1935	KENYA	1935
38005/8	CO533/453	38005/8

Land Commission Report.

Memorandum by Lord Lugard.

Previous

[illegible] file.

Subsequent

Reg 47	1/10
[illegible]	2/10
[illegible]	26/10/35
297	

C.S. / Lugard: Land Commn.

1. Note of interview between the S. of S. & Lord Lugard.

Nominal

2. Lord Lugard (S.O.) ———————— 24th September 35
Encl. a memorandum on the points raised in connection with the Land Commission Report in the discussion with the S. of S.

I acknowledged the receipt of No. 2 semi-officially on the day on which it reached me, and promised that it should be laid before Mr. Malcolm MacDonald as soon as the Dept. had had time to prepare its comments.

The proposal made at the interview between Lord Lugard & Mr. MacDonald recorded in (1) was that Mr. MacDonald should spend a week end at Abinger in, say, a month's time, and that Lord Lugard's case should then be discussed at leisure.

Political changes having made this course impracticable, it seems unnecessary to communicate further with Lord Lugard unless & until he re-opens the correspondence.

2A I attach a note dealing with his main points.

? Put by [illegible]

[illegible signature and date]

This file has just been brought to me as no direction had been given as to its disposal.

It can now be put up.

J.J. Paskin
26/4/35

[illegible].

2A

1. Lord Lugard is perturbed by the proposal that, "all native rights in land outside the Reserves should be expunged by Order-in-Council". He thinks this proposal to be contrary to (a) equity (b) law.

(a) Perusal of §§ 1857 and 2144 of the Report shows that the Commission were impelled to make this recommendation in the interests of the natives themselves.

Lord Lugard refers to a settlement imposed by force, irrespective of any protest by or on behalf of the natives. He ignores the fact that, before framing their recommendations, the Commission took evidence from hundreds of Kikuyu, and that they were acting, in fact, as a quasi-judicial tribunal, hearing evidence and making an award. To any judicial award is in the long run imposed by force. Moreover, he overlooks the elaborate safeguards — § 1854 — which ~~specifically~~ except rights enjoyed under specific title, and prohibits inadequate compensation ~~for~~ in cases where claims other than specific title can be shown to exist.

(b) Lord Lugard questions the legality of

denying British subjects access to the Courts. There is, of course, ample precedent for such action; not to mention the numerous Acts and Ordinances of 'indemnity' which have frequently been passed by the Imperial and by Colonial Governments, the following instances may be cited:-

Kenya Land Titles Court Ordinance (cap. 143), section 37 of which "absolutely bars" claims to land not lodged within a prescribed time.

Kenya Ordinance 25 of 1930, section 3 of which provides that certain rate-assessments "shall not be liable to be contested by suit or otherwise".

(It is perhaps rather surprising that the existence of this legislation was overlooked by Sir Robert Hamilton, from whom Lord Lugard clearly derives this part of his argument.)

2. Composition and location of Lands Trust Board

Lord Lugard pleads that the Lands Trust Board should be located not in Kenya but in London, and should be absolutely independent of the Government. This suggestion was tentatively discussed by the Commission in § 1697;

only one member, however (Mr. Hemsted), made it a definite recommendation, and Sir Morris Carter, in subsequent conversation with Sir Philip Cunliffe-Lister, was quite ready to withdraw his support. Lord Lugard draws misleading comparisons with the Rhodesias; in Northern Rhodesia the native lands are indeed vested in the S. of S., but he would naturally exercise the trust in full collaboration with the Governor. The case of Southern Rhodesia is entirely different; the S. of S. is not in a position to exert authority over the Government of that Colony, and it was consequently necessary to vest native land rights in an authority (the High Commissioner in S. Africa) over whom H.M.G. have constitutional control.

9154

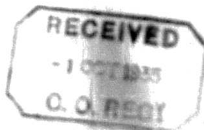
3. Leases in Reserves

Lord Lugard protests against the proposal to provide for agricultural leases to Europeans in native reserves. He forgets (a) that the Commission endorsed the view that 'such leases will be extremely rare' (the Yatta proposal in

§ 941 is a special case, justified by special considerations: (b) that no such loan could be granted unless it would benefit the natives, and unless the application for preliminary setting apart has passed through the prescribed machinery (in consultation with the Native Trust Board) provided to ensure that native interests are fully protected and native views adequately made known (c) that corresponding

in §§ 1094 – 1096 a provision is made for the ~~acquisition~~ lease by natives of land within the European Highlands.

4. In the latter part of his memorandum Lord Hailey touches on the Highlands question. "The decision to exclude all but Europeans is contrary to repeated declarations of Imperial policy." If so, then the converse decision to exclude all but natives from the Native Reserves is equally unjustified.



27th September,193

Dear Mr. Freeston,

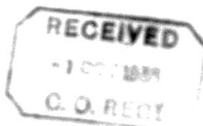
I enclose a memorandum on the points which I raised to Mr. Macdonald the other day, in accordance with my promise. It has been written somewhat hurriedly, and could have been condensed if I had had time.

Mr. Macdonald said that he hoped to find time some three weeks hence to study the whole question very fully, and I should be greatly obliged if you would kindly let him have this memorandum in due course. It will no doubt appear to you to be somewhat hard on the Carter Report, but you will remember that it does not pretend to be a survey of the whole question, but only a confidential memorandum setting out the recommendations which appear to weigh heavily on the natives.

Yours truly,

Lugard

2



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Yours truly,

Lugard

23.9.35.

CONFIDENTIAL.

Note on the Kenya Land Commission Report.

§§ 1854-8

§§ 2144, 1797.

Subject to certain exemptions and provisions the Commission recommend that all native rights in land outside the Reserves should be 'expunged', including the ownership of lands which have been proved to belong 'unequivocally' and 'as of right' to the natives. ~~[illegible]~~ The safeguard of an O.in C.is proposed to ensure that these claims shall not again be reopened. ~~[illegible]~~ The "compensation provided" is assumed to justify this procedure.

Cmd.4580 p.4. § 13.

Finality of the Settlement.

2. In this connection the White Paper states that "H.M.'s Government propose that full effect should be given to these recommendations. It follows as a necessary counterpart that the Order-in-Council should declare that all claims have been satisfied and extinguished by the settlement, which is now recommended and approved."

3. By this decision African British subjects are deprived by Royal Order-in-Council, (viz., by an extra-Judicial Act of State overriding all British Courts including the Privy Council) of the right to appeal to the constituted Courts whether by Petition of Right or otherwise. I understand that Sir R. Hamilton, M.P., ex-Chief Justice of Kenya, considers this to be an unprecedented step.(1)

4. Admitting that a decision in the name of H.M.G. cannot be set aside (unless shewn to be unconstitutional) it is relevant to consider some of the criticisms upon it with a view to considering how such of them as the Secretary of State may consider to be valid may be met when the O.in C.is drafted.

5. Finality may be reached by an agreed settlement, and by arbitration in case of failure to agree, but it is of the essence of this settlement that so far as the Natives are con-

(1). Whether Prof. Berriedale Keith is right in asserting that "the plea of 'Act of State'...cannot be urged against a British subject" is a question for constitutional lawyers. It appears to limit the Royal prerogative. The method was criticised in the Ormsby-Gore Parl. Comsn. of 1925 (Cmd. 2387 p. 28-9) & has been raised both in the House of Commons (Hans. 27.2.35 Col. 1164) & House of Lords (Hans. 23.3.32) ~~[illegible]~~), and may be raised again when the O.in C.is issued.

concerned, it is to be imposed by force, irrespective of any protests by or on behalf of the natives, whose interests are so vitally concerned, and as has been noted, they are to be denied access to the Courts.

Compensation.
§ 1775.
§ 1776.

6. Land in private or communal ownership may by law be compulsorily expropriated by the State if required for a public purpose, subject to strict conditions as to payment of value and arbitration in case of dispute. In the present case the land is not required for a public purpose, but in order that ownership may be transferred to a third party on racial grounds. The compensation for land unequivocally native appears to be arbitrarily fixed without right of appeal to Arbitration. (In the case of land near Nairobi it would be of interest to know whether the Commission would maintain that the auction-value had been given, the rate adopted is Rs.2 (3s/-) per acre.)

§§ 341-3.

Disregarding the principle that equivalent land should be given in exchange for any native land, ~~and the reference app[illegible] to infer that this would be done~~, the compensation has in some cases been assessed in money(1). Where land has been given in exchange it appears to be distant from the family or clan whose land has been taken, and there appears to be no proof that it is of equal value for cultivation.

Since the settlers will not abate their claims no settlement by agreement is possible. If it should appear that the considerations submitted in this Memorandum - for the presentation of which no opportunity was given owing to the simultaneous publication of the Commission's report and the decisions of H.M.G. upon it(2) - would justify some modification

(1). Even so it is reported that the money is given to the District Council for general purposes & not to the families expropriated, against which the natives protest strongly.

(2). The Archbshp. of Canterbury in the House of Lords had strongly urged that sufficient time should be given after the publication of the report to study it before the Govt. took decisions upon it, and the reply appeared to infer that this would be done, but the very unusual course was adopted of publishing the report and the Govt. conclusions on it simultaneously. (Hans. 8.2.33.)

of the conclusions arrived at by His Majesty's Government when the Order-in-Council is drafted, it is worth while to consider whether any such modification can be effected in existing circumstances.

II. Land Trust Board §§1671-1697.

§ 1695 The Commission record the opinion that "it cannot be denied that a Board...in England would carry more weight than one resident in Kenya." and would inspire much greater confidence in the eyes of the natives for the following reasons:-

a). Several members of the present Board are also members of the Executive Council, and admit that they have found difficulty in reconciling the two positions. "It is essential that the

§ 1695 Board should be removed from the sphere of local politics", but all men of standing and ability are involved in them. The Commission is most strongly in favour of complete independence.

§ 1695 b). "Occasions (they say) may arise in which the Native Reserves may have to be protected even against the Government of Kenya." They should be able to veto leases or licences which

§ 1695 the Government had recommended."

§ 1695 c). "The point of greatest importance is that the Board should

§ 1695 command the confidence of the Natives." "A Board resident in Kenya would be more likely to [illegible] than to inspire confidence." They add that "it would be many years before Natives were fitted to represent the interests of natives of Kenya as a whole."

§ 1695 d). Friction would arise from "the contention of interested parties that there are too few or too many natives, settlers, officials or missionaries on the Board."

These opinions were endorsed by the whole Commission, but two out of the three did not make a definite recommendation for a London Board. Mr. Hemsted who did so was an official who was ~~[illegible]~~ about to resign and become a settler. To

(1). The Natives would be content with a Local Board provided they were strongly represented upon it, but I agree with the view of the Comsn. The Trust should be in the hands of an impartial arbiter and not a forum for bitter & indecisive controversy.

these opinions the Commission added that the Board would be the representatives of the Privy Council whose instructions they were carrying out.

Cmd.4580.p.7.

The Secretary of State pointed out that the recommendation was based on a misconception of the functions of the Privy Council; that it is wrong in principle because "the ultimate authority must be the Secretary of State responsible to Parliament", and that it would not work in practice because "to function effectively the Board must reside in Kenya", and have continuing knowledge of local conditions &c.,

§ 1696.

The Commission had anticipated the last of these objections and pointed out that although Administrative duties are the function of the Government, a London Board could, even on the protective side, keep itself fully informed by periodic reports and if necessary by the appointment of Inspectors to report direct to it. I submit that it should be no part of the duty of the Land Trust to supervise the Governor in his major duty of seeing that the Reserves are properly administered and utilised. The attempt to do so - more especially if the Board was resident in Kenya - would render the position of the Governor untenable.

It may be noted that in the only other British dependency in Africa, in which the South African system of Native Reserves has been adopted, viz., N.Rhodesia - the Land Trust is vested in the Secretary of State by the Orders-in-Council of 1924 and 1928. In S.Rhodesia it is vested in the High Commissioner of S.Africa. In neither case is the Trustee resident in the country. The real reason why the proposal so strongly urged by the Commn. was vetoed was because (as Sir Philip

Hans.12.7.34.

Cunliffe-Lister said in the House), "a Board independent of the Secretary of State and Parliament would be unconstitutional and impracticable."

The Commn. did not however make any such proposal. Pointing out that the consent of the Trust would be necessary before land added to the Reserves could be taken away they add, except that there would be an appeal to the Secretary of State

§ 1817.

§ 1817.

who would be able if he considers that sufficient cause exists, to override the veto of the Board."

Proposed Revision.

The fact that the dissent of the Secretary of State was based on a complete misunderstanding affords occasion for reconsideration when the Order-in-Council is drafted without reversal of the principle upon which the decision was based, and if His Majesty's Government should see fit to adopt the proposal of the Commission for a London Board the opportunity would arise for modifying the decision as to denial of access to the Courts in land cases, without opening the door to that constant litigation regarding ownership of land which has been the curse of West Africa.

In order to make clear the final authority of the Secretary of State and to define the duties of the Trustees, it is suggested that any claim affecting land, or any action which the natives considered would be an infringement of their rights, would be referred by them to the Trustees. The Trustees would submit their opinion to the Secrteary of State who is the final authority on behalf of Parliament. He in turn instructs the Governor. If the action of the Governor is in the opinion of the Trustees inequitable or of doubtful legality the Natives would appeal to the Constituted Courts, and from them to the Privy Council, as in other Colonies. Without the sanction of the Trustees no appeal would be permissible. This limitation would prevent needless litigation, and would be justified on the grounds that the natives are at present <u>in statu pupillari</u>, and their lands are vested in a Trust without whose concurrence they would not be competent to act.

III. <u>Leases in Reserves.</u>

Leases of plots of a few acres for Mission or Trading or Education purposes &c., are of course desirable, but the grant of agricultural leases to Europeans for however short a term is really synonymous with alienation. The Natives can never pay claims for unexhausted improvements, and European opinion would be averse to ejection of the lessee. Carter admits that the safeguards

§ 1796.

are inadequate unless the thoroughly independent (London)

§ 546. Board is created. Yet such leases to large syndicates are to

Hans.21.3.32. Col.1027-28. be encouraged at Yatta (I dealt with this point inter alia in a speech in the House of Lords).(1).

§§ 1523,1527, 1753. The system of 'setting apart' land to facilitate acquisition (he uses the word 'circumvent') under the Ordinance limiting such acquisition to a public purpose does not commend itself to me, but has been approved.

General Impression of the Report. A perusal of the report has I regret to say left me with a very definite feeling of disappointment, and in some cases with a feeling that less than justice has been done. That Sir W.M.Carter and his colleagues had an <u>exceedingly</u> difficult task to perform we can readily recognise. It is evident that they consider ~~[illegible]~~ that the questions with which they had to deal must be decided by equity and not by strict legal procedure. Has this standard been maintained as between Europeans and Africans ? Has

§ 30.(1). for instance the dictum that it is wrong for any <u>person or class</u> to allow land to lie waste been applied impartially to both ? In the following notes I set down a few of the reasons which have led me to form this impression. I hope that it may be found that I have misinterpreted the facts. The reason why attention could not be called to these points before general approval was recorded in the White Paper Cmd.4580 is explained on page 2.

His Majesty's Government has given an explicit approval to the recommendation that the whole of the Kenya plateau within the boundaries proposed shall be declared to be European Highlands and defined by Order-in-Council. Except as regards the irrevocable finality of a settlement which cannot remain static I have no suggestion to offer. But it may be of interest to note a few points in this connection as indicating on the one hand that the decision is very favourable to the European claims, and on the other hand that a time is rapidly approaching if not already here, when the shortage of land for the cultivation of food of a large native population may force upon the European population a very difficult problem.

The Highlands. 1. Lord Elgin in 1906 referring exclusively to Asiatics

(1). See reprint of Sir E.Grigg's speech in Leg.Co.10.5.26.,p.12-13, where he stated that the lease-hold clauses have nothing to do with alienation from the tribe & are solely to provide for lease-hold tenure for members of the tribe. He considered that extension of the Reserves if or when congested would not benefit the natives.

§ 1944.
Cmd.1922/23 p.4-5.

(and not to Africans who have always lived there) said he could not legally exclude them from the Highlands, but agreed that in practice a reasonable discretion should be exercised in allowing them to take up land there. Since that date the Africans have become British subjects. Lord Passfield's ruling in his 'Memo.on Native Policy' in East Africa' does not seem to be in harmony with his statement in the Joint Select Committee. The decision to exclude all but Europeans is based solely on race and colour contrary to repeated declarations of Imperial policy.

Cmd.3573/30.
Ques.7998 et seq.

European Estates.

§ 1971.

2. The European landowners are stated to number about 2,000. The European Highlands assigned exclusively to them cover 16,700 sq.miles. It is stated that only a small proportion (about 12%) of the estates owned by Europeans is under cultivation (including cattle 'ranches' the percentage is much higher). It appears that on these apparently unoccupied areas large numbers of natives have settled who have thus become squatters or tenants. A very active campaign for 'Closer Settlement' (strongly supported by Sir E.Grigg) is being conducted including the despatch of agents to India to attract pensioned officials. When the pension holders die their families will constitute a difficult problem. Meanwhile Sir E. Grigg in evidence before the Joint Parliamentary Committee described in the strongest language the plight of the settlers and demanded Imperial assistance to save them from bankruptcy.

Colonial No.57. p.26 & 29.
[illegible handwritten note]
Ibid. §97,100.

Native Reserves.

3. The native population on the Highlands and lake shore is very dense and increasing rapidly with the cessation of epidemics, tribal wars &c., In many areas it is over 500 to the square mile (in one small district over 1,100). Carter reports the average density of the Kikuyu as 283, though the area occupied by the tribe includes considerable tracts of uncultivable land, and also of forest. The figures he gives purport to show that after a lapse of 30 years the density had changed little (increase variously estimated at 37,600 or 41,900), but no account is taken of the fact that during this period (1) They acquired 153 extra sq.miles; (2). That a surplus (of 110,697) was dis-

§§67(note 4) 660, & 556.

§ 67.

14

posed of by squatting" on European estates; (3). That there was a very severe small-pox epidemic; and (4). The enormous mortality due to the war. Already 1 acre in 3 instead of 1 in 8 is cultivated, leaving little for grazing.

If the figures for increase during 1931-33 are analysed it will be seen that the increase is very rapid indeed. The land assigned 'for future expansion' appears to be quite inadequate, and much of it (e.g. Yatta) is said to be of no use for food crops, part is already occupied, part to be held on lease only. As a result of over-grazing and extended cultivation, erosion and deterioration of the soil is as Carter's report graphically depicts going on very rapidly and "ruination is in sight". The land therefore will not continue to support the same number of people. A large number of the squatters are to be returned to the reserves. The outlook gives cause for anxiety in the not distant future. Yet agricultural leases to Europeans are proposed. The natural expansion of these tribes was checked by the Masai. When the Masai (after internecine war and the great Rinderpest) ceased to exert this check, natural expansion was prohibited by European laws, &c.

§ 2088.

§ 1867.

cf. §61, 190, 215. §§117, 325, 327/ pass

The Masai.

4. I do not think the Masai have been treated with justice. The pledges in the past have been broken and the last 'agreement' is to be "discontinued" on the grounds that other tribes need their land - a contention which might also be applied to Europeans. Their claim to the 'Mile zone' giving access to the railway is set aside. They are to accommodate in their Reserve (which is also a game reserve and partly waterless) the whole of the 'Nandi Masai'. They are to be compelled to sell all European farms in the Reserve to Europeans and to lease a further area to them for 99 years.

§§664, 671.

§ 923.

§§690-2, 620, 668, See § 1684.

5. A few points may be mentioned which are not concerned with the land settlement proposed by the Commission.

(1). Fishing rights are jealously guarded by natives, but "Europeans shall be allowed to fish in all rivers in the Native Reserves."

§ 1667

(2). Forced unpaid labour is proposed on the grounds that land

§§2070-4. must not be left unreclaimed. This is contrary to the Convention ratified by Gt.Britain. The principle is not applied to European estates.

§§2048-68. (3). The Comssn.makes out an extremely strong case for the payment of the money due to the relatives of natives who died or disappeared in the War, which they regard as "a debt of honour". His Majesty's Government has made an ex gratia grant of £50,000 in order "to remove any sense of grievance". Being therefore a War debt it was included in the Army Vote. But Sir Philip Cunliffe-Lister stated in the House that £48,000 would be expended as follows:- about £18,000 on land purchased from Europeans for rendition to the natives; upwards of £14,000 in compensation for land from which natives are to be expropriated in favour of Europeans; about £5,000 for surveying of boundaries; and £7,000 for expenses of the Commission including printing of report and evidence(1). Leaving a balance of £2,000 "for other purposes". The removal of the "sense of grievance for which the grant was stated to be made is not mentioned at all. All the items named are such as would form legitimate charges on the Kenya Government Budget.

Hans.1.3.35.

(Kum?)

§ 2100. (4). It appears that as long ago as 1928 the Executive Council agreed that 626 sq.miles should be recognised as Native land and transferred, but that this was never done owing to some difficulty in the Land Trust Ordinance. It is not explained why the Ordinance was not amended, or what has become of this land.

(1). These figures differ slightly in detail from the more precise statement furnished officially to Sir Robert Hamilton. In reply to a question whether "the whole of this £50,000 will be applied to native industries", Sir P.Cunliffe-Lister said that "that is exactly the way in which it is proposed to spend this money." (Hans.1935.).

1/10

N O T E.

Lord Lugard saw the Secretary of State yesterday morning in connection with various matters arising from the Kenya Land Commission's Report.

1. He urged endorsement of the Commission's recommendation that the re-constituted Lands Trust Board should be located in London. Under the alternative proposal favoured by Sir Philip Cunliffe-Lister the Board would be composed largely of settlers; the natives would have no representation, and it would not command their confidence. H.M.G.'s rejection of the Commission's proposal was based on the mistaken assumption that a London Board would be independent of the Secretary of State; but the Commission clearly envisaged that the Secretary of State would retain an overriding power (paragraph 1817 of the Report). Precedent for vesting native lands in an outside authority could be found in S.Rhodesia, where the Native Reserves are vested by Order-in-Council in the High Commissioner.

2. The proposed Native Lands Order-in-Council would impose an enforced, not an agreed, settlement; the natives have never had a chance of stating their case. Yet it is proposed, by declaring all individual claims to be extinguished, to debar native claimants (British subjects) from access to His Majesty's Courts. The remedy would be to allow appeals up to the Judicial Committee of the Privy Council in any case which the Lands Trust Board was prepared to support.

These two points are touched upon in the attached page from a memorandum which Lord Lugard

handed

handed to me.

3. He protested against the Commission's proposals to allow Europeans to take up agricultural leases inside the Reserves. An agricultural lease, whatever its term, is tantamount in practice to permanent tenure. The Reserves are already densely populated; it is proposed to increase the congestion by returning over 100,000 squatters from the Highlands; to reduce the area available for native occupation by granting European leases would be the height of folly and would ultimately lead to widespread starvation.

4. Lord Lugard touched briefly on the Highlands controversy. The fact that the lands were found empty by the invading tide of European settlement in the 'nineties was due to the earlier predominance of the Masai, whose numbers and power were severely reduced by the rinderpest outbreak of 1889.

5. He demurred to the proposed expenditure of the £50,000 compensation grant. Admittedly the next of kin of the missing carriers could not be traced, but their tribal units were known, and under native custom the cash should have been, and should still be, handed over to them.

Lord Lugard promised to send in a memorandum expressing his views on these matters and the Secretary of State undertook to study it as a preliminary to further discussion.

After

After Lord Lugard had left the Secretary of State said that no further action was necessary until the memorandum had been received, when it should be sent on to him with a detailed commentary.

[signature] 21/9

17
END