with in the Articles of Association of the individual Companies. Where control of a Company is vested in the Directorate the race of the Shareholders would have no bearing on the matter.

A transfer from a present landowner to such a Company could not be vetoed if European Directors were originally appointed but there is nothing to prevent the calling of a Shareholders' meeting for the purpose of receiving the resignation of the European Directorate and electing Indians in substitution immediately after the expiration of the veto period of three months. No transfer of land would be involved, since the constitution of the Company would remain unaltered, and the transaction would not come within the knowledge of the Land Registry. It may be assumed that Companies would invariably vest control in the Directorate for this very purpose since, if the Shareholders were placed in control, an interracial transfer would be involved at the outset and the Company would be under the legal obligation imposed in Section 71. of Cap.140 of notifying the Commissioner of Lands and the veto could be exercised.

4. It is true that if the land in question were held under the Crown Lands Ordinance 1915 (Cap.140) Section 59 would apply: it is very improbable, however, that the management or occupation covenant would be ostensibly infringed and the infringement of the control covenant would have to be detected. In the case of land leased under ...

under the Crown Lands Ordinance, 1902, however, that Ordinance contains no racial restrictions as to management, occupation or control of land. There would consequently be no breach of covenant if a racial change did take place in the control of a Company ~~owning~~ land held under that Ordinance. As you are no doubt aware the bulk of the alienated land in the Colony, particularly in the closely settled areas of Nairobi, Naivasha and Nakuru Districts, is held under the Crown Lands Ordinance, 1902.

5. There would have been good grounds for amending the Land Laws of the Colony in 1925, by making Section 39 of Cap. 140 applicable to all lands disposed of by the Crown (perhaps by transposing that section from Part IV to Part VIII of the Ordinance) and it might reasonably be done now as part of the action required to implement the Kenya Land Commission's Report - Part 3 Chapter IX. But even if this were done and a definition of "Control" were also introduced, it would still be beyond the ability of the Land Registry to detect evasions or infringements unless the Registrar's suspicions happened to be aroused by some particular case, and I am at a loss to suggest any practicable means for securing detection. Without such means any provision we may make in the Land Laws can be rendered ineffective.

6. Attention was drawn in 1926 to this matter - vide LND.15/2/4 - and the information to which I refer in para.1, above requires me, I consider, to put the position again before Government.

7. The ultimate safeguard lies, of course, in the hands of the European leaseholders or grantees themselves.

Sd: W.M. Logan.
 COMMISSIONER FOR LOCAL GOVERNMENT,
 LANDS AND SETTLEMENT.

DELANEY AND STRATTON,
ADVOCATES AND SOLICITORS.

BARCLAYS BANK BUILDINGS

NAIROBI.

REF: PS/1304/10.

P. O. Box 111,
Telephone 2361,

1st November, 1935.

The Honourable the Commissioner of Lands,
NAIROBI.

Sir,

RE: FARMS L.O. NOS. 4966 - 7, LIMURU.

With reference to previous correspondence concerning the proposed transfer of the above farms to the Limuru Tanning Extract Company, Limited, we have the honour to inform you that arrangements are now in hand for the two farms to be transferred to a small private limited (holding) company, called "Wattle Estates, Limited", or some similar name permitted by the Registrar of Companies, to be registered in Kenya. This new company will be sponsored by Messrs. A. Baumann & Co., a firm of merchants whose head office is in London, and who carry on an extensive trading and shipping business in East Africa and elsewhere.

2. The funds required for the purchase of the farm will be in the first place provided by Messrs. A. Baumann & Co., but there will be an arrangement between the Limuru Tanning Extract Company, Limited, and Messrs. A. Baumann & Co. whereby the Limuru Tanning Extract Company, Limited, will repay the same to Messrs. A. Baumann & Co.

3. A cutting and replanting agreement in respect of the wattle which occupies the major portion of the farms will be entered into between the Limuru Tanning Extract Company, Limited, and the proposed company for a period of twenty one years to provide for the above repayment.

4. Messrs. A. Baumann & Co., are sole selling agents for the Limuru Tanning Extract Company, Limited, and also for the Kenya Extract Company, Limited, at Thika. Being interested in these two Companies to the extent of many thousands of pounds, Messrs. A. Baumann & Co., are naturally prepared to offer assistance towards the growth and development of the undertakings.

5. Certain of the settlers supply wattlebark to the factory at Limuru. We are advised by our clients that during the rainy season it is impossible to maintain such supplies in anything approaching adequate volume. The efficient working of the factory necessitates a perfectly regular and continuous supply of raw material. Such conditions can only be safeguarded during a long period, provided the Limuru Tanning Extract Company Limited, secure the cutting rights over the farms concerned. The system of purchasing supplies of raw material from the settlers will not be discontinued or altered in any respect and the wattlebark from the two farms will only be used to make good any deficiency in the supplies required to keep the factory running at an economic capacity.

6. Not only is it intended that neither the Limuru Tanning Extract Company, Limited, nor any of the Directors or shareholders of the same should have any interest in the land itself, but it is proposed that the Memorandum of Association of the new company ("Wattle Estates, Limited", or other suitable name) will specifically provide that no person not of European descent shall be a Director or shareholder of the new company. It is also proposed to provide that the new company shall recognise no charge on the land or on any shares in the company in favour of a person not of pure European descent.

7. Our clients are prepared to allow the wording of the Memorandum and Articles of Association of the new company as regards these points to be settled by the Attorney General on behalf of the Government.

8. The reason we suggest the restrictions to which we have referred being incorporated in the Memorandum of Association is so that such restrictions can then only be avoided by Order of the Court.

9. The proposed new company is prepared to enter into a covenant with the Crown to the effect that the farms shall, whilst owned by them, be used solely as a Wattle Plantation or for agricultural purposes. Furthermore, no person other than of European descent will be permitted to occupy any house on the land or to utilize the land in any way, unless such person/persons is/are actually engaged in the work on the plantations or in the adjoining wattle extract factory.

10. We are of the opinion that if the proposed transfer is carried out on the lines indicated above there can be no objection thereto on the grounds that it is contrary to the policy with regard to the occupation of land in the Highlands as set out in the White Paper of 1925. However, our clients have definitely stated they will not proceed with the transaction unless a full disclosure of all the circumstances is made to His Excellency the Governor-in-Council for an expression of opinion.

11. The formation of a holding company as outlined in paragraph 1 is considered to be the best and most convenient method of handling the transaction. However, if it is considered more satisfactory or desirable, we understand Messrs. A. Baumann & Co. are quite prepared to agree to the land being transferred to the names of the partners of that Company.

12. The matter is of great urgency and our clients will be grateful if this letter may be placed before His Excellency the Governor-in-Council at the earliest possible date.

We have the honour to be,
Sir,
Your obedient Servants,
DELANEY & STRATTON.

C. O.

Mr.

Mr.

Mr. Parkinson.

Mr. Tomlinson.

Sir C. Bottomley.

Sir J. Shuckburgh.

Perms. U.S. of S.

Party. U.S. of S.

Secretary of State.

TD

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Private and Personal
following from Botolph Claydon

6/4/26 botan

beginis

Your letter of 28 March

it is desirable that you
should know that within
conversations both

Schwartz and Lord

Plymouth and here it
was necessary to state
that some steps would

Order in Council would

be hereby defining and
would not for statutory

effects a amendment and clear

DRAFT.

James
Harris

(Thought to be
written by
Harris)

7

Lord Plymouth.

There are three possible courses to take with regard to Captain Schwartz's letter.

1. He was leaving for Denmark when he saw you and sails for Kenya on March 17th. ~~Not~~ much harm will be done if you send no reply at all.

2. You might send an acknowledgment (to his Club) thanking him for his letter.

3. You might send a more detailed reply on the following lines:-

(a) Highlands.

It cannot be admitted that the House of Commons has agreed to statutory effect being given to the privilege but you have no wish to argue the point. Settlers would do well to consider whether if they make trouble, they are really helping us to maintain the administrative practice. The suggestion that the Cabinet has given in to the India Office would frankly be rather amusing, but it is the sort of suggestion which could only do harm and which should not be encouraged.

(b) Imperial Conference.

There can be no question of the representation of the Elected Members. As regards representation of Kenya, it could not be accepted without giving other and older Colonies a claim to a similar right. It would be entirely contrary to the constitution of the British Commonwealth of Nations that the Dominions should be concerned with colonial matters, except so far as they affect the problems of the Dominions themselves.

(c) Sir J. Byrne.

The alternative is either to ignore this altogether, or to say that we are getting tired of

these repeated attempts to undermine the
Secretary of State's confidence in
Sir Joseph Byrne. Perhaps it is better to
ignore it.

8

Sir G. Bottomley

W.C.S. 10.3.36

I think the best thing
would be for me just to
acknowledge the letter,
say that he will not expect
me to discuss the matter
raised in it, but that
I am grateful to him for
having passed on Lord
Francis Scott's views
regarding them
to you & me?

Lord Plymouth 11/3/36
I agree you may not want
to admit my personal suggestion,
but I still feel hot on the
Governor point.

Sir G. Bottomley

W.C.S. 11.3.36

To see Lord Plymouth's reply.
? you will wish to have this on a
departmental file - ~~Folder 136/1~~

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Tomley

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to you & all?

11/3/36

Lord Plymouth
I agree you may not wish
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but I still feel hot on the
Governor point

Tomley

W.C.S. 11.3.36

To see Lord Plymouth's reply.
? you will wish to have this on a
departmental file - 12/3/36

67
6
CONSERVATIVE CLUB
74 St. James's Street
S.W.1.

6th March 1936.

The Right Honourable Lord Plymouth
Colonial Office
Whitehall
S.W.1.

My dear Lord Plymouth,

You will forgive me troubling you again but, three hours after our interview yesterday, I received an Air Mail letter from Francis Scott in which he asked me when I saw to put three matters before you.

The first of these matters is the question we discussed yesterday with regard to the Order in Council in connection with the White Highlands. Francis Scott asks me to tell you that the country is becoming very restive at the inaction and to remind you that the Report of the Carter Commission was published two years ago and was approved by the House of Commons twenty months ago. He goes on to say that if the Imperial Government fail to fulfil their obligations in the near future it is inevitable that "an unfortunate incident" will occur.

And P

In view of what Sir Cecil Bottomley told me yesterday, I am afraid that when the decision of the Imperial Government is known there will be most serious trouble. The view taken will be that the only part of the Report that has not been implemented is that safeguarding the interests of the White settlers, despite recommendations in the Report having been approved by the House of Commons. The inevitable conclusion will be drawn that the Cabinet has given in to the India Office, and the indignation which will certainly be aroused will not, I think, be unjustified. I feel that I should be lacking in my duty if I did not emphasize that the question of the security and integrity of the White Highlands stands first in the minds of the whole unofficial community in Kenya, who are absolutely determined that there will not now ever be any infiltration into the White Highlands by Asiatics.

It is difficult for anyone in London to realise the

intense feeling that exists out there with regard to this matter, and I am afraid there can be no question of the harm that will be done, and the intense indignation that will be aroused, if the Order in Council is promulgated in the form outlined to me by Sir Cecil Bottomley yesterday.

The second point Francis Scott asked me to speak about to you was the question of the Imperial Conference of 1937. He asked me to say that the Elected Members are anxious to have a chance of putting forward their various claims and demands at this conference, as they feel that no Secretary of State could, unaided, put their case adequately before the Conference.

The third and last matter is in connection with Sir Joseph Byrne, and in this respect may I quote Francis Scott verbatim.

"Will you please rub into the Colonial Office that things political can never improve until Byrne goes and we get a live wire who will begin to do something. Byrne says he means to stay on till the end of the year unless the Secretary of State wishes otherwise. Cannot something be done? Do tell Lord Plymouth what I say and how strongly I feel about it."

May I be permitted to add that my views and those of Sir Joseph Byrne are in complete coincidence with those of Francis Scott.

I hope you will forgive me for troubling you with these matters but they do mean an enormous lot to us and to White Settlement in Kenya, and I think that that is sufficient excuse.

Please allow me to thank you for your kindness in seeing me again yesterday, which I much appreciated.

Yours sincerely,

H. Johnston

*very fully
revised
in consultation*

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and I am afraid there can be no question
that will be done, and the intense indig-
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in the form outlined to me by Sir Cecil
sterday.

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"I please put into the Colonial Office that
we can never improve until Syme goes and
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Secretary of State wishes otherwise. Cannot
know? He tell Lord Plymouth what I say and
I shall show it."

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of the Europeans in Kenya coincide with
his Scott.

you will forgive me for troubling you with
but they do seem an enormous lot to us
Settlement in Kenya, and I think that that
excuse.

allow me to thank you for your kindness in
in yesterday, which I much appreciated.

Yours sincerely,

H. Roberts

White Paper

5

March. x Captain Schwartz called on Lord Plymouth
this morning and I was present.

1. Highlands Order-in-Council.

He asked whether the Order-in-Council would be laid before the Legislative Council in draft and whether it would be in the form recommended by the Carter Commission. I said that it would not be laid before the Legislative Council or Parliament but that no doubt, if any points arose requiring discussion, they would be discussed. I also said that the Order-in-Council would carry out the terms of the White Paper - that is to say, it would define the White Highlands. Captain Schwartz said that there would be a fuss, but that he quite understood our difficulties. He volunteered the statement that our difficulties consisted of (a) India, and (b) Japan. He said that he hoped that arrangements would be made to get the Order-in-Council through as quickly as possible, and I undertook to see what could be done to expedite it. He pressed for early consideration of the question of non-agricultural user.

2. The Bond Scheme

He said he also was aware that the scheme was now being considered by a Committee. I mentioned what we had heard from Mr. Wade and that we should see any further until we had the report from the Committee. There was some conversation on the terms of the scheme. In particular, he said that the point about preventing foreclosure was intended to cover the case where there were several creditors and one might stand out when others were willing to come into the scheme. He saw no need for any loan. Bonds would simply be issued as occasion arose. He agreed that the tendency would be for bonds to

accumulate in the hands of the Banks, who would thus have unrealizable securities on their hands (just as they now have mortgages on their lands), but they would at all events bring in a reasonable rate of interest.

He spoke of a mortgage of £5000 at 8 per cent being marked down under the Scheme to £3000 at 3½ per cent, (with an extra ¼ per cent for amortization,) and he said that on such a basis he saw no reason to suppose that an estimate of 10 per cent default was unduly small. He did not agree that there were any considerable number of cases in which the debtor was paying nothing at all. The figure of £5,000,000 was put in for illustration and to be on the liberal side. He thought that the total would not be more than £3,000,000, from which must be deducted the first class debts and the utterly bad debts.

3. Political

Captain Schwartze urged that much could be done to ease the position between the Government and the unofficial Europeans if they could be given an active responsibility in the administration, for example by the appointment of one of them as a Minister of Agriculture. Lord Plymouth said that a political question of this magnitude could not be dealt with without very full consideration, but he said if it was put up in definite form it would certainly be considered. Captain Schwartze contrasted the position of Kenya with "stick-in-the-mud places like Jamaica" where very large powers had been given to the unofficial element and he said that it should be recalled that the ultimate aspirations of the European community should

should be led up to in some way now. I suggested that, except where the way could be seen clearly to responsible government, half way stages were liable to be extremely uncomfortable. He replied "That was what Ormsby Gore said".

There is no necessity for present action on this point.

(Intd) W.C.B.

7.3.36.

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8

C. O.

Mr. Flood. 5-2

Mr.

Mr.

Sir C. Parkinson.

Sir G. Tomlinson

Sir C. Bottomley. 2

+ Sir J. Shuckburgh 6/14/36/1

Perm. U.S. of S.

Parly. U.S. of S.

Secretary of State.

DOWNING STREET.

2 February 1936.

Sir,

DRAFT Despatch.

KENYA

CONFIDENTIAL

GOVERNOR

I have the honour to acknowledge the receipt of your confidential despatch No. 148 of the 9th December and No. 156 of the 23rd December, forwarding memoranda submitted by the Federation of the Indian Chambers of Commerce and by the East African Indian National Congress on the subject of the reservation of the Highlands of Kenya. I note the contents of your despatch and shall await your promised communication in regard to the transfer of land for wattle cultivation. P₂ Meanwhile, I request that you will cause the signatories of the two memorials to be informed that I have received them and will consider their views though, of course, I do not intend to give any pledges

copy to LO (K)

FURTHER ACTION

pledges or assurances.

I have, etc.,

(Signed) J. H. THOMAS

RECEIVED

22 JAN 1936

73
24/11



KENYA

No. 156

GOVERNMENT HOUSE,
NAIROBI,
KENYA.

CONFIDENTIAL.

28 605/156

23 DECEMBER, 1935.

Sir,

I have the honour to forward a letter from the Hon. Gen. Secretary of the East African Indian National Congress dated the 12th December, 1935, on the subject of the Order in Council recommended by the Land Commission for the purpose of safeguarding the Highlands for European occupation and ownership.

2. The purport of the letter is very similar to that of the Memorandum submitted by the Federation of Indian Chambers of Commerce and Industry forwarded to you under cover of my Confidential Despatch No. 149 of the 9th December, and on the main line of argument there is nothing to add to that despatch and Mr. Wade's Confidential Despatch No. 64 of the 4th May, 1935.

3. With reference to the transfer of land for wattle cultivation mentioned in the penultimate paragraph of the enclosure and also in the Memorandum by the Federation of Indian Chambers of Commerce, I hope to be in a position at an early date to address you further.

I have the honour to be,

Sir,

Your most obedient, humble servant,

BRIGADIER-GENERAL.
GOVERNOR.

copy of encl. to L.O.

THE RIGHT HONOURABLE
J.H. THOMAS P.C., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON S.W.1.

East African Indian National Congress.

OFFICE OF THE EXECUTIVE COMMITTEE.

P. O. Box 75.

Mombasa, 12th December, 1925.
(Kenya Colony.)

The Rt. Hon'ble The Secretary of State for the Colonies,
Through The Hon'ble The Colonial Secretary,
Government of Kenya,
NAIROBI.

Sir,

I am instructed particularly to bring to your notice the third resolution passed at the Second Kenya Indian Conference held under the auspices of the E.A.I.N. Congress, under the presidency of Mr. A.M. Kaderbhai, which runs as follows:-

- " This conference views with great concern and alarm the recent agitation by a section of the European community and the announcement of the Government regarding the contemplated Order-in-Council placing a statutory restriction on Indian acquisition of land in the Highlands and considers this attempt to be a definite violation of the solemn pledges given by the Imperial Government since 1908 and re-affirmed more than once to the effect that 'It is not consonant with the views of H.M.'s Government to impose any legal restrictions upon any section of the community in the acquisition of land'.
- " This conference is of the firm belief that any Order-in-Council imposing legal restrictions on the Indian Community as regards the acquisition of land in Highlands will constitute a glaring breach of trust on the part of the Government and will cast a slur not only upon the Indian Community in Kenya but stamp the whole Indian Nation with the brand of inferiority which a step has been and will be vigorously opposed by a United India.
- " This conference is further of the opinion that the Carter Land Commission report went beyond its terms of reference in recommending the introduction of any such Order-in-Council imposing legal restrictions on other communities in acquisition of land."

As the E.A.I.N. Congress has pointed out before, it is against the recommendations of the Land Commission in this respect as it really becomes a definite set-back to Indian aspirations.

The absence of a Common Roll for all races and the denial of the right of Indians to acquire land in the Highlands have been accepted by the Indian community always under protest and even the Government of India have reserved the right to re-open this question on a suitable occasion. Up to now there was no statutory discrimination and the reservation of Highlands for Europeans was entirely put into practice by using the vetoing power of the Governor on any transfer of land. The Indians have always opposed to such discrimination but if now the recommendations of the Land Commission are accepted by the Imperial Government such discrimination will now receive statutory sanction. It is now clearly proposed to legalise what was up to now termed 'administrative convenience', that is the permanent reservation of Highlands for Europeans which will shatter the hopes of the Indian community to obtain redress of the wrong even at a future date. This is a matter of vital importance, not only to the Indian community but to all British subjects as it is particularly against the fundamental principle of the British Constitution. It should be borne in mind that such discriminatory legislation is being applied in a Crown Colony directly controlled by the Imperial Government.

There is a further recommendation moreover regarding the Muhoroni area where the Indians have already got a settlement to the effect that no land that is henceforth sold by an Indian to a European will be re-transferable to an Indian. This now is a definite curtailment of rights that we have already acquired and which will be an additional wrong against us who are already labouring under discriminative legislation.

Section 10 of the Royal Instructions passed under the Royal Sign Manual to the Governor and Commander-in-Chief of the Colony lays down (revised edition April 1934) that the Governor shall not assent to any Bill whereby persons not of European birth or descent may be subjected or made liable to any liability or restrictions to which persons of European birth or descent are not also subjected or made liable.

This clearly shows to us that it is not the intention of His Majesty's Government to allow any legislation based on racial discrimination in any Colony to be assented to by the Government but the proposed new step of turning what has been up to now called an 'administrative convenience' into a 'statutory discrimination' is in our opinion very dangerous. In this connection lately a transfer of land which was planted to wattle required for a wattle factory owned by a limited company in which there are Indian interests has been vetoed though in our submission there is no law in this Colony that can allow such a veto to be exercised in cases of transfer from one limited company to another.

77

We submit that Indians in this Colony view with alarm such a step and would request you to abandon the enactment of such an Order-in-Council and that you will allow us to make proper representations on the question if the arguments advanced herein do not meet the case.

I have the honour to be,

Your most obedient servant,

EAST AFRICAN INDIAN NATIONAL CONGRESS.

HON. GENERAL SECRETARY.

D. Khan

77

We submit that Indians in this Colony view with alarm such a step and would request you to abandon the enactment of such an Order-in-Council and that you will allow us to make proper representations on the question if the arguments advanced herein do not meet the case.

I have the honour to be,

Sir,
Your most obedient servant,

WEST AFRICAN INDIAN NATIONAL CONGRESS.

HON. GENERAL SECRETARY.

Doherty



RECEIVED
 - 1 JAN 1936
 GOVERNMENT HOUSE,
 NAIROBI,
 KENYA.

KENYA.

No. 149

CONFIDENTIAL.

9 DECEMBER, 1935.

Sir,

I have the honour to transmit, as requested therein, a memorandum submitted to this Government by the Federation of Indian Chambers of Commerce and Industry on the subject of the reservation of the Highlands of Kenya to Europeans.

2. The memorandum presents an appeal, summarized in paragraph 16, that no Order in Council to define the Highlands of Kenya should be made and that the existing rights of the Indian Community in regard to the Highlands should be maintained to their fullest extent. The argument is advanced that, in view of the paucity of European development, there are strong grounds for permitting ordinary economic forces to operate unchecked by any artificial barriers: and that in any event industrial development by Indians in the Highlands should not be precluded.

3. The first argument is considerably weakened by the errors in the figures quoted in paragraphs 9, 10 and 11 of the memorandum. In the first place the computation overlooks the fact that out of the 16,700 sq. miles recommended by the Commission to be gazetted as Highlands 3,950 sq. miles are Forest Reserve and that there is, therefore, available for alienation on the Commission's showing 12,750 sq. miles or 8,160,000 acres only and not 10,688,000 as stated.

The ...

THE RIGHT HONOURABLE

J.H. THOMAS P.C., M.P.

SECRETARY OF STATE FOR THE COLONIES,

DOWNING STREET.

Copy of mem. to C.O. (A)

The correct position is as follows :-

	Sq. Miles.	Sq. Mile
(1) Land in the Highlands alienated.	9,426	
(2) Land in the Highlands surveyed for alienation.	<u>1,476</u>	10,902
(5) Land in the Highlands unsurveyed at present. (including 175 sq. miles of water)		3,872
(4) Land in the Lowlands alienated. (including 279 sq. miles Coast Freeholds)	1,054	
(5) Land in the Lowlands surveyed for alienation.	<u>99</u>	1,153
(6) Land in the Lowlands unsurveyed at present. (excluding Turkana and Northern Frontier District but including 1,856 sq. miles of water).		22,208

The Agricultural Census Report takes no account of Highlands and Lowlands classification though for practical purposes the area of 5,206,264 acres occupied by Europeans may be regarded as being wholly in the Highlands. From pages 6 and 7 of that Report it is seen that the total area developed for agricultural and pastoral purposes was, in 1935, 2,875,454 acres, i.e. 55.2% of the occupied areas and 47.6% of the alienated areas. The statement that 80% of the land allotted to Europeans remains undeveloped was made in Legislative Council by an Indian Member during the debate on the Kenya Land Commission Report. It was challenged by Major F. Cavendish-Bentinck (vide pages 590 and 622 of Vol. 2 of the Kenya Legislative Council Debates, 1934) and it is clear from pages 6 and 7 of the Agricultural Census Report for 1935 that, whilst the cultivated area was 595,988 acres, the whole area including pastoral areas developed at the time of that Report was 2,875,454 acres. The percentage of land under development was then, therefore, 55.2% rather than 11.4% of the occupied lands.

4. As regards the second point the question whether it was intended by His Majesty's Government in its White Paper ...

Paper of 1925 that the veto should be exercisable in respect of all inter-racial transactions in land in the Highlands situated outside townships and trade-centres, or whether its exercise was visualized as being operative only in regard to lands used for agricultural as distinct from industrial, commercial or residential purposes, was raised in paragraphs 13-18 of Mr. Wade's Confidential Despatch No. 92A of July 4th, 1935. The case, however, to which reference is made in paragraph 15 of the Memorandum relates to an inter-racial transfer of two farms Nos. L.R. 4966 and 4967 (old Nos. 146/2 and 147/2) comprising 862 acres near Limuru. These farms are planted up with wattle and the purpose of the transfer was to secure, as it were, a feeding ground for a Bark Extract factory which stands on an independent portion of 14.5 acres which some years ago was subdivided out of an adjoining farm, L.R.No. 148. I shall have occasion to address you more fully in regard to certain repercussions which are likely to ensue from the exercise of the veto and in this despatch I confine myself, therefore, to remarking that the veto was exercised in respect of the two farms.

5. The appeal that no Order in Council should be issued defining the Highlands accords with the line taken on this subject in India. In his Confidential Despatch No. 64 of May 4th, 1935, Mr. Wade sent you his comments on the representations made by the Government of India, that time should be afforded for the receipt of their comments on the position before an Order was made.

I endorse the view expressed in paragraphs 3 and 4 of that despatch and would add that an Order in Council defining ...

(40)

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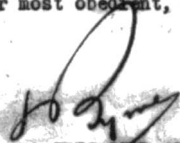
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defining the Highlands is the least the European farming community expect: and unanimous pressure for the fulfilment in whole of the Commission's recommendations on this subject will be exercised by the European political representatives.

I have the honour to be,

Sir,

Your most obedient, humble servant



BRIGADIER-GENERAL
GOVERNOR.

MEMORANDUM SUBMITTED TO GOVERNMENT BY THE FEDERATION OF INDIAN CHAMBERS OF COMMERCE AND INDUSTRY ON THE QUESTION OF RESERVATION OF THE HIGHLANDS OF KENYA FOR EUROPEANS.

THE QUESTION OF keeping out Members of the Asian Race from the Highlands of Kenya was decided in favour of the European in 1933. The Indian Community did not accept the decision and continued to make representations against the reservation of the Highlands for the European for all the subsequent years till the question was re-opened for discussion by the appointment of the Carter Land Commission.

2. Till the appointment of the Commission the position was as described in paragraphs 1944 and 1945 of the Report of the Kenya Land Commission, page 464. They read:-

1944. Lord Elgin confirmed his decision in 1906 stating that while it was not consistent with the views of His Majesty's Government to impose any legal restrictions upon any section of the Community, grants in the Highlands should not as a matter of administrative convenience be made to Asiatics.

1945. The White Paper of 1933 dealt with an objection raised by the Indian Community that whereas Lord Elgin's decision only related to the initial grant Government land in the Highlands, it has since been stretched so as to preclude the transfer of land from Europeans to Indians. The White Paper ruled that the existing practice must be maintained as regards both initial grants and transfers.

3. Ever since the publication of the White Paper of 1933 the demand of the Europeans has been to define the Highlands. The question was left undecided till the appointment of the Commission, and just as it was only for administrative convenience that the Highlands were restricted to the White Race, a loose convention was maintained that the Highlands should be taken to mean the area between Kiu and Fort Toman.

4. The sixth term of reference required the Commission however against the wishes and representations of the

Indian Community to "define the area generally known as Highlands within which persons of European descent are to have a privileged position in accordance with the White Paper of 1953." Acting on this basis of reference the Commission went on to suggest that: (vide Report pp. 493)

1979. These recommendations may perhaps give rise to natural apprehension among Europeans that the extent of the Highlands may be again diminished. One of the main objects of our Report has been to frame recommendations which would instil a feeling of security in the minds of the Natives with regard to their lands. If in doing so we had only transferred the feeling of insecurity from the Natives to the Europeans, we could not feel that we had succeeded in our task. We, therefore, recommend that the boundaries of the European Highlands should be regularised by Order-in-Council, so that the European Community may have the same measure of security in regard to land as we have recommended for the Natives.

4. It may be pointed out that the appointment of the Commission was specially meant for instilling a sense of security among the Natives, and the definition of the Highlands was sought not in the interests of the European but in the interest of the African Communities. It is also evident that the Commission were restricted by their terms of reference to confine themselves within the limits of the White Paper of 1953. The general aim of the Community contained in that White Paper was to have the effect that His Majesty's Government would not impose any legal restrictions upon any section of the Community. Besides, the terms of reference mention a "privileged position" which the Federation submit is something entirely different from an "exclusive" position.

5. The Federation of Indian Chambers of Commerce and Industry feel very keenly that the Commission went beyond their terms of reference in recommending that the Highlands as defined by them should be granted to the European Race by means of Order-in-Council.

6. The Federation felt so far that the Local and the Imperial Governments however would be able to see this and would not jeopardise the rights of the Indian Community and violate the promise contained in the WHITE Paper of 1923 by consenting to define the Highlands by Order-in-Council as such a measure would at once, permanently and beyond possibility of revocation or modification by the local legislature, impose legal restrictions on the Asian Community.

7. Unfortunately, this hope has been doomed to disappointment. The information that a draft Order-in-Council was being prepared and that there is a possibility that it may be published in Kenya for un-official approval has greatly perturbed the Indian Community as a whole and has created a tense feeling of insecurity among its members.

8. The Federation are chiefly concerned with the economic aspect of the position. Even without the contemplated Order-in-Council, the administrative reservation of Highlands in Kenya for the European has been the means of great economic loss to the Colony. The Commission have failed to realize this and have sought to perpetuate this loss by laying an embargo on all future possibility of exploiting the Highlands to the benefit of the Community as a whole.

9. The total area recommended for reservation is a round figure 10,688,000 acres or 16,700 square miles. The total European population (1931 Census) is 9501 males and 7264 females. Of the 10,688,000 acres only, 7,528,800 acres have been surveyed into farms. Out of this area 5,208,384 acres have been allotted to Europeans. According to the Agricultural census of Feb. 28th, 1933, only 593,000 acres or 11.4 per cent are developed by 2102 occupiers. 88.6 per cent of total alienated land remains still uncultivated.

10. In the opinion of the Federation the meaning of these figures is clear. Half of the Highlands are not even allotted. Of whatever is allotted only a small fraction has been cultivated. The development of this fraction has not been very successful from what everybody knows of the plight of the European settlers of the Highlands.

11. In other words, 102 Europeans, one eighth of the total European population of the Colony, are holding, without any immediate prospect of development 15773 square miles of the most fertile agricultural land of the Colony merely in order to safeguard their 927 miles of inefficiently developed land from being utilized to the best advantage of the Colony.

12. This uneconomic hoarding of land in the hands of a small number of men is, in the opinion of the Federation a great waste of national wealth. It is a far greater waste to attach to this hoarded land, territory that is neither allotted nor could be allotted in near future to any one. Just as the Federation are opposed to the delimitation of Highlands by Order-in-Council, they oppose to all additions to the Highlands area recommended by the Commission.

13. Attention may be drawn at the same time to the fact that the whole man-power of 36,000 Indians has to be engaged in trade and entrepreneur activities owing to the Highlands policy of the Government. This man-power could be used to the great benefit of the Colony. The congestion in internal trade and commerce is an economic problem of the first magnitude and the Federation are convinced that a change in the land policy of the Government can alone solve it.

14. The Federation are aware of the fact that European sentiment will not recognize at this stage the considerations urged above. Feeling is too tense in regard to the Highlands among un-official Europeans and prejudices against Asian race too strong to permit of cool consideration of the great economic loss the reservation of Highlands is causing to the country. Government however owe a duty to other Communities

cught to take long views. The definition of Highlands including the additions recommended by the Kenya Land Commission by Order-in-Council when feeling are tense and when the consequences of the step proposed are not fully realised will be a great disaster to the country and will create difficulties when sentiments have grown cold, prejudices have vanished and a desire for reconciliation and intensive exploitation of all resources and manpower of the country arises. It is the earnest request of the Federation that nothing should therefore be done at present in the matter of the Highlands, that would preclude the possibility of businesslike and practical considerations being brought into active play. They strongly urge therefore that no Order-in-Council should be passed and no irrevocable definition of the Highlands be attempted.

15. The Federation are compelled in addition to urging on the consideration of Government the above stated views, to refer to a recent incident of His Excellency the Governor having exercised his veto against the transfer of land intended for industrial purposes near Limuru to an Indian firm. It has always been understood that the restriction against Indians only applied to land intended for agricultural purposes and not for land intended for residence in townships or for industrial purposes. The entire Indian Community have viewed His Excellency's action with the gravest misgivings, as much as in case interested Europeans succeed in confusing the issue by agitation and misrepresentation, Indian industrial enterprise in the Highlands will be paralysed and will be at the mercy of ignorant Africans and unscrupulous European agitators. It is ^{the} general feeling of the Indian Commercial Community that Government should take immediate steps to allay the sense of insecurity and apprehension that has been thus aroused, and should inspire confidence in the minds of Indian industrialists and scientists

protected against attacks by hostile agitators.

16. The Federation of Indian Chambers of Commerce and Industry have therefore to request earnestly that an official announcement be obtained from the Secretary of State for the Colonies to the effect that no Order-in-Council permanently defining the Highlands of Kenya will be passed, and that the existing rights of the Indian Community in regard thereto will be maintained to their fullest extent. The Federation will welcome also an assurance that Government have no intention of imposing any further legal or administrative restrictions on Indians in regard to the Highlands.

17. The Federation will be grateful if Government communicate the views expressed in this Memorandum to the Secretary of State for the Colonies.