

No. 17173

SUBJECT

CO 533/410

Segregation in Townships.

Sale of Land Plots.

Previous

1599 1/30

Subsequent

18096/32

(Formally (S.A.)
C.A.)

18112/33

India Chamber of Commerce in _____ 27 April 2
Great Britain

New H. of C.
this

Comment on legal decision in the appeal to
Privy Council in case of Commissioner for Lands and
Settlement & Shakerbai and state as to effects in
Kenya.

2 India Office _____ 27 April

Enclose copy telegram from Govt. of India
commenting on judgment delivered by Privy Council
and suggest that Govt. be invited to defer
further sales of Crown land where bidding is
restricted to Europeans.

I suggest that the matter
be referred to the Governor
for expression of his views
& that he be invited to
concur on the suggestion
of the S & S for India
provided there are no
substantial objections

(Reached me 27/4)
JMA

18/1/21

8

I attach a Memorandum together with
draft for consen., and the drafts deal with the
matter on the basis that only townships and not the
highlands are involved. This is I think clear
without any express statement to that effect.
When action is taken, the paper should be referred
to obtain (if the action is approved) two copies

Certainly /
see /
see /

of the shorthand notes of the proceedings
before the Privy Council.

11/11/41
11/11/41

There is a good deal
of fuss being made
over this; & implications
are being imported which
~~are not justified~~
~~are not justified~~
are not justified?

An attempt is being
made to upset the
strictly limited amount
of segregation which
had to be retained, without
giving up the general
principle of non-
segregation, in view
of the existing legal
commitment.

I expect that this
will come up before
the Joint Ctee. or Crown
Mtns, which is being
used as a means
for ventilating every
possible grievance

against the Kenya
Administration, with
regards of the subject
which the Ctee is supposed
to be dealing with!

Having regard to the
fact, as it now appears
to be, that the unwillingness
of Indians in E.A. to
co-operate in legislative
& municipal affairs
is confined to a small
body, who are violently
disowned by the rest,
there is little enough in
the argument in para 2
of I.O. letter.

But for all that
we can put the suggestion
to the Finance - widow,
it would be wrong not
to do so - ~~as a result~~

Sir S. G. G. G.

10/15/41

You should see that I have
no objection to the form being
used as proposed in the telegram,
but it is all rather flat: the
facts

Death common as decided
 at 3. The transcripts are
 supplied by Eric Sullivan
 handling the case of
 agents acting on their
 behalf. In this instance
 Mr. M. Burchells were asked
 informally for an estimate
 which they gave as £20-225,
 so we had better deal with
 them.

Approved as
 altered

10-21

J. Allen

2/5

Stall

G. To. Burchells

Cons

13/6
 23 May 1931

Burchells

26 May

acknowledge no. 9, with formal transcript and
 carbon copy of shorthand notes

11 See till ~~the~~ Conf _____ 28 May
 state no sales of land contemplated and
 agree to postponement for the present.

11a Connected copy of no. 11

12 India office 3 June 1931

Enclose copy come with Indian
 Chamber & Commerce in S. Africa

Mr. Patel's memorandum in 17211/30
 (which should be recirculated) deals with this
 matter. It may be convenient to summarise the
 position briefly as follows:-

The judgment does not affect the situation
 since it merely laid down that the Commissioner of
 Lands has the power to impose restrictions. The
 question whether and to what extent those powers
 should be exercised is for the decision of the
 appropriate constitutional authority.

The sole point at issue now appears to be
 the question of ownership and consideration of this
 matter must be taken as subject to the following
 caveats

1. The recognition of existing legal position
 does not touch upon the Title Paper;

2. The Government of India has accepted the
 legal principle laid down.

3. Application of the principle in particular
 cases is one for the Colonial Government and Legal
 Advisers; and...

4. The Colonial Government cannot be called upon
 to take action, which, in the opinion of the Legal
 Advisers, could not be sustained in law.

The question of ownership must now wait for
 examination of the notes of the proceedings before
 the Privy Council are received. As regards the
 postponement of sales it is desirable that the under-
 taking should be limited to saying that no sales are
 at present contemplated and that pending the
 examination referred to, the Secretary of State will

DESTROYED UNDER STATUTE

acc!

be consulted before any notices of sale are
issued. It would ~~be inadvisable~~ ^{be inadvisable} to
give ~~any~~ ^{any} undertaking which the Government of
India could use as a lever for dragging on the
argument as long as it pleases.

I submit for conson a draft letter to
the India Office and also draft telegram and
cable to the Governor. I think it will be
better to say nothing further to the Indian
Chamber of Commerce at present - see No. 5. The
Chamber will be informed of the position by the
Director of Commerce, with whom you will be seen from
the above communication.

Remuneration to be set
17/20 1 all ft
to be set

JWA
6/6/31

agree
see Parkinson
6/6/31

W.C.S. 6/6/31

- 3 To Governor - June 183 Conf - 11 Amal - 8 June
- 1 To S.O. 10 JUN 1931
- 4 To Conf (w/ 1200000) and 1st 10 JUN 1931

Return to
Mr. Allen
for further action

Index type and carbon copy of arguments in
appeal; state cost is £25.12.7.

I have spoken to Mr. Barclay - he
is going to send me the account from the
other firm.

JWA
15/6/31

17 Barclay
Enclose shorthand writer's account for transcript
of arguments and judgment. 16 June

I have spoken to the
Charles Barclay.

Tell the C.A. to
send an order of payment
to Messrs Barclay to the
order of Indian Chamber of
Commerce the amount of
their funds. And the ap
keep copy JWA

Let me see it

15/6
stave

18. To C.A. (enclosed 10 1/2 in nig) 10 JUN 1931

to Bhabha See also 17211

I am afraid this need not
come to you to consider what steps
should now be taken to elucidate
the question of ownership, which is
the foundation of the case.

No 19 - I put up a (very long & poor)
memo on the whole - which I
sent with the question of ownership.
I have had some of the
manuscript of the P.C. forwarding to
a copy of the Judgment

H.A. Allen
20/6/31

I cannot add anything to Mr. Allen's
P.C. memo.
The thing looks now, it seems to me,
to be now to you for the reasons of justification
for the transfer on a basis of ownership.

H.A. Allen
20/6/31
If you do not see the case in
before you go on leave,
I shall be very grateful.
We would like to see you at

Drafts now
dependent on
17211/31
10/7/31

17211/31 by Mr. O. A. ...
Governor for ... - do
not! to Patel.

all?
20.6.31
atuned
15/1/32
15 JUL 1931

20 To Gov Secy (H) (P. C. ...)
out to
H.A.

21 India Office 17.7.31

Ackre No. 14 and notes postponement of restricted sales
points out that Govt of India's telegram of 14th April
does not imply modification of view previously expressed
in regard to areas where legal obligations relating
to restricted residence and occupation exist.

? put to
H.A.
23.7.31

We had better keep the Govt
fully infd. - so send to
Gov. for inf. of conf.
copy of the letter ref'd.
(15) 20

all?
20.7.31
atuned

22 To Gov Secy (H) (P. C. ...)
A/1 8 JUL 1931

include copy telegram from Govt of India
and hope S.G.S. will agree to publicity
being given in India to decision of
Kenya Govt.

It is true that the Government of
Kenya agreed to postpone for the present further
sales of township plots restricting ownership
to Europeans; ~~and~~ the definite undertaking
given to the India Office in the last paragraph
of No. 14 was that the Secretary of State was
arranging with the Governor that pending further
examination of this particular matter, the
Secretary of State would be consulted before
any notices are issued for the sale of township
plots subject to this special restriction as to
ownership.

It would seem obviously desirable
that an announcement should be made in India
before one is made in Kenya, and that any
announcement should be in terms thought suitable
by the Governor of Kenya.

after speaking to Mr. Parkinson,
I submit a draft telegram to the Governor and
also a draft interim reply to the India Office.

J.H. Allen

7/8/31

acc. Parkinson
17/7/31

J. G. ...

8/8/31

To the Governor ... - Case - 102/31

Jo. S.O. (23 ans)

12 AUG 1931

DESTROYED STATUTE

26 Nov tel 26/1 secret
Agree that further sale of land in area affected
by High Council judgment should be postponed
and does not consider action should be announced
as general decision by Govt. Is examining
position and will forward dispatch.

We must wait for the dispatch.
but in the meantime? send a copy of the
telegram to the I.O. reference 25 L.P.

Bothwell ... 2/8
J.H. Allen
n/r

There was ~~no~~ need for us to object
to an announcement if the Government of Kenya were
prepared to agree, but as the Governor objects so
strongly I think we shall have to support him.
~~unwisely~~ In this connection it may be borne in
mind, at an earlier stage when the Government of
Kenya wished to publish correspondence they were
unable to do so because the Government of India
objected. Apparently because such publication would
have revealed the fact that the Government of India
had, in the course of ^{the Corcoran} ~~the Corcoran~~ said that it
really ~~did~~ not wish to challenge the principle on which
the policy of continuing limited segregation was based.

I agree that we should wait for the despatch, but in the meantime I think it would be better to refrain from making any communication to the India Office unless and until they remind, in which case it would probably be sufficient to inform them to the effect that a telegram has been received from the Governor in which he strongly deprecates any announcement at the present time and states that he is sending a despatch which the Secretary of State is awaiting, whereupon a further communication will be sent to the India Office.

W Allen

24/8/31

WJ

24/10/31

at once

Mr. Gordon
W Allen

Please see note

attached

Gordon
18.9.31

W Allen

Please see now Gandhi's letter attached.

Gordon
26.9.31

Mr. Allen

(The writer is the son of the Mahatma)

The letter rests on inability to appreciate

two points:- (1) The Privy Council judgment

was in no sense concerned with policy, but with the interpretation of the existing law. It imposed no "fresh humiliating disabilities" upon Indians. (2) The declaration as regards abandonment of segregation is still part of the policy of H.M.G., but to apply it in the sense suggested by the writer would be tantamount to a breach of faith with existing plot holders, and would expose the local Government to legal proceedings.

The India Office are fully acquainted with the position, and unless they write, no action seems necessary.

Put by.

W Allen
27/9

W Allen

27/9/31

Mr. S. Wilson

The minutes above are as follows. The minutes show that Mr. R. Hamilton is aware of the position, but will of course have had a copy of the minutes before him.

I have had no copy of the minutes.

W Allen
27.9.31

Mr. R. Hamilton

Indicated that you know about this, but I had feared better see this file before it is put by.

Thank you
W Allen
7.10.31

W Allen
6.10.31

27

Please see last paragraph of Mr. Allen's minute of the 24th of August. The despatch from the Governor should have been here by now, but we are in no hurry on this point, and I see no reason why we should remind.

I submit draft reply for consent.

Copy of correspondence to Governor, Secret, L.F. for information, Ref. 26.

Partment
12.11.31
B. White

* Es - but that is rather a long time ago so I have redrafted & added a sentence to the Gov.

St. Allen

16/10/31

16/11/31

29 To Gov. - 28 and - 17 NOV 1931

30 To Gov. Secret (w/cs 28 & 29) Com 17/11/31

Partment
last mail
OK
11/11

Office
Notes of the promised reply from Kenya has been received.

I suppose we had better remind again & tell the Gov. about this. But if this matter is allowed quietly to drop it is - from my point of view - by much the best thing.

J. G. Jones
5.2.32
St. Allen

Ref. to No 31 & say that as the despatch has not yet been received the Gov. is asking again being asked when it will be expected. Tell Gov. Secret of 30 Feb. We so have your reminder & ask when we can expect the result.

St. Allen

17/2/32

at all

30 To Gov. Secret - Com 17 FEB 1932

30 - 31 and - 17 FEB 1932

C. O.

17173/31/Kenya.

11

29

- Mr. Eastwood 12
- Mr. Freeston 12.
- Mr. Allen. 16/11
- Mr. Tamplin.
- Sir C. Bottomley. 16/11
- Sir J. Shuckburgh.
- Sir G. Grindle.
- Parli. U.S. of S.
- Parly. U.S. of S.
- Secretary of State.

C. D.
 R 17 NOV.
 D 17

55

Downing Street

17 November, 1931.

2 DRAFT for conson: *v. minute*

UNDER SECRETARY OF STATE

INDIA OFFICE.

(26)

Copy to Gov Secret. 17 NOV 1931

Sir,

I am directed by

Secretary Sir Philip Cunliffe-Lister to acknowledge the receipt of your letter E and O 5751/31 of the 30th of October, regarding the restrictions on the acquisition by Indians of township plots in Kenya.

2. AS stated in the letter from this Department of the 12th August the Governor of Kenya was consulted by telegram in regard to the desire of the Government of India to give publicity to the decisions communicated in the letter from this Department

(25)

(14)

Department of the 10th June. The
 Governor replied strongly deprecating
 any announcement at the time — on the
 ground it might seriously prejudice the
 position in Kenya but stated that a
 despatch would follow. The Secretary
 of State has not yet received the
 despatch, but the Governor is being
 asked when it may be expected.

I am etc.

(Signed) H. V. ALLEN

TELEGRAMS: WIRELESS, PHONE, LONDON

CABLES: WIRELESS LONDON

TELEPHONE: 6064-6065

OFFICE OF THE EUROPEAN
DELEGATES FROM BRITISH
INDIA TO THE INDIAN ROUND
TABLE CONFERENCE

12
27
199, PICCADILLY

LONDON, W. 1

25th September 1951.

Christopher Eastwood Esq.,
Colonial Office,
Downing Street,
S.W. 1.

Dear Eastwood,

Thank you for your letter of the 23rd. I did not forget
about sending you a copy of the letter which has been circulated
to all the delegates at the Round Table Conference, in
connection with the alleged discrimination of Indians in Kenya.

I have had some copies typed, and I send you one here with.

Many thanks for the assistance you gave me last Monday.

Yours sincerely,

A. H. E. Wilson

INDIAN CHAMBER OF COMMERCE, CALCUTTA.

135 Canning St .

20th June 1931.

To,
Indian Delegates to the Round Table Conference.

Dear Sirs,

I am directed by the Committee of the Indian Chamber of Commerce, Calcutta to invite your careful attention to the fresh disability to which Indians have been subjected in Kenya by a recent decision of the Judicial Committee of the Privy Council in regard to the Leases of Crown Lands in Mombasa. Briefly stated, the position is as follows:-

As far as the agricultural areas of the Highlands of Kenya are concerned the Government have restricted the grant of leases of Crown lands to Europeans only and further fortified the discrimination by statutory powers to the Governor to withhold his assent from any proposed subsequent transfer of such lands from the original grantee to an Asiatic or an African. The object of this scheme was to retain the Highlands area exclusively for the white population. In 1923, however the British Government made a definite declaration that the policy of residential segregation in township areas would be abandoned. This declaration was published in a white paper issued at the time by the Duke of Devonshire, the then Secretary of State for Colonies, as a Memorandum summarising the history of the Indian Question in the Kenya Colony and the Protectorate and setting out the general policy laid down by His Majesty's Government.

In regard to Mombasa to which the present case refers there had been for a number of years a residential area

reserved for Europeans. But until about five years ago the Crown leases contained a specific stipulation to the effect that no Asiatic or African could reside there except in the capacity of domestic servant of a European resident. But this restriction did not prevent Indians from bidding at the Auction of Crown Lands and thus they came to acquire several plots and put up subsequent buildings on them and let the same to European residents. In July 1928 the Commissioner for Lands for the first time in a notification of a sale of Crown Lands in the European area added a further restriction of a racial nature whereby Asiatics and Africans were not to be allowed even to bid as they had been doing previously. This was in addition to the existing stipulation in the lease stated above about Europeans only being permitted to reside on such plots. Mr. Abdul Nasim Kaderbhai on behalf of the Indian Community took steps to challenge the action of the commissioner for lands and preferred an appeal to the Appeal Court for East Africa. He won on the first point in regard to bidding and purchasing but lost on the second point about restriction on residence. On appeal to the Privy Council the Indian side has lost on both the points.

The decision of the Privy Council constitutes a most flagrant breach of the promise contained in the Declaration made by His Majesty's Government in 1923, about abandoning residential segregation in township areas, while the existing humiliating disability forbidding Asiatics and Africans to reside on Crown plots is now aggravated under legal sanction by Indians being prevented from bidding at auction and sales of Crown Lands. The decision of the Privy Council

puts the seal of legal authority and sanction to a humiliating and discriminatory measure aimed at a class of people because of their race and colour, regardless of the fact that those upon whom the same is imposed are British subjects owing allegiance to the same King.

It may be pertinent to state here, as was observed by the Secretary of State in his speech at the Banquet of the Indian Chamber of Commerce in Great Britain on the 30th December, 1929, that East Africa was opened up for the Empire by Indian merchants. But these services of the Indian merchants to the Empire apart from their long-standing vested interests in the land, have not obtained immunity for Indians from discriminatory treatment of a humiliating and disgraceful character, based on racial and colour prejudice.

My Committee fail to understand why Kenya which is a Crown Colony should countenance such discriminating treatment against British Indian subjects who have been residing there for a long time and who were the pioneers in building up the Colony. When Indians are subjected to discriminatory treatment in the Dominions, the British Government have expressed their inability to interfere with the discretion and powers of independent and self-governing members of the Commonwealth. But Kenya is directly under the British Government and the practice of discrimination there could only be with the sanction and support of the British Government, which is really responsible for the humiliating and differential treatment meted out to Indians by an administration which is under the control of the

Colonial Office and the British Parliament which is supposed to be the trustee of Indian interests. In the case of India, the British interests are clamouring that India shall abrogate her right of discrimination in favour of her own nationals. In this connection it is of interest to note that the fact of Indians being British subjects in Kenya has not provided automatic guarantees against the imposition of fresh humiliating disabilities, to say nothing about any approach to equality of treatment with the European residents, British or non-British. Even the Germans who were enemies of His Majesty's Government during the last war would receive preferential treatment as against Indian fellow-subjects of the Crown who are supposed to be citizens of the Empire and with whom equality of status is being demanded by British traders in India on the ground of their being British subjects.

My Committee desire to bring this matter to your notice, on the eve of the discussions at the Round Table Conference in regard to the future constitution of India in order that this may furnish an unanswerable argument for India reserving to herself the right of discrimination in favour of her own nationals.

My committee would also suggest for your consideration the necessity of the Kenya Government repealing without delay this discriminatory measure of a most humiliating and disgraceful character, based on racial and colour prejudice against the Indian residents in Kenya.

Yours faithfully,

M.P. Gandhi,

Secretary.

Mr. Molson, who is Secretary of the European Delegation to the Round Table Conference, called this afternoon. He produced a printed letter signed by Mr. Gandhi, and circulated to all members of the Round Table Conference. This letter dealt with the recent "extension" of discrimination against Indians in Kenya by the restriction on ownership imposed by the recent decision in the Judicial Committee of the Privy Council, and arguing that the existence of discrimination against Indians in Kenya provided justification for discrimination against Europeans in India.

I explained the position to the best of my ability to Mr. Molson, who went away to consult the report of the proceedings in the Judicial Committee.

He said that his delegation would probably have to take the matter up with Sir Robert Hamilton.

Mr. Molson promised to let me have a copy of the letter from Mr. Gandhi.

A /

Randall
18.9.31

(see no. 19 for a summary of the position)

Fortunately he already has a file memo
of the subject in No 19. The Eastern I
of Annuaire is already before Sir R Hamilton
last in

J. H. [unclear]
19/9
atance

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

Dated the 19th August, 1931. Received at 12.48 p.m. on the 19th August.

no 24
no 4
no 11

No. 241 SECRET. Reference to your Secret Telegram No. 244 of 10th instant. I acquiesce in suggestion made in your Confidential telegram No. 159 14th May that further sale of land in area at Mombasa affected by Privy Council Judgment should be postponed pending a further examination of the matter - see my confidential telegram No. 171 20th May - and do not consider this action should now be announced as a general decision by this Government.

no 20

I have now received your despatch confidential (4) 15th July and am further examining the position but until I am in a position to indicate what this Government is prepared to advise I strongly deprecate issue of any announcement at present which might seriously prejudice the position here.

no 4

I may remark, in regard to the ground for postponement put forward by Secretary of State for India in your telegram 14th May concerning Congress decision that participation in Legislative Council affairs has not answered, in fact, materialised as Indian members elected have declined to take their seats. Despatch follows.

(Delayed in Tel Section
for repetition)

24
19

C. O.

10 AUG
10

X.171/5751 Kenya.

Coed and
W.D. 2/2/31
10/4

Mr. Allen 7/8
Mr. Tolson 8/21

Mr.
Mr.

100
26

Sir C. Bonamy 8-8-31

No. Secret.

Sir J. Shackleton

Sir G. Grindell

Form U.S. of S.

Part U.S. of S.

Secretary of State

My confidential despatch (4)

(20) of the 15th July. Government of India

for COBSON v. mark

DRAFT. Telegram.

enquire whether Colonial Office have any objection to publicity being given to ~~the~~ decision of Kenya Government to postpone for the present further sale of township plots where bidding is restricted to Europeans, also to simultaneous announcements that question of restriction of ownership by Indians is receiving less attention of the Secretary of State for the Colonies, who proposes to examine the matter further in consultation with the Government of Kenya. I suggest that it would be best for announcement to be made by you in Kenya and simultaneously in India. ^{By Govt. of} Should be glad if you will telegraph text of announcement you would consider suitable. I will then arrange with India Office with

Governor Nairobi.

2 drafts.

a view to simultaneous publication in India
and for this purpose it would be convenient

if you would propose a date for publication
not earlier than three weeks from date
of your telegram.

SECR.

100 2310

Further communication on this subject should be addressed to:
The Under Secretary of State for India,
Department,
Economic & Overseas
India Office,
London, S.W. 1.
N. & O. 5844/31.

INDIA OFFICE,

WHITEHALL,

LONDON, S.W. 1.

5th August, 1931.

RECEIVED
5 AUG 1931
COL. OFFICE

Sir,

With reference to the correspondence ending with the letter from this Department dated 17th July 1931, No. 4231/31, on the subject of the restrictions on the acquisition by Indians of township plots in Kenya, I am directed by the Secretary of State for India to transmit, for the consideration of the Secretary of State for the Colonies, copy of

telegram received from the Government of India.

Dated 20th July 1931)

2. Mr. Secretary Benn trusts that Lord Passfield will be able to agree that publicity might be given in India to the decisions communicated in your letter of the 10th June, 1931, No. 17173/31, as suggested in the Government of India's telegram.

I am, Sir,

Your obedient servant,

E. Turner

The Under Secretary of State,
Colonial Office,
S. W. 1.

14 AUG 1931

1931

FHB/DH.

(40 words)

4065.

DECODE OF TELEGRAM.

From Government of India, Department
of Education, Health and Lands,
to Secretary of State for India.

Dated Simla, 20th July, 1931.

Received 6.30 p.m., 20th July, 1931.

603/08.

Reference correspondence ending with
India Office letter dated 19th June, 1931, No.
E. & O. 4231-31. Town-ship plots at Mombasa.
We shall be glad to be informed whether Colonial
Office have any objection to publicity being
given to the decision of Kenya Government to
postpone for the present further sale of town-
ship plots where bidding is restricted to
Europeans, also to simultaneous announcement
that question of restriction of ownership by
Indians is receiving the attention of the Secretary
of State for the Colonies, who proposes to
examine the matter further in consultation with
the Government of Kenya.

Any further communication on this subject should be addressed to—
 The Under Secretary of State for India,
Economic & Overseas Department,
 India Office, London, S.W. 1,
 and the following reference quoted—
E. & O. 4231/31.



INDIA OFFICE,
 WHITEHALL,
 LONDON, S.W. 1.

RECEIVED
 INDIA OFFICE
 14 July, 1931

July, 1931.

Telephone—
 Victoria 8023. I.O. Ext. No. _____
 Telegrams—
 Reinaxatum, London.

Sir,

I am directed by the Secretary of State for India to acknowledge with thanks the receipt of your letter of the 10th June, No. 17173/31, on the subject of the restrictions on the acquisition by Indians of township plots in Kenya, and to state that a copy of your letter has been communicated to the Government of India. Mr. Benn notes that the Governor of Kenya has now reported that no further sales of township plots in Mombasa are at present contemplated, and that the Governor agrees to the postponement for the present of sales where the bidding is restricted to Europeans.

2. As regards the third paragraph of your letter, I am to point out that the Government of India telegram of 14th April does not imply any modification of views previously expressed by them in their letter of 5th January, 1928, or elsewhere as to the extent of the areas in regard to which

there/

The Under Secretary of State,
 Colonial Office,
 S.W.1.

Copy - Gen Sec (S) - 8 JUL 1931 A

14

sent to
 1007/15

there are legal obligations compelling His Majesty's
Government to acquiesce in restrictions relating to
residence and occupation.

I am, Sir,

Your obedient Servant,

E. Turner

C. O.

C/17/3/31/kenya

20/24

Mr. Allen. 27/6

Mr. Anshe 1/7

Mr. Robinson 27/7/31

Mr. Tomlinson

✓ Sir C. Bottomley. 2.7

• Sir J. Shuckburgh

Sir G. Grindall

✓ Presid. U.S. of S.

✓ Party. U.S. of S. 2.7.31

✓ Secretary of State. 8h

ALL 10/26

DOWNING STREET,

C. D.
R 8-JUL
D 9

15. July 1931.

Sir,

DRAFT. Carson.

(15)

KENYA

CONFIDENTIAL (st.)

Gov. Byrne.

Transcript
(one copy only,
(and a spare copy for this
purpose is in X.B.A.)

Am 4/5
10/13/31

In continuation of my Confidential despatch of the 10th June regarding restrictions on the acquisition of township plots by Indians, I have, etc., to transmit to you the accompanying transcript of the shorthand notes of the proceedings before the Judicial Committee of the Privy Council on Appeal No.8 of 1930 "The Commissioner for Local Government, Lands and Settlement and Abdulhusein Kaderbhai and Cross Appeal Consolidated".

2. You will observe from the correspondence which has already been sent to you that the Government of India have represented that the legal obligations which have compelled His Majesty's Government to acquiesce

in the policy of partial segregation
should, it appears to them, be
adequately satisfied by limiting
restrictions only to residence
and occupation, and have asked
that sales should be based
on the basis of the following
criteria:
1. The person should be
a citizen of the State of
California.
2. The person should be
a resident of the State of
California for at least one
year prior to the date of
the sale.

Further, it is noted that
the restriction of ownership
as the sole purpose of these
sales is being arranged that
in the meantime I should be
consulted before any notices
are issued regarding the sale of
property subject to this

restriction

*in consultation
with you;*



restriction. Also, as misconceptions appear to have arisen as to the scope and affect of the judgment of the Judicial Committee of the Privy Council, I felt it desirable having regard also to the reference in the

(In 2/
(7)

telegram from the Government of India, which accompanied my ^{Copy} ~~Copy~~ ^{of the 15th} ~~of the 15th~~ ^{May.} to enforcing the judgment, to draw

attention to the statement in the judgment that "the Courts are concerned only with their ^{here} question of law,

^{viz.} namely; the powers ^{of} for the Commissioner of ~~Native Lands and Settlement~~ under the ~~Crown Lands Ordinance~~, and that questions of policy, or, in other words, how the legal power shall be exercised are not matters for the legal tribunal but have to be determined by the ^{authorities} ~~legal~~ constitutional authority. ~~The result~~ (has been) ~~the result~~, ~~the~~

~~of the proceedings before the Judicial Committee therefore did no more than determine the legal point and had the~~
question of ~~policy~~
no



restriction. Also, as misconceptions appear to have arisen as to the scope and affect of the judgment of the Judicial Committee of the Privy Council, I felt it desirable having regard also to the reference in the

(In 21
(7)

telegram from the Government of India ^{which accompanies my Conf. ltr of the 15th May,} to enforcing the judgment, to draw

attention to the statement in the judgment that "the Courts are concerned

only with their ^{here} question of law, ^{viz.,} the powers ^{of} for the Commissioner

~~of Native Lands and Settlement~~ under the ~~Crown Lands Ordinance~~ and that

questions of policy, or, in other words, how the legal powers shall be exercised

are not matters for the legal tribunal but have to be determined by the ^{appropriate} ~~proper~~

constitutional authority. ~~The result~~ (has been) ~~in effect~~, ~~the~~ of the proceedings before the Judicial

Committee therefore did no more than determine the legal point and had ~~the~~

Question of Policy

~~no~~

Review for consideration
in relation to policy.

4. Before dealing with the particular point now in question,

namely: the restriction of ownership, it would be convenient to

summarise certain relevant considerations which are recorded

in the earlier correspondence.

These are

(i) The recognition of the

principle of local autonomy

in accordance with the principles of the

White Paper of 1923 (letter to

the India Office, 4th July 1927)

(No. 5 on 10227/27)

(No. 7 on 17173/31)

(No. 3 on 10227/27)

(No. 6 on 10227/27)

(No. 3 on 10227/27)

(No. 6 on 10227/27)

(No. 3 on 10227/27)

(No. 6 on 10227/27)

(No. 3 on 10227/27)

(No. 6 on 10227/27)

✓ despatch No.387 of the 11th May, 1927).

(iii) The application of the principle in particular cases is one for the Government of Kenya and its Legal Advisers (letter to the India

✓ Office of the 11th May, 1927, also enclosed in my predecessor's despatch No.387 of the 11th May, 1927); and

(iv) The Government of Kenya

is not called upon to take action which in the opinion of its Legal Advisers could not be sustained in law (letter to the India Office of the 26th November

✓ 1926, which also accompanied my predecessor's despatch No.387 of the 11th May, 1927).

5. Turning now to the sole issue remaining, i.e. the restriction on ownership, the following brief references may be made to earlier

correspondence.

(No. 5 on 10227/27)

(7761/26)

(No. 5 on 10227/27)

(No. 7 on 17173/31)

(No. 3 on 10227/27)

(No. 6 on 10227/27)

correspondence. In the memorandum
by the Commissioner of Lands
enclosed in the late Sir Robert
Coryndon's despatch No. 374

of the 1st April, 1924, it was

(Page 1 of memo.
with 21325/24)

stated that from time to time

land had been sold by auction

with only European or American

bidders admitted, the leases

issued containing a clause

prohibiting transfer without the

consent of the Government.

In a subsequent despatch No. 1191

46145/24. (para 11)

of the 4th September, 1924

Sir Robert Coryndon summarized

the position generally and remarked

that "While there are no cases

in which Crown leases specifically

prohibit Asiatic or European owner-

ship, there are a number of plots

in effect non-transferable between

races on account of a restriction

as

21325/24

No. 13 on 10221/27.

(para 11)

27

as to residence; this differentiation
was apparently not expressed with
sufficient clearness in the Commissioner's
memorandum attached to my despatch No.
374 of the 1st April, 1924. The
actual position in all the townships
was investigated; and as an illustration,
I would refer to the particulars given
in ^{Sir} ~~Mr.~~ (now Sir) Edward Denham's despatch
No. 580 of the 19th August, 1927, as
to plots already alienated in the
restricted area in Mombasa and as to
the nature of the covenants in force.
These particulars related to sales in
the years 1912, 1913 and 1918. In each
case the covenants included restrictions
as to residence ^{and/or} ~~and~~ occupation, but
the restrictions quoted include no
mention of ownership. The plots disposed
of in 1912 were sold to Europeans and
in the case of the sales in 1913 and
1918, purchase was restricted to

Europeans

Europeans. There were also other plots which have been leased to Europeans from time to time on similar conditions.

The area was also stated to include Government official residences and leases to the Bombasa Golf Club and the

East African Nursing Association. *J. Ernest Bunker*
The acting Governor

Further said that there was not a single Indian occupation of the area and that all the houses erected on it were occupied by Europeans.

6 There is of course no question of departing from the policy of abandonment *restrictions* in all cases in which this can be done without exposing the Government to the risk of unnecessary legal proceedings and the only point which calls for further examination

(para 6)

Opinion which is/should not be successful Courts;



is therefore whether the abandonment would result in the limitation of the right to bid for and purchase plots in restricted areas and in townships could be sustained in law. I should therefore be glad if you would now cause the whole position to be reconsidered by your legal

advisers and furnish me with *a full statement of the reasons and justification for the restriction as to ownership.*

I have, etc.,

7. I have in my private

(Off on 17/21/31)

last copy of this of even date forwarded to you a memo by Mr. H. B. Patel in which he refers, among other matters, to the Eastern Salt with in this respect.

I have

(Signed) PASSFIELD.

19

SEGREGATION BETWEEN EUROPEANS AND ASIATICS IN TOWNSHIPS
IN KENYA.

A. THE POLICY.

(a) White Paper, 1923.

The relevant passage of the White Paper of 1923 is as follows:-

"The next matter for consideration is that of segregation of the European and non-European races. Following upon Professor Simpson's report, a policy of segregation was adopted in principle, and it was proposed to Lord Milner to retain this policy on sanitary and social grounds. So far as commercial segregation is concerned, it has already been generally agreed that this should be discontinued. But in regard to residential segregation, matters have been in suspense for some time, and all sales of township plots have been held up pending a final decision on the question of principle involved. It is now the view of the competent medical authorities that, as a sanitation measure, segregation of Europeans and Asiatics is not absolutely essential for the preservation of the health of the community; the rigid enforcement of sanitary, police and building regulations, without any racial discrimination by the Colonial and municipal authorities will suffice. It may well prove that in practice the different races will, by a natural affinity, keep together in separate quarters, but to effect such separation by legislation enactment except on the strongest sanitary grounds would not, in the opinion of His Majesty's Government, be justifiable. They have therefore decided that the policy of segregation as between Europeans and Asiatics in the townships must be abandoned."

(b) Continuance of racial segregation.

As a result of the White Paper decision, the Governors of Kenya and Uganda were in July, 1923,

instructed to revoke all restrictions in leases prohibiting transfer to Europeans from Indians or from Indians to Europeans, as the case might be, or occupation by a member of a ^{different} race from the lessee.

51989/23

In Uganda, as a result of this a notice was ~~thereupon~~ issued by the Land Officer that in the case of leases where a restrictive covenant as to residence or occupation occurred, the Governor did not propose to insist upon the observance of the covenant, and that no future leases should contain such covenants. A European lessee then raised the question whether this decision formed a breach of contract with him, and the Attorney-General of Uganda advised that the point made was good in law, and that the holder of a lease in the area formerly reserved for Europeans would have ~~been~~ a good action if any plot in that area were leased to an Asiatic.

14629/24-

Similarly in Kenya, the Governor on being notified of the White Paper decision to abandon segregation in townships, pointed out that a legal question of considerable importance was involved, and that he was advised by his Attorney-General that the revocation by the Crown of restrictive covenants relating to transfer or occupation of plots or buildings by persons of different race from those to whom the premises have been leased could not fail to prejudice the interests of parties who purchased in the knowledge of these restrictions and that the Government might expect heavy claims for damages.

21325/24

On receipt of these representations from Kenya and Uganda the matter was fully gone into here. The general opinion of our legal advisers ^{was} that in the case of areas sold or leased by the Crown in plots at auction where only Europeans were allowed to bid and the leases contain covenants against transfer to, or residence by, other than Europeans,

the Crown could not waive the covenant without rendering itself liable to legal proceedings. Similarly in the case of areas sold or leased by the Crown in plots at auction where only Europeans were allowed to bid and subject to undefined restrictions on transfer, the Crown could not, without equally rendering itself liable to legal proceedings sanction transfer to a non-European if in any particular area a practice exists amounting to custom, that no assent to transfer is allowed to other than Europeans. In all other cases no difficulty ^{was} ~~is~~ thought to exist as to waiving the restrictive covenant as to residence or occupation.

It was decided to adopt the view of the legal advisers and to apply it as follows: Each part of township areas, both in Kenya and Uganda, will have to be considered on its merits. Where no difficulty exists as to waiving the restrictive covenant, segregation should be abandoned under the White Paper decision. On the other hand, segregation should continue in cases in which the legal advisers and the local Governments are satisfied that abandonment would not be sustained in law.

B. THE PRINCIPLE.

The decisions taken in 1924 in regard to the continuance of partial segregation were based upon the general principle that where the same vendor sells to a number of persons plots of land, parts of a larger property, and exacts from each of them covenants imposing restrictions on the use of the plots sold and are meant by the vendors and understood by the buyers to be for the common advantage of the several purchasers, the restrictive covenants inure for the benefit of the purchasers and should have rights not only against the vendor, but inter se; and these rights must exist in respect

7761/26, and see also memo. by Mr. Bushe on 14629/29.

of the holder of the property to be sold as a part of the scheme.

10221/27.
No 3

This principle has been accepted by the Government of India which stated in a letter dated the 17th February, 1927, that they did not desire to challenge it, adding, however, that the practical application of the principle gave rise to difficulties and left room for differences of opinion. It appeared from a later telegram of the 18th June, 1927, that the Government of India regarded this addition as a qualification of the acceptance of the theoretic principle.

10221/27.
No 8

C. APPLICATION OF THE PRINCIPLE.

This aspect of the matter became acute in view of a decision in 1926 to put up for sale, subject to restrictions, certain plots in Mombasa *Mombasa*

The matter has two aspects:-

- (a) the areas to which the principle applies;
- (b) the nature of the covenants in force.

(a) Areas. The Government of Kenya had proceeded to an examination with a view to ascertaining to what extent it was legally possible to waive restrictive covenants. The results were communicated to the Government of India ^{which} in a letter of the 17th February, 1927, and asked for an opportunity to satisfy themselves that the action which it had been decided to take did not go beyond the necessities of such case, and specified certain points on which they would be glad of further information in regard to the exact nature of the restrictions in force, and the number and location of the plots already alienated - the point being that the Government of India wished to contend that the principle could apply only to plots already sold

Enc. 3 to
in 10221/27.

or leased to Europeans by the Crown.

On receipt of this request the Department put the following questions to Mr. Bushe:-

Minute on 10221/27.

- (a) Is it possible, except on the spot, to judge whether the action in any particular case goes beyond the necessities;
- (b) Is it practicable for the Colonial Government to supply the Government of India with such complete information as would enable their legal advisers to form a useful opinion;
- (c) Would Mr. Bushe on such information as India asks for be prepared to express an opinion, and if so would he be able to go so far as to recommend the Secretary of State to overrule the local view.

To these enquiries Mr. Bushe replied as follows:-

Below 5 on 10221/27.

"If one had all the information asked for by the Government of India, together with copies of all the leases and the conditions of sale, and what-not, one would, no doubt, form a view in relation to each individual site. But I am ~~am~~ strongly of opinion that we ought not, and indeed cannot, do more from this end than enunciate a principle. This I have done, and it has been accepted by the Government of India. Its application must be left to the local Government, and I see no reason why it should be assumed that they will not act reasonably and honestly. I should not encourage the extensive form of interference suggested by the Government of India".

5 on 10221/27.

The India Office were accordingly informed on the 11th May, 1927, that the C.A.G. would be asked

to furnish as far as practicable the further information desired by the Government of India, but that as the Government did not challenge the principle the Secretary of State was not prepared to interfere with the discretion and responsibility of the Colonial Government in its application. In an earlier letter of the 26th November, 1926, the India Office has been informed that in applying the principle the Colonial Government was not called upon to take action which their legal advisers were satisfied could not be sustained in law. The Secretary of State also declined to withdraw the discretion given to the Colonial Government as regards the proposed sales. The letter ^(4 July 1927) so informing the India Office added that the Secretary of State was not prepared to admit that the recognition of the legal position already existing in any way trespasses upon the principles of the White Paper of 1923. This attitude was reaffirmed in a letter to Mr. Polak of the 26th August, 1930.

7761/26.

10 on 10221/27.

3 on 15991/30.

(b) Covenants.

The restrictions discussed relate to (i) residence and occupation, and (ii) ownership.

(i) The position as regards this aspect of the matter is not in question, as is shown by the latest communication from the Government of India, which ^{expresses the opinion} ~~regards the statement~~ that the legal obligations which have compelled H.M.G. to acquiesce in the policy of partial segregation ~~is not~~ adequately satisfied by limiting restrictions only to residence and occupation.

(ii) The sole point at issue therefore is the question of ownership, and this is referred to later.

Enc. to 2 on 17173/31.

D. PUBLICATION OF PAPERS.

Mr. Patel complains that although Sir Edward Grigg promised to furnish a deputation of Indian and Arabs which waited upon him on the 15th May, 1926, with the gist of the correspondence on the matter between the Colonial Government and the Colonial Office, ~~but~~ that promise was never fulfilled. It would seem convenient to deal with this particular point before proceeding further.

Arising out of the proposed sale of plots in 1926, the Government of India asked for the facts as regards the sales for publication in India if it was thought desirable. The Colonial Office replied to the effect that the Secretary of State had no knowledge of any restrictions to place on sale land in Mombasa other than plots to be sold in accordance with proposals already submitted, but offered to make enquiry by telegram if necessary; before a reply was received from the India Office the Governor had telegraphed asking for authority ^{to} ~~on~~ published ^{British} ~~correspondence~~. Putting this enquiry to the India Office the then Secretary of State said that so far as he was concerned he was prepared to agree to the publication of papers as proposed by the Governor, and enquired whether there was any objection to publication so far as the India Office correspondence were concerned. The India Office replied that the Government of India were prepared to agree to the publication of papers on the assumption that restrictions applied only to plots sold or leased to Europeans by the Crown, and on condition that this point is made explicit in an explanatory statement. Otherwise, if restrictions were to be applied to plots not yet alienated the Government of India asked for postponement of publication pending further consideration of so extensive an application of the principle of segregation. This question

See 1724/31.

4655/26.

5916/26.

6554/26.

3 on 10221/27.

question of the extended application of the principle has already been dealt with above, and it is only necessary to note here that in view of the contention that the principle applied to areas, not merely to plots not yet alienated, the Government of India eventually asked that the Governor of Kenya should be informed that the papers cannot be published for the present.

The fact is, therefore, that failure to publish was due to objections not on the part of the Colonial Government or the Colonial Office, but of the Government of India, and it does not seem an unfair assumption that their attitude was largely dictated by the fact that they could not challenge the legal principle involved, but did not wish to broadcast the fact that they were unable to do otherwise than accept it.

~~1899~~ 1899/30.

E PRIVY COUNCIL JUDGMENT.

The case before the Judicial Committee was concerned with the question whether a power exists to limit the bidding to Europeans only when township plots are being sold by auction and whether a condition that a township plot sold by auction shall be occupied by Europeans only may lawfully be inserted in the lease.

The Judicial Committee found for the Government contentions both as regards the limitation and the restriction as to residence. as to bidding and purchase. The point for decision was a very narrow one. No one contested that the Governor had the right to impose the conditions and the only question was whether the Commissioner of Lands had the power under the Ordinance. The result did no more than determine the legal point and had nothing
whatever

whatever to do with policy. As pointed out in the Judgment itself the Courts are concerned with the bare question of law viz. the powers of the Commissioner under the Ordinance; questions of policy, or in other words, how the legal powers shall be exercised are not matters for the legal tribunal, but have to be determined by the appropriate constitutional authority.

F. RESTRICTION ON OWNERSHIP.

As already indicated the restrictions on residence and occupation are not in question and the sole point at issue is the restriction on bidding and purchase i.e. ownership.

2/13/74

In a memorandum by the Commissioner of Lands sent home by the Governor of Kenya in a despatch dated the 1st April 1964 it was stated that land had been sold by auction with only European or American bidders admitted and the leases issued contained a clause prohibiting transfer without the consent of Government. But

46/4/74

in a subsequent despatch dated 4th September 1964 the Governor summarized the position and while there were no cases in which pointed out that, Crown leases specifically forbade Asiatic or European ownership,

there were a number of plots in effect non-transferable between races on account of the restriction on residence. The Governor added that this differentiation was apparently not expressed with sufficient clearness in the above-mentioned memorandum by the Commissioner

of Lands.

13
to 2nd (13)

The actual position in all the townships affected was investigated and in a despatch dated 19th August 1927 the ^{Acting} Governor sent home particulars as to the plots already alienated in the restricted area in Mombasa and as to the nature of the covenants in force. These related to sales in 1912, 1913 and 1918. In each case the covenants included restrictions as to residence and occupation/ ^{but} the extracts quoted included no mention of ownership. The 1912 plots were sold to Europeans and in 1913 and 1918 purchase was restricted to Europeans. There were also other plots which had been leased to Europeans from time to time on similar conditions. The area also includes Government official residences and leases to the Mombasa Golf Club and the East African Nursing Association' ^{Acting} The Governor further stated that there was not a single Indian occupant of any of the area and that all the houses erected on it were occupied by Europeans. The bidding at the later sales was also restricted to Europeans.

2. GENERAL.

Consideration of the question of the restriction as regards ownership and its relation to the policy laid down in the White Paper of 1925 as subsequently modified must take account of the following points which have been included in correspondence with the India Office:-

- (1) The recognition of an existing legal principle does not trespass on the White Paper;
- (2) The Government of India has accepted the legal principle laid down;
- (3) The application of the principle in particular cases is one for the Colonial Government and its legal advisers;
- (4) The Colonial Government cannot be called upon to take action which, in the opinion of its legal advisers, could not be sustained in law.

J. H. Allen

- 15/6/31

C. O.

Mr. Pooley 19/6/31.

Mr. Venning.

Mr. Allen.

Mr. Tomlinson.

Sir C. Bottomley.

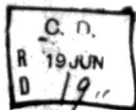
Sir J. Shuckburgh.

Sir G. Grindle.

Permt. U.S. of S.

Parly. U.S. of S.

Secretary of State.



19 June, 1931.

Gentlemen,

I am etc. to transmit

to you an account ~~for Rs 10 7~~ from Messrs. Marten

Meredith and Company, 8, New Court,

Carey Street, W.C.2., in respect of

the ~~transcript~~ ^{total of copies of} of the shorthand notesof the proceedings before ^{judicial committee} the Privy

Council on Appeal No. 8 of 1930 "The

Commissioner for Local Government

Lands and Settlement and Abdul Husein

Kaderbhai and Cross Appeal Consoli-

dated,"; and to ^{request} ~~authorize~~ ~~ask~~ to send~~a voucher for this amount to Messrs.~~

Burchells, 5, The Sanctuary, S.W.1.,

as ^(transfer £25.12.7) ~~the~~ payment to the order of Messrs.

Marten, Meredith and Company.

2. The amount in question
should be charged to Kenya funds.

I am etc.

(Signed) H. T. ALLEN

DRAFT.

The Crown Agents
for the Colonies.

Account (Orig. encl. to
No. 17)

(Copy of Account
to be kept for
record.)

I have spoken to
Mr. Collier by Dept
I understand this
off will do
H. T. ALLEN



41
17

5, The Sanctuary,
Westminster, S.W.-1

16th June, 1931

Dear Mr. Allen,

Abdulhussain Kadirbhai's Appeal.

As requested by your telephone message I have obtained and herewith enclose you the Shorthand Writers account for the transcript of the arguments and judgment on the Privy Council Appeal.

Yours sincerely,

Charles D. Darvell

Mr. G.
Mr. Allen Esq.,
Colonial Office,
Downing Street,
S.W.1.

8 New Court,

Carey Street, London

W.O.2

42
June 1931.

Messrs. Burchells
to
Marten Meredith & Co.
Shorthand Writers.

£. S. D.

1931.

Commissioner for Local
Government Lands and Settlement
and Abdulhusein Kaderbhai

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5th June, 1931

Telephone - Victoria 8431

PLEASE ADDRESS YOUR WRIT TO THE FIRM AND REFER TO NO.

17173/31

RECEIVED
6 JUN 1931
COLL. OFFICE

ACKD, HYPE

The Commissioner for Local Government Lands & Settlements
Abdulhassim and ~~Abdullah~~

no. 9

With reference to your letter of the 23rd ultimo we now send you a type and carbon copy of the arguments before the Judicial Committee of the Privy Council on this Appeal and the cross Appeal. The cost of these copies is £25.12.7

We are,

Sir,

Your obedient Servants,

Burnells

The Under Secretary of State,
Colonial Office,
Buckingham Palace,
Westminster, S.W.1.

below

Copy to Secy sent to Dept
JMA 20/6

Copy sent to Burnell - Case book (42) - 15 JUL 1931

IN THE PRIVY COUNCIL.

COUNCIL CHAMBER, WHITEHALL, S.W.

Tuesday, 3rd February, 1931.

Present:

LORD BLANESBURGH.

LORD ATKIN.

SIR LANCELOT SANDERSON.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Between:

THE COMMISSIONER FOR LOCAL GOVERNMENT
LANDS AND SETTLEMENT Appellant
(Original Respondent).

and

ABDULHUSEIN KADERBHAI Respondent
(Original Applicant).

and

Between:

ABDULHUSEIN KADERBHAI Appellant
(Original Applicant)

and

THE COMMISSIONER FOR LOCAL GOVERNMENT
LANDS AND SETTLEMENT. Respondent
(Original Respondent).

(Consolidated Appeals).

(Transcript of the Shorthand Notes of Marten, Meredith & Co.,
8, New Court, Carey Street, London, W.C.2).

Counsel for the Appellant (Original Respondent): THE SOLICITOR
GENERAL (Sir R. Stafford Cripps, K.C.) and MR. E.W. LAVINGTON,
instructed by Messrs. Burchells.

Counsel for the Respondent (Original Applicant): SIR THOMAS
INSKIP, K.C. and DR. C.J. Colombos, instructed by Mr. Hy.S.
L. Polak.

THE SOLICITOR GENERAL: May it please your Lordships. In this case I appear with my learned friend Mr. Lavington for the first Appellant, the Commissioner for Local Government Lands and Settlement, and my learned friends Sir Thomas Inskip and Dr. Colombos appear for the Respondent.

LORD BLAKESBURGH: You are the Respondent on one appeal and the Appellant on another?

THE SOLICITOR GENERAL: Yes, my Lord. I think the chief point is really raised upon my appeal, and I think it will be convenient if I open both appeals together. My learned friend Sir Thomas Inskip agrees that that will be the convenient course.

This appeal is from the Court of Appeal for Eastern Africa, and it affects the powers of the Governor or his officer, the Commissioner for Local Government Lands and Settlement as regards the sale of Government land in Kenya Colony and Protectorate. It deals substantially with the question of town plots in Mombasa Island. The Respondent, Abdulhusein Kaderbhai is an Indian and a British citizen. The question that is raised is whether the Commissioner has power to restrict an auction to bidding by Europeans only to the exclusion of Indians and other citizens, and also whether he has power to include a special covenant in the special conditions of the auction restricting the use of land afterwards to Europeans alone. As regards the first point as to the restriction of the bidders at the auction, the learned acting Judge in the first Court was in favour of the Commissioner of land and was unanimously upset by the Court of Appeal. So that I have a unanimous Judgment of the Court of Appeal against me on that point. On the second point, all four Judges were in my favour. That is the point upon which my learned friend appeals.

Now the most important point before your

Lordships which is quite a short point. Is the question whether, where there is an auction, there can be a limitation of the bidders. It turns, in my submission to your Lordships, entirely upon the Ordinance.

The form of the motion was for a mandatory injunction against the Commissioner for Local Government Lands and Settlement to permit the respondent to bid at the auction, and also to cancel a Special Condition in the terms of the Auction Notice which limited the subsequent user of the land. It was a Motion for a mandatory injunction.

LORD ATKIN: For mandamus?

THE SOLICITOR GENERAL: I think actually it must have been for a mandatory injunction to cancel a certain condition in the Conditions for Sale. It was expressly stated that no technical objection would be taken in the first Court by the learned Attorney General who appeared on behalf of the Government; but the whole case has proceeded upon the basis that it is desirable to have this point settled irrespective of whether these are the right proceedings or not.

LORD ATKIN: I dare say their Lordships will assent to that, but it is a matter which the Courts might well consider as to whether or not other proceedings should be taken. Representing the Crown, you may have some views about it.

THE SOLICITOR GENERAL: I respectfully agree with your Lordship that there is a question, but as that was the submission in the Court below, it would not be right for me to raise any question with regard to that, I think.

LORD ATKIN: I do not see why we should not hear that.

SIR LANCELOT SANDERSON: Was there a suit?

THE SOLICITOR GENERAL: No, my Lord, it was simply a Motion before the High Court of Kenya.

LORD ATKIN: It was an application for the prerogative writ.

THE SOLICITOR GENERAL: Yes, in form it was, but it is a little

allowed to purchase more than one plot." Your Lordships will see there are two restrictions upon the number of people who bid at the auction, firstly, only Europeans and, secondly, after the first plot has been sold, the buyer of it may not bid again. Then below there is a number of other conditions; "(2). Each plot will be auctioned separately. (3) The amount of the advance of each bid will be regulated by the auctioneer, and no bidding shall be retracted. (4) The highest bidder will be the purchaser, but if any dispute arise as to any bid, the plot will be reoffered at the last undisputed bid". Then there is a question of deposit. Then 6 is: "Each purchaser shall on paying the deposit inform the auctioneer of the name or names of the person or persons on whose behalf the plot is purchased; the grant will be issued in accordance with this information." Condition No. 7 deals with the balance of the purchase money, and Condition No. 8 is again dealing with the payment of purchase money. Condition No. 9 deals with the right of the Government to enter upon the plot for various purposes. Condition No. 10 states that no building shall be erected upon a plot unless plans have been passed, and Condition No. 11 says that the grant will be for a lease for 99 years. Then we come to the Special Conditions, and it is Condition No. 5 as regards which the question is raised.

LORD ATKIN: No. 2 is of importance, is it not?

THE SOLICITOR GENERAL: Yes, my Lord: "Each grantee shall erect within two years of the commencement of his grant a dwelling-house with suitable outbuildings of approved design suitable to the locality." Then he has to fence it. No. 4 is: "No building shall at any time during the term of the grant be used for any purpose other than a dwelling-house. (5) Not at any time during the term of the grant shall the grantee permit the dwelling house or outbuildings to be used as a place of resi-

dence for any Asiatic or African who is not a domestic servant employed by him". Then No. 6 states that only one dwelling house shall be erected.

LORD BLANESBURGH: The validity of Special Condition No. 5 has been upheld?

THE SOLICITOR GENERAL: Yes, by all the Judges, my Lord. I do not think your Lordships need be troubled with any of the following Special Conditions.

LORD BLANESBURGH: I suppose there is a special reason for upholding Special Condition No. 5 and rejecting No. 1.

THE SOLICITOR GENERAL: Yes, my Lord. There is said to be a special reason under the Ordinance. I will draw your Lordships' attention to the Ordinance now.

LORD BLANESBURGH: General power to impose all these different conditions is not questioned with regard to the restriction as to user and so on.

THE SOLICITOR GENERAL: There is no question as regards them.

LORD BLANESBURGH: That is within the competency of the Commissioner of Lands.

SIR THOMAS INSKIP: Not all the conditions, my Lord, but general conditions proper or usual in a lease as special conditions.

THE SOLICITOR GENERAL: Would your Lordships turn back now to the first page of the Appendix to the Record. There is set out: "Colony and Protectorate of Kenya. Crown Lands. Ordinance No. 12 of 1915." I think as far as I have been able to see the material clauses are set out in the Appendix to the Record. I think the first section that requires any attention is section 6 which your Lordships will find on page 4.

LORD ATKIN: Perhaps the definition of "Crown Lands" would be of some importance.

THE SOLICITOR GENERAL: There is no question that those lands were

Crown lands, my Lord, and your Lordship will see that "Township" at the bottom of page 3 is defined. This was a township; there is no question about that. These were town plots in a township, and it was Crown lands.

Now section 6 of the Ordinance is: "The Governor, in addition to, but without limiting any other right, power or authority vested in him under this Ordinance, may:-- (1) Subject to the provisions of any Order in Council or to any general or special instructions of the Secretary of State" -- there are no special instructions or Order in Council -- "grant, lease or otherwise alienate in His Majesty's behalf any Crown lands for any purpose and on any terms and conditions as he may think fit." That is an operative section which gives complete and absolute power to the Governor subject only to any provision which may follow in a subsequent part of the Ordinance which limit or set down that absolute power.

THE LORD ATTORNEY: There is a power here which is not set out. Section 6 (ii) is: "Wholly or partially remit, except where otherwise provided, all or any of the covenants, agreements or conditions contained in any lease, agreement or license where, owing to special circumstances, compliance therewith would be impossible, or great hardship would be inflicted upon the purchaser, lessee, or licensee".

THE SOLICITOR GENERAL: I think that deals with the leases which had been granted before the lease which subsequently may be granted in common form and where someone draws the attention of the Governor to some special reason why there should be a variation of lease.

THE LORD ATTORNEY: It would be enabling the purchaser to obtain one of these special conditions if he went to the Governor.

THE SOLICITOR GENERAL: Yes, but I do not think it would enable him to get himself allowed to bid before the thing is purchased.

SIR LAWRENCE SANDERSON: Ask us to take it that these terms and conditions in the Bill have been imposed by the Governor

is the overriding power of the Governor to alter the rules in the Ordinances in any particular place; "unless the Governor shall otherwise order". Your Lordships will see in sections 25 and 26 "except with the consent of the Governor"; and, again, "unless the Governor shall otherwise order". The sections under which the Commissioner cannot exercise the power conferred upon the Governor are generally speaking, sections in which the Governor is given some special overriding power.

LORD ATKIN: As I read this section, power to alienate Crown land in the Ordinance is given under section 6 and is given to the Governor.

THE SOLICITOR GENERAL: Yes, my Lord.

LORD ATKIN: And the Commissioner is not to exercise the powers given to the Governor under section 6, therefore, the Commissioner cannot sell by auction but only the Governor.

THE SOLICITOR GENERAL: The Commissioner can only sell by auction where there is a subsequent section authorizing it. I think your Lordships will see that must be the meaning because an express power is given to the Commissioner in the following sections as regards disposal of various kinds.

LORD HAMBURGH: I read section 18 rather differently. I read that to mean that as the normal course for a sale is by auction, if it is to be otherwise than by auction, the Governor personally and not the Commissioner shall give that direction.

LORD ATKIN: In a sale by auction the Commissioner is calling; he is agreeing to sell.

THE SOLICITOR GENERAL: He is instructing the auctioneer to sell; he is acting as the freeholder.

LORD ATKIN: His authority is an authority which enables a contract to be made with the purchaser; therefore he personally agrees to sell. That seems at present to be a power which is not even being exercised by the Governor unless it is to be taken as that the sale by auction is impliedly being done by the

Commissioner for the Governor which is, of course, a perfectly possible view.

THE SOLICITOR GENERAL; I think that is what section 8 is intended to mean, that the "Governor shall appoint a Commissioner of Lands who shall have charge of the administration of this Ordinance, and shall further appoint such assistant land officers as the Governor may deem necessary to transact the administration of the Ordinance" ---

LORD ATKIN; He is not to exercise power under section 6.

LORD BLANESBURGH; So far as you have gone, the Governor must with regard to any particular specific property authorize or direct the Commissioner to sell; thereupon he having got that authority section 18 applies.

THE SOLICITOR GENERAL; I think if it was not for section 15 I should agree with your Lordship. It is difficult to see what that reservation as regards section 6 actually means.

SIR LANCELOT SANDERSON; It looks as if section 6 never ought to have been put in.

THE SOLICITOR GENERAL; Section 6 was necessary in order to clothe the Governor with power.

SIR LANCELOT SANDERSON; I mean in the proviso.

LORD ATKIN; I think it ought to have been limited. The whole of section 6 is not printed in the Appendix to the Record, but there are sections for limiting covenants for extending time and so on. Except for surrender, it is probably intended to be negative those powers.

THE SOLICITOR GENERAL; I do not think I need read section 11 at this stage. Section 15 is: "The Commissioner of Lands may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the manner hereinafter prescribed".

SIR LANCELOT SANDERSON; That is the special power to the

Commissioner.

THE SOLICITOR GENERAL: Yes, I think so, although it does not say the Commissioner may dispose of it, I agree, but I think one must imply from that as the Commissioner is the man appointed to have charge of the administration of this Ordinance that is his primary duty, and section 15 must mean that the Commissioner of Lands can dispose of them subject to the provisions that follow. Section 16 is: "Leases of town plots may be granted for any term not exceeding ninety-nine years. (17) Before any town plot is disposed of under the next succeeding section the Commissioner of Lands shall determine: (a) The rent which shall be payable in respect of such plot; (b) the upset price at which the lease of such plot will be sold; (c) The building conditions to be inserted in the lease of the plot". Then (d) is the one under which the special covenant is. "(d) The special covenants, if any, which shall be inserted in the lease".

SIR LAURELOT BARNARDON: This is a special part.

THE SOLICITOR GENERAL: Yes, Part III deals with town plots. Part IV deals with agricultural purposes, and Part V deals with land for special purposes. Then, my Lord, section 15 is: "Lease of town plots shall, unless the Governor shall otherwise order, in any particular case or cases, be sold by auction." Then section 16 is a very important section. "The place and time of sale shall be notified in the Gazette not less than four weeks or more than three months prior to the day of sale, and the notice shall state" - then there follow five things which the section shall state: "(a) The number of plots and the situation and area of each plot; (b) the upset price at which the lease of each plot will be sold; (c) the general of survey fees and the cost of the deeds for each plot; (d) the term and the lease and the rent payable in respect of each plot; and (e) the building conditions and the special covenants, if any, to be inserted in the lease to be granted by virtue of any plot." Provided, however, that the lease of any plot may be withdrawn from sale by the Commissioner of Lands at any time prior to the same being offered for sale.

LORD BLANCKENBURN: That is very striking; it is the Commissioner who may withdraw. If he may withdraw, I should think he may also order.

THE SOLICITOR GENERAL: I do not really think there can be any doubt of the intention, whether the words are apt or not, for the Commissioner to do everything in Sections 18 to 20, subject to where it says in cases where the Governor shall otherwise order. Your Lordships notice that those five conditions must be put in the Notice. There are a number of other provisions which will be put in at the option of the Commissioner. Section 20 is: "The auctioneer shall, before the commencement of the sale, read the terms and conditions of the sale, and all persons bidding at the sale shall be bound by their terms and conditions so read." I draw your Lordships' attention to that last sentence there, because the learned Acting Chief Justice in the Court of Appeal placed some reliance upon the words "and all persons bidding at the sale" as showing that everybody had the right to bid and there could not be any limitation.

Then, my Lords, Part IV is important for this reason, if I may just explain your Lordships first the reason why it is important. In paragraph 27 (c) your Lordships will see that it lays down that a Notice shall state "whether persons other than Europeans will be permitted to bid for the lease of the ~~land~~ ^{land}". The main argument which has been put against the ~~Commissioner~~ ^{Commissioner} and which is contained in all the Judgments in the Court of Appeal is that as that is in the case of agricultural land and not in the case of town plots, it must be assumed that the Commissioner has no power to make such a provision in the case of town plots. Your Lordships will notice, of course, that it is only in the place where it is dealing with what the Notice shall contain.

The Sections giving power or compelling the sale by auction, Sections 18 and 26 in Parts III and IV respectively, are verbatim identical.

LORD ATKIN: There is a provision in Section 24, which is not printed in the Appendix to the Record, which says that there is an implied covenant by the lessee not to divide the plot and assign any portion of it; and then subsection (2) says: "If the lessee of a term plot is desirous of dividing such plot and assigning a portion thereof, application shall be made to the Governor through the Land Officer to accept a surrender of the lease of the plot and to issue new leases of the plot in parcels." Then subsection (3) is: "If the Governor shall approve of a proposed division of a plot, he may authorise the Land Officer to accept the surrender of the original lease, and to grant leases of the plot in such parcels as he may have approved."

THE SOLICITOR GENERAL: Your Lordship notices a very curious thing, that Section 24 is not one of the Sections enacted by the proviso to Section 16 except that generally where there is a power left over it is enacted by Section 16.

LORD ATKIN: It may be that as power to accept surrenders is in the Governor under Section 6 (iv), that a new lease is to be by the Governor.

SIR LAWRENCE SANDERSON: Clause 24 (2) provides specifically that it shall go to the Governor through the Land Officer.

THE SOLICITOR GENERAL: Yes, my Lord; and the Governor shall have power to grant a new lease.

LORD ATKIN: It seems to suggest that the actual power of disposition was, and was intended to remain in the Governor, and the Commissioner is to administer the way in which the disposition should take place.

THE SOLICITOR GENERAL: I quite appreciate your Lordship's point.

LORD BLANESBURGH: Just to see that I understand what may be the meaning of Section 10, is it this; These Sections 6, 8, 9, 12, 18, 25, 26 and 39, all of which I assume in terms confer some power upon the Governor so named, those powers conferred upon the Governor so named are not to be exercisable by the Commissioner, leaving it therefore to be implied that if, in other words, there are powers conferred upon the Governor so named, those powers may be exercised if they are within the general powers of Section 10.

THE SOLICITOR GENERAL: Yes, my Lord; the general powers of Section 10, and possibly as governed by Section 8.

LORD BLANESBURGH: Yes, that is the meaning of it; the same powers, in which in terms are the Governor's powers, may be exercisable by the Commissioner, but certain others may not by virtue of the proviso to Section 10?

THE SOLICITOR GENERAL: Yes; powers specifically given to the Commissioner he can exercise.

LORD BLANESBURGH: Yes; it is only if they are given to the Governor.

THE SOLICITOR GENERAL: No question arises upon that.

LORD BLANESBURGH: It is the general structure of the Statute that I was covering.

THE SOLICITOR GENERAL: Yes, my Lord.

LORD AYLIN: I think the only point that could be suggested was that if an auction has taken place -- and it has to be by auction unless the Governor shall otherwise order -- and if the sale did take place by something other than auction in the strict meaning of the word, then you would assume that the Governor had directed it. The Governor has clearly power to sell.

THE SOLICITOR GENERAL: Yes; I do not think there is any suggestion here that the Governor gave any special directions.

LORD BLANESBURGH: That means that the Commissioner may not sell

otherwise than by auction?

THE SOLICITOR GENERAL: Yes, my Lord; that is right.

Now, if I may go to Part IV, having put before your Lordships the question that is raised on Part III, Section 25 is: "The Commissioner of Lands may cause land available for leasing for agricultural purposes to be surveyed and divided into farms which shall not, except with the consent of the Governor, exceed five thousand acres, or except with the consent of the Secretary of State, exceed seven thousand five hundred acres." Section 26 is: "Leases of farms shall, unless the Governor shall otherwise order in any particular case or cases, be sold by auction." I draw your Lordships' attention to the fact that those words are identical with the words in Section 18 of Part III. Then Section 27 is: "When land available for leasing for agricultural purposes shall have been surveyed and divided into farms and it is proposed that leases thereof shall be sold by auction, the Commissioner of Lands shall give notice in the Gazette of the place and time which shall not be within three months of the date of the publication of such notice at which leases in respect of such farms will be offered for sale by auction." Your Lordships will notice one little thing there, namely, that the time "shall not be within three months". The time as regards town plots is "not less than four weeks or more than three months". These agricultural lands are many of them a long way from any scene of civilization and that no doubt is the reason for that difference. "Such notice shall state:-

(a) The situation of the farms and the approximate area of each farm and the time when and place where the plan of each farm may be seen; (b) The upset price at which the lease of each farm will be sold; (c) Whether persons other than Europeans will be permitted to bid for the lease of the farms; (d) Any special covenant or condition to be inserted

in any lease to be granted; (e) The annual rent to be paid for each farm for the first period of the lease, as herein-after defined; and (f) The survey fees and the cost of the deeds to be paid in respect of each farm".

LORD BLANESBURGH: You have (e) there, which says "whether persons other than Europeans will be permitted to bid for the lease of the farms". You have pointed out that there is no similar provision with regard to town plots. Now, what is the contention against you? Is it suggested that even the Governor under the mere terms of this Ordinance could not impose that restriction, or is it that the Commissioner could not do so?

LORD ATKIN: It is not suggested that the Governor could not?

THE SOLICITOR GENERAL: No, my Lord; only the Commissioner.

LORD BLANESBURGH: Under his limited power?

THE SOLICITOR GENERAL: Yes, my Lord, that is right; and the argument is that the word "auction" in Section 18 cannot apply to an auction where there is a limitation of bidders. Of course, I assume that "auction" in Section 26 does so apply and must so apply because of what follows in Section 27.

LORD BLANESBURGH: I mean to say that the issue is in fact one which only turns upon the powers of the Commissioner as distinct from the powers of the Governor?

THE SOLICITOR GENERAL: I do not think it would be disputed if the Governor had given special directions or was to say that any limitation was to be put upon it, he could do so.

LORD BLANESBURGH: Then it is a very limited question?

THE SOLICITOR GENERAL: Yes, it is, my Lord.

SIR LANCELOT SANDERSON: I suppose it is argued really that the special covenants mentioned at the top of page 6 would not include such a limitation?

THE SOLICITOR GENERAL: It is not suggested this limitation of bidders does include the limitation of subsequent user, but the limitation of bidders is inherent in section 18; that is to say, an auction may be an open auction to everybody or an auction to a limited number.

LORD BLAIRBURN: To a selected public? -

THE SOLICITOR GENERAL: Yes, my Lord, to a selected public. One argument put against me is that the Commissioner of Lands has to realize the best price, and, therefore, he must open the auction to everybody. The fallacy of it is that the one way to get the best price where you have a large committee is to reserve certain areas for certain purposes.

LORD ATKIN: I suppose the reason for public land being sold by public auction is to avoid favouritism. That is the sort of situation. Otherwise you could say: Here are my two friends A. and B.; let us put them in a room and have dinner and after dinner they shall bid.

THE SOLICITOR GENERAL: I do not think there is any suggestion that any extreme case like that would probably be justified. It does not deprive it of being a public auction because you say: We are going to reserve this area of land for Europeans and the other for natives.

LORD BLAIRBURN: With regard to a town plot, if you sold it free from restrictions you would only have one bidder.

THE SOLICITOR GENERAL: Yes, my Lord; or you might have none.

LORD ATKIN: You have (s) in one and not the other?

THE SOLICITOR GENERAL: Yes, my Lord; I pointed out to your Lordships the difference in the time for notice of auction. One can see a very good reason for putting (s) into the agricultural lands; you have auctions happening as regards lands which are far distant from any centres of population, and to allow people to come long distances and then find they could not bid would be a great hardship, whereas in connection

with town plots that would not arise.

LORD ATKIN: Was this Ordinance passed after the Secretary of State's despatch about bidding for land?

THE SOLICITOR GENERAL: No, my Lord; this was before.

LORD BLANESBURGH: That does not seem to me to be very convincing.

I quite agree that if a man has to go two or three hundred miles, it is well that before he starts he should know that he has no chance of bidding even if he likes the place; but that does not seem a reason for not telling a similar man in the town that he need not attend an auction if when he gets there he is told he cannot bid. The reason for^{the} omission does not seem to be quite justified by what you have said. If it had been intended -- althought it may have been an oversight -- to mean to depend upon its being very far, if the thing had been present to the draftsman's mind and he had intended to impose sale restrictions, he would naturally have said so.

THE SOLICITOR GENERAL: Yes, my Lord, that may be so. I was only throwing it out as a suggestion. Of course, a native might make a journey of hundreds of miles into Mombasa, and when he got there find he could not buy it. Then it goes on at Section 39: "There shall by virtue of this Ordinance be implied in every lease granted under this part to a European a covenant that he shall not without the consent of the Governor in Council appoint or allow a non-European to be manager or otherwise to occupy or be in control of the land leased." That is somewhat similar to the present covenant.

LORD BLANESBURGH: That is not to be contained in the lease as a covenant; it is by implication a covenant; a restriction on the land devised.

THE SOLICITOR GENERAL: Yes, my Lord; and the argument was again raised upon that Section that as there was no similar section as regards town plots a special covenant to a somewhat similar effect, that is to say, as to no residents being Asiatic or Afrkan, could not be put in under the power of the Commissioner under Section 17 (d).

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Then, my Lords, Part V. has a little importance. It is the disposal of land for special purposes. Naturally this is a case where one will expect to find special classes of people desiring to purchase. Section 47 is: "Save as in this part under this Ordinance otherwise provided, the Commissioner of Lands shall not entertain any application under this part without the sanction of the Governor first obtained. (48). The rent to be reserved under any lease or license under this part, the period and the covenants and conditions of the lease or license shall be such as may be prescribed by rules under this Ordinance or as may be determined by the Governor. (49). The Commissioner of Lands may, with the approval of the Governor, cause a lease or license under this part to be sold by auction." That, your Lordships will see, is in rather different form because in this case the approval of the Governor has to be given to the auction. Then it goes on: "The provisions of sections nineteen to twenty-three (both inclusive)" -- that is, the town plot auction provisions -- "of this Ordinance shall, so far as applicable, apply to every sale by auction under this part."

LORD ATKIN: What do you assume is this disposal of land for special purposes? Would the Commissioner have any power to grant a lease for a special purpose? If he is not to entertain an application, he cannot lease.

THE SOLICITOR GENERAL: No, my Lord; he can only do that with the permission and sanction of the Governor.

LORD ATKIN: You might say he may with approval cause a lease to be sold by auction. Suppose he did not do that.

THE SOLICITOR GENERAL: No, my Lord; the disposal of land for special purposes is reserved to the Governor.

LORD BLANCKFURN: Section 48 is express with regard to the Governor's powers and so forth. It says "by rules under this Ordinance or as may be determined by the Governor".

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THE SOLICITOR GENERAL: Under Section 49, once that has been approved, the machinery to be used is the town plot machinery, and that is a case in which one would expect a number of very special conditions and so on; but the Notice to be given will be a Notice under Section 19, and not a Notice under Section 27.

SIR LANCELOT SANDERSON: In Section 46 it says: The application must be made in the prescribed form.

THE SOLICITOR GENERAL: "Every application for a lease or licence of or relating to Crown Land for any special purpose shall be made in writing in the form prescribed and shall give such particulars as may be required by rules under this Ordinance."

SIR LANCELOT SANDERSON: To whom ~~was~~ that application directed?

THE SOLICITOR GENERAL: That must be made to the Governor.

SIR LANCELOT SANDERSON: Is the prescribed form to be found in this Ordinance?

THE SOLICITOR GENERAL: No, I am afraid not, my Lord. One or two rules have been made, but none affect the disposal of land for special purposes.

LORD ATKIN: Then there is power to grant "Licences to occupy Crown Land for temporary purposes and to erect thereon a hut or huts or other temporary erection may be granted by the Commissioner of Lands".

THE SOLICITOR GENERAL: Yes, my Lord; that is to continue for one year only.

Now, having taken your Lordships shortly through that, before I go back to any arguments upon it your Lordships would like to have the Judgments and your Lordships will see what ~~shall~~
I have to meet.

LORD ATKIN: I should like to see the procedure. Of course, this is quite without prejudice.

THE SOLICITOR GENERAL: If your Lordship please. It starts at page 1 of the Record. Your Lordships will see that there was

an ex parte Notice of Motion on the 9th August, 1928. *Take notice that the Court will be moved on Friday the 10th day of August, 1928, at 9.30 o'clock in the forenoon or as soon thereafter as the Counsel can be heard on the part of the Applicant that a Writ of Mandamus may be granted commanding the Respondent to allow the Applicant to bid for and purchase at the auction sale intended to be held by the Respondent for disposal of Crown Lands being the plots on the Nombasa Island referred to and specified in the Schedule attached to the General Notice No. 714 appearing at the page 982 of the issue of the Official Gazette dated the 3rd day of July, 1928, and also commanding the Respondent to cancel or annul the Condition Number 5 of the Special Conditions in the said Notice.

LORD BLAVESBURGH: ^{Why} ~~What~~ want you something like a rule nisi.

SIR LAURENCE SANDERSON: They got it.

LORD ATKIN: How far does this objection to the technical point go? How could a person demand the Commissioner to allow him to bid and command the Commissioner to annul? He might very possibly command him not to sell except in accordance with the Ordinance, but ~~if~~ the Commissioner, if he had ordered an auction sale upon conditions upon which he would not otherwise have ordered it, would have a right to withdraw from the sale or to get the Governor's directions. The Governor had only to give a direction, and the whole thing would be right?

THE SOLICITOR GENERAL: Yes; in so far as this would compel the Commissioner to sell, I think it would clearly be beyond the jurisdiction of the Court; clearly the Court may not compel the Commissioner to sell; they can stop him from selling.

LORD ATKIN: I do not know what the Crown submitted to over there.

THE SOLICITOR GENERAL: I think it is quite clear at the top of page 8.

LORD ATKIN: This could be put right by getting a direction from

the Governor at any stage?

THE SOLICITOR GENERAL: Yes.

LORD ATKIN: That is why I am so astonished that the whole thing should be in the power of the Commissioner -- it not being disputed that it would have been in the power of the Governor -- when there is no suggestion in this matter that the Commissioner and the Governor are not of the same mind.

THE SOLICITOR GENERAL: I think perhaps the reason lay in the political situation, that the Governor would not desire to step in on any particular occasion in order to authorise something which was not within the Commissioner's powers under the Ordinance.

LORD ATKIN: It is an extraordinary position.

THE SOLICITOR GENERAL: I have no instructions upon this, my Lord; I am only suggesting the possibility that the Governor might have thought it wiser to take that course.

LORD ATKIN: To let you go on and do something.

THE SOLICITOR GENERAL: I leave it to the Courts to decide whether what you are doing is right or not under the Ordinance.

LORD ATKIN: The Governor can stop it at once.

LORD BLANESBURGH: Unless the Commissioner has power to do what he likes within the terms of the Ordinance, the Governor cannot absolve himself from responsibility.

THE SOLICITOR GENERAL: Yes, my Lord; under Section 8 of the Ordinance the Commissioner is appointed to be the person to take charge of the administration of the Ordinance, and it is only on exceptional points that the Governor is to be called in, as it were; for instance, unless the Governor otherwise orders under Section 18, the main administration of the Ordinance is put by the Ordinance into the hands of the Commissioner.

SIR LANCELOT SANDERSON: On the appointment by the Governor?

THE SOLICITOR GENERAL: Yes, my Lord; on the appointment by the

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Governor; but once appointed under the Ordinance, it is the Commissioner who has to do the administration.

LORD BLANESBURGH: The position of the Governor must be this: If the Commissioner has power under the Ordinance to do it, I will let him do it, but if he has not, I will take the responsibility of telling him to do it.

THE SOLICITOR GENERAL: Your Lordship might put it in that way; your Lordship might also put it in this way, that the Ordinance has empowered the Commissioner to sell lands in a certain way. If the Courts decide that this is not within his powers, then he ought not to do it. I am not going to interfere in order to give him a power which is outside the powers of the Ordinance. That should be the consideration.

LORD ATKIN: The Commissioner of Lands is put into the same position as the Commissioner of Railways. They are to administer the law and the executive have no power to interfere with them, except in so far as they have statutory authority to do so.

THE SOLICITOR GENERAL: Yes, my Lord; something on those lines, and the executive would not willingly interfere ⁱⁿ a particular case, especially where it was a case of this sort.

LORD ATKIN: My trouble about that is to start with the general power of the Governor, which seems to me to dispose of the whole thing.

THE SOLICITOR GENERAL: That is followed by Section 8 which compels the Governor to appoint a Commissioner of Lands who shall have charge of the administration of the Ordinance.

SIR LAURELOT SANDERSON: I understand that both parties agreed in this case that it should be left to the Courts to decide whether the Commissioner of Lands by himself had power.

THE SOLICITOR GENERAL: Yes, my Lord; so I understand. If your Lordships look at the top of page 8 of the Record you will see the name of Counsel appearing. "Atkinson; I am instructed

not to take any technical points but to argue on the merits."

LORD ATKIN: We are determining now what the merits are. We have the procedure so far, that is, the Notice of Motion. There is an affidavit leading to that?

THE SOLICITOR GENERAL: Yes, my Lord; I do not know that there is anything in it except that he had requested to have the provisions annulled and cancelled; that is in paragraph 8.

LORD ATKIN: Upon that there was an Order made?

THE SOLICITOR GENERAL: Yes.

LORD BLAVESBURGH: The affidavit ought to be referred to to this extent, because according to that everything was done by the Commissioner; there was no reference to the Governor whatever in any part of the transaction.

THE SOLICITOR GENERAL: Yes, my Lord. Then Order No. 3 was made upon that motion to postpone the auction while the motion was heard, a sort of interim Order. "This Court doth order that the said auction sale be postponed until further order of this Court and it is further ordered that a notice to shew cause do issue to the Respondent upon the above mentioned Motion for Mandamus to be returnable on the 19th September, 1928."

LORD BLAVESBURGH: That is a sort of shorthand way of making an Order, is it not -- notice to shew cause for what, and in respect of what? Was a rule issued?

THE SOLICITOR GENERAL: It is the only document that is amongst the papers.

LORD BLAVESBURGH: So far as the Order is concerned, it would appear again to have been made ex parte; at any rate, there is no reference to any appearance by the Respondents.

THE SOLICITOR GENERAL: Yes, my Lord.

SIR LANCELOT SANDERSON: Was there not any notice served upon your clients in accordance with that Order?

THE SOLICITOR GENERAL: I am afraid I cannot tell your Lordships except what is in the Record.

SIR LAURELOT SANDERSON: This Order directs notice to be issued; I should have thought there must have been a notice,

LORD BLACKBURN: It is rather an amazing thing to grant an injunction ex parte to restrain the holding of an auction.

THE SOLICITOR GENERAL: Your Lordship sees it was restrained on terms.

LORD BLACKBURN: Yes, imposed by the Court in the absence of the Respondent.

THE SOLICITOR GENERAL: I hope your Lordships will not think that I am upholding the procedure of the Court in this case. It must have been thought to be a very convenient method of determining the point.

LORD BLACKBURN: Yes.

LORD ATKIN: That was done apparently on the 10th August, and was returnable on the 19th September?

THE SOLICITOR GENERAL: Yes, my Lord.

SIR LAURELOT SANDERSON: There is a further Order at the bottom of page 6, that the Order is to be served upon the Resident Commissioner at Bombay on the same day.

THE SOLICITOR GENERAL: Yes, my Lord.

LORD ATKIN: Then on the 22nd August, apparently the Respondent did appear and he applied for a time to be fixed.

THE SOLICITOR GENERAL: Yes; an affidavit to be filed on the 30th September, and

LORD ATKIN: And then on the 20th October there was no affidavit and they refused to make an affidavit?

THE SOLICITOR GENERAL: Yes, my Lord. Then there was a telegram and the date of the hearing was changed, and on the 10th December it was heard.

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LORD ATKIN: Without any affidavits by the Respondent?

THE SOLICITOR GENERAL: Yes, my Lord.

Then, my Lords, may I just draw your Lordships' attention to one thing at the bottom of page 7? You will see that the only point argued by Mr. Phadke for the Applicant was the first question as to whether there might be a limitation of bidders. Apparently the second point was not argued.

LORD ATKIN: In showing cause apparently the Applicant began.

THE SOLICITOR GENERAL: Yes. Then, my Lords, at the bottom of page 8 is the Judgment of Mr. Justice Johnson. "The applicant prays that the Court will grant a Mandamus commanding the Respondent, the Commissioner of Lands, to allow the Applicant to bid for and purchase certain Crown Land proposed to be sold by auction in Mombasa Island and also commanding the Respondent to cancel or amend the condition No. 5 in the Special Conditions of Sale in General Notice No. 714 appearing in the Official Gazette of 3rd July, 1926. The first prayer is concerned with the General Conditions of Sale of which the first part of the first paragraph runs 'Europeans only will be allowed to bid and purchase' and the second with the fifth of the Special Conditions which runs 'Not at any time during the term of the Grant shall the Grantee permit the dwelling house or outbuildings to be used as a place of residence for any Asiatic or African who is not a domestic servant employed by him'. The Notice in question commences 'Notice is hereby given that Grants in respect of the Plots in Mombasa specified in the Schedule hereto will be sold by auction in the Jubilee Hall Mombasa' on a date and at a time specified. The Ordinance under which Sales of Crown Lands must be conducted is Chapter 140 Revised Laws of

Kenya and the mode in which Sales of such lands must be conducted is laid down in Parts III and IV of the Ordinance. Part II of the Ordinance deals with Administration and by Section 18 the Commissioner of Lands is authorised to execute for and on behalf of the Governor any Conveyance, lease or licence of or for the occupation of any Crown Lands but by a proviso excepting certain powers he is unable to vary the procedure laid down in Section 18 which ordains that, unless the Governor shall otherwise order in any particular case or cases, leases of Town Plots shall be sold by Auction. The Applicant's case is based on the word 'Auction' and on the difference in wording between Sections 17 and 19 and 27 of the Ordinance. Section 27 obliges the Commissioner of Lands in giving Notice of an Auction of Agricultural Lands by subsection (c) to include in the Notice a statement as to whether persons other than Europeans will be permitted to bid for the lease of the Farms. There is no similar provision in the case of land within Townships and it is suggested that the omission together with the use of the word 'Auction' ties the hands of the Commissioner. The land is freehold and the Governor and his Agent the Commissioner are free to dispose of it within the limits imposed by the Ordinance as they may decide, subject in the case of the Commissioner to the limitations referred to. For the Commissioner it is said that he is not fettered by the first Part of either Section 17 or Section 19, for Section 18 does not say that he shall determine only the matters referred to in the Section nor Section 19 that the Notice shall state only the particulars given in the Section. In my view the conditions, general and special, are within the Commissioner's powers if the word 'Auction' does not, as Mr. Phelan presses upon me, connote a public auction, that is, an auction at which all are free to attend and bid and purchase. If it does, then the Commissioner would not be free to

determine whether the land should be offered to a particular class of bidders only, though he still might be able to include the prohibition of further alienation to an excepted class under Section 17 (d). No case has been cited in which the word 'auction' has been defined but several have been brought to my notice in which particular forms of sale have been held to be sales by auction. A definition of the word is to be found in Chambers Dictionary in which it is stated to mean 'a public sale in which the bidder offers an increase on the price offered by another and the articles go to him who bids highest'. Heber Hart, in the 'Law relating to Auctioneers' says, 'An auction, in the most usual sense of the word, is a proceeding at which the public are invited to compete for the purchase of property by successive offers of advancing sums'. But, he adds:- 'It will be sufficient to point out that other meanings of the word are not unusual. For example, an auction often denotes a competition by bidding limited to a particular class or association, as distinguished from the public at large.' As an example of this an auction at the end of a Church Bazaar might be instanced where the bidding is confined to those who have paid to enter the building in which the Bazaar is held. In Halsbury Volume 1, page 500, 'Auction' is defined as 'a manner of selling or letting property by bids, and usually to the highest bidder by public competition.' The Sales by Auction Ordinance, Chapter 103, Revised Laws of Kenya, which have not been referred to during the case, in Section 3 defines an auctioneer thus: 'Every person who sells or offers for sale any moveable or immoveable property or any interest therein at any sale or roup where any person becomes or may become the purchaser of the same by competition and being the highest bidder, either by being the sole bidder or increasing upon the biddings made by others, or decreasing on sums named by

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the Auctioneer or person acting as Auctioneer or other person at such sale, or by any other mode of sale by competition shall be deemed to carry on the business of an Auctioneer'. The cardinal essential in all sales by auction seems then to be that it is a sale by competition between those present, with the object, of course, of enhancing the price to be paid whether that competition be stimulated by the expected fall of the hammer or the expiry of a candle flame. But that it is an essential that all and sundry may bid seems to me no part of the connotation of the word as is shown by the instances quoted by Mr. Atkinson in which certain sales have been held to be sales by auction. An auctioneer by Section 3 of 19 George III Chapter 56, is he 'who doth or shall exercise the calling, etc., of an auctioneer, by outcry, knocking down of hammer, candle, lot, parcel or by any other mode of sale at auction, or whereby the highest bidder is deemed to be the purchaser.' The instance quoted by Lord Eldon in 1813 in the case of Baker v. Atwood's General (a House of Lords case) 3 English Reports, page 640, of a female auctioneer well bears repetition. 'She continued silent during the time of the sale; but whenever any-one bid she gave him a glass of brandy. The sale broke up, and in a private room, he that got the last glass of brandy was declared to be the purchaser'. This has decided to be an auction. In Baker v. Atwood's General the facts were that an estate was to be sold at auction. No bids were made at the place and time of meeting. Soon after the Agent of the owner was approached by some of those who had attended at the public meeting and in a private room it was agreed that offers should be made in writing and the Agent agreed before inspecting the offers that the highest offer should be accepted. This was held to be a sale by auction. Under our own sales by Auction Ordinance I believe the following facts would constitute a sale by auction enforceable

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by the bidder. Three adjoining Town Plots are held No. 1 by A, No. 2 by the Crown and No. 3 by B. The Businesses of A. and of B. are prospering and it becomes obvious that either will require to extend his premises. If the Commissioner of Lands fulfilled the Conditions laid down in Sections 17 and 19 but confined the auction to bids from A and B and only one of them turned up at the time and place appointed and offered a bid of the reserve price the Commissioner could be obliged to convey the land. 'Auction' in the Crown Lands Ordinance means, I think, no more than 'a manner of selling immoveable property by bids'. Holding this view, the Applicant fails. Costs to the Respondent."

LORD BLANESBURGH: What would be your answer to this question? Supposing you have an auction and I had stipulated the words "without reserve". Is the Commissioner entitled to refuse any individual bid?

THE SOLICITOR GENERAL: Does your Lordship mean in the ordinary law?

LORD BLANESBURGH: Yes.

THE SOLICITOR GENERAL: I do not think so.

LORD BLANESBURGH: Not if it is "without reserve"?

THE SOLICITOR GENERAL: Why, my Lord?

LORD BLANESBURGH: I rather think that is the law.

THE SOLICITOR GENERAL: There could well be a general condition of the auction that no one under thirty should be allowed to bid.

LORD BLANESBURGH: There is a sort of implied right in a person who has bid to have it entertained?

THE SOLICITOR GENERAL: Unless there is some provision which stops the right.

LORD ATHER: You are offering to make a contract with a person who bids.

SIR LAURELOT SANDERSON: It is an offer to the public.

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THE SOLICITOR GENERAL: On the terms and conditions of sale.

LORD BLANESBURGH: That just emphasizes in the interests of the vendor the necessity for such conditions, because otherwise it would never happen in the ordinary case of a sale of land. If you do not have such a condition and you do have a sale without reserve, then a vendor would be compelled to accept an insolvent purchaser who tendered a bid.

THE SOLICITOR GENERAL: Certainly,

SIR LANGELOT SANDERSON: Any ordinary person who had a bit of land in Kenya could say: I propose to offer this land for sale on a certain day on certain conditions, and it must be clearly understood that I am going to sell it to a Briton and not an Indian.

THE SOLICITOR GENERAL: Yes, my Lord; or vice versa; an Indian could say: I do not intend a European to bid for this land.

LORD ATKIN: The question is on the question of construction in dealing with public land, whether or not the legislature has imposed a prohibition upon exercising the ordinary rights of the Commissioner. Obviously the Commissioner could sell it to his brother-in-law if it were at a price.

THE SOLICITOR GENERAL: Yes, my Lord; and it is quite clear by Sections 18 and 26 that there has to be a sale by auction; that is for the protection of the public. Is it a protection to the public to say, as is said in one of the judgments which I am going to, that you must sell to everybody?

LORD BLANESBURGH: Would you agree, unless there is something to be found in the Ordinance to give it another meaning, that "sale by auction" means "sale by public auction"?

THE SOLICITOR GENERAL: Yes, my Lord; and I should say still by general conditions of sale by public auction you could limit the kind of bidder. I should certainly say that the Commissioner could not, under Section 18, have a hole-and-corner auction in a private room in an hotel.

LORD BLANESBURGH: He could not decide it upon the question of who drank the last glass of brandy?

THE SOLICITOR GENERAL: No, my Lord.

LORD ATKIN: You might say: I will sell by public auction to only members of the Government.

THE SOLICITOR GENERAL: That, my Lord, I think would be a case for removing the Commissioner of Lands; that would be the remedy.

LORD BLANESBURGH: But it would nevertheless be a public auction.

THE SOLICITOR GENERAL: I do not think it would assist your Lordships to refer to any arguments before the Court of Appeal. Your Lordships will see the Grounds of Appeal on page 12, and I do not think it will assist to read them to your Lordships. At page 18 your Lordships will find the Judgment of His Chief Justice Sheridan. I will start at line 25, because the preamble part I have already read to your Lordships before from the other Judgment. Section 18 of the Crown Lands Ordinance provides -----

LORD ATKIN: Ought not you to read the paragraph before because it is about the second point?

THE SOLICITOR GENERAL: If your Lordship pleases. "The Appellant on the 10th August, 1938, obtained a rule calling upon the Respondent to show cause. This rule was discharged by the Judgment from which this appeal has been lodged. The cause before the Supreme Court would appear to have been argued principally on the meaning to be attached to the word 'auction' in the Crown Lands Ordinance. I think the learned Judge considered that the decision of the first prayer decided the second prayer. If he thought so I do not agree for the fact that a person is not allowed to bid at a sale of property does not per se prohibit his being allowed to occupy the property by the State." I think that really is a misunderstanding, because I do not think the second point was argued according to the notes of the learned Judge below. "Section 18

of the Crown Lands Ordinance provides that leases of town plots shall, unless the Governor shall otherwise order, in any particular case or cases, be sold by auction. In the absence of any limiting words in this Section the word 'auction' should, I think, be given the meaning it most usually bears, namely, a sale by public auction. I do not think it can reasonably be said that where plots are to be sold by auction the sale is to be restricted to a particular section of the community in the absence of express and unequivocal words. True, as the authorities reveal, there may be many sales which would come within the meaning of the word, but that would not be a reason for giving the word in a particular case a limited meaning. The learned trial Judge seemed to think that because a sale could be held in a variety of ways any one of those ways being an auction that it was competent for the Commissioner of Lands to hold the sale in any one of those ways as could be said to be an auction. To pursue this argument to its logical conclusion such an interpretation would permit of the Commissioner holding a sale and restricting the bidding to two or three persons. Before such a construction can be accepted the words of a Statute must be clear and free from ambiguity. Now in the particular Ordinance there is an indication not that such a limited view could be taken of the meaning of the word 'auction' but that the Legislature had no intention of adopting the unusual method of restricting the bidding at a sale of township plots to a particular section of the community. In the first place Section 19 which prescribes what a notice of sale shall state makes no reference to the bidding being restricted to a particular class of persons. Secondly Section 20 refers to the reading of the terms and conditions of sale and says 'all persons bidding at the sale shall be bound by

the conditions and terms so read', and there is nothing in the Section suggesting a limited class of bidders. Thirdly -- and this is the point on which Mr. Burke has placed most reliance -- Section 27 which refers to the notice of auction of Agricultural Lands provides inter alia that such notice shall state 'whether persons other than Europeans will be permitted to bid for the lease of the farms'. If the notice of auction of Agricultural Land must contain those words and no mention of such a restriction is made in the Section prescribing what the notice of auction of township plots shall contain it seems not unreasonable to think that no such restriction was contemplated in the latter case. In so far as the Appellant's right to bid is concerned I am of the opinion that the rule should be made absolute. I now turn to his prayer that the 5th Special Condition should be cancelled. By virtue of Section 17 (d) of the Ordinance the Commissioner of Lands shall determine the special covenants, if any, which shall be inserted in the lease. This Section in my view is sufficiently wide to authorise the Commissioner to determine that a special covenant such as the 5th Special Condition in this case shall be inserted in a lease. I consider therefore that the Appellant should fail in regard to the second prayer. The appeal is therefore allowed to the extent that the rule in regard to the first prayer is made absolute. It was on the first prayer that the case was mainly fought in the Supreme Court and I would consequently allow the Appellant costs in this Court and the Court below."

Now, my lords, the next judgment is that of Acting Chief Justice Guthrie-Smith. I think I can start at the top of page 80, line 5: "The Ordinance is silent as to such provisions in relation to Township plots and it is worth remembering that the session of the Act as to Agricultural leases provides that the notice of sale is to state whether Non-Europeans are to be permitted to bid. Part IV Section 27c. The Learned Judge devotes most of his judgment to a discussion of what the word 'auction' means, and he holds that a sale to a limited class is an auction. I do not doubt this. If I called in a few friends and got them to bid for my effects, this would certainly be an auction, though not a public auction. The Ordinance does not say 'Public auction' and I understand the learned judge to hold that such a limited auction would be an 'auction', within the meaning of the Ordinance, and so a proper exercise of the powers and trusts reposed in the Commissioner. I disagree. The Commissioner is a trustee and as such he is bound to get the best price he can in the interest of the SOLE TRUSTEE, who here is the Government. This is a self-evident proposition but if authority for it be wanted, it will be found in DAVIS V. SHAWBROOK. If he limits the class of people who will be permitted to bid he does not sell to the best advantage. Such a limitation tends to reduce the price bid since it cuts out a class of potential bidders." In my submission that is a complete fallacy. "Again powers like these have to be carried out exactly, for example, a power to sell by auction will not authorize a sale by private treaty, Daniel v. Brown. Unless there were an express power to sell in this way it would be illegal to do so. There is no such power in the case of Township plots though there is such a power in case of agricultural plots, so it may be safely inferred that to sell Township plots in this

limited way is authorized by the Ordinance. The second point raised in the application for a mandamus was an objection to special condition No. 5 in the notice of sale. It reads 'not at any time shall the grantee permit the dwelling house or outbuilding to be used as a place of residence for any Asiatic or African who is not a domestic servant employed by him'. This is passed over in the judgment with very slight notice and it would appear that the learned Judge considered it covered by his decision on the first point. This is incorrect. To say that a non-European shall not bid for a plot is not at all the same thing as to say that he shall not live in it. A town plot may be a rising security in which a man might wish to invest without any intention of himself going into occupation."

LORD BLANESBURGH: Is the effect of this Decision this, that it is illegal having regard to the terms of the Ordinance that ^{on} a sale by public auction ~~shall~~^{to} exclude from bidding a non-European according to whatever that expression might mean. It seems to me rather doubtful what it does mean. A non-European may bid, but having bid, and having been the highest bidder, and having become the purchaser, he may upon the conditions of the lease he has bought, be prevented from living in the house.

THE SOLICITOR GENERAL: Yes, my Lord; I think he is bound to build a house.

LORD BLANESBURGH: It seems rather unfair to him.

LORD ATKIN: You could put it the other way. If this condition is a valid condition, and you could validly stipulate that a purchaser should build a house for his own occupation and occupy it, and that no person should occupy the house who is not a European, under those circumstances it seems that it cannot be unreasonable to make the condition that such a person should not bid.

THE SOLICITOR GENERAL: Yes, my Lord, because that would prevent

his building because he would not be an eligible bidder.

LOHD BLANESBURGH: The non-European would extend to an American or a Boer.

THE SOLICITOR GENERAL: I think so far as this problem is concerned, it extends to the African and the Indian.

SIR THOMAS INSKIP: European is defined in the Ordinance, my Lord. I do not think it helps very much, because it is a person of European origin.

THE SOLICITOR GENERAL: Now, my Lord, may I turn to Mr. Justice Muir-Watson's Judgment. I will begin at the top of page 22. "In my view, with respect to the learned trial Judge, the issue before the Court was not so much concerned with what the word 'auction' meant or what might be considered to be included in an auction, as whether or not the Crown Lands Ordinance gives powers to the Commissioner to include in an auction of Town plots restrictive conditions of sale general and special such as he has sought to include here. I really think it is hardly necessary to cite authority to establish that auction usually means public auction or that auction may mean an auction restricted to a particular class of bidders or that the bidding may be conducted in a variety of ways. All we are concerned with is the powers of the Commissioner of Lands to insert these conditions in an auction of Town plots. Auctions of Town plots are governed by sections 17, 18, 19 and 20 of the Crown Lands Ordinance, Auction of Agricultural land by sections 26, 27 and 28. It is mandatory upon the Commissioner of Lands that in the notice of an auction of Agricultural lands he shall state 'whether persons other than Europeans will be allowed to bid', Section 27(d). That must mean whether or not persons other than Europeans are allowed to bid. He must say something in his notice. He can not merely issue the notice without any condition and thereby exclude persons

other than Europeans. There is no mandatory provision of this sort in relation to the auction of town plots in section 19 the corresponding section to section 27 dealing with agricultural plots.'

LORD ATKIN: I am not sure that I follow the learned Judge there when he says "That must mean ~~whether or not~~ persons other than Europeans are allowed to bid." He seems to proceed on the footing that unless somebody is stated, nobody but Europeans would be allowed to bid. If it is to be extended to this, it must say so.

THE SOLICITOR GENERAL: Yes, my Lord, that is what I should have thought. Apparently the learned Judge takes the opposite view and says, in any event you have to specify. Then he goes on: 'I cannot think that in its absence this Court ought to assume that power is given to the Commissioner of Lands to make such a condition. I think it is right and in accordance with the established rules of construction of Statutes which have been cited to us, to assume that the power having been expressly granted under the one Section and omitted in the other it was not intended to grant it in the one from which it was omitted. For this Court to hold that such a power may be assumed without being expressly granted would be to take upon itself the function of the legislature.'

LORD CLARKE: Pausing there for a moment, if that is the true meaning of that provision, namely, that ^{assumption} ~~generally~~ the ~~scope~~ of the Ordinance is that nobody but Europeans would be allowed to bid, and unless in a particular case you are going to allow any others, and you are going to indicate to them that they are to be so privileged, if that is the meaning, does it entirely turn on its construction in your favour. It means that with regard to town plots there is not any option given to anybody other than Europeans.

THE SOLICITOR GENERAL: I think, with respect, your Lordships will appreciate that this is dealing only with the contents of the Notice.

LORD BLANESBURGH: I do not care what it is. I am saying that if these words are to be taken according to their strict signification, it would seem with regard to these particular plots that you might extend the wording to non-Europeans, but with regard to town plots in respect of which there is no permissible extension, you must confine it to that.

SIR LANCELOT SANDERSON: That is with regard to the power of the Commissioner of lands. I do not think anybody could deny that it would be a public auction if only a person of European origin was permitted to be there.

THE SOLICITOR GENERAL: Yes, my Lord. The argument I understand which is put against me is that in section 26 the word "auction" means an auction at which you may restrict bidders, because in the Notice as regards that auction in section 27 you find that such a thing may be put in the Notice, and must be put in the Notice.

SIR LANCELOT SANDERSON: Must be put in the Notice.

THE SOLICITOR GENERAL: In Section 18 the word "auction" cannot be so limited because you do not find in section 19 that such a thing must be put in the Notice. In my submission your Lordships that is a complete fallacy. The power given is a general power. These are all sections limited to a general power and where you see that leases of town plots shall be sold by auction, it means that you shall not sell them in any other way.

LORD BLANESBURGH: The point I am putting to you is based on a different hypothesis from that. The hypothesis on which it proceeds is this: although you would not think this Ordinance at a public auction so called shall be confined to Europeans as bidders, that nevertheless you do find from the particular

provision that it is so intended.

THE SOLICITOR GENERAL: I quite appreciate the argument, my Lord, if I may say so with respect.

LORD ATKIN: As I understand, the point is this: This special exception as to giving Notice is not dealing with the question of the powers at all. The powers are in precisely the same terms as to a sale by auction; and then it has been rather assumed in exercising that general power of sale, you might in fact restrict in this way; if you do restrict in this way, you must in the case of agricultural lands give notice. That does not seem to modify the power at all in any way.

THE SOLICITOR GENERAL: No; it is very helpful taking section 27 (c) in, because it does seem clear that the word "auction" does contemplate cases where there may be a limitation to particular bidders.

LORD ATKIN: Power to sell by auction does involve a power to sell to certain people, and when you exercise your discretion and give notice of it, that is merely a statutory form of notice.

LORD BLANESBURGH: Might it not be put in this way: On the terms of the Ordinance with reference to the sale of agricultural land which has to be sold by public auction, such as Crown lands, it is none the less a public auction that there is quite properly, as is admissible, in the Notice an intimation to the effect that non-Europeans will not be allowed to bid.

THE SOLICITOR GENERAL: Yes, my Lord.

LORD BLANESBURGH: It remains a public auction notwithstanding that restriction on the terminology of the Ordinance.

THE SOLICITOR GENERAL: Yes, my Lord, and the fallacy which really, in my submission, lies upon all these decisions of the Court of Appeal -- not behind the decisions of the Judge of First Instance -- is the fallacy in paragraph 11, page 22 of Mr. Justice Muir-Mackenzie's Judgment.

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LORD BLANESBURGH: Is it not enough to put it from this point of view: Whatever "public auction" may mean in any other Ordinance, quite plainly in this Ordinance you may have a thing called a public auction in which there is a limitation of bidders.

THE SOLICITOR GENERAL: Yea.

SIR LANCELOT SANDERBOS: The words are not "public auction".

LORD BLANESBURGH: I am assuming it means "public auction".

THE SOLICITOR GENERAL: I think probably the fact that there is to be a Notice and ^{to} be given in the Gazette, makes it a public auction.

LORD BLANESBURGH: Assuming it as fully as you will against your final point, even with the word "public", an auction may be of a character from which certain competitors are excluded by reason of the fact that the auction of farm lands is an auction from which they may be excluded, but it is nevertheless public.

THE SOLICITOR GENERAL: Yea, my Lord, and the power to hold it is in identical words with the power given for holding the auction of town plots.

Then, my Lords, Mr. Justice Wuir-Wackensie goes on "As to the special condition restricting by covenant the user by the purchaser, that appears to me to be on a different footing. In my opinion the Commissioner of Lands has power to insert this special condition because the power is granted in the Ordinance and similar powers are granted both in respect of Town plots and Agricultural land. It has been suggested by the appellant that Sections 6 and 10 bar the Commissioner of Lands from inserting this special condition. The material portion of Section 6 states; (1) Subject to directions of the Secretary of State the Governor may alienate on any terms and conditions he thinks fit. (2) He may rent covenants, agreements and conditions in a lease. Section 10 says: "That subject to any general or special directions by the Governor the

Commissioner of Lands may do any act or thing, exercise any power and give any order or direction which may be done or exercised by the Governor under this Ordinance. Provided that nothing in this Section shall be deemed to authorise the Commissioner of Lands to exercise any of the powers conferred upon the Governor by Section 6 and certain other Sections with which we are not concerned'. I cannot find that there is anything in Section 6 to confine the power to insert special conditions of sale of an auction to the Governor; but turning to Section 17 I find the express provision: before any town plot is disposed of under the next succeeding section the Commissioner of Lands - not the Governor be it noted - but the Commissioner of Lands shall determine the special covenants if any which shall be inserted in the lease. Further the matter is made still more clear on turning to Section 19 where it is stated: The notice - that is the notice of the auction - shall state ... the special covenants, if any, to be inserted in the lease to be granted in respect of any plot:- There then, it seems to me, the Commissioner of Lands is specially empowered and directed to determine the special covenants, and when they are so determined to insert them in the notice. It is argued that section 39 which creates an implied special restrictive covenant in all agricultural leases shows that, since there is no corresponding section in the previous part of the Ordinance dealing with town plots, it was not intended that power was to be given to insert a special restrictive covenant in the notice to sale. I do not agree. To begin with the case dealt with by section 39 is an implied covenant in the lease and has nothing to do with the notice and to go on with it ^{is} quite a different covenant to the one with which we are concerned only applying, as it does, to leases made to Europeans."

It has just occurred to me on that point your Lordship put to me just now, that that is of some relevance.

because if in every lease granted to a European there is put this covenant, it would add to the implication prima facie that the lease was to be to a European unless there was some other statement.

Then the learned Judge goes on: "Thirdly, whereas in the case of the general covenant it is specially mentioned in regard to agricultural land and no mention is made at all as regards town plots. In the case of special covenants the Commissioner of Lands is specially directed to determine and give notice of them both in agricultural and town plots. For the reasons I have stated I think that the appellant succeeds on the first prayer and fails on the second."

LOD BLANESBURGH: Some of the learned Judges seem to have envisaged the extreme inconvenience of the conclusion at which they have arrived and never seem to have asked themselves the question whether if the two conditions were not valid, either of them would be used. It seems very unfair to impose on the bidder the second condition and not accept his bid.

THE SOLICITOR GENERAL: Yes, my Lord, and none of them seem to have realized that where you have town plots and a mixed community, it may be very much to the advantage of the State, and the Government, to see that these communities are kept apart.

LOD BLANESBURGH: Surely it would not be wrong to suggest that anybody but a Jew should be permitted to bid.

THE SOLICITOR GENERAL: So, my Lord. Supposing you had a residential quarter and you said no shopkeepers are to be allowed to bid; it might be an advisable thing to do.

I really do not think I can assist your Lordships further. I think I have my point quite clearly before your Lordships. It is a very short and simple point, namely, that sections 6, 8 and 10 give the Commissioner of Lands certain powers. The limitations which are placed upon those

powers can only be found in sections 18 and 19 if there are any. The words of section 18 are identical with the words of section 26 as to the power of sale by auction. Whether the word "public" is to be implied at all is exactly the same in the two cases. There can be no doubt that the power includes the power to limit to a certain class of bidders.

LORD SLANESBURGH: Remaining still a public auction.

THE SOLICITOR GENERAL: Yes, my Lord.

LORD SLANESBURGH: If that be so, does not that get rid of the difficulty, which the learned Judges found in defining "public auction".

THE SOLICITOR GENERAL: Yes, my Lord. I do not think the question of the definition of "auction" in a sense matters, because the Ordinance defines it. As regards the special covenant that is, in my submission, obviously a matter falling within section 17 and falling within section 19 too. I submit the Commissioner of Lands has express power to include such a covenant in such special conditions of sale. I ask your Lordships to say for that reason that the Court of Appeal were wrong in their decision.

LORD SLANESBURGH: And the fact that he has special power to include the covenant to that effect in the lease is some indication anyhow that it would not be beyond his power to exclude a person who would be subject to that covenant from the privilege of buying, otherwise you would be leading him into a trap.

THE SOLICITOR GENERAL: Yes, my Lord. For these reasons I ask your Lordships to say, so far as it was against me, that the Decision of the Court of Appeal was wrong.

MR LAVINGTON: My Lords, I appear with my learned friend the Solicitor General in this case. I think all our points have been so fully and clearly put before your Lordships by the

Solicitor General that there is very little for me to say further. However, I would like to call attention to section 6 of the Ordinance. It says: "The Governor, in addition to, but without limiting any other right, power or authority vested in him under this Ordinance, may:- (1) Subject to the provisions of any Order in Council or to any general or special instructions of the Secretary of State, grant, lease or otherwise alienate in His Majesty's behalf any Crown Lands for any purpose and on any terms and conditions as he may think fit." The Governor himself has absolute power to alienate any lands or lease on any terms and conditions ^{that} as he may think fit. Now would your Lordships look at section 8 where the Governor appoints a Commissioner of Lands for the administration of the Ordinance, that is, I assume, in carrying out the Ordinance, he is the officer to say not how the sale shall be carried out, because the sections which my learned friend has called your Lordships' attention to, sections 18 and 26, say it shall be by auction, but he is to arrange the details of those auctions. If your Lordships go to section 10 without the proviso, as far as I can see that gives the Commissioner exactly the same powers as the Governor, subject to any special directions.

LORD ATKIN: It gives him general authority within the scope of the Ordinance to act for the Governor. It restricts that general power in respect of matters in the proviso?

MR LAVINGTON: Yes, my Lord. Then we come to the proviso. The proviso says: "Provided however, that nothing in this section shall be deemed to authorise the Commissioner of Lands to exercise any of the powers conferred upon the Governor by sections 6, 8, 9⁹ and so on. In my submission your Lordships must give some meaning to that. First of all, that is wholly inconsistent.

SIR LANCELOT SANDERSON: If it applies to the whole of section 26

that takes away from the Commissioner the power of alienating any land. It says so in so many words.

MR LAVINGTON: With respect, it cannot apply to the whole section; it applies, I think, to the power given to grant a lease or otherwise alienate; it is not intended to deal with the conditions to be inserted or the terms on which that sale or grant is to be made.

LORD BLANESBURGH: Let us try to get at the bottom of this. The other provisions of section 6 -- I do not know with regard to all of them -- but, for instance, take (iii) -- they are all relatively trivial. It would be rather odd that with regard to a trivial thing like (iii) the Commissioner was to have no power, and that was to be exercised by the Governor, and with regard to a more important thing like (i) the Commissioner was to have power and the Governor not to have power.

MR LAVINGTON: Only a portion of (i), my Lord.

LORD BLANESBURGH: I am rather meaning the reading you have given to the proviso with reference to section 6 would appear to result in this, that you are, notwithstanding the proviso,

leaving the Commissioner with the exercise of the more important

power, but depriving him of the least important?

MR LAVINGTON: No, my Lord.

LORD BLANESBURGH: Is not that the sort of result on the view you

are taking of the section?

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MR. LAVINGTON: I do not suggest, my Lords, that the Section is intended to give the Commissioner greater powers than the Governor.

LORD BLANCKINGHAM: No; but the point is that the same powers of the Governor are not to be exercised by the Commissioner, amongst them are the powers set forth in Section 6. But if you select them you find your selection includes powers that are less important than those that you leave out.

SIR LANCELOT SANDERSON: Speaking for myself, I should have said that the whole powers of Section 6 are taken away from the Commissioner of Lands. The only way you can get round the corner is by saying that there are powers given in the subsequent Section which are inconsistent with that proviso.

MR. LAVINGTON: My Lords, I will not pursue the argument.

LORD ATKIN: I do not know how the Commissioner, having sold this plot and having to effectuate a lease, gets the power to sign the lease.

SIR THOMAS IRKIP: My Lords, there is a special provision about signing the lease. There is an amending Section in another Section; Ordinance No. 18 of 1927, Section 2, which says that notwithstanding anything contained in the Crown Lands Ordinances, all grants, conveyances, leases and so on which shall be issued under or relating to the aforesaid Ordinance, which require to be in writing and signed by the Governor, shall be deemed to be validly executed if they are signed by the Commissioner.

LORD ATKIN: That seems to indicate that on the Section, as it stands, there was a doubt about it.

LORD BLANCKINGHAM: I suppose you ^{will} ~~ought~~ to give the fullest effect to the provisions of Section 10, the proviso is applicable to Section 6, so that the powers of the Governor under Section 6 are withdrawn from the Commissioner. Can you affirmatively find in the other Sections of the Ordinance

powers in the Commissioner enabling him to do what has been done in this case by him; in other words, can you get it in this case without the assistance of the words of Section 6?

MR. LAVINGTON: Yes, my Lord; I think so. That Ordinance which my learned friend, Sir Thomas Inskip, has just referred to refers to numerous other Ordinances.

SIR LANGHOLOTT SANDERSON: That does not seem to make any difference, because supposing the Governor had made an Order that you should take a lease by his own hand, then it would be sufficient if the Commissioner of Lands signed the lease on his behalf. It does not affect this question at all whether the Commissioner of Lands has power to alienate the lands without special power from the Governor.

MR. LAVINGTON: No, my Lord; I do not think it does.

LORD BLANCKFORD: Would you mind addressing yourself to that in considering this matter, and assuming for the moment, without in any way admitting it, that you can derive no powers from Section 6; inasmuch as you assume, without admitting that the Commissioner may not exercise any powers thereby conferred upon the Governor, and assume, without admitting, that on the construction of Section 15 the Commissioner may not exercise any powers conferred upon the Governor by Section 6, can you find elsewhere in the Ordinance powers expressly conferred upon the Commissioner to enable him to do in this case what he has done, namely, offer this land for sale by auction?

MR. LAVINGTON: Yes, my Lord. Section 15 of Part III dealing with the offering of town plots says: "The Commissioner of Lands may cause any portion of a township which is not required for public purposes"

LORD ATKIN: No; to cause to be divided into plots does not mean that you can sell them at all. It does not go on to say, oddly enough, "shall cause such plots to be disposed of"; it says: "and such plots may from time to time be disposed of in

the manner hereinafter prescribed."; it does not say by whom.
MR. LAVINGTON: With respect, I think that must mean the Commissioner.
or.

LORD ATKIN: There is no express power given to him.

MR. LAVINGTON: If your Lordships read Section 18 in conjunction with Section 15, you will see it says: "Leases of town plots".

I think my learned friend was arguing that that was out of place. I think it should follow Section 15.

LORD BLANESBURGH: Which means that the Commissioner of lands sells by auction unless the Governor otherwise orders him?

MR. LAVINGTON: Yes, my Lord; I think so.

LORD ATKIN: And you read it: "and such plots may from time to time be disposed of by the Commissioner"?

MR. LAVINGTON: Yes, my Lord.

LORD BLANESBURGH: Which is shown by Section 18 because he is the person to dispose by auction unless the Governor tells him to do it in another way.

LORD ATKIN: You say there is also power in the Commissioner to exclude a lease or a conveyance?

MR. LAVINGTON: Yes, my Lord.

LORD BLANESBURGH: On the other hand, at the moment the question is not as to the execution of a lease; the question is as to the conditions and covenants of a lease; how the lease is hereafter to be made valid is another matter and it may be that the lessee might say: I must have the signature of the Governor for this.

MR. LAVINGTON: Yes, my Lord; but that does not affect the present dispute.

LORD BLANESBURGH: We are not concerned with the consideration of any lease in this instance; we are only concerned with the terms of the proposed lease?

MR. LAVINGTON: Yes, my Lord. Then your Lordships will also

remember that before the signature of the Governor the Commissioner has absolute power to withdraw.

LORD BLANCKBURGH: That is, ^{rather} another point.

MR. LAVINGTON: Yes, my Lord; but it is a special power.

SIR LAURENCE SANDERSON: You say that if he has the power to withdraw, he has the power to put forward?

MR. LAVINGTON: Yes.

LORD BLANCKBURGH: If he has power to withdraw he has power to effect?

MR. LAVINGTON: Yes, my Lord.

SIR THOMAS INSKIP: My Lords, the question in this appeal, as your Lordship said, when my learned friend, the Solicitor-General was arguing, appears to be a narrow one as at one time stated by him. That is, ^{the} a question of fact as to whether the Commissioner had the power^s to make these conditions; it being conceded that the Governor perhaps has the powers. Stated in that way the question does seem to be a narrow one, and rather a technical one and one ^{with} which it does not seem very useful or necessary to trouble your Lordships' Board ^{with}. The question is really one of substance, and as presented by my learned friend, ^{the} the Solicitor General, in the case it appears to be not really a question of the powers of the Commissioner as distinguished from the Governor, but solely a question as to the powers of the Governor. I will tell your Lordships in a moment why it is an important question for this Appellant.

LORD BLANCKBURGH: Would you wish to say that nobody had any power to do this thing?

SIR THOMAS INSKIP: No, my Lord; I do not say that nobody had any power. I say these restrictions may be imposed upon non-European as a matter of policy by the persons entrusted with that power by the Legislature, but the Commissioner of Lands certainly has not that power. Then your Lordships may say to

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no; But the Governor has the power, and the trouble, if there is trouble, can be cured by the Governor at once imposing the restrictions. The answer to that is that the Governor will do it, if he does do it, as a matter of considered policy, and what my learned friend, the Solicitor-General, has said here as to what he surmises to be the position illustrates the importance of the distinction, because he says the Governor appears to him to have taken up the position of leaving the Commissioner to validate his restrictions if he can, but he himself, the Governor, will not take the responsibility of himself stepping in and saying that these restrictions shall apply. Your Lordships I am sure appreciate that in a country like Kenya where these questions of racial distinction have been so very important, that a matter of policy is very different from a mere matter of machinery. A question of policy is attended by publicity and by consideration which could never be given to the decisions of the Commissioner of Lands, who appears to be appointed by the Ordinance as a municipal officer to carry out the matters which it could not be supposed the Governor would be able to attend to in connection with the disposal of plots of land.

SIR LAMBLOT SANDERSON: A good many more people would be entitled to be heard if it was a question of policy, and a great many other considerations might come in.

LORD BLANESBOROUGH: If it were a question of policy it might have repercussions outside the Colony?

SIR THOMAS INSKIP: Yes, my Lord; and that is the real importance attaching to this case. As your Lordships know and I shall show in a moment, this question of segregation has been a matter which has been considered by His Majesty's Government and Secretary of State, who has powers to give certain directions in the Ordinance to the Governor, and if the whole

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of this question of policy is to be given the go-by by clothing the Commissioner with powers to enforce a policy of segregation, literally what is the result of the consideration which has been given to these matters by the Governor and the Secretary of State falls into the background. Would your Lordships be good enough to look at the Case in order that I may justify my statement that my learned friend's appeal seems to be based upon the contention that the Governor may do what he likes with his own, and was not based upon the contention that the Commissioner of Lands was clothed with powers. The Reasons are: (1) Because under the Crown Lands Ordinance the powers of the Governor to limit the bidding at any sale by auction is unrestricted; (2) Because there is no Order in Council or any general or special instructions of the Secretary of State; (3) Because the Governor may, apart from the Ordinance, by virtue of his right as a land-owner alienate the said Crown Lands by auction and subject to any conditions or limitations he thinks fit; (4) Because the word "auction" in Section 18 of the Crown Lands Ordinance does not mean that any and every person has a right to bid and buy without restriction, -- I am not on the materiality or importance of the contentions, but only on the question as to the Governor's or the Commissioner's powers. (5) Because under Section 19 (E) the Governor had absolute power to insert Special Condition No. 5 in the said Conditions, and such condition was legally inserted. If that was the question which this appeal raised, my argument would be very different; indeed, I should not be here to argue that the Governor, being clothed with the powers which this Ordinance gives him, may not impose the restrictions which are in fact an embodiment of the policy of segregation between the different races. The Governor, as your Lordships have fully

appreciated, is clothed with the power of giving both general and special directions. I imagine that "special directions" means directions with reference to particular transactions, or a particular series of transactions. "General directions" presumably are directions which apply to a matter of policy as to the disposal of Crown lands, and I am not going to contend for a moment that the Governor may not, as a matter of policy, either on his own account as Governor -- I do not know what his constitutional powers exactly may be to set apart from directions of the policy of the Secretary of State -- or the Secretary of State might give directions which would require a segregation in Mombasa of the races, which, of course, are three, as recognised by the Ordinance, Indians or Asiatics, natives and Europeans. But here the Governor has not taken the responsibility of acting upon that policy, and indeed it is not the policy of His Majesty's Government, nor has it been the policy of the Governor. The Governor has, in fact, so far as one can ascertain from the available documents, given general directions, if he has given any, in an opposite sense, and the whole of this case, in my submission, turns upon the powers of the Commissioner.

LORD BLANFORD: In the possibility at all events, that if the power is in the Governor, he would not exercise it?

MRS THOMAS INSKIP: Yes.

LORD ATKIN: I suppose that may be true, but it looks to me as if he had complete control of this situation, because the sale is to be by public auction unless the Governor otherwise orders. If he at any particular moment directed this sale should not take place by public auction, there is an end of it. I should think that this proceeding is taking place with the sanction of the Governor inasmuch as he could stop it and has not stopped it.

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SIR THOMAS INSKIP: I only know what my learned friend, the Solicitor-General, said he surmised the position to be; but I attach great importance to that.

LORD ATKIN: It seems a detached attitude for the Governor to take towards the matter.

SIR THOMAS INSKIP: It may seem a little detached, but I am ^{not} sure that there is not a good deal of substance behind the Solicitor-General's surmise. Would your Lordships be good enough to turn to some documents which are appended to the Applicant's Case?

LORD ATKIN: How do those documents become relevant on the question of construction?

SIR THOMAS INSKIP: They are relevant as to the general instructions of the Governor.

LORD ATKIN: This is Mandamus?

SIR THOMAS INSKIP: Yes, my Lord, in form.

LORD ATKIN: The proponent must set out his case. He ought to set out the demand ^{and} the refusal, which seems to be very inadequate to start with.

SIR THOMAS INSKIP: I am not here, my Lords, to suggest that the form of the proceedings has been what in this country we should call irregular.

LORD ATKIN: It is all the more important to maintain strict regularity in these cases. I do not know of any proceedings in Mandamus or anywhere else where you can quote documents which are supposed to represent questions of policy without their being brought into evidence in the ordinary way and subject to contradiction.

SIR THOMAS INSKIP: If your Lordships take the view that it is not right or convenient to look at these documents, I do not press them for this reason, that I am quite content to take my learned friend, the Solicitor-General's statement, and

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indeed apart from that statement, and assume here that the Governor has never imposed these restrictions, and there is no evidence or suggestion on the documents that this is anything else than the action of the Commissioner.

LORD BLANFORD: It has been so opened by the Solicitor-General.

SIR THOMAS INSKIP: Yes, my Lord, and my learned friend has strenuously argued that the Commissioner is clothed with these powers; that is the issue between us, and I only desire your Lordships to appreciate that I am not troubling you on behalf of the Appellant with a mere technical matter which is purely academic, because this is a question of policy on the question of what the Commissioner may from time to time think desirable in connection with a particular plot. The suggestion which has been made is that the Commissioner may impose these restrictions.

LORD ATKIN: Upon that the question which is suggested as to the possibility that the Commissioner has not power to sell at all by auction would be very material, but apparently you concede he has power to sell.

LORD BLANFORD: Otherwise you would be entirely out of Court.

SIR THOMAS INSKIP: I think my learned friend would be out of Court.

LORD BLANFORD: You want to bid?

SIR THOMAS INSKIP: Yes, if they are put up,

LORD ATKIN: Your form seems to be hopelessly wrong, but you might have succeeded in getting a Mandamus to the person who disposed of the property in accordance with law.

LORD BLANFORD: You desired the auction to go on if the conditions were eliminated?

SIR THOMAS INSKIP: No, my Lord; my Mandamus was to permit the auction being held with that in it.

SIR LANGHOLOTT BARRINGTON: If he has no power to sell at all, then he cannot sell with or without it.

LORD BLANCKENBURN: You were an expectant buyer?

SIR THOMAS INSKIP: We desired to have that which they submit is their right as British subjects, to enjoy whatever advantages may come from the disposal of what is held on His Majesty's behalf.

LORD ATKIN: You cannot compel a Commissioner to sell on conditions of which he does not approve. If he does sell according to law, then you say you have a right to bid?

SIR THOMAS INSKIP: Yes, my Lord, I unhesitatingly accept that. You cannot compel a Commissioner to sell any more than you could compel any of His Majesty's Secretaries of State here to dispose of Government property. But what you can compel according to our common law, in so far as it applies to Kenya and His Majesty's Secretaries of State if they dispose of Government property, is not to restrict any class of His Majesty's subjects from the opportunity unless Parliament has clothed them with the power. That is the fundamental point of law against monopolies.

LORD ATKIN: If they have powers of sale which are statutory, you get a Mandamus to the Minister to carry out his Statutory duties. If his duties are not statutory, I do not suppose you can get a Mandamus against him at all.

SIR THOMAS INSKIP: No, my Lord; I respectfully agree as to the form of the proceedings.

LORD BLANCKENBURN: There is no duty on the Minister to sell anything.

SIR THOMAS INSKIP: No, my Lord; no duty to sell at all, but if a Minister of the Crown holds public lands on His Majesty's behalf and sells them or puts them up for sale, I submit that apart from any powers of restricting that sale to a limited class of His Majesty's subjects which Parliament or the Legislature may confer upon him, it is the right of the British subject to bid for them. That was fundamental to the old

Statutes against monopolies. It was said to be the birth-right of a British subject to buy and to sell, and, of course, Parliament might restrict the right to a class.

LORD ATKIN: Do you mean the Minister having power to sell might make a private sale?

SIR THOMAS INSKIP: If Parliament has clothed him with the right to sell privately, he may sell privately; but I say you have to look at the Statute as a whole, and here we have to look at the Ordinance as a whole to see whether or not the intention was to clothe the Commissioner with these powers.

LORD BLANESBOROUGH: I do not think it would affect the ultimate issue; there is no doubt what the attitude of your client is in the matter. That is shown in paragraph 6 of his Affidavit. He says: "I am an Indian, and as such I am therefore refused the right to bid for and purchase at the auction any of the said Plots, or to occupy any building which may be erected on any of the said Plots except as a menial servant." Then in paragraph 8 he says: "I have requested the Respondent to annul or cancel the said two restrictions and to let me bid for and purchase any of the said Plots at the auction" and so on. So that he really put himself forward as an intending purchaser ^{who} ~~and~~ by these restrictions was prevented from bidding.

SIR THOMAS INSKIP: Yes, he wants to bid if these properties are to be sold.

LORD BLANESBOROUGH: He thinks that if this property is being sold and he is precluded from bidding, it is a particular injury to himself over and above His Majesty's subjects?

SIR THOMAS INSKIP: Yes, my Lord. Therefore, we have to look at the Ordinance as a whole and see whether or not the Legislature has clothed the Commissioner with powers to restrict what I say being found is the fundamental right of every British

subject in Kenya, namely, to bid for land which is put up for sale held on His Majesty's behalf as public lands.

LORD BLANESBURGH: Do you say a British subject has any particular right because he is a British subject?

SIR THOMAS INSKIP: Yes, my Lord.

LORD BLANESBURGH: A German or a Frenchman would not be precluded from bidding here?

SIR THOMAS INSKIP: I do not think a German or a Frenchman could come along and claim the same right as His Majesty's subjects.

LORD BLANESBURGH: Under the Ordinance?

SIR THOMAS INSKIP: Apart from the Ordinance, I say that His Majesty's subjects have a right to bid at a sale of public property or land which is held on His Majesty's behalf. I submit there is no provision of the common law which empowers a Minister to restrict the rights of His Majesty's subjects in buying and selling Crown property.

SIR LANCELOT SANDERSON: Would a Minister have any right to sell any Crown property without statutory authority? He could not sell it at common law?

SIR THOMAS INSKIP: No, my Lord; but I am saying if the Legislature does give him power to sell the Minister cannot of his own volition impose restrictive conditions which favour a particular class of His Majesty's subjects.

LORD BLANESBURGH: Supposing a Minister has power to sell a Crown property and no more, he is by virtue of that power precluded. While he may restrict the purchasers to His Majesty's subjects, and he may, therefore, exclude all who are not, he is precluded from excluding any section or individual members of His Majesty's subjects?

SIR THOMAS INSKIP: I do not say if the Statute simply empowers him to sell. You have to look at the whole of the provisions of the Statute and I say when you have looked at the whole of these Ordinances you find from them an intention of the

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Legislature that he shall not have power to restrict to a particular class.

LORD BLANESBURGH: I should have thought myself that if there was to be any limitation of his powers in that respect, it could not go so far as to exclude from the potential bidders any who were entitled by the law to hold land in Kenya.

SIR THOMAS INSKIP: That is sufficient for me.

LORD BLANESBURGH: That is the sort of rational restriction with reference to the subject matter, because it must be his duty to get as big a price as he can.

SIR THOMAS INSKIP: The learned Solicitor-General said something as to that, and described it as ~~MAKING~~ a fallacy -- I am not at all sure that he is right -- and that in this community you would get a bigger price quite possibly by restricting the sale to Europeans. But, after all, the Europeans are in a very small minority in Kenya.

SIR LANOELOT SANDERSON: I thought he was saying that if it was open to everybody, probably the price would be higher.

SIR THOMAS INSKIP: No, my Lord; that is how the learned Judges put it. The learned Solicitor-General said it was because a European will give a bigger price for property which is in the European area.

SIR LANOELOT SANDERSON: That is a question of speculation.

SIR THOMAS INSKIP: May I start from the proposition which your Lordship put to me as to the prima facie right of any of His Majesty's subjects in Kenya to bid for property?

LORD BLANESBURGH: The trouble I find is in finding any right in His Majesty's subjects as such and any privilege in the matter of purchase.

SIR THOMAS INSKIP: It is not necessary for me to trouble your Lordships to consider that point.

LORD BLANESBURGH: His Majesty's subjects as such.

SIR THOMAS INSKIP: I say at any rate there is no power, apart from the Legislature's Ordinances, to exclude one of His Majesty's subjects from the right to bid. It may be that the Legislature would clothe the Minister with power simpliciter to sell. Then it might be a proper inference from the Ordinance that he had a power to sell privately.

LOWD BLANFORD: Power to select his purchasers?

SIR THOMAS INSKIP: Yes, power to select his purchasers, and power to sell to anybody whom he thought would be an owner congenial to the administration. But when you read this Ordinance and consider all the provisions, including, of course the provisions of sale by auction, my submission is that the necessary inference is that he has no power to restrict except in special cases specially provided for. It is noticeable that Section 6 of the Ordinance says that the Governor is to have power to "grant, lease or otherwise alienate in His Majesty's behalf any Crown Lands" -- that would appear to dispose of one of the reasons of my learned friends' in their Case, that the Governor is to be treated exactly as a private landowner who has powers to dispose of his property as and when he likes. Then Section 10, to which your Lordships have directed so much attention, and Section 9 are, in my submission, mere machinery making the Commissioner the ministerial officer to carry out the power of alienation which are in the Governor under Section 6, and obviously, in my submission, do not clothe the Commissioner of Lands so far as we have got with the powers which the Governor has got of alienating the lands "on any terms and conditions as he may think fit". These are the words taken from Section 6. Then we come to Part III with reference to Town Plots. Section 17, upon which reliance is placed with regard to the covenants in the leases against occupation by Agriculture,

refers to the lease when granted. Section 17 is relied upon, as I understand, in part as justifying the Crown's contention on the first point, namely, the right to restrict the sale to Europeans, whatever the relevance Section 17 (d) may have to the second point as to the restriction upon the use of the land when purchased, in my submission, 17 (d) has no relevance at all to the first point.

LORD BLANESBURGH: I think it was only in this way that it was used: If under Section 17 (d) it is permissible to insert in the lease a covenant against occupation by a non-European, it would be nothing less than a trap to the non-European if he were to forbid him to bid for that property.

SIR THOMAS INSKIP: I respectfully agree. The second condition seems very much the corollary of the first condition. Although presumably inserted to prevent a person buying colourably for himself and then transferring the very next day to an Indian, it was a condition which must be the necessary follow of the restriction to Europeans to make it effective. You might get somebody buying for his nominee or trustee. Which ever way you look at it the two seem to be closely connected.

LORD BLANESBURGH: The learned Judges having decided as they have, it is not necessarily fatal to their decision. They do not seem to have noticed that inconsistency.

SIR THOMAS INSKIP: That may be, my Lord. My submission under Section 17 (d) is that whatever you get out of the rest of the Ordinance you cannot get out of Section 17 (d) power, either directly or indirectly, to restrict the sale to Europeans, because Section 17 (d) is dealing with special covenants to be inserted in the lease.

LORD BLANESBURGH: I do not say directly, but why not indirectly? If you want to begin by saying that this covenant which is proposed to be inserted in the lease is not authorized by

Section 17 (d), and if you have to admit that, are you not in a difficulty with regard to the other conditions?

SIR THOMAS INSKIP: No, my Lord; I say ⁱⁿ⁻directly as well as indirectly, because I say Section 17 (d) is limited, unless you find something else in the Ordinance, to those covenants which are proper or usual in a lease.

LORD BLANESBURGH: Not usual.

SIR THOMAS INSKIP: I say proper or usual.

LORD BLANESBURGH: Special; you must not use the word "usual"; that is a sacred word in Chancery.

SIR THOMAS INSKIP: Shall I say Section 17 (d) is restricted to covenants which are in the lease and which, in my submission, can be put into a lease, that is, a lease when granted. In my submission, that would be a very slender foundation upon which to build an argument that you may restrict the sale altogether to Europeans, because a covenant can be put in that this is not to be occupied by an Asiatic for his own occupation. It is a very curious restriction, and one which seems to me to work very harshly.

SIR LANCELOT SANDERSON: Clause 5 is really put in in pursuance of Section 19 (e), is it not? "The building conditions and the special covenants, if any, to be inserted in the lease to be granted in respect of any plot". I do not know that it makes any difference, but it is in a power given in Section 19 (a).

SIR THOMAS INSKIP: Your Lordships see that Sections 17 and 19 deal with two rather different stages of the matter. Section 17 requires determination by the Commissioner, and Section 19 is dealing with what the notice shall state.

SIR LANCELOT SANDERSON: But this condition is in the notice?

SIR THOMAS INSKIP: Yes, this condition is in the notice.

SIR LANCELOT SANDERSON: Therefore, it is put in in pursuance

of Section 19 (e)?

SIR THOMAS INSKIP: Put into the notice in pursuance of Section 19 (b) certainly.

LORD BLANESBURGH: Telling the man what he is going to get.

SIR LANOELOT SANDERSON: And it comes under the words "The building conditions and the general covenants".

SIR THOMAS INSKIP: It is called a special condition in the heading in the notice. I assume, as Sir Lancelot Sanderson suggests, that it is put in because of the requirements of Section 19 (e), the Commissioner having determined that this is to be put in a special covenant.

LORD BLANESBURGH: Before you begin at all you have to make up your mind with regard to (a), (B), (c) and (d); having made up your mind you have to give effect to it in the notice?

SIR THOMAS INSKIP: Yea, in order to be fair to intending purchasers, so that they may know what they are going to buy. Perhaps I ought to call attention to the form of the restriction. Clause 5 of the Special Conditions is: "Not at any time during the term of the grant shall the grantee permit the dwelling-house or outbuildings to be used as a place of residence for any Asiatic or African who is not a domestic servant employed by him." It is a provision which allows a European to have any number of people living in the house.

LORD BLANESBURGH: But not to be in control.

SIR THOMAS INSKIP: But not to be in control of it. It is very like Section 39 with reference to the agricultural land. My learned friend, the Solicitor-General, himself said that Section 39 is dealing with an implied covenant. The implied covenant is that a European who receives a lease shall not, without the consent of the Governor, appoint or allow a non-European to be manager or otherwise to occupy or be in control of the land leased. This special condition which the

Commissioner says he has power to insert as a special covenant appears to be framed with the same intention as that. Section 17, in my submission, does not, as I say again, directly or indirectly empower the Commissioner to restrict this sale to Europeans.

LORD BLAIRBURNHURGH: Do you or do you not say that on Section 17 he would by special covenant be entitled to preclude a non-European from being in occupation of the premises?

SIR THOMAS INSKIP: I say he could not, and for this reason, that when you look at the Ordinance as a whole you find, or I submit I can find, that he must allow everybody to bid, both Asiatic and European.

LORD BLAIRBURNHURGH: No; I am not on bidding.

SIR THOMAS INSKIP: No, my Lord, but I am stating the steps of my argument. Why I answer your Lordship as I do is because I say that I find from the Ordinance as a whole that he must allow non-Europeans as well as Europeans to bid, and I infer from that or I pass from that to saying that he cannot make that freedom ineffective by imposing a condition such as he calls a special covenant to be inserted in the lease. It is taking away with the left hand what he is bound in law to give with the right hand. That is why I say he cannot insert the Special Condition 5 under the powers which are conferred upon him.

LORD ATKIN: I suppose that is the reason of your cross-appeal?

SIR THOMAS INSKIP: Yes, that is the reason of my cross-appeal.

LORD BLAIRBURNHURGH: Is not the answer given to that argument -- it may be good or bad -- your reason for saying that he cannot insert it in the Conditions of Sale is that it would not then be a public auction? Let me put it in this way. You say: I find this special covenant is not permissible because you cannot insert a special covenant which would be in complete

contradiction of the title which you have handed over by auction to a purchaser; therefore, I begin at the beginning, and I say at auction you cannot impose this restriction, and because you cannot impose this restriction you cannot have this special covenant. The answer on behalf of the Commissioner of Lands which the Solicitor-General makes to that is this; Your reason for saying you cannot do it by auction is that it ceases to be a public auction, and this Ordinance says you may have a public auction with that restriction, namely, a public auction of agricultural lands.

SIR THOMAS INSKIP: I am not attaching very great importance to the publicity of the auction. You have to take this Ordinance, as I think the Courts have always taken it, expressly as a whole and try and discover what the intention of the Legislature was as to subject-matter. A meticulous examination as to the meaning of the word "auction" in dictionaries carries the matter very little distance. The way in which I read this Ordinance and ask your Lordships to read it is to say that the Legislature intended that these sales, apart from direction from the Governor, should not be conducted privately, but that there should be publicity attending them; that they are to be sold to the highest bidder of the persons who were to come and bid for them, and that that, apart from ^{being} something which can plainly be ascertained from the Ordinance, implies that everybody is to be free to come and bid for them. Supposing, for the sake of argument, the Ordinance began and stopped at Section 18, and said the sale was to be by auction; in my submission, that would imply that everybody was to be free to come, as I have already submitted, and bid.

LORD BLAKESBURGH: That was only to be avoided by withdrawing the property from the sale which is authorised?

SIR THOMAS INSKIP: Yes; if you find it inconvenient as a matter of policy or impropriety to sell to Indians or natives,

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withdraw the property; do not sell it. Then when you go on to the other provisions which have been compared by the Courts, and compare, for instance, the provisions of Section 19 and Section 27, you find a manifest intention of the Legislature, when they are dealing with this question of restriction, to make special provision for it, and, therefore, you enforce what seems to be intended by Section 18, that everybody shall be free to come and bid by the arguments to be derived from a comparison of different methods dealing with town plots and agricultural plots. Taking the Ordinance as a whole and reading it as a whole, I say that the manifest intention of Parliament was that this is not to be by private sale to A, B, and C. and anybody whom the Commissioner may pick out, or the Governor may, when he likes, say: I am going to sell to this Company or to that Company; I think it will be a big advantage to have a big shipping Company here, so that we will sell these plots to them; and that the Commissioner may do that, but the Governor may not -----

SIR LANGHELOT SANDERSON: Do you say, supposing there was an auction and everybody was entitled to bid, the Africans, the Asiatics and the Europeans, and then when the auctioneers sold it to an Indian the Commissioner could come forward and say: I withdraw this?

SIR THOMAS INSKIP: No, my Lord, because he has to withdraw before the property is put up or before it is offered. Once it is offered for sale, he cannot do it.

SIR LANGHELOT SANDERSON: I thought if you were admitting that, it was rather an awkward position for you.

SIR THOMAS INSKIP: No, my Lord, he must withdraw it before he gives anybody an opportunity of bidding. Therefore beginning with what appears to be the intention of the Legislature to give a complete and universal freedom of bidding in Kenya when offered, you go on and find that provision is actually made

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in certain cases both for the purchase and use of these properties which have been held on His Majesty's behalf and are now going to be sold; you find in Section 27 such a restriction contemplated, that is to say, upon the right to bid. You find in Section 39 a restriction not merely contemplated but enforced by the Legislature against occupation by an Asiatic. You find no corresponding provisions at all of that sort in connection with town plots, and if my learned friend's argument is right, it would appear that in connection with agricultural plots, although it is necessary for the notice to state the position, with regard to the freedom to bid in connection with town ^{plots}, he may determine upon a restriction and yet give no notice at all. In my submission, that is so unlikely a result that unless you find clear words saying that is what the Legislature intended, the Court ought not to interpret the Ordinance in that sense.

The provisions of section 18 read in their natural sense certainly do not authorize restriction to a class, and yet when you go on to read the Ordinance, you find that when it occurs to the Legislature to restrict the use or the right to bid for a property to a particular class, it makes special arrangements for that situation.

SIR LANCELOT SANDERSON: You say in the case of town plots the Commissioner may determine not to sell to Indians and yet give no notice.

SIR THOMAS INSKIP: If my learned friend the Solicitor General's argument is right, he may determine not to sell to Indians and yet he need not state it in the matters which the Notice must state according to section 19. If your Lordship compares section 19 with section 27, you will find point for point section 27 reproduces section 19. For instance, section 27(a) is the same as section 19(a) in substance. Section 27(b) is ^{to} ~~an~~ analogous/section 19(b); section 27(d) is the same as section 19(c) and section 27(e) is the same as section 19(d). These last two have been transposed, and the only one which is not included is section 27(c).

Now, my Lords, my learned friend the Solicitor General sought to justify or explain that difference which I think he thought was significant, by saying that it was obviously right that in the case of agricultural land, which was up country, a buyer or prospective bidder should have notice of whether he was to be allowed to bid for it or not, but in the case of town plots where everybody was on the spot, it was not so important that the notice should inform him.

LORD BLAKESBURGH: Is that any reason for suggesting that there is no power at all if they think fit?

SIR THOMAS INSKIP: With respect, my Lord, is it not a ground for

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thinking that if the Legislature had intended the Commissioner to be clothed with these powers in the case of town plots, it they would have put it into the matters which the Notice must state in the same way as the Legislature put it into the Notice about agricultural plots.

LORD BLANESBURGH: I suggest they were put there, because it was thought only right that the person coming to the auction should know what was in front of him; it might very well be that a great deal more should be said,

LORD ATKIN: Does not the general law with regard to auctions compel a seller to give some sort of Notice as a condition of this kind?

LORD BLANESBURGH: In an auction without reserve the last bidder can claim the property.

LORD ATKIN: I think the seller has to give notice if there are conditions of this kind. If he advertises the sale by auction intending to put a restriction upon the persons who bid, certain people who attended would have a grievance if he did not give notice of that kind. I am inclined to think that would be a legal cause of action.

LORD BLANESBURGH: Sir Thomas is approaching the section from another angle altogether. He says there are sections which are complete, and there is with regard to the restriction nothing more to be inserted than ~~there~~ is there authorized or permitted.

SIR THOMAS INSKIP: I do not say that nothing more may be inserted in the Notice.

LORD ATKIN: The point is dealt with in the Consolidated Kenya

Statutes at section 14. It says: "(1) It shall be stated in the particulars or conditions of sale by auction of any movable or immovable property whether such sale be without reserve or subject to a reserve price, or whether a right to bid is reserved."

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LORD BLANESBURGH: That is by the vendor?

LORD ATKIN: Yes. "(2) If it is stated that the sale be without reserve or to that effect, then it shall not be lawful for the seller or any person on his behalf or employed by him to bid at such sale, or for the auctioneer to take knowingly any such bidding".

LORD BLANESBURGH: Would you agree that it was permissible under section 19 in the Notice to say that the sale would be without reserve or that it would be subject to reserve?

SIR THOMAS INSKIP: Yes, my Lord; that would be subject to the upset price; it would be without reserve.

LORD BLANESBURGH: When you have a reserve you never do sell as without reserve; when you have an upset price you state the reserve.

SIR THOMAS INSKIP: The reserve is a reserve.

LORD BLANESBURGH: Yes, in the case of an upset price you cannot withdraw that, and when it is reached the property is without reserve.

SIR LANCELOT SANDERSON: It is really an offer to sell the property at a certain price.

SIR THOMAS INSKIP: Yes, my Lord, and as soon as you have advertised the auction to the public to sell property at a particular price without reserve and somebody comes along, and is then prevented from enjoying what he is prepared to make a contract for, I venture to submit he has a cause of action.

SIR LANCELOT SANDERSON: I understood Lord Atkin to say: Here is an offer made by the seller through the auctioneer apparently to everybody, but as a matter of fact it is really intended as an offer to a certain class only.

SIR THOMAS INSKIP: That is an offer if the Notice says so.
SIR LANCELOT SANDERSON: Somebody comes along and bids, and there is a contract completed. If the man will not complete it, there would be an action for breach of contract.

SIR THOMAS INSKIP: Yes, my Lord.

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LORD MHAESSBURNH: Your contention must come to this, that in view of the provisions of Section 19, it is not permissible for the Commissioner in his notice of sale by auction of a town plot to indicate that he will not be willing to accept a bid from anybody who is not a European.

SIR THOMAS INSKIP: Your Lordship sees why I make that submission. I say he has not the power to determine. There are two steps. He must, first of all, determine the special conditions, and so on, and then the notice is to state certain things. I say he has no power in limine to restrict the sale to a certain class unless the Legislature gives him that power. I find nothing in this Ordinance to give him power to cut down the prima facie right of people in Kenya irrespective of race to bid for public property. That submission is reinforced and made stronger by what I find in the Ordinance when I read it as a whole, that when the Legislature does intend that the right of a particular race shall be cut down they make special provisions. They want to cut down the right to occupy agricultural lands; they say it shall not merely be the right of the Commissioner to make the condition, but it shall be implied as a condition of law that an Asiatic may not occupy agricultural land. In respect of a right to purchase agricultural land, the Legislature does not go quite so far as that, but it says the Commissioner may impose this as a condition that a non-European shall not be allowed to buy.

LORD MHAESSBURNH: It is a little awkward to your argument when you look at the form in which the provision with regard to persons other than Europeans is described. Under section 27 subsection (c) what he has to do is to indicate whether the privilege to persons other than Europeans for bidding is to be conceded to them. The implication from that would be, apart from that indication of the concession, that there would be a restriction.

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SIR THOMAS INSKIP: I think that is, if I may say so, going much too far in the interpretation of this Ordinance, because you do not find it anywhere outside that sentence. There is nothing in this Ordinance to justify that, in my submission.

LORD BLANESBURGH: That is what you start with. You have an implied condition in the lease.

SIR THOMAS INSKIP: I submit with great respect that what Mr. Justice Muir-Mackenzie said is right about section 27(e); it must mean if you are going to restrict the right to Europeans, the Notice must say so, and you do not start from the position that Europeans are to be the only persons allowed to bid, and then require the Commissioner to say if other people are to be allowed to bid, what you start from is an unrestricted right to bid, and the Commissioner is to give notice if he is cutting down that unrestricted right.

LORD BLANESBURGH: It is nothing like express. If that is what it means so far as the words are concerned, it is entirely the other way.

SIR THOMAS INSKIP: It is the intention of the Legislature which you have to deprive from the Ordinance as a whole.

LORD BLANESBURGH: I wonder what the Legislature could have meant in this matter that the non-Europeans were to enjoy.

SIR THOMAS INSKIP: That is not submitted by the Solicitor General. Your Lordship remembers his reason for saying that it was fair that with regard to agricultural land notice should be given because of the distance they might have to travel, and it would be awkward if they came only to find that they were not allowed to bid. If your Lordship's suggestion is right, they need not know whether they might or not.

LORD BLANESBURGH: That was before I indicated to the Solicitor General what might be the meaning of section 27(e).

SIR THOMAS INSKIP: I am not saying that your Lordship's point is

not a good one, but with great respect, this point is not a sound one upon the construction of this Ordinance, because you do not find anywhere in it, apart from this particular sentence, anything by inference to lead to the conclusion that only Europeans are to have the right to bid for public property in Kenya.

LORD BLANESBURGH: Perhaps a more orthodox method of putting the point would be the other way, that really the power is to sell by public auction if you concede that within the meaning of this particular Ordinance auction is no less a public auction because some restriction is made.

SIR THOMAS INSKIP: I am not suggesting that an auction is not a public auction because a particular class of persons are restricted from bidding. I say the Commissioner has no more right to limit the class who may bid for this property to non Europeans than he has to say: I will not have any Irishman bid in this sale.

SIR LANCELOT SANDERSON: Supposing section 27(a) were not to be found in the Ordinance, then I suppose it must be admitted that everybody who was a British subject could bid at the auction?

SIR THOMAS INSKIP: I submit so, my Lord.

SIR LANCELOT SANDERSON: When you find this is put in with regard to agricultural land, must it not mean that the notice shall state whether or not persons other than Europeans are to be permitted?

SIR THOMAS INSKIP: That is the way in which Mr. Justice Muir Mackenzie put it, and, in my submission, that is right.

SIR LANCELOT SANDERSON: There is nothing in the Fourth Part which deals with agricultural land to correspond with section 17 in regard to town plots, is there. Section 17 says that the Commissioner of Lands shall determine certain things. Section 27 corresponds to section 19, but there is nothing in Part IV that corresponds with section 17.

LORD BLANESBURGH: That strikes one as being perfectly impossible; that is only a kind of warning.

SIR LANCELOT SANDERSON: It is recognised that he is to determine certain matters, but it does not seem to say he has to determine whether you should have Europeans or not.

LORD ATKIN: The only point about section 17 is that it says that the Commissioner shall determine, before any town plot is disposed of, certain things, and saying that he has at least four weeks to give notice of the very things which are the subject matter of his determination. It seems perfectly obviously that he must determine them before he must publish them. I do not see why section 17 is there at all.

LORD BLANESBURGH: Subsection (c) and (d) are in relation to the lease and not in relation to the auction.

SIR THOMAS INSKIP: Yes. As drafted most of section 17 must simply be this, that the Commissioner has to determine, whereas section 19 says the notice shall state. It is awkwardly drafted. It might have been done by section 19 simply saying that the Commissioner shall state instead of saying that the notice shall state, ~~that~~.

SIR LANCELOT SANDERSON: I do not see why section 17 is put in if that is the only meaning of it.

LORD ATKIN: Section 27 does say that the Commissioner of Lands shall give notice.

SIR THOMAS INSKIP: Yes, my Lord, if they had adopted the same method of section 19, they might have left out section 17. I imagine that the draughtsman was not thinking of the orderly perfection of things, and when he got to Part IV he got rather tired of stating it long and stated it short.

LORD ATKIN: These things have to be determined before you can give notice.

SIR THOMAS INSKIP: My argument does not depend merely on a comparison of sections 19 and 27. It is, in my submission, a way of reinforcing the inferences which I say must be drawn from the enactment as to auction. I am not relying at all upon publicity of the auction. What I am relying upon is the distinction which the Legislature intends to be drawn between the right to sell privately to any person whom the Commissioner might select, and the duty to offer it to persons who shall bid against each other.

LOUIS BLANCKFURN: Beginning at the beginning you come to the conclusion that prima facie and a priori there is no power at all in the Governor to restrict the persons making a bid.

SIR THOMAS INSKIP: In the Governor, no; in the Commissioner. I draw the greatest distinction between the two.

LOUIS BLANCKFURN: Supposing you begin with that. I do suggest that this implication in the Ordinance in the provision in section 27(c) is extraordinarily inept, not only inept, but it is almost absurd.

LOUIS ATKIN: You must say also for this purpose that the terms of sections 18 and 26, which are identical in language, mean two different things; section 18 means unrestricted auction, and section 26 means restricted auction.

SIR THOMAS INSKIP: No, my Lord, if I may say so with respect, I do not accept it in that way, because you have to take the sections as a whole. You cannot divide the thing into water-tight compartments and say that section 18 is something different from section 26. Section 18 is different from sections 26 and 27.

LOUIS ATKIN: I quite agree, but I say so far as the words go which deal with the mode of saying it is by auction, "by auction" in section 18 means by unrestricted auction, and "by auction" in section 26 means by restricted auction.

SIR THOMAS INSKIP: Yes, my Lord, because there is a plain

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inference from the language of the Ordinance that there is power to restrict. That is given by these provisions in section 27.

SIR LANCELOT SANDERSON; Section 18 and section 26 only deal with the mode of sale, and section 27 deals with persons to whom it applies.

LORD ATKIN; Section 27 does not deal with anything, but the notice you have to give.

SIR THOMAS INSKIP; Yes, but I understood your Lordship to say just now that section 27, ^{although it} is only dealing with the notice which has to be given, has implicit in it ^a the determination before the notice by the Commissioner.

LORD BLANESBURGH; The way in which the learned Judge ought to have put it, I should think, is that whereas under section 26 the leases have to be sold by auction in view of what the conditions of that auction may be, it may be that persons other than Europeans may be permitted to bid, nevertheless it is a public auction.

SIR THOMAS INSKIP; It is an auction, I agree, but you do not find anywhere in the Commissioner the power to cut down the right to bid. The provision which is contained in section 27 is a power not to cut down, but a power to extend.

LORD ATKIN; That argument must assume that the point from which ^{is} you start ~~that~~ only Europeans may bid.

LORD BLANESBURGH; That looks like the words of it unless others are permitted to come in.

SIR THOMAS INSKIP; That is not the construction of the Crown.

LORD BLANESBURGH; But it is the meaning of the Ordinance.

SIR THOMAS INSKIP; It is nowhere to be found in the Ordinance or in that particular section and, in my submission, if you can give a reasonable interpretation to a section instead of an unreasonable one, the reasonable one must be preferred. Your

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view of Lordships ~~SECTION 27(a)~~/section 27(a) requires one to begin with the assumption that only Europeans were to be allowed to bid. That is neither conforming with the common law, as far as I know, or to any statute in force in Kenya. It is certainly not ^{the} common law that Europeans ^{only} are to be allowed to bid for public property. It is not to be found in any statute so far as I am aware in Kenya. I do not profess to be acquainted with anything but a very small part of it. My learned friend the Solicitor General will know better than I can and will contradict me if I am wrong.

LORD BLANESBURGH: I rather gathered from the way it was put that it was not contested that non Europeans may hold land in Kenya.

SIR THOMAS INSKIP: No, my Lord, and may bid.

LORD BLANESBURGH: They may hold land apart from bidding.

LORD ATKIN: You are talking about the common law. I do not understand that there are restrictions in the common law. If the King held property in his own right and chose to employ an agent to sell his own land, he could impose any restriction he liked upon it, could not he, and if a person was able to give authority to a person to sell land, he could authorise him to sell it by private treaty or by public auction or restricted public auction. How does the common law come into it?

SIR THOMAS INSKIP: I am dealing with the right of the Commissioner to impose these restrictions and I say, apart from some provision of the common law or statute law, that the Commissioner may not impose these restrictions upon the prima facie rights of His Majesty's subject, namely, to bid for public property. If I were dealing with the powers of the Governor, I should respectfully accept that my Lord Atkin is putting to me, but we are not dealing with the powers of the Governor; ~~maximally~~

dealing with the powers of the Governor; we are dealing with the statutory powers of the Commissioner.

LORD BLAKEBURGH: Can you put it higher than this, that this would be a power of the Governor; ^{but} that on the true construction of this Ordinance that particular power of the Governor has not been delegated to the Commissioner?

SIR THOMAS INSKIP: It has not been delegated to the Commissioner, and the power has never been exercised by the Governor.

LORD BLAKEBURGH: No, it is not suggested for a moment that it has.

SIR THOMAS INSKIP: Even if it had, the powers have never been delegated to the Commissioner to make these restrictions. I am not disputing for a moment that if the King by one of his Secretaries of State, or a Governor, acting in accordance with the policy of His Majesty's Government, might not exercise this restrictive power upon the rights of persons to bid.

LORD BLAKEBURGH: If that is what you do recognise, then I suggest to you it is not perhaps so difficult to read into the Commission a power by implication as it would have been if there had been no power in the Governor.

SIR THOMAS INSKIP: The Governor has these powers, and it can be done as a matter of the Government's policy, or by special permission of the Governor. I am not concerned to dispute that. I could not dispute it in the view I take of this Ordinance. I think the Ordinance obviously intended that the Governor should have these powers because of the very wide words it uses, but the Legislature has not given the Commissioner these powers, and, in my submission, what your Lordship has been putting about section 27(e), if I may repeat it once more, is unsound, and for that reason, that you do not find anywhere in the Ordinances of Kenya the law that only Europeans may bid.

and, therefore, you cannot read section 27(c) as saying that nobody but Europeans are to be allowed to bid which prima facie is the law.

LORD BLAKESBURGH: All you have to say now according to this view of it is that the Governor having that power, if he so desires to exercise it, ⁱⁿ the form of section 27(c) which refers to the Commissioner's powers to embody in the notice the condition in that form as between the Governor and the Commissioner, the Commissioner will not allow non Europeans to bid, but that he may, and in fact in a particular case he will, if he is so minded.

SIR THOMAS INSKIP: I do not follow that, my Lord.

LORD BLAKESBURGH: Because of the form in which it is put.

SIR THOMAS INSKIP: The form in which it is put is, I submit, correctly interpreted by Mr. Justice Muir-Mackenzie, who says this obviously means that the notice must say whether or not any class is to be restricted from bidding at the sale unless you start with something which quite likely might have been the law in Kenya that, prima facie, only Europeans are allowed to bid. If there was anything that anybody could point to as establishing that starting point, my learned friend's case upon section 27(c) would be very much stronger. The argument altogether would be irrelevant because he would start with the proposition that only Europeans were to be allowed to bid. If you want that right enlarged, it must be done by express enactment and, therefore, the respondent's appeal is off of Court altogether, because he cannot get rid of the original Act. No. But we do not start from that position. It has not been suggested, nor can it be got, in my submission, from any enactment or Ordinance of Kenya, or any branch of the law which may have been taken from this country to Kenya.

LORD BLAKESBURGH: Do you accept the suggestion that if you were

able to displace the second point that has been decided against you, your contention on the first would be much strengthened:

SIR THOMAS INSKIP: I do not think it would be much strengthened on the point of the exact interpretation of this Ordinance.

LORD BLAKESBURGH: If the point which is found against you in relation to the lease is correct, does not this weaken all the general considerations which you have been putting forward on the first point?

SIR THOMAS INSKIP: No, my Lord, I do not think so; It may weaken in some respects. I have regarded the second point as an attempt by the Commissioner to prevent the first point from being got round. Therefore I regard the two points as really part and parcel of the same determination by the Commissioner, but I do not think that it is the least necessary for me to say that if I am wrong on the second so I am wrong on the first point. It may be as the learned Judges below said.

LORD BLAKESBURGH: Would you not wish to say with regard to the second argument: I object to this because exclusion of particular classes of His Majesty's subjects in this matter is something which ordinarily by common law may be vested in the Governor, but is not in such express terms vested in the Commissioner according to the terms left out of the provision which he was purporting to put in, because he was not really authorized to put it in.

SIR THOMAS INSKIP: I do say that, my Lord.

LORD BLAKESBURGH: The difficulty you have to face is that you have no words to help you.

SIR THOMAS INSKIP: As to the second point, my Lord?

LORD BLAKESBURGH: Yes.

(Adjourned for a short time)

SIR THOMAS INSKIP: My Lords, the view that I myself have taken

about these clauses is that notwithstanding exclusion by section 10 and section 6, yet you must find from Part III and Part IV powers in the Commissioner to dispose of plots of land in accordance with the regulations. That seems to me to be the correct interpretation of the Ordinance taken as a whole if you can confine yourself entirely to section 10 and section 6.

LORD BLANESBURGH: It shows how extraordinarily comprehensive the proviso to section 10 is when they put ^{it} in section 8, because ^{even} if they had not put in section 8, whoever would have thought the Commissioner could do anything under section 8. It is really painting the lily to exclude section 8 in that proviso.

SIR THOMAS INSKIP: I think if it had not been for the last sentence of section 15, it would have been very much more difficult than it is ^{even} now to find that the Commissioner had the powers to dispose of the lands. When your Lordship was discussing this matter with the learned Solicitor General, it occurred to me that the last sentence of section 15 is really a way out of the puzzle.

SIR LANCELOT SANDERSON: That is how it strikes me.

LORD ATKIN: It seems so odd that they should invert the nominative.

SIR THOMAS INSKIP: I understand that this enactment was passed by the Kenya legislature which was a legislative body. Strictly speaking, I think it is what the experts call a self-governing colony with responsibility at the centre.

Now, my Lords, the view which I respectfully submit is the right view, if you have a covenant which is put in as a special covenant, is this. If I am wrong and the Commissioner has the powers to restrict the bidding to Europeans, and question, the second question goes with it.

LORD BLANESBURGH: It is complimentary?

SIR THOMAS INSKIP: Yes, it is complimentary; but on the other hand, supposing I am right on the first part, and I submit that

is the question you have to ask yourselves, whether I am right on the first part, then the second seems to be a denial of what has been conceded or yielded on the first part. I submit it is the wrong way to approach this case to consider, first of all, whether a special covenant restricting the use of the land can be included in the lease -----

LORD BLAKESBURGH: Are not they restricting the users?

SIR THOMAS INSKIP: I submit it is the wrong way to approach this case to consider, first of all, whether you may have a special covenant so far as the Ordinance appears to show a restricting of the users of the land, and then to infer from that that you may have a restriction upon the number of people who may bid for the land. I submit that the right way to approach the Ordinance is to consider the other question first, namely, as to whether you may have a restriction upon people who may bid for the land and may own it. If you find that there ought to be no restriction placed upon the number of people who may bid for the land and own it, then I submit ~~as~~ the proper meaning of the Ordinance taken as a whole is that the persons who may bid for it and own it may use it.

LORD BLAKESBURGH: I am a little astonished that the learned Judges do not seem to have found the difficulty in the way of their construction imposed by their view of the first point.

SIR THOMAS INSKIP: They say that the Asiatic who may not use it and live in it may desire to buy it as a speculation. I think it is a fact that the value of property in Bombay is very considerably increasing or was until quite recently, and it may be that the learned Judges knowing that there was a speculative market in property in Bombay thought that an Asiatic might buy this as a speculation.

LORD BLAKESBURGH: This Ordinance is 1915, that is to say, sixteen years ago.

SIR THOMAS INSKIP: That is so, my Lord. With great respect to

the learned Judge, I do not think that is a very satisfactory explanation. I prefer to say that if you approach this Ordinance as a whole and construe it as I say it ought to be construed, you arrive at the conclusion that it was intended that apart from a special provision in the Ordinance, Europeans and Asiatics and Indians should be allowed to bid, and that there should be no restriction upon the non Europeans. When you have reached that conclusion, you must assume that the Legislature intended that persons whom ^{may} bid may use the property apart again from clear words in the Ordinance such as we have in section 39.

LORD BLANESBURGH : Is it not rather striking that whereas in relation to agricultural holdings this particular restriction is to be implied even if it is not there; but with regard to town holdings, you are not allowed to put it in at all, the Commissioner is not allowed to.

SIR THOMAS INSKIP: Your Lordship sees how I get at the position that you have no right to put it in, because that would be to destroy the very value of that for which everybody has a right to bid equally. If there is to be unrestricted bidding by Europeans and Asiatics, it must be for the same subject matter. Unless you find clear words as usual have been put into the Ordinance, I say you cannot read that rather unreasonable provision into the statute.

LORD ATKIN: It cannot be merely unreasonable. I can understand there being a big question, not drawing invidious distinctions between the two races, but for the purpose of more effective letting of your land, I imagine that you might very well make a European district and a native district. On this suggested view the Legislature intended to prevent anybody bidding or putting up houses of a certain quality or certain description.

SIR THOMAS INSKIP: Then you are back at the old position as to whether you can find in this Ordinance words clothing the

Commissioner with the powers of deciding this very important question of policy, that is to say, the segregation of the races. If there were words plainly allowing him to do it, or leading to the necessary inference from the words, of course the matter would be concluded.

LORD ATKIN: It is obvious he may say that the property is to be used for dwellings or for commercial houses, industrial purposes and so forth, and he could say that the plots are to be used for such purposes that no native would desire to acquire them.

SIR THOMAS INSKIP: If he has any condition to put into the Covenant which is necessary for public purposes in connection with sanitation of the proper use of the house, such as, we will say, in Grosvenor Square, that it ought not to be used for a slaughter-house, that is a provision which you may well read from the clause in the Ordinance, that a special covenant or condition may be inserted in a lease to be granted and the Commissioner may decide as to that special covenant or condition, but my submission is that these words are not strong enough to cloth the Commissioner with powers of deciding on a very big policy or a big question involving racial distinctions that a particular portion of Mombasa should be closed to natives and Asiatics. Section 39 is: "There shall by virtue of this Ordinance be implied in every lease granted under this part to a European a covenant".

LORD BLANESBURGH: That is described as a covenant.

SIR THOMAS INSKIP: Certainly, my Lord.

LORD BLANESBURGH: Therefore it is the same words as special covenant.

SIR THOMAS INSKIP: "that he shall not without the consent of the Governor in Council appoint or allow a non-European to be

manager -- the point of the argument, I submit, is that when you find them anxious to restrict the use of land, they deal with it expressly. In my submission you have to take this Ordinance as a whole, and that is what has been said over and over again in dealing with the provisions of statutes which are not easy at first sight to understand. Whether it is taking statutes or anything else, you have to consider the statute, or whatever it may be, as a whole, and see what the intention of Parliament was. You cannot read out/a particular section something which on the face of it the words seem strong enough to bear if it is inconsistent with the scheme and the contrivance of the statute as a whole. When you look at the statute as a whole, I submit that the Governor is given very great and wide powers, and the Governor might have exercised them. The Commissioner is an administrative officer to carry out the machinery of the powers of the Governor with regard to Crown lands; that it is inconceivable, in my submission, that the Commissioner -- when I say inconceivable, perhaps that is putting it too high -- that it is not to be supposed that an administrative officer like a Commissioner of Lands should be allowed to go counter to something that has been advocated as a matter of policy by the Governor; If he wishes to alter that, he must go to the Governor and get the Governor to exercise his power, but merely by his ipse dixit, he cannot do something as to the segregation of races which is not provided for in the Ordinance itself. It is said against me that the words giving him power to insert special covenants in any lease are wide enough on the face of these words to include any covenant; that any covenant is a special covenant/^{which} is not a usual one. My answer to that is that if that section stood alone the words might be wide enough, but you have to look at the whole and see if there are other parts of the Act which necessarily cut down

that position. You find that the Commissioner is not allowed to sell by private auction; he must give everybody an opportunity to bid. You find no words at all empowering him to restrict the right of persons to bid except in the clauses which deal with ~~the~~ other land than that which is being dealt with in this particular case.

LORD BLAKESBURGH: This strikes me in your favour as to what one might call the complimentary character of these two provisions which you can extract from section 39. In the case of section 39 the implication is that this covenant could only be found in a lease granted to an European. That one understands but if the other view be correct, you would have to have permission to have this covenant inserted in a lease granted to a native under the decision of the Courts appealed from. That would be so, would it not?

SIR THOMAS INSKIP: Yes, my Lord, that would be so.

LORD BLAKESBURGH: It is awfully difficult for me to see that the two do not go together one way or the other. The Solicitor General would put it from his point of view and say: I begin with a special covenant. You say: I begin with the notice of the auction. However they begin, they ought to go together.

SIR THOMAS INSKIP: That, my Lord, is one way of focussing the issue between the Solicitor General and myself. Broadly speaking, he says: I may put ~~in~~ in any covenant which is a special covenant. So far as the words of that section alone are concerned, I do not dispute that the words ~~mean~~^{appear} on the face of them to be wide enough to include any covenant even if it was a covenant that only a Scotman or an Irishman or an Englishman or a person born in Kenya should occupy them. But if you look at the rest of the Ordinance you cannot find any intension on the part of Parliament to give the Commissioners of lands the power to say that only one branch of the British race should

occupy these lands, or that only native born persons, whether of European origin or Asiatic origin, should occupy them. Therefore, you have ^{to} cut down ⁱⁿ some words the broad unrestricted powers to insert any special covenant in the lease. The only question is how far are you to cut it down. Then you have to look at the Ordinance as a whole and see, first of all, the very wide powers that are given to the Governor which can always be exercised. The Governor may step in at any moment and give general directions. I submit that two persons are not to be clothed with these important powers which the Governor in my submission, is to exercise. What is the object of giving the Governor power to issue special or general instructions as to segregation if the Commissioner may issue special or general instructions as to segregation. Supposing the two differ, in my submission, the Commissioner is merely an administrative officer to carry out the behests in these important matters and the decisions of the Governor. Of course, if the words empower the Commissioner, there would be no argument, but there are not any words, and my friend can only get it by saying that as you find clear power to insert provisions as to a special covenant, and he also gets it by saying as the Judge of First Instance did, that anything is an auction, an auction restricted to A. S. is an auction and, therefore, the words are satisfied. My answer to that is that that is not the reading of the section.

LORD BLAIRSBURGH: It is quite plain that the word "auction" would connote an auction in which there was this restriction.

SIR THOMAS INSKIP: That is not my strong point. My strong point is that "auction" is intended to distinguish the method of sale from private treaty.

LORD BLAIRSBURGH: To eliminate the power of selection?

SIR THOMAS INSKIP: Yes, to eliminate the power of selection; to

prevent the Commissioner from going to some trader, or to some individual and saying: You buy this land; you can have it for £1,000; that is a fair price. The Governor may do that. He ^{might} say, for instance: I think it is important that a very large trading concern up country should have this wharf or plot of land, as the case may be; but the Commissioner cannot do that.

SIR LANCELOT SANDERSON: He has to sell it by auction.

SIR THOMAS INSKIP: Yes, my Lord; then when you have started with that, when you have limited the right of private selection, where do you get the power to eliminate any class of the community? My learned friend must go as far as this, that the Commissioner would have had the power to say: I am not going to have anybody from the Dominions; I am going to have a British born subject; British in the sense of being born in the United Kingdom. With respect, I do not see anything to prevent that if my learned friend is right.

LORD BLAISEBURGH: The Governor may intervene and say: I will not have a sale.

SIR THOMAS INSKIP: But, my Lord, that illustrates my submission that this is for the Governor. It may be that the Governor would not be aware of what was being done; the thing could be done in a hole-and-corner way.

LORD ATKIN: With a four weeks notice?

SIR THOMAS INSKIP: I do not know enough about the country -- it is a large country -- and as to the notice, I do not say anything.

THE SOLICITOR GENERAL: And that notice is to be in the Official Gazette.

LORD ATKIN: I think the Governor or some of his staff would know.

SIR THOMAS INSKIP: Do not let me overstate any point I am putting. I am not suggesting that the Governor would not know,

but, in my submission, it is not a sufficient answer to say that the Commissioner cannot restrict the power to any class of the community he chooses to select, because the Governor would intervene. I am saying that the Governor has power. What I am saying is that the Commissioner has not those powers; he must get directions if he wants to cut down the prima facie right of everybody to take part in the auction.

LOD BLAIRBURGH: It would need ^a very strong inference to come to the conclusion that even in this matter the particular restriction imposed by the Commissioner had been imposed with the knowledge and even with the approval of the Governor, but that is not enough for the Solicitor General in this case, because there is no evidence of that.

SIR THOMAS INKIP: I am sure the Solicitor General will let me say this. He could not contend that having regard to all that has taken place in Kenya with regard to this segregation.

LOD ATKIN: My own finding would be that this matter has been advertised and the sale has been apparently held over, and it is to take place with a condition; I myself should have inferred that inasmuch as the Governor could have stopped this if he disapproved of it, and must be taken to have known of it, that this proposed sale with these condition took place with his knowledge and approval. I do not know what other inference can be drawn. That does not, I quite agree, dispose of the point of law.

SIR THOMAS INKIP: That would lead to this position, that I should then have to say that it is to be implied that I do not object as representing these Asiatics.

LOD BLAIRBURGH: Although you are only representing a prospective bidder at an auction.

SIR THOMAS INKIP: I do not object to the view that the Governor can do this, and if, as my Lord Atkin says, the inference is that the Governor must have known it, and would have stopped

it if he had objected, and if your Lordship is going to say that it is to be assumed that this is really something the Governor has done, then the person concerned is content. I do not say he is content with the policy at the particular moment, but what he does not want is that in a matter which ought to be the subject of discussion in the proper Legislatures, the Commissioner, the Ministerial Officer, shall be clothed with these powers, because if it is to be decided by the Governor there are ways of bringing pressure to bear upon Governors and Secretaries of States, but you cannot bring pressure to bear on a Commissioner of Land who is in his own office.

LOD BLANESBURGH: Who is ⁱⁿ an office created by Parliament?

SIR THOMAS INSKIP: Yes, my Lord. A British subject may come and say: I strongly object to a Permanent Secretary of the Treasury deciding how much income tax I shall pay; I do not object if it is decided by the Chancellor of the Exchequer. That merely illustrates the difference I seek to draw between the powers being exercised by the Commissioner and being exercised by the Governor.

Now, my Lord, this case, although it appeared at one stage to be very narrow on a not very important distinction which was being drawn between the powers of the Commissioner and the Governor, is a case of fundamental importance to this Indian bidder. He says, and I submit on good ground, that the Commissioner is not the person to do this thing.

LOD BLANESBURGH: It is a little remarkable that in the Appellant's Case they talk about the "Governor" all through.

SIR THOMAS INSKIP: That points as I submit to what was the conception of their position until the learned Solicitor General came to argue the matter here. He is relying on the powers of

the Governor, and if he had come here to say that the Governor had these powers and, therefore, this is all right, I should say: Yes, but there is no evidence that the Governor has done this. I submit if the Governor has done this, your case falls, because you produce no evidence that the Governor has ever exercised those powers. The learned Solicitor General realising that he cannot stick to his case and rely upon a power of the Governor, is seeking to infer from the Ordinance that the Commissioner has the same powers as the Governor.

SIR LANCELOT SANDERSON: I think we are all agreed that this Ordinance is not an easy one to understand. Suppose the Commissioner were going to sell some agricultural land, and he said: I am going to let natives bid as well as Europeans; then suppose that the highest bidder happens to be a European, and, therefore, he gets the land, and he occupies the land. That is right so far, is it not?

SIR THOMAS INSKIP: Yes, my Lord.

SIR LANCELOT SANDERSON: Under section 39 he would not be allowed to engage an Indian as a manager; he would not be allowed to engage the next bidder. Supposing A.B. was an Indian and he bid for the land and wanted it but just failed to get it, although if he had only gone a little more as regards money he would be entitled to have the land and use it for his own purpose; however, because a European happens to be a higher bidder he gets the land, but cannot employ A.B. as his manager.

LOED BLAMESBURNH: I think the answer is that the mind of the draftsman of section 39 was only applied to an auction where Indians were not allowed to bid.

SIR LANCELOT SANDERSON: What do you get out of that, Sir Thomas?

SIR THOMAS INSKIP: What I get out of section 39 is that the Legislature intended to deal with that question of race distinction, and it dealt with it in plain terms. The

terms may go further than was intended or was then necessary on that view. It is not for me to criticise the drafting.

SIR THOMAS INSKIP: Perhaps they went upon the policy that a European and a non European could not possibly live in the same premises together.

LORD ATKIN: I think the real position is that for agricultural purposes the land is really segregated. The highlands are for Europeans and the lowlands for Indians.

SIR THOMAS INSKIP: That is probably so, my Lord. My own idea is that agricultural land was allocated to Europeans ⁱⁿ the town, and the Indians were allowed to hold land with the Europeans.

Now, my Lords, I cannot too strongly insist upon my submission that you must read the Ordinance as a whole. There was nobody who stated that more clearly than Lord Herschell in the famous Tax case of Golghoun v. Brooks, where he said you must read the whole of an Act, and in that case he came to the conclusion that although at first sight the section did appear to bear the meaning which was contended for, it was not the inevitable inference to be derived from the whole of the Income Tax Act. So here you have to look at the whole of the policy of the Legislature as contained in the whole of the sections in this Ordinance, and to fasten upon this provision about the insertion of ^a special covenant is, in my submission, to misread the language of the Legislature and to clothe the Commissioner with powers with which, in my submission, it would be very surprising to find an administrative officer so clothed.

LORD BLAIRBOROUGH: Your view is that ~~if~~ if you are right on the first point, you are right on the second?

SIR THOMAS INSKIP: Yes, because if the second was decided against me it would be to take back with one hand what has been given with the other hand.

LORD BLAIRBOROUGH: And if you are wrong on the first point, then you would be wrong also on the second?

SIR THOMAS INSKIP: Yes, my Lord, I think so. I should not detain your Lordships with an argument upon that.

LORD BLAKESBURGH: You must be consistent, either both out or both in.

SIR THOMAS INSKIP: I think the two ⁶⁰together.

LORD ATKIN: You would not like to say if you are wrong on the second point, you are also wrong on the first.

SIR THOMAS INSKIP: No, my Lord, because I submit that is the wrong way of approaching the case, and I do not accept that way of putting it at all. I say that he likely to lead you very much astray, because you are taking the words which on the face of them I admit are wide enough to allow special covenants -----

LORD BLAKESBURGH: You must either have your consistency or the Solicitor General's consistency, but you say yours is the right one.

SIR THOMAS INSKIP: I say mine is the right one, my Lord, and much more in accordance with what one would infer to be the intention of the Legislature when you find them dealing in express terms with selection in connection with agricultural lands, and when you find them silent with regard to segregation as regards town plots, and bearing in mind that the Governor can exercise these powers. I cannot conceive a Legislature ^{in a} ~~submitting about any~~ matter, which even in 1915, as long ago as this Ordinance, was a matter of great complexity and very great difficulty, saying to its subordinate officials: You may settle this burning question in relation to any particular plot. If the Legislature has done so, there is an end of it. The Legislature might be wise or not, but, in my submission, you do not find it in express terms.

LORD BLAKESBURGH: Is it not quite plain that in any particular

case if the Commissioner and the Governor were in variance as to view, the Governor's view would prevail, and he would give effect to his reasons? It is not as if the Solicitor General's contention put the Commissioner in the saddle so that he could not be dislodged by the Governor in relation to this particular transaction, therefore, your contention from that point of view is not quite so strong.

SIR THOMAS INSKIP: I should have thought, my Lord, with respect, it is rather stronger. The fact that the Governor can displace him rather goes to show that if the Commissioner purports to exercise powers he has not got, the Governor may come in and rap him over the knuckles and bring him back to his right position. Of course, I am imagining a Commissioner who purports to exercise a power which he has not got.

LORD BLANESBURGH: Could not your position be stronger if it could be inferred from the Ordinance that this was the position? The Commissioner does not expressly under the Ordinance have these powers at all, but if he purports to exercise them, and has been put in an independent position, the result is that he is exercising powers that the Ordinance never intended should go beyond the Governor. That is an intolerable position. If you find on the true construction of the Ordinance/^{that} anything in this matter which the Commissioner did or purported to do, would be under the direct control of the Governor to exercise it do you in the exercise by the Commissioner/get anything more than the exercise by the Governor who has power to do it, and by whom it could be done?

SIR THOMAS INSKIP: Obviously the first position is not so strong as the second.

LORD BLANESBURGH: Is not the second position this position -- not with regard to this particular case, but with regard to this particular Ordinance?

SIR THOMAS INSKIP: You are still back in the position that you do not find any express words giving the Commissioner these powers which are claimed for him. The mere fact that he asserts the right to exercise them, of course, does not give him the powers. You do not create powers by claiming them. If you want to reach the position that there is nothing in the Ordinance giving the Commissioner powers, then, in my submission, the fact that the Governor is always there to keep him straight and prevent his acting ultra vires does not justify the Court in saying that the Commissioner is right to impose these special conditions. If I may say so with respect, I am sure your Lordships appreciate the immense importance of my contention which is as to whether the Commissioner has the powers which my learned friend in his Case has asserted the Governor has.

LORD CLAREBOROUGH: We are very much obliged, ^{to you} Sir Thomas, for your argument.

THE SOLICITOR GENERAL: May it please your Lordships. I do not want to repeat what I have already put before your Lordships, but there are just two points I want to deal with. My learned friend's argument is based, as I understand it, fundamentally upon two propositions, firstly: that it is the right of any subject to bid at any auction of Crown Lands, and that if there is an Ordinance dealing with such a matter, you have to assume that right exists unless you can find an express limitation of it; secondly, where in an Ordinance of this sort there are certain powers as regards policy given to the Governor which are not passed on expressly to the Commissioner, you must assume that the Commissioner has no power to determine those matters of policy. As regards the first proposition, in my submission there is not such proposition in law. The duty of anyone charged with the care of Crown Lands is a duty, if they are to be sold, to sell them to the best advantage of the Crown. That may be done in any way that the person having charge of the land thinks fit. It may be by private treaty or by auction or by limited auction; it may be in any way provided only that it is for the best advantage of the Crown and the public.

LORD BLAYNEYBURN: Pecuniary advantage?

THE SOLICITOR GENERAL: Not only pecuniary, my Lord; there may be conditions in which it is better that the pecuniary advantage should be lost sight of because of some greater matter.

LORD BLAYNEYBURN: Any restriction having in view the beneficial realization of the property?

THE SOLICITOR GENERAL: Yes, my Lord; and also matters of State. Now, my Lords, as regards the second proposition, it really entirely defeats my friend's argument when one comes to analyse it. Let us suppose, in accordance with what he suggested, that there are general conditions laid down by the

Governor as regards the way in which town plots in Bombay are to be sold. The man who has to sell them under the Ordinance is the Commissioner. In order to carry out those general conditions he is bound to put in limitations, because otherwise he cannot carry out the general conditions imposed by the Governor. Let us assume that the Governor said as a general condition that five acres in the north of Bombay was to be reserved for Indians. That is a matter of policy. Those five acres come into the market of the Commissioner thinks they should come into the market; the demand has grown sufficiently to entitle and make it necessary for the Commissioner to sell them. He has now to carry out the general conditions which the Governor has laid down, and he has to sell the land by auction under Section 15. Not only can he, but he is bound to put in a condition to limit bidders in order to carry out the general conditions.

LORD BLANCBURGH: Would not Sir Thomas say in answer to that; You have in those circumstances to establish that there were any such general conditions.

THE SOLICITOR GENERAL: I am not concerned with those circumstances in the least. I am concerned with the Ordinance. The Ordinance is to regulate the sale of all Crown Lands.

LORD BLANCBURGH: This particular sale is impugned?

THE SOLICITOR GENERAL: I agree, my Lord, but my learned friend was putting it forward as a matter to be taken into account in a consideration of what the Ordinance meant, and one must regard it generally to other circumstances besides the specific one with which we are concerned. I am asking your Lordships to consider the circumstance in which general directions have been laid down.

LORD BLANCBURGH: Would Sir Thomas say in that case this was a Government sale?

SIR LAURENCE SANDERSON: I understood him to say that he would not

dispute that.

THE SOLICITOR GENERAL: No. He does not give directions that this should be a limited auction. The Governor gives his directions that a certain part of Mombasa is to be reserved for Indians.

LORD BLAKENBURGH: Let us say reserved for Europeans.

THE SOLICITOR GENERAL: If your Lordship pleases. When that land becomes ripe for the market or a portion of it, it is then and not until then that the Commissioner's functions start as an administrator. He comes along and says; I decide under section 15 that part of this land ought to be sold, and I am going to put it up, as I have to do, for auction. I have to consider, first of all, under Section 17 the special covenants. I must put in³ special covenant to stop Indians and Asiatics going there, because that is a general direction of the Governor; now I have to consider the terms of the auction. I am going to say, as I must say, that neither Asiatics nor Indians may bid at the auction; I must do that or otherwise I may find that I am going contrary to the general direction of the Governor. This Statute must be capable of dealing with such a case as that. According to my learned friend's argument, in such a case as that the Commissioner of Lands could not do that which he had been generally directed to do.

SIR THOMAS INSKIP: That is not my argument.

THE SOLICITOR GENERAL: That is what it comes to, in my submission.

LORD BLAKENBURGH: Would he not say on that hypothesis and if that state of affairs were true, that the general direction given to the Commissioner in this matter was in fact ~~an~~ an exercise of the absolute power of the Governor to have the sale carried out in that way?

THE SOLICITOR GENERAL: It would not deal with the particular sale that I am considering.

4
LORD BLAKESBURNH: It would deal with the particular sale of the property which is being reserved for Europeans?

THE SOLICITOR GENERAL: No, my Lord; it would be dealing with the segregation of the property; it would not deal with the sale, although it may be the property was never sold or used for Government buildings.

LORD BLAKESBURNH: If you start with this, that the Governor has given a general direction that blackacre was to be reserved for Europeans, it would be a breach of that direction if it were sold to others than Europeans. That being the position, the Commissioner then comes to the decision that the time has now arrived for the sale, and he has to carry out that sale subject to that direction; in order to carry it out subject to that direction, he would make the sale subject to the direction that no ^{non-}European would be allowed there.

THE SOLICITOR GENERAL: There would be no direction as to the sale at all.

LORD BLAKESBURNH: He could not obey or comply with that prohibition.

SIR LAURELOT SANDERSON: The Governor makes the order that that particular land or any part of it shall not be sold to anybody but Europeans.

THE SOLICITOR GENERAL: That would be an entirely different case.

SIR LAURELOT SANDERSON: Supposing that were the position in this case, the Commissioner would produce that direction that the land should not be sold to any but Europeans. Then Sir Thomas says he would not object.

THE SOLICITOR GENERAL: That is not the case I am putting, my Lord.

LORD BLAKESBURNH: Is there any distinction between your pass and that?

THE SOLICITOR GENERAL: Yes, my Lord, a very great distinction. This Ordinance does not deal with the question of segregation at all; it is quite outside this Ordinance altogether. A

99

54

some time or another the Governor decides that a certain portion of Mombasa is to be reserved for Europeans. It may be used for Government offices if the Commissioner thinks right, or it may not ever be sold at all. The Governor does not concern himself with the sale; he simply makes a direction that it should be used for European classes and so on. At a subsequent date the Commissioner of Lands has to decide as to whether any of it is to be sold or not. That is his job.

LORD ATKIN: The first thing he has to do is to divide it up into plots?

THE SOLICITOR GENERAL: Yes, my Lord. He has, first of all, to decide that it is not required for public purposes, and then to divide it up into plots.

LORD ATKIN: The plots are to be divided according to the best use for which it is going to be sold?

THE SOLICITOR GENERAL: Yes, my Lord. At that time he has to put into operation or work under the Code in Part III in order to comply with the general direction not as to sale at all, but as to user, and he finds himself compelled under Part III to put certain conditions in the auction Notice. In my submission, one must so read Part III that he can do that, because otherwise you find yourself in this position, that under some direction, nothing to do with this Ordinance at all, this Ordinance prevents the Commissioner from doing what he has to do. In my submission, you could not find such a state of affairs unless you find there express words in the Ordinance saying that under no circumstances shall the Commissioner limit the bidders, or whatever the provision might be. I only give that illustration as showing that the argument which my learned friend puts forward does not really assist him. It is really against him.

LORD BLANESBOROUGH: I have some little difficulty in seeing how the

validity of that restriction could be sufficiently found in the direction given by the Governor pursued to its natural consequences, because you would not have a user by Europeans otherwise than by restricting its ownership to Europeans.

THE SOLICITOR GENERAL: I agree, pursued to its natural consequences but not pursued through Part III of the Ordinance.

LORD ATKIN: The question which one has to decide in the hypothetical state of affairs is whether the reservation of an area for European purposes was under section 18 an order otherwise eventually preventing the sale by auction.

THE SOLICITOR GENERAL: Yes, in a particular case or cases. I am assuming it is sold by auction, and all I am suggesting is that you must find in PART III Machinery by which the administrator could in such a case -----

LORD BLANCKENBURN: According to your view, you find a special case in which quite properly and almost necessarily such a condition should be imposed upon the sale by auction, and yet you say, according to Sir Thomas' view, that you cannot find that by the Ordinance?

THE SOLICITOR GENERAL: Yes, but that does not affect the argument which I put before your Lordships, that if you take this Ordinance and look through it, you must interpret Sections 18 and 26 in the same way.

LORD BLANCKENBURN: I think it is now conceded by Sir Thomas Inskip that if he recognizes that under this Ordinance the word "auction", whether it be under Section 18 or Section 26, there is nothing which would preclude under Section 18 this particular restriction because it is still an auction when you have that restriction under Section 26. He finds a restriction before you begin to talk about auctions at all.

SIR THOMAS INSKIP: I do not quite understand where my learned friend finds the restriction. Section 6 says that it is the

IN THE PRIVY COUNCIL.

Between:

THE COMMISSIONER FOR LOCAL
GOVERNMENT LANDS AND SETTLEMENT

Appellant.

and

ABDULHUSEIN KADERBHAI

Respondent.

and CROSS OPPOSITION.

Tuesday, 3rd February, 1931.

C. O.

17173/31. Kenya

149
15

Mr. Allen

Mr. Parkinson

Mr.

~~Mr. ...~~

Sir C. Bottomley

Sir J. Shackburgh

Sir G. Grindie

Permt. U.S. of S.

Party U.S. of S.

Secretary of State

C. O.
R 8-JUN
D 9 11

DOWNING STREET,

10 June, 1931.

Sir,

DRAFT. *Car. v. minute*

I have etc., to confirm ~~my~~

confidential telegram No.....

in the following terms, which I

sent to you on the ~~1~~ June,

regarding the question of the

restriction of the acquisition of

township plots by Indians:-

(See copy to - comparison off)

2. I enclose for your informa-

tion ~~copy~~ *in other* of correspondence which has

~~recently~~ *recently* passed on this subject.

3. As stated in my telegram,

I shall address a further despatch to

you regarding the question of

restrictions as regards ownership, when

I have received and ~~considered~~

the transcript of the shorthand notes of

the proceedings before the Judicial

Committee

KENYA

CONFIDENTIAL

Gov. Byrno. *(Conf. = off)*

Fr. Indian Chamber of
Commerce 27th April '31.

Fr. I.O. 7th April '31.

Fr. Indian Ch. of C. 15th May.

Fr. I.O. 15th May.

Fr. ~~...~~ 1931

Fr. ~~...~~ 10 June 1931

3 dfts.

C. O.

17173/31. Kenya

149
15

Mr. Allen *6/6*

Mr. Jarkinson *[Handwritten signature]*

Mr. ~~_____~~

X Sir C. Buttley *8/6/31*

Sir J. Stuckburgh

Sir G. Grindie

Perm. U.S. of S.

Part. U.S. of S.

Secretary of State

C. O.
R 8-JUN
D 9 11

DOWNING STREET,

10 June, 1931.

Sir,

DRAFT. *Conf. 1 minute*

KENYA

CONFIDENTIAL

Gov. Byrno. *(Conf. 1/1)*

I have etc., to confirm ~~my~~
confidential telegram No.....
in the following terms, which I
sent to you on the ~~10~~ June,
regarding the question of the
restriction of the acquisition of
township plots by Indians:—

[See copy to - comparison 1/1]

2. I enclose for your informa-
tion ⁱⁿ ~~the~~ ^{other} copy of ^{the} correspondence which has
~~recently~~ ^{been} passed on this subject.

3. As stated in my telegram,
I shall address a further despatch to
you regarding the question of
restrictions as regards ownership, when
I have received and ~~considered~~ the
transcript of the shorthand notes of
the proceedings before the Judicial

Committee

3 dfts.

Fr. India. Number of
Com. No. 27th April '31.

Fr. I.O. 7th April '31.
and encl.

to Indian Dept. of 2. 15th May.

to I.O. 11th May.

[Handwritten notes]

to Gov. 10 June 1931
d. herewith. 14.

14

Committee of the Privy Council.

I have, etc.,

(Signed) PASSFIELD.

O. O.

Mr. Allen 6/6
Mr. [unclear] 1/6
Mr. [unclear] 0/6/31
Mr. [unclear]

17173/31 Kenya

X Sir C. Bottomley 86 f
Sir J. Stuckburgh
Sir G. Grindie
Fornt. U.S. of S.
Parly. U.S. of S.
Secretary of State.

ansd 21

10 June, 1931.

DRAFT. Cas: v. minutes

THE U. S. OF STATE.
ECONOMIC AND OVERSEAS DEPT.,
INDIA OFFICE. (6)

Sir,

I am etc. to refer to the letter from this Dept. of the 15th May on the subject of the restrictions on the acquisition by Indians of township plots in Kenya, particularly in Mombasa; and to request you to inform Mr. Secretary Wedgwood Benn that the Governor of Kenya has now reported that no such sales in Mombasa are at present contemplated, and that he agrees to the postponement for the present of further sales of township plots where the bidding is restricted

Copy to For. Conf. 10 JUN 1931

Saf

to Europeans.

2. ^{As regards} Lord Pasfield does not

understand the reference in the tel.

from the Govt. of India of the 14th ^(in 4.2)

April to enforcing the judgment of the

Judicial Committee of the Privy Council.

^{as pointed out in the judgment,}

~~since~~ the Courts are concerned only with

*In Govt of India
no doubt appreciate
that.*

the bare question of law, namely the

powers of the Commissioner for Local

Govt., Lands and Settlement, under the

Crown Lands Ordinance, and the questions

^{or, in other words,}
of policy ~~and~~ how the legal power shall

be exercised are not matters for the ^{Legal} ~~Legal~~

Tribunal, but have to be determined by the

appropriate constitutional authority."

3. The Govt. of India in the tel.

referred to express the opinion that the

^{Legal} ~~Legal~~ obligations which have compelled

H.M.G. to acquiesce in the policy of

partial segregation should be adequately

satisfied by limiting restrictions only

to residents ^{of and} in occupation. ^{of} The ~~only~~ ^{only}

point

point at issue therefore is the restriction as regards ownership, ~~and~~ Lord Passfield now proposes to proceed to a further examination of that aspect of the matter in consultation with the Government of Kenya; ^{arranging} His Lordship is ~~giving~~ ~~directions~~ that in the meantime he should be consulted before any notices are issued for the sale of township plots, subject to this particular restriction.

I am etc.

(Signed) G. FARKINSON

C. O.

17173/31 *long*

13
132

Mr. Allen. *6/6*

Mr. Parkington *6/6/31*

Mr.

~~Mr. ...~~

* Mr. C. Bottomley *6 am*

Mr. J. Shackburgh

Mr. G. Grindle

First U.S. of S.

Party U.S. of S.

Secretary of State

Indelible

not 146 pm

5-6-31

No. 153. Confidential.

Your Confidential telegram No. 171

Sent for India

Have informed ~~India Office~~ that I

propose to proceed in consultation

with you to further examination of

question of restriction of ownership

and that in the meantime you will

consult me before any notices are issued

for the sale of township plots subject

to this particular restriction.

Despatch follows with correspondence

and further despatch will be sent when

I have received and considered notes

of proceedings before Privy Council.

Secer.

DRAFT. tel.

for consen. v. minutes.

GOVERNOR

NAIROBI.

3/11/31

Communications on this subject should be sent to—
THE UNDER SECRETARY OF STATE,
Colonial Office,
Whitehall, London, S.W. 1.
 and the following number quoted—
E. & O. 3763/31

Reference to previous correspondence: *1 C*

Letter to the India Office of the 15th May 1931, No. 17173/31. *153*

RECEIVED
4 JUN 1931
COL. OFFICE

INDIA OFFICE,
 17 June 19 31

The Under Secretary of State for India presents his compliments to the Under Secretary of State for the Colonies, and begs to transmit to him copy of the papers noted below.

The Under Secretary of State,
 Colonial Office,
 S.W.1.

10 JUN 1931

copy of mail to Govt Comfr

Origin.

Date.

Subject.

From Indian Chamber of Commerce in Great Britain (without encl.)

7th May 1931.

Restrictions on the acquisition by Indians of township plots at Mombasa.

do.

21st May 1931.

Copy also sent to—

INDIAN CHAMBER OF COMMERCE IN GREAT BRITAIN.

85 Gracechurch Street,
London, E.C.3.

7th May 1931.

4516

Sir,

I have the honour to forward to you a copy of the representation sent on behalf of the Council of the Indian Chamber of Commerce in Great Britain to the Secretary of State for the Colonies, dealing with the question of Indians in East Africa.

The Council note with grave concern that the policy of racial discrimination entailing disabilities of a humiliating nature based on colour prejudice should have now received legal authority and sanction. The Council submit that such disabilities as form the subject matter of their representation to the Secretary of State for the Colonies cannot be explained on grounds other than racial.

The Privy Council judgment referred to has been the subject of grave apprehension to members of this Chamber in East Africa. But its repercussions on the already strained patience of the Indian public that has for years past tolerated humiliations within the British Empire galling to their national pride, must prove far-reaching and disastrous. Under such aggravating conditions common allegiance to the Crown has been rendered meaningless and considerations based on colour and racial prejudice have in preference weighed with the white settlers in the various parts of the British Empire. In fact it will be remembered that at one of the Imperial Conferences, the then Secretary of State for India was at pains to beg of the Dominion Representatives that "Asiatics of British Nationality should at least not be less favourably treated than other Asiatics". A position so unsatisfactory and highly aggravating as this, must severely strain the common bond of allegiance to the Crown that constitutes the basis of Imperial citizenship. For it is an unfortunate but very striking testimony that even their allegiance to the

same

same Crown has not secured immunity to British Indians from humiliations within the British Empire.

In view of this, my Council trust that you will support their representation to the Secretary of State for the Colonies with a view to influence the Dominion and Colonial Governments to desist from pursuing a policy - which from an Imperial viewpoint cannot but ultimately prove disastrous - of penalising a certain section of His Majesty's subjects because of their race and colour, and imposing upon them disabilities untenable on moral or economic grounds and highly degrading in character.

My Council will be glad to have your assurance that their respectful suggestion will be favourably considered and given effect to by you at an early date.

I have, etc.

(Sd.) David .S. Erulkar.

Chairman.

The Rt. Hon. the Secretary of State for India,
India Office,
Whitehall,
S.W.1.

Economic & Overseas.

E. & O. 3763/31.

29 MAY 1931

May, 1931.

Sir,

With reference to your letter of the 7th May, No. 4516, I am directed to inform you that the Government of India have asked Mr. Sastri, who is at present in London to verify if he can whether in the past Indians have been allowed to bid for plots in European areas in Kenya. In this connection Mr. Sastri has been informed of the statement in your letter to the Colonial Office of the 27th April, that your Chamber has access to copies of Crown Leases of plots in the European residential area at Mombasa issued to Indians who purchased at auction, in which leases the special condition restricting residence to Europeans appears. Mr. Sastri has enquired whether the condition restricting residence to Europeans appears in the earliest leases of the class referred to; and if it does not, when it first makes its appearance; and I am to request that you will be good enough to furnish information on this point for communication to him.

I am, Sir,

Your obedient servant,

(Sd.) E. J. TURNER.

Secretary,
Economic & Overseas Department.

The Secretary,
 Indian Council of Economic Research
 in Great Britain,
 69, Whitehall Street,
 London, W. 1.

Corrected Copy.

11a
156

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

Dated the 28th May 1931. Received at 4.14 p.m. on the
29th May.

No. 171 CONFIDENTIAL. Your telegram No. 169

Confidential. Privy Council land case judgment.
M. sales in this area at Mombasa are at present
contemplated and I agree to postponement for the
present though I am not clear how far
examination as well other positions resulting
from combined effect of 1923 Command Paper and
Privy Council judgment unless some modification
of former is contemplated.

4
Send reply to him

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

Dated the 28th May 1931. Received at 4.14.p.m. on the
28th May.

No 4

No. 172 CONFIDENTIAL. Your telegram No. 159
Confidential. Privy Council land case judgment.
No sales in this area at Mombasa are at present
contemplated and I agree to postponement for the
present though I am not clear how further
examination can well alter position ^{as} resulting
from combined effect of 1923 Command Paper and
Privy Council judgment unless some modification
of former is contemplated.

DECODE

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

Dated the 28th May 1931, Received at 4.14.p.m. on the
28th May.

NO 4
No. 192 CONFIDENTIAL. Your telegram No. 159
Confidential. Privy Council land case judgment.
No sales in this area at Mombasa are at present
contemplated and I agree to postponement for the
present though I am not clear how further
examination can well alter position ^{as} resulting
from combined effect of 1923 Command Paper and
Privy Council judgment unless some modification
of former is contemplated.

17/12/31

Kenya

C. O.

- Mr. Jay 24/5
- Mr. Allen 24/5
- Mr.
- Mr. Tomlinson
- Sir C. Bottomley
- Sir J. Shackburgh
- Sir G. Grindie
- Permt U.S. of S
- Partv U.S. of S
- Secretary of State

April 16

~~SECRET~~

23 MAR 1931

DRAFT. for consen.

Beau.
Burchells

21-
15/11/30

Genl. with ref: to your letter of
the 11th inst.

I am directed
by Lord Passfield to
request that you
will supply one
manuscript and one
carbon copy of the
short-hand notes
of the proceedings
before the Privy
Council on Appeal
case of (1930) The
Commissioner for
Local Govt. v. James &
Settlement and
Abdulhussein Kaderkhan
& Pass Appeal
consolidated.

I am also
that these manuscripts
are required for
transmission to the
respondents, that is
the Govt of Kenya,
and it is assumed

~~Copy for the...~~

para 2 is based on
previous similar
case (No. 2 of 1523/3)
but the Bench says we
follow the Arch. v. East
similar that para 2
is omitted

that in estimating
the cost, which it
is understood ^{is a result of}
~~an enquiry will be between~~
~~£20 & £25~~
of £20 you have
taken this into
consideration

2 The account for
the transcripts should
be sent to this
Department. It is
understood as a result
of an enquiry by telephone
that the cost is estimated
at between £20 &
£25.

Yours truly

Signed, H. T. ALLEN

C. O.

BY AIR MAIL

159

Mr. Allen. 9/3.

Mr. Padmasan 10/5/31

Mr.

~~Mr. T. Johnson.~~

X Sir C. Bottomley. 11.5 f

Sir J. Shuckburgh.

Sir G. Grindle.

Permt. U.S. of S.

Parly. U.S. of S.

Secretary of State.

Downing Street,

15 May, 1931.

DRAFT. *Ans: v. minute*

Sir,

With reference to my

KENYA.

Confidential (2)

Confidential telegram No. 159.....

GOV.

(comp. draft)

of the 14 May, I have the

honour to transmit to you the

accompanying copy of correspondence

with the India Office and

Indian Chamber of Commerce in

Great Britain on the subject of

restrictions

12 June 30. / 27/4/31 (2)

From: Govt. Secy 27/4/31 (1)

To: Govt. Secy 17/5/31

To: Govt. Secy 17/5/31

To: Govt. Secy 17/5/31

4 drafts. 20.1.31. 21/7/31

19/5

19/10 10221/27

(current mail)

restrictions on the sale of
township plots in Kenya, and particularly
in Mombasa.

2. As regards the correspondence
referred to in the last paragraph
of the letter to the India Office of the

.....^{15th} May, copies of the correspondence (comp. draft)

with Mr. Polak accompanied my despatch

No. 713 of the 16th ~~of~~ September, 1930. A (No. 8 on
15991/30)

copy of the letter to the India Office of

the 4th ~~of~~ July, 1927, is enclosed herewith. (No. 10 on
10221/27)

I have &c.,

C. O.

Mr. Allen. 8/5/31

Mr. ~~Polak~~ 10/5/31

Mr.

~~Mr. Tomlinson~~

X Sir C. Bottomley. 11-5

Sir J. Shuckburgh

Sir G. Grindle

A Perm. U.S. of S. 13.5.31

Parly. U.S. of S.

Secretary of State. 14/5

Downing Street,

15 May, 1931.

Sir,

DRAFT. *Cons. v. minute*

I am so. to acknowledge

THE U.S. OF S.,
ECONOMIC AND OVERSEAS DEPT.,
INDIA OFFICE.

the receipt of your letter

E.A 0.2630/31 of the 27th

April on the subject of

restriction on the Acquisition

by Indians of township plots

in Kenya.

2. Lord Passfield

consulting the Governor of Kenya

by telegram in ~~accordance with~~ *regard to*

the suggestion that the

Government of Kenya should ~~for~~

~~the present~~ *defer* sales of Crown

lands in townships where the

bidding is restricted to

Europeans until the matter has

been

4 drafts.

Copy des. Cons. Dept. (2) - 15 MAY 1931

- ✓ HC To Chamber of Commerce 27/4/31. *draft*
- ✓ To Chamber of Commerce (comp. draft) (No. 1 on 17173/31)
- ✓ To Mr. Polak 1st August, 1930. (No. 1a)
- ✓ To Mr. Polak 26th August, 1930. (15991/30)
- ✓ To Mr. Polak 26th August, 1930. (No. 3 on 15991/30)
- ✓ To Mr. Polak 26th August, 1930. (No. 4 on 15991/30)
- ✓ To Mr. Polak 11th Sept., 1930. (No. 6 on 15991/30)

been further examined, and a further communication will be addressed to you when a reply is received.

3. I am to enclose for Mr. Wedgwood Benn's information a copy of correspondence on this subject with the Indian Chamber of Commerce in Great Britain together with a copy of earlier correspondence ~~on the general~~ ^{W.P.L.} ~~subject~~ with Mr. Polak.

4. As regards the statement in paragraph 3 of the letter to Mr. Polak of the 26th of August, 1930 that the Secretary of State cannot admit that the recognition of an existing legal position in any way trespasses on the principles of the White Paper of 1923, I am to invite reference to paragraph 2 of the letter addressed to your Department from the Colonial Office ^{on} the 14th of July, 1927. (No. 10 on 10221/27)

I am &c.,

(Signed) A. C. C. PARKINSON.

X.17173/31.
KENYA.

C. O.

Mr. Allen. 875

Mr. ~~Adams~~ 1075731

Mr.

~~Mr. Fenderson~~

✓ Sir C. Bottomley, I. O.

Sir J. Shackburgh.

Sir G. Grindle.

✓ ~~Parly. U.S. of S.~~ 13.5.31

✓ Parly. U.S. of S.

✓ Secretary of State. W.P.



Downing Street,

15 May, 1931.

DRAFT. *Case in point*

Sir,

THE CHAIRMAN,

I am &c. to refer

INDIAN CHAMBER OF COMMERCE
IN GREAT BRITAIN.

to your letter of the 27th

of April on the subject of

restrictions on the sale of

township plots in Kenya and

particularly Mombasa.

2. Lord Passfield will,

in consultation with the

Governor of Kenya give careful

consideration to the suggestion

in the last paragraph of your

letter, and a further

communication will be sent to

you in due course.

I am &c.,

(Signed) A. C. C. PARKINSON.

*Copy to 10 15 MAY 1931
Lggy. Gen. Secy (C) - 15 MAY 1931*

4 drafts.

5-161

162
Coded & Sent
8.30 pm
14/5/31
H.M.

C. O.

Mr. Allen. 17/7/31
SECRET.

Mr. ~~Adams~~ 10.5.31

Mr. ~~Bushell~~ 11/5

Mr. Tomlinson

Sir C. Bottomley. 11.5

Sir J. Shackburgh.

Sir G. Grindie.

+ Perms. U.S. of S. 11/5 15.5.31

Y Parly. U.S. of S. 11.5. 15.5.31.

Secretary of State
11/5

~~100
Arch no 11~~

No. 159

Confidential.

DRAFT. TELEGRAM (Gaj)

20: V. minutes.

GOVERNOR

NAIROBI

27
15.5.31/30
sub file A.

(No. 27 on
15901
sub file A)

My despatch 9th April

No. 231. Representations have

been received from the Government

of India in regard to the recent

Judgment of Privy Council

In forwarding them the Secretary

of State for India supports view

urged by Government of India as

to desirability of avoiding any

action at the present juncture

which might affect recent

decision of East African

Indian Congress to participate

again in legislative and municipal

affairs and notes that Government

Kenya
of India might be invited to defer

4 drafts.

further

been further examined, and a further communication will be addressed to you when a reply is received.

3. I am to enclose for Mr. Wedgwood Benn's information a copy of correspondence on this subject with the Indian Chamber of Commerce in Great Britain together with a copy of earlier correspondence ~~on the general~~ ^{M.P.L.} ~~subject~~ with Mr. Polak.

4. As regards the statement in paragraph 3 of the letter to Mr. Polak of the 26th August, 1930 that the Secretary of State cannot admit that the recognition of an existing legal position in any way trespasses on the principles of the White Paper of 1923, I am to invite reference to paragraph 2 of the letter addressed to your Department from the Colonial Office ^{on} the 4th July, 1927. (No. 10 on 10221/27)

I am &c.,

(Signed) A. C. C. PARKINSON.

X.17173/31.
KENYA.

C. O.

Mr. Allen. *875*

Mr. *Robinson 175731*

Mr.

Min-Fundament

X Sir C. Bottomley, I. D.

Sir J. Shackburgh.

Sir G. Grindle.

+ *Permt. U.S. of S. 13.5.31*

Parly. U.S. of S.

Secretary of State. *W.S.*



Downing Street,

15 May, 1931.

DRAFT. *Consent*

THE CHAIRMAN,

INDIAN CHAMBER OF COMMERCE
IN GREAT BRITAIN.

Sir,

I am &c. to refer to your letter of the 27th April on the subject of restrictions on the sale of township plots in Kenya, and particularly Mombasa.

2. Lord Passfield will, in consultation with the Governor of Kenya, give careful consideration to the suggestion in the last paragraph of your letter, and a further communication will be sent to you in due course.

I am &c.,

(Signed) A. C. C. PARKINSON.

Copy to C.O. 15 MAY 1931
Copy - Cons. Dept. (2) - 15 MAY 1931

4 drafts.

further sales of Crown lands where
the bidding is restricted to Europeans

until the matter has been further examined

Do you see any objection? ~~as now proposed~~

~~Should be glad to know whether any~~
~~(New point) if in fact there are any~~
such ~~of land~~

~~Restricted sales in European areas~~

~~by~~
~~and townships are at present~~

I should be glad if at any rate
contemplated. ~~Even if so I think it~~

action could be postponed pending my
~~would be reasonable in all the circumstances~~
consideration of you reply

~~to postpone any such sales until the~~
to this telegram which I should wish to have

~~decision can be examined in the light~~
at your earliest convenience of
~~of the full arguments before the Judicial~~

~~Committee as well as of the Judgment~~

~~itself and I hope you will feel able~~

~~to agree to my giving assurance to this~~

~~effect should be glad of early reply~~

(New point)

~~and~~ Although I have not received replies to

my telegrams Nos. 69 and 123 ✓

(Nos. 23 and 30 of
1599/30
sub file A)

✓
I am taking steps to obtain

~~copy~~
manuscript of full shorthand notes

as it is essential to have them for
examination of the matter
in the light of the arguments used
before the Judicial Committee.

Leah

On the main file 15991/30, Sir C. Bottomley
minuted as follows:

(See copies of the Judgment)

"When they are sent out, we must I think
point out to the Governor that the decisions will of
course only be applicable - so far as the exclusion
of non-Europeans from bidding or residing is concerned -
to the particular plots, and that the general policy
of non-segregation still holds good. The draft had
better go forward".

The Judgment when received was registered in
a separate sub-file, and copies were sent to the
Governor without reference to the above quoted minute
of Sir C. Bottomley on the main file. As I was
responsible for this, I attach an explanatory note
of the circumstances with an apology.

So far as the Government of India is
concerned, they apparently accept the position in so
far as occupation and residence is concerned, but are
troubled about the question of ownership: that may
involve some difficulty. It is, however, a legal
question, and I, therefore, limit myself to the remark
that it does not seem at all clear why the Judgment
is held to impose a further disability on the Indians or
why the Government of India should refer to enforcing
the Judgment of the Privy Council. The powers of the
Commissioners of Land are ^{not} mandatory, and they exercise
at their discretion them as any of policy. There is not now, nor I think
has there been, any intention of extending the partial
segregation already in force. It may also be
convenient to record the following extracts here:

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 them ^{if it goes to} ~~as a matter of~~ policy. There is not now, nor I think
 has there been, any intention of extending the partial
 segregation already in force. It may also be
 convenient to record the following extracts here:



(a) Judgment page 2. "The case of the Commissioner is that the terms of the Ordinance do not prevent him from imposing the restrictions of which complaint is made. It is desirable to point out that the Courts are concerned only with the bare question of law, *viz.*, the powers of the Commissioner under the Ordinance. Questions of policy, or in other words, how the legal powers shall be exercised are not matters for the legal tribunal, but have to be determined by the appropriate constitutional authority."

(No. 10 on 18991/31)

(b) Minute by Mr. Bushe 13th February, 1931.

"The point for decision in this appeal was a very narrow one; indeed, so narrow that I am rather surprised that Kenya thought it worth while to appeal at all. No one contested that the Governor had the right to impose the condition, and the only question was whether the Commissioner of Lands had the power under the Ordinance. The result can do no more than determine the legal point, and has nothing whatever to do with policy.

If there is going to be any trouble about it, it might be desirable to get one or two transcripts of the shorthand note of the arguments."

N.B. (The Governor was consulted as to obtaining two copies of these transcripts at the cost of Kenya funds ~~was~~ ^{has} not yet replied).

In view of the contention in the letter from the Indian Chamber of Commerce in Great Britain that these restrictions are contrary to the White Paper of 1923, mention should be made of

(No. 3 of 16991/30)

A

of the fact that Mr. Polak was informed in a letter dated the 26th of August, 1930 that the Secretary of State cannot admit that the recognition of an existing legal position in any way trespasses on the principles of the White Paper of 1923. This is a reaffirmation of the statement made to the India Office in a letter dated the 4th of July, 1927.

(No. 10 on 10321/27)

The immediate point is the request that sales of land in townships subject to restrictions may be suspended pending further examination. I do not know that any such sales are actually in contemplation. In any case it is ~~is~~ ^{has been} politic to agree to this request, but the Governor of Kenya should, of course, be consulted. I have drafted a telegram accordingly in ^{the} form of a lead to agree. I have also drafted interim replies to the India Office and the Indian Chamber of Commerce. I have not thought it politic at this stage to include in the letter to the Chamber of Commerce ^{as} a caveat of the ~~the~~ ^{the} determination at A above, although it will probably be necessary to reaffirm the statement later on.

JN Allen
8/10/31

NOTE.

3 A 166

Sir C. Bottoaley's minute of the 9th of March was written on the main file 15991/30. Copies of the Judgment when received were registered on a separate sub-file, and unfortunately there is no cross reference. The copies of the Judgment were received from the Privy Council on the 18th of March, and for some time afterwards the papers were circulating with other correspondence. The result was that I discovered them on the 6th of April in room 29, where there was considerable pressure; and in view of the delay I treated the matter as one of urgency in order to get copies away to the Governor by the following mail, three days later. I have no recollection of having seen Sir C. Bottoaley's minute till now. The minutes following were written separately and attached subsequently. In dealing with the matter I was under the impression that no comment as to the facts of the Judgment could be made until the lawyers had had an opportunity of going into the matter with the full shorthand notes of the proceedings before them. In the circumstances, I regarded the action to be taken as in the nature of routine, and did not read the other files; but in view of A above, I included a reminding telegram to the Governor, ^{as had} ^{having} been asked if he wished for a copy of the notes. ^{It is} regard to all the circumstances it is, of course, possible that in any case it would have been agreed that the action taken was all that was possible at the time. But the fact remains that the papers were not sent on as directed, and for this I must apologise.

J. H. Wilson
9/1/31

I signed the letters in order
the responsibility.
ack
10/1/31

Any further communication on this subject should be addressed to—
The Under Secretary of State for India,
Economic & Overseas Department,
Colonial Office, India Office,
London, S.W. 1.
E. & O. 2630/31



INDIA OFFICE,
WHITEHALL,
LONDON, S.W. 1.

Telephone—
Victoria 6920. I.O. Ext. No.
Telegrams—
Ressasdam, London.

RECEIVED
28 APR 1931
COL. OFFICE

27th April 1931.

Sir,

With reference to the letter from this Department of the 13th July 1929, E. & O. 4977/29, and connected correspondence, on the subject of restrictions on the acquisition by Indians of certain township plots at Mombasa, I am directed by the Secretary of State for India to transmit, for the information of the Secretary of State for the Colonies, copy of a telegram received from the Government of India commenting on the judgment delivered by the Privy Council on the 27th February 1931 in the Appeal of Abdul Husain Kaderbhai.

3 on 15623/29

Dated 14th April 1931.

2. Mr. Benn supports the view urged by the Government of India as to the desirability of avoiding any action at the present juncture which might affect the recent decision of the East African Indian Congress to participate again in legislative and municipal affairs, and he would suggest, for Lord Passfield's consideration, that the Kenya Government might be invited to defer further sales of Crown lands where the ^{holding} is restricted to Europeans until the matter has been further examined.

It will be observed that the Government of India are asking Mr. Sastri to discuss the matter informally with the Indian delegation from Kenya who are coming to London to give evidence before the Joint Parliamentary Committee.

I am, Sir,

Your obedient servant,

E. Turner

Copy (to under) - Cass. Conf. (2) - 15 MAY 1931
Answered 15 MAY 1931

The Under Secretary of State,
Colonial Office,
S.W. 1.

2630
1931

34

LJC/AW.

(67 groups)

2468.

DE CYPHERO F TELEGRAM.

(COPIES CIRCULATED) From Government of India, Department of Education, Health & Lands, to Secretary of State for India.

Dated New Delhi, 14th April, 1931.

Received 14th April, 1931, 11.30 a.m.

X

1077-S. First of Two Parts.

Department of Education, Health & Lands. Sale

of land in Mombasa in reserved European residential areas. We have just seen copy of Privy Council judgment in appeal of Abdul Husain Kaderbhai. Council have held that it is lawful to effect sales, subject not only to restrictions as regards residence and occupation but also as regards ownership. We understand that decision does not take into account fact that there have been previous instances of Indian bids being accepted for plots of land in these areas, and if followed by Colonial authorities will have the effect of imposing fresh disability on Indians. You will agree that resentment that adoption of this new restriction might cause at present juncture, when moderate opinion in Kenya seems to be (?? gaining) ascendancy, as evidenced by recent decision of Congress favouring Indian participation in municipal Government, might have the most unfortunate effect of checking return to co-operation.

2630

1931

LJC/MM.

(66 groups.)

2470.

DECYPHER OF TELEGRAM.(COPIES
CIRCULATED)From Government of India, Department
of Education, Health and Lands,
to Secretary of State for India.

Dated New Delhi, 14th April, 1931.

Received 12.30 p.m., 14th April, 1931.

I

1077-S.Second and last part.

Legal obligations which have compelled His Majesty's Government to acquiesce in the policy of partial segregation should, it appears to us, be adequately satisfied by limiting restrictions only to residence and occupation. In any case in order to ensure calm atmosphere for work of Joint Parliamentary Committee on closer union in England, and also revival of co-operation between the Government and Indians in Kenya, we feel strongly that sales limiting bids to Europeans should not be proceeded with until the desirability and the necessity of enforcing judgment of the Privy Council has been carefully examined. We are asking Sastri to discuss the matter informally with Kenya Indians who come to London to give evidence before the Joint Parliamentary Committee, and especially to verify whether in the past Indians have been allowed to bid for plots in European areas. On receipt of his report we shall address you again.

INDIAN CHAMBER OF COMMERCE IN GREAT BRITAIN.

SECRETARY
K.M.Kheshvals, B. Com.

YOUR REF. NO.

85, GRACECHURCH STREET,

OUR REF. NO. 4465

LONDON, E.C.3

April 1931

R
ACKD. BY P.C. 52

Sir,

I am desired, on behalf of the Council of the Indian Chamber of Commerce in Great Britain, to address you on the subject of the recent decision by the Judicial Committee of the Privy Council in the connected Appeals of the Commissioner for Local Government Lands and Settlement v. Abdulhusein Kaderbhai and Abdulhusein Kaderbhai v. the Commissioner for Local Government Lands and Settlement, from His Majesty's Court of Appeal for Eastern Africa.

Apart from my Chamber's general interest in the questions raised in these Appeals, and now decided against the Indian nominal party, I am authorised and instructed to address you also on the ground that the rights and interests of the Mombasa members of the Chamber are directly and immediately affected by the Privy Council judgment, whilst those of my Chamber's members in other parts of Kenya Colony are indirectly affected by the decision.

The two points at issue in these Appeals were (1) whether the Commissioner for Local Government Lands and Settlement in Kenya, in giving notice of an auction sale of town plots at Mombasa, in the so-called European residential area, was entitled to impose a stipulation limiting the right to bid and purchase to Europeans only, and (2) whether he was entitled to impose a further special condition that, during the term of the grant, the grantees should not permit the dwelling-house or outbuildings, which had to be erected on the plot sold, to be used as a place of residence for an Asiatic or African not a domestic servant employed by him. The notice purported to have been issued in terms of the provisions of the Crown Lands Ordinance, No. 12 of 1915, of Kenya Colony.

The attention of my Chamber has been drawn to the statement of policy of His Majesty's Government contained in the White Paper presented to Parliament, relating to Indians in Kenya, in 1923,

copy 26 1.0 } 15 MAY 1931

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from which I take leave to quote the following passage:

"Paragraph 7 of Part II: Segregation in Townships:-
The next matter for consideration is that of segregation of the European and non-European races. Following upon Professor Simpson's report, the policy of segregation was adopted in principle, and it was proposed by Lord Milner to retain this policy, both on sanitary and social grounds. In so far as commercial segregation is concerned, it has already been generally agreed that this should be discontinued. But with regard to residential segregation, matters have been in suspense for some time, and all sales of Township plots have been held up pending a final decision on the question of principle involved. It is now the view of competent medical authorities that, as a sanitation measure, the segregation of Europeans and Asiatics is not absolutely essential for the preservation of the health of the community; a rigid enforcement of sanitary, police and building regulations, without any racial discrimination, by the Colonial and Municipal authorities will suffice. It may well prove in practice that different races will, by natural affinity, keep together in separate quarters, but to effect such separation by legislative enactment except on the strongest sanitary grounds would not, in the opinion of His Majesty's Government, be justifiable. They have, therefore, decided that the policy of segregation as between Europeans and Asiatics in Townships must be abandoned. But for the present, at any rate, it is considered desirable, as in other native dependencies, to keep the residential quarters of natives, so far as practicable, separate from those of the immigrant races. In the case of individual natives, such as servants, strict segregation would be unworkable; but it is important, when areas have been fixed in Townships for native residence, that those areas be regarded as definitely set aside for the use of natives and no incroachment thereon by non-African races be permitted."

In my Chamber's opinion, the imposition of the special conditions, referred to above, regarding residence, is in direct conflict with the principles laid down and the policy adopted by His Majesty's Government in the above quoted passage.

Turning now to the question of the limitation to Europeans only of the right to bid at auction for, and purchase, the plots notified for sale, I am to point out that there appears to be a misapprehension in the minds of their Lordships as to the true facts of the situation in Mombasa. Their Lordships appear to have been under the impression that, when plots in the same area had previously been put up for sale by auction, Europeans only had been purchasers, mainly on the ground that non-Europeans could not enjoy the user of the plots. This, however, is an unwarranted assumption. My Chamber has access to copies of Crown

Leases of plots in this very area issued to Indians who purchased at auction, and in which the special condition restricting residence to Europeans appears. It has been a serious grievance with Indians that they could not enjoy the user of the plots for purposes of residence, but now that grievance will only be intensified when a further disability has been placed upon them in not being allowed to enjoy the user thereof in their capacity of Landlords. The claim of the Mombasa Indians was and is that the notification issued by the Commissioner in July, 1928, restricting bidding for and purchase of the Crown Leases in this area, imposed for the first time in the history of Indians in Kenya yet another disability of a distinctly racial character, and that it is actually going to reinforce the practice of racial segregation in residential areas in townships in direct conflict once more with the principles and policy, affecting such residence, laid down by His Majesty's Government in the 1923 White Paper aforesaid.

It must now regretfully be accepted that this policy of imposing on certain classes of His Majesty's subjects disabilities of a humiliating nature on racial grounds has received legal authority and sanction in as much as it is now lawful for the Kenya administration to maintain racial segregation in residential areas in townships (a) by stipulating that only persons of a particular race may bid at public auction for and purchase, Leases of Crown Lands; members of other races are thus prevented in Law from becoming owners and landlords under the said grants; and (b) by imposing a special condition in the Leases granted, restricting residence, except in the capacity of a domestic servant, to persons of the race to whom the grants have been made.

But whilst a matter may be lawful, it is not necessarily expedient, and my Chamber is strongly of the opinion that the matter having now ceased to be one of judicial interpretation, and having become once again a question of high Imperial policy, His Majesty's Government should reconsider the whole question anew in the light of their declared policy, laid down in the 1923 White Paper, in the principles of just administration recognized in the Hilton-Young Report on Closer Union in Eastern Africa, and in more recent State papers relating to the same question. In my Chamber's respectful submission there is no justification whatever for the maintenance of racial segregation in residential areas in townships in Kenya. The same classes of people, white and Indian, reside in the closest juxtaposition in Bombay and other Indian cities, where "a rigid enforcement of sanitary, police and building regulations, without any racial discrimination" is found sufficient to preserve the amenities.

In view of the fact that the Privy Council judgment is certain to be the subject of grave apprehension in the Kenya Indian community, in particular, and in the minds of the Indian public, which is closely concerned with the welfare of Indians overseas, in general, and the further fact that my Chamber is informed that representations thereon have already been made to the Government of India, with a view to further discussions on this important question with His Majesty's Government, I am to request that instructions be given by you to the Government of Kenya to refrain, pending such further discussion, from notification of the sale by auction of Crown Lands in residential areas in Kenya Colony, and particularly in Mombasa, wherein similar stipulations and restrictions to those that were the subject of the litigation now terminated are or may be embodied. No measure or policy savouring of humiliating discrimination such as this imposing disabilities on British subjects because of their race or colour can but strain the common tie of loyalty to the British Crown and thus endanger the success of the most vital constitutional issues with which the Empire is at present faced. My Chamber will be glad to have an assurance that its respectful suggestion will be favourably considered and given effect to by you, at an early date.

I have the honour to be,

Sir,

Your obedient servant,

David P. F. ...

Chairman.

The Rt. Hon. the Secretary of State for the Colonies,
Colonial Office,
Downing Street,
S. W. 1.

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