

1925

KENYA

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C.O.  
40203  
3 SEP 25

From

E. A. G. DENHAM,

CONF  
125

DATE

5th August 1925.

For Circulation

Mr. *Agnew*

Mr. *Rush*

Mr. *Billingsley*

Asst. U.S. of S.

*Wm. Strickland*

Part U.S. of S.

Part U.S. of S.

Secretary of State.

PINE IMPOSED ON NATIVES UNDER COLLECTIVE  
PUNISHMENTS ORDINANCE, 1909.

Submits further comments and explains  
position with regard to squatting generally. The  
present system is accepted by natives and consid-  
ered just. Chief Native Commissioner agrees that  
Ordinance should be retained.

Previous Paper

*Conf. 103 2/25*

MINUTES

*How far and for the basis in the  
light of the report*

*17/8/25*

*4/9/25*

*My views remain unchanged.*

1<sup>st</sup> The appropriation of labourers concerned does not,  
in my opinion, fall within the operation of the  
Ord<sup>n</sup>.

2<sup>nd</sup> There is no proof - only suspicion for which there is  
hardly even a flimsy basis - that any crime  
was committed.

3<sup>rd</sup> There is nothing to support the ~~premise~~ <sup>theory</sup> that there  
was any combination by these labourers or any  
one else to suppress evidence.

4<sup>th</sup> There is nothing to <sup>in fact</sup> justify the suspicion  
that any evidence was suppressed.

5<sup>th</sup> Whether the charge may have been for which  
this ~~community~~ <sup>alleged</sup> community has been fined, it was

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Subsequent Paper

*Conf 57604*

was not formulated & the community has been  
condemned without being given an opportunity of defence.  
The procedure followed in this case seems to me to involve  
a denial of elementary justice, for which the best subjects are  
entitled to redress.

I agree that it is desirable that the folk of the colony  
should be sympathetic to native feelings & ideas but I  
do not think it desirable that it should involve the  
unbridled methods of administering justice to which  
the natives were formerly accustomed.

Albert Th. Erhardt

29/10

There is really no issue that I can  
see to my mind on 3/10/62/10. I am sure that  
the fact of the decision on the point raised is  
the dispatch, though I am sure to let  
Erhardt's view.

A.P.S.  
1/10

This matter is becoming complicated and  
it seems desirable to set out in question form the  
various points which arise:-

- (1) Is an Ordinance intended to meet the needs of a  
lightly administered country where a man may  
emerge from a wild native area, commit a crime  
and return, with no possibility (owing to the  
collusion of his tribe) of being traced, suitable  
for the case of an undiscovered thief by a  
resident labourer on a European Estate?
- (2) If it is suitable, is it legally applicable?
- (3) If it applied to such a case, should the European  
be compensated out of the proceeds of the collective  
fine?
- (4) Were the provisions of the Ordinance properly  
observed in the particular case?

(5)

(5) If the decision on (1) and (2) is against the  
Kenya Fund, are the proceeds of the fine in  
the particular case to be handed back to the  
individual natives who would not understand  
the position, or should they be:-

- (a) Retained by the Government
- (b) Paid into the native trust fund
- (c) Applied in part to the compensation of the  
European and the rest disposed of under (a) or  
(b)

The point mentioned by the Acting Governor  
in paragraph 2 concerns (4) above. That is, on  
legal advice <sup>we have</sup> the line that there should  
have been special enquiry apart from the abortive  
hearing of the original case. Mr. Bughe has  
doubts on this matter, but is on the whole inclined  
to support Mr. Erhardt in the original view that  
the case was mismanaged.

On (1) I am still satisfied that the  
Ordinance is at all appropriate, nor do I think that  
the fact that in this instance the larger number of  
the resident natives happen to be of the same tribe  
is sufficient by itself to clothe them with  
collective responsibility. It would be impossible  
to draw the line as to what percentage of fellow-  
tribesmen on the Estate constituted a community for  
the purposes of the Ordinance. The implication of  
this despatch is distinctly that there was no other  
means of punishing <sup>them</sup> in such a case. The Acting  
Native Commissioner goes so far as to suggest that  
we should be provoking a native rebellion if we do  
not apply the Ordinance. This on the face of it is  
extraordinary, and I think that what he means is  
that if the Ordinance is not applied the Europeans  
will take matters into their own hands and by the  
illegal punishment of native crime will sow the  
seeds of general native trouble.

The last man in  
to support action  
to be thought hard  
action

Against



applicable in all cases such  
as this, and that the responsibility  
must rest on the foreman  
of assuming himself in each  
case that the powers conferred  
by the Ordinance ought to be  
used as well as on the  
points mentioned by Mr  
Bottomley at B.

J. H. L.  
at once

6.11.25.

KENYA.

No. 125.  
CONFIDENTIAL.



C. O.  
40203  
GOVERNMENT HOUSE,  
NAIROBI,  
KENYA

43

5th August 1925.

Sir,

*Gen 10367/25*  
I have the honour to acknowledge receipt of your despatch (Confidential) of the 29th April, 1925, referring in particular to the fine imposed under the Collective Punishments Ordinance 1909 on 56 natives resident on Captain Hewitt's farm and generally to the necessity for the continuance of this Ordinance.

*Gen 10367/25*  
2. It is with much regret that I learn that you are unable to accept the recommendations put forward by the late Sir Robert Coryndon in his (Confidential) despatch No. 16 of February 5th.

*Gen 31063*  
I conclude that you are satisfied on the legal points raised in paragraph 2 of your Confidential despatch of September 19th 1924, and I assume therefore that the grounds of your decision rest on the point raised in paragraph 2 of your despatch under reply.

3. I feel that there may be some misapprehension in this connection in regard to the position of squatters on a farm. Where a large number of squatters are found residing on a European's property they are generally a tribal group - members of the same sept - who have been recruited in the same native reserve. They frequently arrive on the farm as members of the same gang or to join communities of their own tribe. They work, feed and leave together - they form a distinct association of their own closely bound together by like interests and objects. Villages in East Africa are

generally...

THE RIGHT HONOURABLE

LIEUTENANT COLONEL L.C.M.S. AMERY, P.C., M.P.

SECRETARY OF STATE FOR THE COLONIES.

DOWNING STREET.

LONDON, S.W.

generally small in population and scattered over a large area. A squatter community on a large estate presents all the features of village life with a population generally denser than that of an ordinary village and while closely united by family ties are still more firmly bound together by common aims and objects. Such a community cannot be regarded as a fortuitous aggregation of individuals.

It is one of the advantages of the squatter system that a village of labourers grows up around a European residence and that the European Manager and his wife show towards these people the care and attention which a good landlord would show towards his tenants. The settlement itself is governed by native law and custom and one of the enactments which most truly expresses and conforms with native ideas of justice and fair treatment is the Collective Punishments Ordinance.

There have recently been a very large number of stock thefts on the Tang-Nzola and the neighbouring Districts which led to a motion at the last Session of Council that a Special Committee of Enquiry should be appointed to enquire into the administration of the Stock and Produce Thefts Ordinance and to suggest what further legislation if any is necessary.

A Committee was appointed and will shortly be presenting its report. Undoubtedly, one of the principal causes of this serious outbreak of crime has been the presence of large number of Nandi and other squatters - drawn from tribes who have always been notorious for their cattle-lifting propensities - on farms on the border of settled European areas and of the Native Reserves.

Not to enforce an Ordinance, which is universally accepted by natives not only in East Africa but in other parts...

parts of Africa as based on tribal custom and in accord with native usage can only have a very prejudicial effect in dealing with the evil.

4. Cattle theft stands in a class by itself amongst crimes. As the Chief Native Commissioner points out in a report - extracts from which are enclosed - "to a native theft of stock is no more theft than it was to the border raiders of our own history. Successful loot is highly laudable. Life and liberty is cheerfully staked in the gamble, and the raider returns amid the plaudits of his community which will benefit by his feats, and which helps him in every way to cover his tracks".

The Chief Native Commissioner points out further that the law of "spoof" was established in 1858 in British Kaffraria and the same idea of collective punishment is found in the legislation of many other countries.

I believe that in Ceylon - which certainly may be regarded as enjoying settled conditions - the Punitive Police Tax is still in force - which provides for the imposition of a tax to cover the cost of police imposed on a village or area in which there has been an undiscovered crime.

5. I will not deal further here with this side of the question - it is fully and clearly set out in the Chief Native Commissioner's memorandum.

6. I would however point out with regard to the special case under reference that the penalty appears to have been regarded as just by the natives as shown by their failure to appeal and by the absolute silence on the subject of those tribal elders out of whose <sup>heads</sup> ~~hands~~ the fine for tribal misdemeanour has probably been paid. The Resident Commissioner, Kitale, further has reported that "there is little or no doubt in my mind but that the guilty party could be brought forward and is <sup>at</sup> present



on the farm. It is significant that no attempt has been made by the Kitosh squatters to accuse any squatters of other tribes living on the farm but only to accuse each other and in particular two men who left the farm shortly after the fire took place."

7. The decision conveyed in your despatch under reply will of course be complied with but I desire to suggest for your further consideration that the fine be paid into the Native Trust Fund. It would be almost impossible to dispose of it otherwise. Though after careful enquiry the ownership of the stock paid as fine might be determined any such enquiry would be regarded with great suspicion as an attempt on the part of Government to ascertain who the actual offenders in the case were through the discovery of the names of persons who actually surrendered the stock and who would thus be associated with the perpetrators of the theft. The consequence would be that false statements and bogus claims would undoubtedly be made in order to obscure the issue and the money received by the sale of the animals would probably pass into the wrong hands. The proceedings would not be understood by the natives and would also cause unrest and undermine the authority of the Administrative Officers.

As a refund has been ordered I would suggest that the course to be followed now should be to pay the amount into the Native Trust Fund of the North Kavirondo District from which these squatters came and inform them of the action taken.

8. Several applications have been made to Government by Captain Gordon Hewitt through his lawyers for the payment to him of compensation for the losses incurred by him. Payment has been recommended by the Resident Commissioner who tried the case and I propose that it should now be paid - Owing to the fact that the animals



were sold some months after they had been attached and that the price of cattle had risen considerably in the meanwhile there is sufficient money in deposit to pay Captain Hewitt's claim and still hand over the full amount of the fine imposed in cash to the Native Trust Fund.

9. I would add in conclusion that the Chief Justice to whom all the correspondence was referred entirely concurs in the opinion of the Chief Native Commissioner that the Collective Punishments Ordinance should be retained on the Statute Book.

I have the honour to be,

Sir,

Your most obedient, humble servant,

ACTING GOVERNOR.

COLLECTIVE FINE - CARL HEWITT'S SQUATTERS.

I very much regret the decision given in the matter by His Majesty's Secretary of State. It would appear to be based on one of those fundamental misconceptions which have occasioned so many native rebellions, and I feel that I should be failing in my duty as His Excellency's adviser on these matters of native law and custom, which have been the study of so much of my life if I neglected to express in the clearest and most forcible manner my considered opinions on this subject.

2. While the principle of collective punishment would appear to have been admitted, I cannot find from any papers to which I have access that its basic principles have been expressly defined from this Colony. It is necessary to premise that collective punishment is not to be regarded as an administrative expedient designed to meet an emergency, but in itself of doubtful justice and morality. It should rather be borne in mind that it belongs to a legal system which is fundamentally different from ours. English law is based on the premise of individual responsibility. Native law starts from the collective unit. There can be no more cardinal error than to read into native mentality the processes of European thought and reverse a decision given under one system of law because it conflicts with the theories of another. To diverge to one instance it is absurd to an English mind that a man should be liable for his brother's debts. To a native mind it is natural and just that not only he but his children and grandchildren should be held responsible for the payment of the last head of stock. Any other finding by a British Magistrate would not be accepted by a native community, and the case would probably even now be re-tried in private by the Elders, and a decision given which public opinion would enforce.

3. In dealing with stock-theft we find ourselves in the face of similar alternatives. Either our own Police and courts must find a remedy for the border problems of inter-racial contact, or we shall find irregular tribunals established, as the only alternative to armed reprisals. To a native theft of stock is no more theft than it was to the border raiders of our own history. Successful loot is highly laudable. Life and liberty is cheerfully staked in the gamble, and the raider returns amid the plaudits of the community which will benefit by his feats, and which helps him in every way to cover his tracks. To avoid continual reprisals between European and native we find the law of "spoor" already established in 1858, (Kaffir Law and Custom 1858) in British Kaffraria, and accepted everywhere in more recently acquired Colonies as an extension of tribal law and inter-tribal and inter-racial disputes, much as we should recognise the justice of the application of our own methods if imposed internationally by some world powers.

At a recent meeting of Senior Commissioners a Motion was brought forward that in order to expedite the course of justice the power to award collective punishment should be delegated to Senior Commissioners. The Motion was dropped because of the hopelessness of convincing public opinion at Home that collective punishment is not only not an instrument of oppression, but the best means of establishing that security of life and property which is the first essential to inter-tribal miscegenation and inter-racial goodwill. Of the 8 men who discussed the Motion none had less than 17 years experience of native administration and the aggregate of their service was 163 years. I have no hesitation in replying to the Secretary of State that the time is emphatically not ripe for the abandonment of collective punishment.

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Mr. Clifford 9.11.25.

Mr. M. K. 14/10

Mr. Stanley 16/10

Sud.

C. D.  
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Mr. Stracey

Mr. J. Shuckburgh

Mr. O. Davis

Mr. G. Brindley

Mr. J. H. ...

Mr. Ormsby Gorge

Mr. Amery

Downing Street.

17 November, 1925.

**DRAFT**

KENYA

CONFIDENTIAL

GOV. CRIGG

Sir,

I have etc. to acknowledging the

receipt of Mr. Denham's Confidential  
despatch No. 125 of the 5th of August  
with regard to the operation of the  
Collective Punishment Ordinance 1909.

I feel bound to accept the  
local view that it was necessary and  
justifiable to apply the Ordinance in the  
case in which the fine was imposed on the  
56 natives resident on Captain Hewitt's  
farm and I therefore agree that  
in these circumstances  
compensation should be paid to Captain  
Hewitt up to the value of the cattle at  
the time the loss was incurred. I fear

however

However, that the payment of the fine

into the Native Trust Fund of the

Northern ~~Windsor~~ District, through ~~the~~

may point out the native in question

have no interest, would ~~also~~ inevitably

be construed as implying an uncertainty

as to the justice of the punishment

imposed; and I ~~therefore~~ consider that

the balance of the proceeds of the

sale of cattle after the payment of

compensation, <sup>to</sup> Captain Hawitt, should be

retained by the Government.

3. ~~While~~ I am not altogether  
satisfied that the Collective Punishments

Ordinance is applicable in all cases

such as the one referred to under

consideration, I do not feel in a position

to dissent from the views of the Chief

Native Commissioner and the Chief Justice

~~Collective Punishments (cases)~~  
that the Ordinance ~~will~~ be retained on

the Statute Book of the Colony, <sup>with</sup> and I ~~must~~

~~therefore~~ must leave to you the responsibility of

deciding in each <sup>instance</sup> case, whether the

powers conferred by the Ordinance  
can properly be put into force.

Before coming to such a decision <sup>the</sup> ~~it~~  
will of course be necessary for you  
to satisfy yourself beyond doubt that

the responsibility of the fellow-  
tribesmen of the suspect is established

and in that case <sup>to</sup> ~~to~~ ensure <sup>that</sup> ~~that~~  
compliance ~~with~~ the provisions of the

Ordinance as to a special enquiry <sup>are</sup>  
*Complied with itself.*

I also wish it to be understood that the  
principle of collective responsibility

cannot properly be applied to cases in  
which there is any doubt (a) whether

<sup>the</sup> ~~the~~ suspect is a resident native, or

(b) whether being a native resident,

he is of the same tribe as the main  
number of the resident natives.

*Shaver*

(Signed) L. S. AMERY