



571

DESPATCH

EAST AFR. PROT.
1955

C O
1955
30 MAY 08

279

(Subject)

1908

Waste Lands

8 May

Last previous Paper.

Dismisses right of Govt to ^{Difficulty} resolves itself into what are tribal lands & what waste & unoccupied lands. Proposes to enter into a ^{agreement} with various tribes by which they relinquish all claims they may have to certain lands on condition that some of these lands are reserved to them for use. Suggests Messrs. Scott & Bellis be consulted.

5501
39814

(Minutes.)

Mr. Contades

You shall see this in connection with the draft to the Belgians Mr. French on 19804.

It is clear from this that in certain cases ^{the benefit has} been departed from the law of granted land to the people which is not properly to be desired as waste ^{land}. The lands are now ^{being}

Hand 5. 5. 4. No W

Next subsequent Paper

negotiations in case brought
before them. I have not
thought it necessary to en-
quire from Mr French of the
3 I think the Gov's suggestion
that the extent of the Crown lands
& of the natives land should be
settled by agreement with
the native tribes as in Uganda
is a good one: and I think it
would be well if a conference
were held ^{at L.C.} with the Crown
Advocate & the Secretary for
Native Affairs as Sir J. Pether
proposes. ~~Mr~~ 3/6

~~negotiations~~
Mr. Selby The Crown Advocate &
the Secretary for Native Affairs
are now both at home so it will
be well to arrange a conference
as soon as possible. Mr. Selby will
probably be at home

Yes. Let us have a conference
as suggested.



572

Governor's Office

Ministerial

May 1957

AFRICA PROTECTORATE

No. 219

1957
MAY 08

My Lord,

The question of the ownership of the land in the East Africa Protectorate and the right of the Government to alienate certain lands not occupied by natives but which may be liable to be claimed by them as tribal or private lands, has recently been under discussion and has also formed the subject of a suit in the Law Courts.

2. It has been assumed that the right of the Government to all waste lands, i.e. the lands not occupied by the natives or used by them, follows our occupation of and declaration of a Protectorate over East Africa. But it is evident that questions may arise in connection with the disposal of lands assumed to be waste lands but to which claims not known at this time may subsequently be advanced by the tribes. And though great care is now exercised in ascertaining native rights before the Government disposes

H. H. Principal Secretary of State
for the Colonies,
Downing Street,
LONDON, S.W.

48/11/57

disposal of land, this has not always been the case, and there have been cases where land has been given in concession to the natives without their consent. Some cases of this kind are mentioned in the report of the Commission on Native Rights, and in the report of the East African Commission on the Administration of Crown Land's matters in the territories in East Africa which are subject to the control of His Majesty by virtue of any treaty, agreement or Arrangement, or of His Majesty's prerogative, and all lands which shall have been acquired by His Majesty for the public service or otherwise no sooner." This is an unsatisfactory provision, but unless the Order in Council is amended, it is the only one we have in connection with the New York Land Ordinance. I understand that the view held by the judges of the High Court is that the lands are not public lands and cannot legally be alienated by the Government, yet in many cases in the past the Government has undoubtedly alienated the lands to natives or such tribal lands and leased or sold them to Europeans and others. In cases where it has been found that portions of the lands were occupied compensation has usually been paid to the natives actually in occupation for the loss of their crops, huts, etc., and no compensation has been paid for unoccupied land though such land may have been used as grazing areas or it may have been cultivated, and it was a mistake to do so in some cases, but few if any cases have the elders of the tribes been compensated for the loss of their tribal lands. Under the circumstances there is danger that many of

the grants of land made by the Government, could
 be held to be invalid should the matter be brought
 into Court. The matter really resolves itself
 into a definition as to what constitutes title
 lands and what waste and uncultivated lands.
 Here it appears to me that our Courts may be
 able to take the view that, in the absence of any
 agreement from the Chiefs passing over to the
 Government waste lands, lands though waste at the
 time be disposed of them still remain tribal lands,
 thus negating the assumption referred to in
 Paragraph 2 of this despatch.

Steps have been taken to set aside large
 areas for the natives, but I consider that this
 is not sufficient and that it will be advisable
 for us to enter into agreements with the various
 native tribes according to the terms of which
 they relinquish all claims they may have to certain
 lands on condition that the remainder of their
 lands are reserved to them for ever. I foresee
 no difficulty in this procedure and I shall
 take steps to ensure the natives being treated
 liberally.

affairs of the Colonies, and the Secretary
of the Colonies are now on their way home, and
leave I would suggest that they should meet some
of the officials at the Colonial Office and
discuss this matter with them.

I have the honour to be,

With the highest respect,

My Lord,

Your Lordship's most obedient,

humble servant,

J. Hayes Satter
 (J. Hayes Satter)

570

RIGHT OF GOVERNMENT TO DISPOSE OF WASTE LANDS IN THE
EAST AFRICA PROTECTORATE

Mr. Antrobus.

Colonel Seely.

Mr. Coombe, the Crown Advocate, and Mr. Hollis, the Secretary for Native Affairs, attended at the time fixed for the Conference referred to in the previous Minutes. Colonel Seely was, unfortunately, unable to be present, but I discussed the matter with them and we came to the following conclusions

1. At present the right of the Government to dispose of land in the East Africa Protectorate is somewhat doubtful. According to the view held by Mr. Coombe (and it is believed by the Judges of the High Court, though apparently there has not been any judicial pronouncement on the subject) the expression "public lands" in the East Africa Order in Council of 1902 s. 2 is intended to define the lands of which the Crown has the power to dispose, and that that definition excludes all lands over which tribes have in the past grazed their cattle or which they have cultivated; and that accordingly the Government have been wrong in assuming - as they have done in some cases - the right to dispose of lands which were merely not at present in the occupation of

native

natives. As a question of legal interpretation this position appeared to me to be not free from doubt. I inclined to think that the word "public" was mere surplusage and that the definition of Crown lands was to be found in the following words i.e., (lands) "which are subject to the control of His Majesty by virtue of any Treaty Convention or Agreement or of His Majesty's Protectorate, and all lands which have been acquired by His Majesty for the public service or otherwise howsoever". But even if this view were accepted we are a long way from a satisfactory definition, as I think it has never been decided what lands if any, vest in His Majesty by virtue of his Protectorate over a country. We therefore did not differ in our opinion that it was advisable that

"Agreements should be made with the heads of the tribes or sub-tribes about 40 in all, by which a proportion of their lands adequate for their present requirements should be reserved to them, and the residue should be surrendered to the Government. The agreements would not affect the rights of individuals or families (if any) within the tribal area, except in one case the Waiteia where the tribal ownership of land having clearly broken down the agreements would have to be made with the heads of families."

The Agreements to be concluded with due ceremony

ceremony, the Governor or Assistant Governor being, if possible, present on each occasion."

3. "Lands once declared a reserve by such an Agreement not to be alienated outside the tribe without the consent of the chiefs and the Governor; except that land might be acquired for public purposes as defined in the Crown Lands Ordinance on similar terms as to compensation to those allowed in the case of settlers lands so acquired".

I suggested - and Mr. Coombe and Mr. Hollis did not differ - that the extent of the Reserve and the conditions of their alienation should eventually be embodied in an Act of Parliament in order to oppose some sort of obstacle to the robbery of the reserves in the event of the East Africa Protectorate becoming a self-governing colony.

4. The natives to surrender mineral rights under their land to the Crown".

This seemed only fair as natives are not likely to work minerals themselves and moreover such rights are always reserved ^{in the Crown} even in grants of freehold to white men in the East Africa Protectorate.

This will, of course, eventually involve our granting prospecting rights to white men in the Native Reserve (natives are not allowed by the existing law to take out prospecting or mining licenses)

and

and I think it would be necessary to add a provision in the agreements to the effect that if minerals are discovered in a Native Reserve it shall be lawful for the Government to take over the area affected by such discoveries (with proper compensations for crops, &c.) on adding an equivalent area of land elsewhere. Such a provision may not be all together easy to work in all cases; but any one who knows anything of the history of gold rushes knows very well that if gold were discovered in a Native Reserve it would be quite impossible to prevent the white inhabitants of the Protectorate from working it whatever the law might be, so that it is as well to have a legal way of dealing with such a situation if it arises.

W.D.E.

10/9.

Mr. Cox

As you know, this same question - as to the right of the Govt. to dispose of land in a Protectorate has been raised in the Gambia, and we wrote to the Law Officers on the 17th of last month. I do suggest that we should refer this case to them too.

W.D.E.

Atome
 O-100 30/9
 P.T.O

H. M.

The L.O. have already referred in
the right of the Crown to lands in
Uganda in the S.A.P. see opinion
of 13 Dec 1855. Here it

H. M. has agreed that in view
of his opinion the paper reference to the
L.O. directed in the foregoing minutes
was not necessary. The opinion answers
the basic question which has arisen in
the L.O. & a copy has been sent to the
L.O. in view of consideration with the
reference made to them on that question
L.O. book

Mr. Antrobus
Then proceed as proposed
in my typed minute referring
to the first of the L.O. which
it must be remembered does not bind
the Protective Comtee)

M. H. J. 1855

L. Coy

If you agree to proceed
I am not sure however that
it will be enough to reserve for
the natives a proportion of the best
land available for their purposes

representations. Some allowance
 should be made for future
 expansion.

W.H. Oct 8

Sir P. H. Wood,
 Mr. Ant. Am.

I agree. I think that the R.O.
 report covers all lands not
 actually occupied or cultivated by
 natives. I had forgotten this report, if
 indeed I ever saw it.

(d. Sully
 Lond. New.

H. B. C.

9/10

J. M. 10. 10

I agree, but clearly the reservations
 must allow for future expansion.

C 19. X

J.
13. 10.

Dear Sir

9th May 1844

My dear Sir

I am writing you a
 duplicate of this which
 regarding the question
 of the right of land to
 be held in the
 and I have requested your
 further advice should be
 all on the subject.



John ...
B
S
N
Nov 19

(No. 551)

Sir,
I have the honour to acknowledge the receipt of your
despatch No. 419 of the 8th inst. on the sub-
ject of the right of the Govt. to ^{dispose of} ~~allocate~~
unoccupied lands in the D.A.P.

H.R.C. 2/10
Mr. Ellis *MEU*
Mr. Anrobus *Nr. 2*
Mr. Fox 3
Sir F. Hopwood *JHC*

In the opinion of The Crown Advocate,
whose views I took the opportunity of ^{discussing} ~~discussing~~
^{in the expression} ~~in the expression~~ "public lands" in
the L.A. Order-in-Council of 1902, sec. 2,
is intended to define the lands of which the
Crown has power to dispose, and that defini-
tion excludes all lands over which in the
past tribes have grazed their cattle or ~~which~~
which they have cultivated; and that accord-
ingly the Govt. has been wrong in assuming
the right to dispose of lands which were
merely not at present in the occupation of
natives. ^{on the other hand} ~~It appears that~~ in 1899 the Law
Officers of the Crown expressed the opin-
ion that in Pr. etc. such as the D.A.P. the
right of dealing with waste and unoccupied
lands accrues to H.M. by virtue of his
right as the Prop., and ~~as at present advised~~

3.12
HS

The legal position being
thus uncertain
in order that the wisest
course will be to admit
your proposal

~~It is proposed to act on that opinion~~
~~It is proposed to act on that opinion~~
It may now be placed
on a paper for the Govt. I think it advisable
that arrangements should be made with the
heads of the tribes and sub-tribes by which
a proportion of their lands, adequate for
their present requirements and affording
scope for reasonable expansion in the future
should be reserved to them, and the residue

should be surrendered to the Govt. The agreements would not, I understand, affect individuals or families within the area, except in one case, the Waite's, where the tribal ownership of land will be broken down the agreements would have to be made with the heads of families. The Agreements should be secured with the Govt. or direct negotiations with each

tribe. The agreements should be made with the heads of families. The agreements should be made with the heads of families. The agreements should be made with the heads of families.

Similar

It will be the duty of the Government to ensure that the conditions of their alienation should be embodied in an Act of Parliament.

Mineral rights under Native Lands should be surrendered to the Crown and a provision should be added to the agreements requiring the Govt. to take over ~~the~~ any area affected by the discovery of minerals, or within an equivalent area of land elsewhere.

John G. Brewer