AFRICAN LAND AND PROPERTY RIGHTS

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IN 1913 the Union of South Africa embarked officially on the policy of territorial segregation or separation of land rights as between Europeans and Africans which constitutes both the foundation and the background of apartheid to-day. In that year, the first Parliament of the new Dominion passed its first Native Land Act. Prior to Union, in all the states that were to constitute the Union, some provision had been made in the form of Native locations or reserves for Africans living in traditional fashion and, in addition, except in the Orange Free State, general rights of purchase of land in freehold by Africans had been recognized. Now, alarmed at what the European electorate claimed to see as a dangerous tendency on the part of the African population to exercise this right, the first Union Government sought in this Act to limit and define the areas in which acquisition by Africans might take place—this ostensibly with the intention of preventing the intermixture of European and African ownership.

Experience, however, has repeatedly shown that it is easier to limit than to define rights in a multi-racial society. Particularly is this the case where the legislators belong to one section of those for whom the arrangement is being made. It is true that, under the Act of Union, the Africans of the Cape Province still retained a franchise which they had enjoyed since the institution of representative government in the old Cape Colony; but even in the Cape, the African voters had lost the right to send one of their own kind to Parliament, and the Africans of the other three contracting states had no political rights at all. (The existence in Natal of a provision for a highly discretionary franchise does not invalidate this generalization.) So then, as now, European interests and claims exercised a dominating influence on the government of the country; and against the determined opposition of that section of the African population which was already politically conscious, and of those Europeans who stood by the traditional policy of the Cape of equal rights for all civilized men, parliament legislated to restrict African rights in land to the already established reserves, such land as was already held by Africans in freehold, and such further land as might

be considered necessary to meet the legitimate future claims of the African population. It was to take twenty-three years before any South African Government could decide what this further provision should be.

In line with the general principle of the Act, all cash tenancy by Africans of non-African-held land became illegal. Exemption from this restriction was, however, provided in respect of African families already established as rent-paying tenants in other than scheduled Native Areas—that is, the Reserves and African-owned land exempted under the schedule to the Act from the restrictive provisions of the Act. But it was understood that this exemption should continue only until other provision could be made for the people concerned.

What Land to be Released?

It is significant that a challenge in the courts established the claim of the Africans in the Cape Province that the restrictions of this Act could not apply to them in view of the franchise rights which they shared with the European population, and until 1936, when those franchise rights were abolished, Africans in the Cape remained outside the scope of the Act.

Significant also, although for a different reason, is the history of the attempts of successive governments to implement the obligations of the Act by delimiting both the extent and the locality of the further areas to be opened to acquisition by Africans. The Act itself made provision for the appointment of a commission to explore the position and to make recommendations in the light of its experience, its report to be completed within two years. In due course, the commission was appointed under the chairmanship of Sir W. H. Beaumont and in 1916, with a slight delay occasioned by the outbreak of the First World War, it presented its findings. It recommended the release from the restrictions of the 1913 Act of some 8,000,000 morgen of land, the amount of land which its investigations revealed as actually occupied at that date by Africans as recognized and established rent-paying tenants. This, together with the estimated 10,000,000 morgen of scheduled area, would have meant that ultimately some 18,000,000 morgen of land might pass into the hands of the African population.

These recommendations, which were submitted to Parliament in the form of a Bill, proved unacceptable to all parties, European and African alike. Since they had been made on a specific Provincial basis, it was thereupon decided to refer them to a series of local

committees for review. This was done and in due course these committees presented their own proposals. These followed generally the lines of the Beaumont Commission's recommendations but reduced somewhat the total area proposed for release by that Commission. They were also rejected and it was not until 1936, when the aftermath of the Gold Standard controversy produced fusion between the two major parties in the country, that this issue was brought to some sort of finality as part of what General Hertzog regarded as his comprehensive "solution to the Native problem". In that year, under the Native Trust and Land Act, legislative provision was made for the release of seven and a quarter million morgen of land for acquisition by or on behalf of Africans which, with the scheduled areas, would have opened to Africans something over 12 per cent of the whole area of the country. Most of this amount was specifically defined in the schedule to this Act, but according to the most recent estimate, that of the Tomlinson Commission, some 1,900,000 morgen still remain to be specified. Also according to that Commission, the final amount of land which may become "Native area" is not seventeen and a quarter million morgen but nearly nineteen and a half million morgen, which would bring potential Native area up to 13.7 per cent of the land of the country. Nearly all this land is situated in the eastern part of the country. It consists of some 260 scattered blocks of varying size and quality.

Area, not Availability

But in the circumstances of South Africa, the potential amount of Native area does not in itself reflect or explain the nature or extent of African property rights. These depend on the availability of such land. Here it is of the first importance to realize that only a small fraction of the areas scheduled under the 1913 Act was and is held in private ownership. The bulk of those areas is Native Reserve, the ownership of which vests in the Crown or, since 1936, in the Native Trust constituted under the Native Trust and Land Act of that year. It was and is densely populated by African families who are in effect tenants of the Trust. Their use of the land tends to follow a traditional pattern, namely an arable allotment, a garden site (on which the family's huts are erected) and a share of common grazing. The traditional size of the arable allotment is five morgen, but as pressure on the available land has increased, many allotments are smaller than this. No man may own more than one lot, and while in some circumstances he may alienate his

interest in his lot, he may not devise it by will. In each and all of these areas there are considerable numbers of landless men each of whom hopes some time to secure an allotment.

Segregation and the African National Home

Thus the bulk of the scheduled areas does not provide a property market in the usually accepted sense of the term. The released areas would, it was assumed, serve this purpose. There were to be areas in which an aspirant class of land-owners might find an outlet for their resources and ambitions on land available in freehold. But by the time these released areas received legislative sanction, the country's Native policy had changed from one of residential separation to one of separate group development. Already under General Hertzog's segregation policy, the Native areas had begun to assume the character of an African national home. In these circumstances, and in order to hasten the process of separation of Africans and Europeans, the Government of the day planned not only to release areas for acquisition by Africans but to help to purchase these areas for African settlement. Thus the Native Trust constituted under the 1936 Act came into the field as a competitive buyer and most of the land that has been acquired since 1936 has passed into its hands to be settled on terms similar to those already operating in the Reserves—that is tenancy on the basis of one man one lot. Little land indeed has been acquired for Africans in freehold and less is likely to be so acquired in the foreseeable future for two reasons. In the first place the restrictions on the amount of land open to African purchase, together with the Government's interest as a purchaser, has gravely aggravated the general tendency in these latter years for land values to rise steeply, so that land purchase is beyond the reach of all but a very few Africans.

But an at least equally effective deterrent to African acquisition of land is to be found in the fact that Government policy is now opposed to the purchase of land by individual Africans. Where, in 1936, the Nationalist Party strenously opposed General Hertzog's decision not only to release but to buy land for Africans, to-day, the drive of the Minister of Native Affairs is to control by public ownership as much as possible of the so-called Native areas, this in the interests of that ethnic grouping and the establishment of Bantu authorities under which he seeks to re-establish and maintain what he regards as the essential character of African society. Thus to-day, no African may buy land even in a released area without the

consent of the Minister of Native Affairs, and the Minister has declared that it is his policy to refuse this consent unless the proposed purchase fits into his plans for African social or administrative organization.

A further significant check on the possible emergence of an African landed class is to be found in the decision of the Minister of Native Affairs to maintain the present system of land distribution in the Trust-controlled areas, with its tendency to fragmentation, rather than encourage the consolidation of holdings and the emergence of a full-time farming class with a reasonable standard of living independent of migrant labour. His rejection also of the proposal to convert quitrent tenure to freehold, which was strongly urged by the Tomlinson Commission in order to encourage a sense of security and enterprise, tends in the same direction.

African Property Rights in Urban Areas

Thus it is clear that for the African population, property rights in rural areas are very strictly limited. But not all Africans wish to become farmers even if it were possible for them to do so. To-day, out of a population of eight and a half millions, of whom something more than half have to seek their livelihood outside the Native areas, some two millions are already fully urbanized in the sense that their hopes and their ambitions are essentially urban; and the speed with which the process of urbanization continues is one of the most conspicuous features of our socio-economic life. What opportunities do our law and our practice afford to this section of the population?

At the time of Union, a degree of residential separation had already been enforced in the urban areas of all the South African states—in the Transvaal and the Orange Free State by law, in the Cape Province and Natal without legislative sanction. At the same time there existed generally a right on the part of Africans to purchase property. This right continued to exist down to 1937 when it was formally abolished by the Native Laws Amendment Act of that year.

But even while Africans had the right to purchase in urban areas, after 1923, when the first Natives (Urban Areas) Act was passed, rights of tenancy were strictly limited and ownership did not necessarily convey the rights of occupation. Under that Act, Africans could be required to live in municipally provided locations or hostels as tenants at will of the local authority unless they owned and occupied property valued at £75 and over, (in 1938 there were

3,431 such cases all told); and except in the Cape Province, even African-owned property might be expropriated to implement the principle of separation. It is true, the Natives (Urban Areas) Act suggested some recognition of the claims of permanently urbanized Africans to some form of investment and security in their place of domicile, by providing that areas might be set aside by the municipal authorities or be recognized by the Government as predominantly Native areas in which Africans might acquire property in freehold. But it is significant that the release of such areas is entirely discretionary and that even before the advent of a Nationalist Government pledged to apartheid, the provision in the Act was to all intents and purposes a dead letter. To-day, it is entirely without value, since not only has the present Minister of Native Affairs declared his determination to allow no new rights of freehold to Africans in urban areas but he is pledged to wipe out such meagre rights as have survived from a less rigid past. The attack on the Western Areas of Johannesburg under the Natives Resettlement Act of 1955, and the extension last year of the powers of the Group Areas Board to all other areas of actual or potential African ownership —a meagre four in all of which Lady Selborne in Pretoria is the most important—reflects the vigour with which the policy of making urban areas completely European, at least in the property sense, is being pursued by the doctrinaire protagonists of apartheid. To-day apart from these four areas which are now doomed to extinction, the only interest in property open to Africans who are not content to be tenants of municipal houses is the "privilege" of building a house on a municipally owned stand on a thirty-year lease—a concession which is itself at the discretion of the municipal authorities in each individual case. And having built his house, if he wishes to sell it, an African can only do so to a purchaser who has established or can establish his right to be in the same urban area. The same limitation applies to business premises and businesses, a limitation which can be very severe in operation. It has already happened that a man, having built up a successful business in an urban location or township and wanting to sell and retire, can find nobody in the area with the capital necessary to purchase the business and is yet denied permission to sell to a would-be purchaser from another area.

Aliens Versus South African Citizens

But in terms of the apartheid policy, urban areas are European areas where Africans have no right to property. Incidentally,

"European" in this context includes aliens, who thus enjoy more rights in our towns and cities than do South African citizens who have helped to build them and continue to help maintain them—for Africans are South African citizens in terms of our citizenship law. Africans, urban as well as rural, should, it is contended by the protagonists of apartheid, seek their property rights—and indeed all their rights—in Native areas. But it is one of the significant anomalies of segregationist thinking that such towns as have come into being in Native areas are also European areas in terms of our law, with all the restrictions for Africans of the Natives (Urban Areas) Act. It is true that at last the Minister of Native Affairs, the arch apostle of apartheid, has agreed that this is, in fact, something of an anomaly and has stated that one day these towns must become African towns. But he has also made it clear that the day is to be a distant one. He has indeed now agreed that Africans should be allowed to purchase property in these areas, but in each case his approval and consent must be obtained for each transaction, and the policy does not visualize any general withdrawal of the Urban Areas Act. For the rest, his plan for the urbanized African and the diversification of African society is limited to the surveying of new townships in the Reserves where individual Africans will be permitted to purchase lots on the familiar conditions of one man one lot. This, with the potential acquisition from Europeans of rural trading sites and mission stations, will, in the Minister's opinion, adequately meet the needs of African investors in the foreseeable future.

When the present Minister of Native Affairs addressed the final meeting of the Natives' Representative Council in 1952, he informed the members of the Council that Africans must look for their own advancement to the sort of economic diversification through which Europeans had built up their society. The opportunities for investment and property which the Minister's policy itself allows would suggest that the process of diversification will not only be a lengthy one but that the Minister's intention is that it should be so.