

1934

23299

1934

23299

KENYA

C0533/451

Inter-Racial Transfers of Land in the Highlands.

Previous

Subsequent

Mc Boyd	4/5
Mr. Ward	4/5
C.O. Registrar	8/5
190	9/5
198	10/5
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29 R

Reference Lord Francis Scott's letter below, dated October 7th. I had a talk with him in general terms on the points he raises. Could the Department let me know whether the question of transfers of lands in the Highlands outside townships is a burning issue at the moment? If not, when and how is it likely to arise? Have the Colonial Office registered any interpretation of the formula?

6.9.
Land.
Highlands - Inter
Rural Transfers.

[Signature]
15/10

Mr. Phipps (C).
Sir C. B. Stanley

You have discussed with me, & I have also spoken to Mr. Parkman. The answers to Sir John Phipps' enquiries are:-
(a) We have no reason, other than Lord Francis Scott's letter, to suppose that this is a burning issue. It is relevant to note that a Select Committee in 1933, of which Lord ~~Scott~~ Francis was a member, was invited to consider the question but considered it to be outside its terms of reference.
(b) It will inevitably arise when the draft is under consideration of the Order-in-Council to implement the Carter Commission's recommendations regarding the Highlands. The first draft of the O-in-C. is being prepared in Kenya.
(c) Search has failed to find any. It is

Last para. of Report
No. 1 in 318d/35

improbable that in 1923, when the terms of the White Paper were being negotiated, the possibility was taken into account for what ever has been foreseen that Indians would apply for land for industrial, commercial or residential purposes in the Highlands.

It may fairly be said that S. P. is not tied by any commitments, and can deal with the question on its own merits when it is put up to him by the Government.

(I note that Lord Francis Scott asks for the return of the pp. enclosed in his letter)

Donegal
17/10

Yes, but the question, like others in Kenya, may get acute at any time. I agree that there are no "pledges" really.

J. E. V. Flood
17/10

Sir J. Moffat

I am quite sure that the distinction was not considered in 1923. It was not a new question then. Pl. see the memo. I have marked on p. 43 of H. P. 158 and on p. 33 of C. 4117.

Now the language is perfectly general though, on the other hand, the matter actually in mind was that of farm land.

I rather sympathize with what you say. I am sure that we may say for the purpose of this case.

18/10
J. E. V. Flood
19/10

I feel sure that the Gov. will not act without doing so.

I assure them to be the order to keep.

J. E. V. Flood
19/10

17.7.06
17.3.08

Sir C. Bettamy
his attention

2. To Lt. Col. Lord Francis Scott (6.0) - was not - 11 Oct 34

18/10

Mr. Freestone,

(3) This is a copy of the letter from Lord Francis Scott to the Duke of Devonshire, which Mr. Mansel brought home & which he also ^{sent} to you when you were in my room this afternoon.

I have a further copy which has been sent on to the S. of C. & you think desirable. The Duke of Devonshire has asked for advice as to what reply he should make in the interim to the offer renewal of residential land in the Kenya Highlands.

Ed. Lloyd

23/4/35

A.

The point at issue is identical with that raised by Lord Francis Scott in 23299/34 below. The minutes on that paper make it clear that the distinction between "agricultural" and "residential, commercial & industrial" areas was not considered when the 1923 White Paper was under discussion, and that H.M.G. are bound by no pledge, explicit or understood. We have not yet had the promised despatch from Kenya.

? The Duke of Devonshire might be reminded as in 'A'.

Ed. Lloyd

24/4

P.T.O

Sir C. Bottomley

Mr. Freeston informs me that the letter has been sent by the Duke of Devonshire to Mr. Marsh (who was, of course, his Private Secretary) with a request for guidance as to a reply.

I attach a copy of the White Paper of 1923 and as you know more about it than anybody else I think I need not minute at length. It seems clear from the Paper and from the minutes on 23299 that the suggested distinction between land for agricultural purposes and land for other purposes was not considered when the 1923 Paper was being drawn up. The paragraph at the top of page 16 of that Paper, pointing out that the Indians were claiming that any transfer did not come under the restriction, goes to show that the idea of drawing the distinction had not then occurred to the Indians and so far as I know there is nothing to show that it has occurred to them since. The point is being raised by the Legal Department in Kenya.

I was asked to give an opinion out of the blue I should be inclined to think that the ruling was intended to cover all the land in the Highlands, which at that time could only be used as far as anyone knew for agricultural purposes, ~~except~~^{cept} for land in townships (which would not be agricultural land). Also, in point of fact, it is difficult to imagine what use could be made of land other than agricultural in the Highlands, since it can very well be argued that a sugar factory or a sisal factory or a cotton ginnery (supposing

one

one could be set up) was just as much agricultural in purpose as a field of cabbages. So that the point cannot arise unless it is desired to transfer ground to Indians outside townships for some definitely non-agricultural purpose. In fact I think that Lord Francis Scott is right.

At the same time what we have to consider now is what the Duke of Devonshire is to reply. It is better to keep the reply short and simple because if any arguing is entered into Lord Francis Scott will quote it or bits of it in Kenya and use it to raise trouble and embarrass the Govt. The Govt. is, of course, considering the whole question and has to consider it not in the light of what the Duke of Devonshire now thinks he meant in 1923, but what has actually been said and, much more important, what the present situation is.

I suggest then that Mr. Marsh might be asked to write to the Duke on the lines of the attached draft.

[It is in a way rather amusing to see that Lord Francis Scott contemplates the possibility that the white settlers might be ready and willing to sell their land to Indians if they could. If so the case for the maintenance of the purely white area gets rather weak.]

J. E. W. Hood

25.4.

The 1922-3 papers were looked up before the minutes on 23299/34 were written, and the view that the difference between agricultural & other rural land in the Highlands has not been considered is not based on anything

On my recollection -
which is clear on the point.

Whether that occurs (as in
the Flood's draft) that the
Govt. is not committed is a
matter of opinion. The White
Paper promised the land to
the Europeans.

But I see that the draft
may go.

W.L.S.
25.4.35

My friend,

The Secretary of State considered
this today, and the paragraph which
I have had typed out in the sheet marked
(marked X) represents what he thinks
you should say in reply to the Duke of
Devonshire about Lord Francis Bouverie's letter
of the 14th 2nd April.

Ed. Boyd

4/5/35

4. To the Duke of Devonshire - etc - 4. May, 1935.

N^o 3+4 to be entered
L.R. 50+ R. 248

4

- 9 MAY 1935
C. C. ...

4th May, 1935.

My dear Duke,

As I told you, I consulted the Colonial Office about Francis Scott's letter, which I return, and they have now suggested an answer. They point out that the whole question is at present, as Francis Scott says, under active consideration in Kenya.

It seems clear that in 1923 the idea of a distinction between land in the Highlands used for agricultural purposes and land in the Highlands used for any other purpose (outside townships) was not actively considered. ^{probably} It follows then that the Government have not given any definite pledges in either direction. In these circumstances ~~I think~~ ^{seems to be} the only possible answer to Lord Francis Scott is that, so far as you can recollect now, the distinction was

not

His Grace
The Duke of Devonshire, K.G., G.C.M.G., G.C.V.O.

6B

not considered, so that no pledge on the point has been given, and that obviously the matter will have to be discussed and if possible agreed in Nairobi with the Government.

I enclose a copy of the white Paper as you may not have one by you.

Yours sincerely,

(sgd) E.Marsh.

X
C

With regard to Lord Francis Scott's question, I have consulted the Department and they point out that the whole question is at present, as Lord Francis Scott says, under active consideration in Kenya. It seems clear that in 1923 the idea of a distinction between land in the Highlands used for agricultural purposes and land in the Highlands used for any other purpose (outside townships) was not actively considered. It follows then that the Government have not given any definite pledges in either direction. In these circumstances I think the only possible answer to Lord Francis Scott's ^{letter of 10/11/24} that, so far as you can recollect now the distinction was not considered, so that no pledge on the point has been given, and that obviously the matter will have to be discussed and if possible agreed in Nairobi with the Government.

I enclose a copy of the White Paper as you may not have one by you.

Cmd. 1922

C. O.

Mr. Plead 25.4

Mr.

Mr.

Mr. Parkinson.

Sir G. Tomlinson.

X Sir C. Bottomley

Sir J. Shuckburgh.

Permt. U.S. of S.

Parly. U.S. of S.

Secretary of State.

DRAFT.

(To be put in letter
from Mr. Maude to the
Duke of Devonshire)

FURTHER ACTION.

In these circumstances
I think the only
possible answer
to Lord Scott
is

on this point
should be
succinct, and

X

with regard to Lord Francis
Scott's question, I have consulted the
Department and they point out that the
whole question is at present, as Lord
Francis Scott says, under active
consideration in Kenya. It is
therefore advisable to say as little as
possible from here since what both
sides have to go on is the actual
wording of the White Paper of 1923 and
the situation as it now exists. It
seems clear, however, that in 1923
the idea of a distinction between land
in the Highlands used for agricultural
purposes and land in the Highlands used
for any other purpose (outside town-
ships) was not actively considered.
It follows then that the Govt. have not
given any definite pledges in either
direction. We suggest that your reply
to Lord Francis might take the form
that so far as you can recollect now
the distinction was not considered,

so that no pledge on the point has been
given, and that obviously the matter will
have to be discussed and if possible agreed
in Nairobi with the Govt.

Send me a copy of the White
Paper - you may not have one
by you.

Ans 1922

9
Deloraine,
RONGAI.

(3)

Copy

April 14th.

My dear Victor,

I am taking advantage of Maud's return to send you this letter, to bother you, I am afraid! It is about the 1923 White Paper on Indian question here, and the interpretation thereof. As you will remember, apart from other points, it was agreed that there should be no segregation etc. in townships, but that the land in the Highlands outside townships was preserved for the white community. It has now been recommended by the Carter Land Commission and accepted by the Imperial Government, that these lands should be secured by an Order in Council. We are discussing this question now with our local Govt., and they have put up the legal interpretation that the land safeguarded to us can only be agricultural land, and that any "change of user" of agricultural land to residential or commercial washed out the "privileged position" of Europeans. Now I certainly understood in 1923 that the agreed settlement referred to all land outside of townships

townships, and cannot remember any discussion as to whether it was agricultural or not, and in fact that residential reasons were the chief reasons for the original concession to Europeans. You will see that if the interpretation put on it by the lawyers is accepted, there can be no restriction on the peaceful penetration by Indians wherever a white man wants to evade the restrictions, and sell to an Indian. I should be very grateful if you could let me know what your own recollections are on this point, and also whether I may quote you to our Govt. here.

I hope you are all fit and well, ~~and~~

Yours aff.

(Sd.) FRANCIS SCOTT.

11th October, 1934.

Dear Lord Francis Scott,

Sir John Maffey, who has been away from the Colonial Office for a few days, has asked me to thank you for your letter of the 7th October, which he found waiting for him on his return to-day:

Sir John is afraid he will not be able to let you have an answer to the difficult questions raised in your letter in the course of the next few days; but he would much like to see you and discuss matters. His only free day in the immediate future is Monday next, the 15th, and he wonders whether you would be able to come and see him here at quarter to three on that day.

Would you kindly let me know whether that time would be convenient to you?

Yours very truly,

LIEUTENANT-COLONEL
LORD FRANCIS SCOTT, D.S.O.

(Signature) JB Williams

I should like to
have my papers
back before I leave,
but we are busy.

DIRECTOR 8020

F/S

Oct 7 - 1934

20 HYDE PARK PLACE
W. 2.

RECEIVED
- 5 MAY 1955
C. U. ...

Dear Maffey

~~My kind regards to your mother~~
~~of Sir John now that you are~~
~~no longer H. H. S. representative.~~
I have had a letter from Kinga
this mail, ... tells me that the
but there are two separate
to find some on the subject in
transmission from the Highlands.
So as to give you a clear idea of
the question I am sending you
herewith all the subject's correspondence

on the subject except the part of
Kanya's final despatch. I understand
they are not stressing any particular
side of the question but want a
middle. I had a talk with Cecil
Bottomley a few days ago, & he
probably knows more about this
question than any one else had so
much to do with it in 1923. I was
also one who signed our acceptance
of the White Paper at that time.
We did so because we understood
that our 2 main points were
conceded, (1) that there should be
no common roll (2) that all the

PADDINGTON 8020

2

20 HYDE PARK PLACE
W. 2.

Highlands outside townships
was definitely reserved for white
settlement (excluding of course
native reserves). We agreed to the
abolition of segregation in the
townships, which existed up till then,
& the Indian representation was
increased on 2/3 from 2 nominated
members to 5 elected members. At
same time we were promised an
immigration bill to check undue
immigration of Indians into Kenya,
but this has never been implemented.

afford, a little has been done to
reduce it. Hans Bell that Hong
is just looked on as a place to
provide well paid jobs for civil
servants irrespective of the well being
of the tax payers. The modern
policy of restriction of production
is bad enough in the developed
countries, but it must be disastrous
for our underdeveloped countries, as
it is only by increased production
that we can ever hope to pay our
way. The policy of quotas & restrictions,
which may have been advisable as a
temporary expedient, does keep down
the price of all Empire raw products

DICTIONARY 8020

5

20 HYDE PARK PLACE
W. 2.

by making the demand much
smaller than the supply, & the old
policy that the home countries would
take all the overseas territories
raw products, & they would take
British manufactures, was so unworkable
& the obvious result must be
increased manufactures overseas,
but the Secretary of State's current
policy is to encourage such enterprises,
wide fiscal tariffs in Hongkong etc.
What is to be the future development
of the young colonies, if they are to

restrict production & to be prevented
from any development of manufactures.
Are we to depend only on gold?
It seems to me an impossible
position, & one fraught with great
dangers in the future. I feel terribly
wornied about the position & fear a lot
of trouble unless fort. come forward &
show themselves a little more sympathetic
to the producers.

One other thing, can you tell me if
anything has yet been settled about
air defence? I am in London till
Oct 17: when I fly back to Kings, &
I hope I may get a chance of seeing
you before I leave. Yes my dear
James Scott

No. S/C/L.D.4/1.

The Secretariat,
Nairobi,
Kenya.

3rd. March 1934.

Dear Lord Francis,

I enclose as promised a copy of the Attorney General's opinion on the subject of the transfer of land to Indians in the Highlands. We cannot hold up the Kikuyu case indefinitely, and if you are in doubt as to the correctness of the enclosed opinion I think probably the best thing to do is to refer the matter home for decision with my arguments 'contra' you have to put forward based on your personal knowledge of contemporary events here at the time the White Paper was published.

Yours sincerely,

(Sgd.) H. H. M. Moore

Lt. Col. The Hon. Lord Francis Scott, D. S. O.,

"Deloraine"

Rongai.

17

Extract from a letter, dated 13th February, 1934,
from the Attorney General.

SEGREGATION OF RACES.
THE WHITE PAPER 1923 - LAND IN THE HIGHLANDS.

In the White Paper of 1923 His Majesty's Government laid down the policy to be observed in regard to the reservation of land in the Highlands for Europeans only. The question that has now arisen is this: Did His Majesty's Government intend the restriction to apply to all land, other than land in townships, irrespective of the purpose for which the land was to be used, or did it intend the restriction to apply only to agricultural land? In my opinion the intention of His Majesty's Government, as stated in the White Paper is, in effect, that the reservation for Europeans of land in the Highlands outside townships is to be confined to land for agricultural purposes.

2. A perusal of paragraph 8 of the White Paper shows that His Majesty's Government, in arriving at a decision, traced the history of land policy in the Colony and it is on the wording of the paragraph as a whole that I base my opinion.

3. In reciting Lord Elgin's policy, the words "suitable for European cultivation" and "agricultural land in the Highlands" are used. Further on we come to the words "particular farms". Again, when referring to the reservation of the European area it is stated that "Lord Milner made it clear that the reservation of a certain area for Europeans implied that a similar reservation should be available for Indians who wished to take up agricultural land". And at the end of the paragraph in dealing with the reservation of land for Indians the words "what demand there is for agricultural land on the part of the Indians who will give suitable guarantee of their intention to develop the land themselves" appear. In other words, paragraph 8 would appear to refer only to agricultural land.

4. It seems to me, therefore, that, so far as land outside townships is concerned, the restriction to European ownership can only be maintained, in the absence of restrictive covenants, to land which is used or is intended to be used for agricultural purposes.

5. The following extracts from letters of my predecessors, which support my contention, are relevant -

"A careful perusal of that document, however, inclines one to think that its intention is that Indians may have any sort of holding in the Highlands except an agricultural holding, whether the holding be inside or outside a township. The only restraint on alienation to Indians is contained in the Crown Lands Ordinance, 1915."

"As I understand the White Paper, coupled with the subsequent communications from the Secretary of State on the subject, the question as to whether Asiatics may hold land in any area depends in the first instance upon whether the area is, taking all circumstances into account, including

the conditions of title under which it is held, essentially -

- (a) agricultural, or
- (b) residential or commercial,

in its character and user. If an area is agricultural then the policy laid down is that land in that area should be granted only to Europeans. If, on the other hand an area is a residential or commercial area then prima facie the policy of segregation must be abandoned regardless of whether the area in question is declared to be a township under the Ordinance or not.

So far as I am able to ascertain from the records of my Department Government has, since the issue of the White Paper, dealt with all cases which have arisen in accordance with the above broad principles."

"I think the test to apply is whether the land is agricultural land or is properly to be used for industrial purposes. From that point of view I find it difficult to distinguish between a township and a trading centre."

(Sgd.) W. Harragin
Attorney General.

24th. April 1934.

The Hon. The Colonial Secretary,
Nairobi.

Sir,

I have the honor to submit the following reply to the Hon. the Attorney General's letter dated the 13th. February, 1934.

It appears to me that the settlement of the point in issue in the Makuyu case should depend not merely on the strict interpretation of the terms of the White Paper of 1923 (though, as I will mention later, these terms in my submission are in favor of my contention) but that the history and all the circumstances of the Controversy between the Europeans and Indians in regard to the transfer of land in the highlands should be taken into consideration. I believe that there is a rule of law or evidence that a statute must be construed on its wording only and that extraneous circumstances cannot be considered in order to throw light on the meaning of some ambiguous term, but I would suggest that the construction of a Parliamentary paper should not be hampered by any such rule, and that in arriving at the intentions of the White Paper, due regard should be paid to the circumstances surrounding the controversy which led to its issue, whereas the Attorney General's opinion is based - as is only natural having regard to the fact that he must necessarily be ignorant of such circumstances - solely on the wording of the Paper itself.

There can be no doubt in the mind of anyone conversant with the history of the case that the dispute between the two communities in relation to land was as to whether the White Highlands as a whole (other than land in townships, which was of necessity excluded) were to be kept inviolate for White Settlement. It can be accepted that the particular issue arising in the Makuyu case was not raised specifically during the years of controversy because both the European and Indian communities were at one, in treating the question as relating to land outside townships generally, without regard to its proposed user.

It will be appreciated that if the test to be applied is the ultimate use to which land is to be put rather than its original use, the whole object of the Veto will be lost and little by little, encroachment will creep in in every highland area in the Colony, with the resulting breakdown of the integrity of the highlands for European Settlement. In fact if a change of user from agricultural purposes to purposes other than agricultural is to mean that the Veto of the Governor in Council is not to be exercised in respect of such land, it is clearly demonstrable how easy it would be *completely* to negative the Imperial Government's decision on this Cardinal issue.

When the case was argued with the Colonial Office and H.M.'s Government by the Members of the delegation which proceeded to England in 1923, the European case was based largely on the risk of gradual encroachment were the Veto to be removed. In the Memo: submitted to the Colonial Office of this deputation the following passage occurs :-

"To permit free transfers between the races would inevitably result in the gradual encroachment on the Highland area by Asiatics, and would certainly nullify

"the attempt to preserve these areas for European occupation by restricting original grants to Europeans. This would not be because Europeans as a whole would sell to Indians, but because here and there one might find an individual who might do so and by a process of "dumaying" through the medium of Europeans not settled in Kenya, it might be possible to transfer considerable areas to Indians. Once they are established in certain areas, neighbouring Europeans would wish to leave and themselves be forced in their turn, to transfer to Indians, and so, gradually, large districts might become exclusively settled by Asiatics."

Mr. Churchill, speaking at the first African Dinner in January 1921 when he was Secretary of State for the Colonies said :

"We consider we are pledged by undertakings given in the past to reserve the Highlands of Kenya exclusively for European Settlers and we do not intend to depart from that pledge".

The (old) District Agreement which contained proposals for settlement of the various issues between Europeans and Indians contained, in relation to the Highland areas, the following passage :

"having regard to past policy and commitments the Colonial Office cannot contemplate any change in the existing law and practice".

Turning to a consideration of the terms of the White Paper itself, I submit that the expression "agricultural land" to which the Attorney General attaches importance in support of his argument is used by way of contra-distinction to land in the highlands situated within a township which has as above mentioned, always been admittedly open to occupation and ownership by members of the different races. The only question arising with reference to such township areas was whether race segregation was or was not to be imposed within their boundaries.

The offer of land to Indians in the Lowland areas for agricultural purposes was made to meet their complaint that by being deprived of land in the highlands they were in effect being shut out from all agricultural enterprise in the Colony and to give an earnest of the Colonial Office's oft-repeated assurance that there was no unfair discrimination against Indians in their exclusion from the highlands.

The penultimate paragraph of clause 8 of the Command Paper appears to me to set the matter beyond all doubt. This paragraph is in fact the operative part of the clause, the passage containing the finding of His Majesty's Government on this issue, whereas the previous passages, some of which are quoted by the Attorney General in support of his opinion, are in the nature of mere recitals of the successive stages of the matter in dispute. The paragraph in question reads as follows:-

"After reviewing the history of this question and taking into consideration the facts that during the last 15 years European British Subjects have been encouraged to develop the highlands and that during that period settlers have taken up land in the highlands on this understanding, His Majesty's Government have decided that the existing practice must be maintained as regards both initial grants and transfers".

The decision of His Majesty's Government was therefore for the maintenance of the "existing practice" and a search of the records from 1906, when the Elgin Policy was first introduced, until 1923 the date of the White Paper, will, I believe, show that in no case concerning land in the Highlands (and outside the limits of a township) was sanction given for a transfer to an Indian.

Copy.

The Secretariat,

Nairobi, Kenya.

No. S/C/LND. 4/1/36.

13th August, 1934.

CONFIDENTIAL.

Sir,

INTER-RACIAL TRANSFERS OF LAND IN THE
HIGHLANDS.

With reference to the discussion held at the Secretariat on the 3rd. August, 1934, concerning inter-racial transfers of land in the Highlands, I forward herewith three copies of the Commissioner for Local Government, Lands and Settlement's memorandum for your information.

2. It is understood that the Elected Members propose to revise the memorandum submitted on the 24th April, 1934.

3. I am to ask that the revised memorandum may be submitted at your earliest convenience.

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

(Signed) C. M. DEVERELL,

For ACT. COLONIAL SECRETARY.

MAJOR THE HON. F. W. CAVENDISH-BENTINCK,
P. O. NAIROBI.

Land in this Colony has been issued under the Crown Lands Regulations, 1897, The Crown Lands Ordinance, 1902, and The Crown Lands Ordinance, 1915: and Section 73 of the latter Ordinance applies to land issued under each of the three measures. For the present purpose the Crown Lands Regulations 1897 may be disregarded as practically no land remains under them.

2. Leases under the Crown Lands Ordinance, 1902, provide that the land be used for agricultural or pastoral purposes but contain no special covenant against inter-racial transfer. They run for 99 years. Government has consistently held that use for residential, business or industrial purposes constitute a change of user which required approval. When such approval has been given the method of giving effect to the transaction is by a deed of assignment in respect of the portion concerned: and, as a higher rental for this portion is charged by Government, the Crown is made a party to the assignment for the purpose of receiving the rental covenant and authorising a change of user.

3. In similar circumstances where the land was issued under the Crown Lands Ordinance, 1915, between the date of that ordinance and that of the Registration of Titles Ordinance, 1919, the procedure prescribed is the surrender of the head title and the issue of two fresh titles.

4. "Since 1919" grants of land have been made under the Registrations Of Titles Ordinance, 1919 and in the same circumstances the original grant is not surrendered but a Transfer in the form prescribed by the Registration Of Titles Ordinance is executed and registered in respect of the portion; a record is endorsed on the Head Title that such and such portion has been subdivided off, and a Certificate of Title in respect of the portion is issued by the Registrar to the transferee. Both the transfer and the certificate contain any special conditions which may have been laid down by Government in respect of the subdivision.

5. Now it is not, I believe, open to question that, in the case of land leased between 1916 and 1919, there can be no carry over of the terms of the original lease to both of the new leases issued for the subdivided portion, and the remainder of the farm. In such cases a change of user is held to have occurred and the lease for the sub-divided portion would not be issuable under part IV of the Crown Lands Ordinance. As regard length of term in such lease, the present policy is to make the term 999 years in areas reasonably remote from any township where there would be no conflict with the policy applicable to township titles and where an industrial purpose closely connected with the agricultural pursuits of the area is contemplated; otherwise a term is for 99 years.

6. It appears, however, to be open to question, in regard to leases issued under the Crown Lands Ordinance, 1902, and grants made under the Registration Of Titles Ordinance, 1919, whether, on the grant of an additional user, the Deed of Assignment in the one case or the Transfer in the other represent a limitation of the original conditions or merely an additional permissive use.

7. The first case in point, which came up to Executive Council, viz: Farm 487/4/17 Elburgon, was in 1927. Here the original farm was held under the Crown Lands Ordinance, 1902, and a number of sub-divisions had been made and used for commercial purposes. The change of user in the particular case was for a store and house. Executive Council approved the sub-division and advised that "no restrictive clause need be inserted in the lease on change of user". The farm adjoined Elburgon Township and, although at the time no question had actually arisen of including these portions in the township, it may have been in the air as the acquisition of a fairly considerable area of the farm for township purposes was mooted in 1928, and after fairly protracted negotiations the boundaries of Elburgon Township were in fact extended in 1932 so as to include all the commercial developments on this farm.

Executive Council may, therefore, have been influenced by the vicinity of the plots to a township.

8. The same reasoning does not, however, cover the next cases which were considered in Executive Council on the same day, viz: (1) a subdivision of 10 acres for residential purposes: this was to be cut out of L.O. 469/3/1, a farm situated approximately 12 miles north of Nakuru on the Solai Road. (2) a subdivision of 3-5 acres from L.O. 238 Uasin Gishu for the purpose of a store at Hoey's Bridge and a transfer to the Kitale and Hoey's Bridge Stores Limited. (3) a subdivision of 3 acres from L.O. 796 Uasin Gishu (not far from Turbo Station) for the purpose of a store and hotel.

Each of these farms was held under Crown Lands Ordinance, 1902, and in each case on January 19th, 1927, Executive Council approved the change of user and advised that no restrictive covenants regarding inter-racial transfer need be inserted.

9. The next case to go to Executive Council in this connection was the Rongai Case. This case covers a period of several years. It comes in here chronologically, since on February 18th 1927, a transfer to an Asiatic was vetoed and a sharp reversion of opinion from that recorded the previous month as shown above took place.

10. Following apparently on this decision, when the next case came up from the Commissioner of Lands (viz: a subdivision in respect of 2 plots, one of 5 acres for factory purposes in connection with the adjoining farm, and one of 3 acres for residential purposes - L.O. 4895 Maccotha River, Kyambu-Crown Lands Ordinance, 1902, title) a Secretariat enquiry whether both or either lease would be covenanted against Asiatic ownership or residence by other than a servant was put to and answered in the affirmative by the Commissioner of Lands, and Executive Council, on May 20th 1927, advised approval of the subdivision on this understanding.

11. Then on the 26th July, 1927, and 17th August, 1927, there were submitted two cases of subdivision with change of user. The first was in respect of a 6 acre plot for residential purposes, L.O. 446 Nakuru (H.H. James); the second was for 2 acres for a store, L.O. 474/2 close to the junction of the Lower Molo-Ravine and Nakuru-lower Molo roads. Both leases were under the Crown Lands Ordinance, 1902, but in neither case was any mention of restrictive clauses made one way or the other either in Executive Council or in the correspondence on the files.

12. Finally we come to the Makuyu case where a 1 acre plot has been cut out of a freehold Estate and sold to a Company called Makuyu Stores Limited. This Company is in liquidation and the administrators have applied for permission to sell the plot to an Asiatic. There are, in the close vicinity, 3 "shops on farms" but the development is by no means so full for commercial purposes as at Rongai. It is this case which is now up for consideration. No approval of a change of user is required as the land is freehold (though, actually, when in error the application was submitted for approval to a change of user approval was given by Executive Council on August 22nd 1930.

13. The crux of the matter appears to be whether or not Government agrees to a change of user for commercial or industrial or for any purpose other than agricultural purpose - save where the industrial purpose is intimately connected with the agricultural use, e.g. a coffee factory. If it does, then it appears to be questionable whether it can thereafter veto an inter-racial transfer on the ground that the grant is agricultural land in the highlands, as no Agricultural user is involved.

14. In regard to the Makuyu Stores, the use is de facto commercial and, if the farm had been held on a leasehold title, the change

3.

of user for commercial purposes would have been given. Control of inter-racial transfers of freehold land used for non-agricultural purposes can, be quite effective because Government may veto any sale in respect of which it is not satisfied that, having regard to the size and situation of the plot and any other relevant factor, the freeholder has proved that this proposed user will not and cannot be agricultural.

15. It is, however, a fact, that every application we have had up to date concerns land held under the Crown Lands Ordinance, 1902 as to which, as is noted above, legal interpretation is open to doubt. Moreover the above record of cases shows that at different times Executive Council has taken different views as to the interpretation to be put upon the White Paper, 1923.

The matter is of such obvious importance that it is high time that a definite view should be taken and adhered to, and presumably when action is taken to implement the Kenya Land Commission's recommendations regarding the Highlands, the point must be precisely dealt with.

(Sgd.) W.M. Logan
COMMISSIONER FOR LOCAL GOVERNMENT,
LANDS AND SETTLEMENT.

NAIROBI. 4th JULY, 1934.

26th September

4.

The Hon: The Colonial Secretary,
The Secretariat,
NAIROBI.

Sir,

INTER-RACIAL TRANSFERS OF LAND
IN THE HIGHLANDS.

I have the honour to refer to your confidential letter No. S/C/LND4/1/36 dated 13th August, together with its enclosures, being three copies of a memorandum drawn up by the Commissioner for Local Government, Lands and Settlement.

2. With regard to paragraph 2 of your letter under reply, I beg to inform you that the Elected Members do not propose to revise the memorandum submitted by Lt.-Colonel The Hon'ble Lord Francis Scott dated the 24th April 1934, which they consider sets out the case admirably, but wish to make certain additional representations in the light of the recommendations contained in the Report of the Kenya Land Commission, which has been published since the date on which the original memorandum was submitted. Such additional representations are as under:-

3. The terms of reference given to the Commissioners on the Kenya Land Commission contain inter alia the following:-

No. 6. "To define the area generally known as the Highlands within which PERSONS OF EUROPEAN DESCENT ARE TO HAVE A PRIVILEGED POSITION IN ACCORDANCE WITH THE WHITE PAPER OF 1923."

The Commissioners endeavoured to comply with this term of reference in Chapter 9 of their Report, the whole of which is devoted to making recommendations as to the precise boundaries within which a European privilege is to obtain in the future. They conclude this chapter with the following sentence: "We therefore recommend that the boundaries of the European Highlands should be safeguarded by an 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."

The Commissioners further in the final paragraph of their Summary of Recommendations (Para. 215B) state: "We consider that it would be invidious if the Native Reserves were to be protected in this manner and no similar security be given to the European Highlands. We recommend, therefore, that the external boundaries of the European Highlands

R/Gl.

The Hon: The Colonial Secretary,

26th September 1934.

be defined under the Order in Council and be subject to analogous safeguards as to exclusions, additions and exchanges."

4. If, as has been suggested in the letter dated 13th February from the Attorney General, the question as to whether Asiatics may hold land in the Highlands depends in the first instance upon whether the area is, taking all the circumstances into account (a) Agricultural, or (b) Residential or Commercial, the result will inevitably be a gradual and a fairly rapid encroachment upon the Highland area by Asiatics and would obviously nullify the attempt made hitherto to preserve these areas for European occupation. Once Asiatics become established - as they certainly would - in certain areas, neighbouring Europeans would wish to leave and would either abandon their holdings or transfer them to Indians. Thus agricultural production would be diminished in such districts, which would ultimately be exclusively settled by Asiatics.

5. As long as there is any possibility of such a state of affairs arising, it could never be maintained that the BOUNDARIES OF THE EUROPEAN HIGHLANDS WERE SAFEGUARDED or that THE EUROPEAN COMMUNITY HAD ANY MEASURE OF SECURITY IN REGARD TO LAND.

6. I notice that the Commissioner for Local Government, Lands and Settlement also thoroughly appreciates the gravity of this question, as he ends his memorandum by saying: "This matter is of such obvious importance that it is high time that a definite view should be taken and adhered to and presumably when action is taken to implement the Kenya Land Commission's recommendations regarding the Highlands, the point must be precisely dealt with."

7. As accredited Representatives of the European Community, the elected members must urge that any Order in Council designed to give the European Community security in regard to land must also cover the question of transfer of land in the Highlands to Asiatics. This is essential in view of the fact that, at this late stage doubts are cast as to the true meaning of what the European Community have always understood was a definite undertaking given by the Imperial Government in 1923.

8. In conclusion, European Elected Members venture to point out that the complaint sometimes made by the Indian Community in the past that by not being allowed to acquire land in the Highlands they are being debarred from all agricultural enterprise - although they have actually always had the right to take up land in the Coast Province and in the Western portion of the Kisumu/Landiani District, is definitely met by the recent recommendation of the Kenya Land Commissioners to the effect that very large tracts of land should in future be classified as Class D land, that is, "land in which no special privilege of race should obtain in respect of either INITIAL GRANT OR TRANSFER." The mere fact of this recommendation being couched in such terms appears to the Elected Members to constitute tacit admission on the part of

E/G.1.

The Hon: The Colonial Secretary,

26th September 1934.

the Commissioners that, in their opinion, the principle, that persons of European descent had a privileged position in the Highlands, had been unquestionably accepted.

I have the honour to be,

Sir,

Your obedient servant,

ACTING LEADER OF EUROPEAN ELECTED
MEMBERS.