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for
Covering 113

E. Afr. Prot. (Durs of Appeal on C 1404)

1916

15. Sep.

Ends memo. by Q. Justice dealing with interpretation of Sect 2 - memo read & approved by Q. Justice of Uganda - the Justice Ehrhardt. Encloses letter from Atty Gen. in which he differs from view of Q. Justice. Requests ruling

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Mr. Risley

W.H.
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Mr. Risley,

The C.J. raises the question as to the interpretation of art. 2 of the O. in C. of the 16th Feb. 1909 (East African Pro. Statute in C. of appeal O. in C.) The question is whether the C. of appeal, as constituted by that art., has authority to determine, by rules of Court made under the order, what powers it shall exercise in regard to appeals before it, or whether its powers are only such as are conferred upon it by the ordinances of the different Provinces.

Copy to Mr. as all can
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The C. J. in para 24 of his memo concludes that, the Provisores having conferred jurisdiction on the Ct. of appeal, that Court has full authority to determine in what manner it will exercise its powers in disposing of an appeal.

The att. General thinks otherwise: he construes the Article as meaning that the Court of appeal can only exercise such jurisdiction as is conferred on it by ordinance, including in the term jurisdiction the powers to be exercised by the Court when dealing with an appeal.

I submit that the att. General's interpretation is correct: the words "and shall exercise such jurisdiction and such other powers" "as may from time to time be conferred by ordinances passed under the provisions of the O. in C. relating to the sd. Provisores respectively" seem conclusive on this point, & as the att. General points out in para. 7 of his memo, the full power referred to by the C. J.

C. J. (in para 24 of his memo) is full
 power "to determine in accordance
with this order". That power must
 be limited to "Such appellate juris-
 diction and such other powers
 "as may from time to time be con-
 ferred by Ordinances"

I take it that "such other powers"
 would mean, e.g., powers of revision.
 If this interpretation is correct, those
 Protectorates which have, by their
 Ordinances conferring jurisdiction on
 the Ct. of appeal, also purported to
 define the powers of the Court, have
 acted within their powers under the
 O. in C.

2. Another question raised by the C. J.,
 with regard to the Zanzibar O. in C. of
 1914, is whether the Order could
 properly "lay down rules of procedure
 for the Ct. of appeal: it has
 purported to do so, both in Criminal
 & civil appeals, (art. 29, 30, 41, 42).
 The C. J. appears to refer to the Zanzibar
 O. in C. as if it was an enactment of
 the local legislature, instead of an
 Imperial

Imperial O. in C. I take it that in so far as the O. in C. has provided a procedure on appeals, it has deprived the Ct. of appeal of the power of making rules to regulate its own procedure, in respect of Zangiban appeals. The Zangiban O. in C. does ^{implicitly} ~~not~~ ^{not} confer on the Ct. of appeal the power to make rules of procedure, in art. 42, but such rules, if made, would be subject to the provisions of the O. in C. itself.

3. There remains the question whether the O. in C. should be amended to give the right to determine what powers the Ct. of appeal shall exercise, with regard to appeals, to the Ct. of appeal itself, instead of allowing it to remain vested in the Legislature of the various Protectorates.

No doubt it is undesirable for the Ct. of appeal to be hampered, in the exercise of its jurisdiction, by a restriction of its powers, but the C. J. does not say that the laws of the Protectorates

Protectorates, as they now stand, have had this effect, & the amendment he proposes, in para. 25 & 26 of his memo., would not apparently carry out the object he has in view (see para. 3 of the att. General's minute). I submit that he has not made out a good case for the amendment of the O. in C., as suggested in para. 25-27 of his memo.

4. The amendment proposed in para. 28 of the memo would appear to be unnecessary. The method in which an order of the Ct. of appeal is carried out is, I would submit, a matter of procedure, & the Ct. of appeal would have power, under art. 4(6), to make a rule directing the inferior Court "to conform with & execute the order, in the same manner as an original judgment of the inferior Court would be executed."

5. In para. 30 of his memo, the C. J. further suggests an amendment of the Zangiban O. in C. 1914, on

on the ground that it deals with pure procedure.

? There is no necessity for such an amendment. The Court can still make rules of procedure, subject to the provisions of the O. in C.

6. I submit in conclusion that the C.P. has not shown that an amendment of either O. in C., that of 1909, or that of 1914, is necessary or advisable.

Amended
27.3.16.

Mr. Bottomley.
Mr. Read.

This paper has been delayed by various causes but I do not think that the subject is very pressing.

1. As the main point as to the interpretation of Article 2 of the 1909 Order in Council I agree with the Attorney General and Mr. Woodward.

[Incidentally I may point out that, when the 1909 Order in Council was drafted by the Judges in East Africa they imported into Article 2 of the previous Order in Council of 1902 the passage "which shall be a superior Court of record, ... before the Court and" (taken from the Criminal Appeal Act 1900 section 1(7)), and it is this passage which has caused the question now raised by Mr. Hamilton as to the construction of Article 2.

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As Article 2 stood in the 1902 Order in Council the meaning was quite clear. "A Court shall be constituted etc., which shall exercise such appellate jurisdiction and such other powers etc. as may be conferred by Ordinances etc".

There is nothing in the papers to show that the draughtsmen intended by the words added in 1909 to increase the powers of the Court of Appeal. The accompanying memorandum merely said "This Article has been slightly amplified on the basis of VII Edw. Cap. 23", and I thought then, and think still, that the addition merely made it clear that the Court can exercise all the usual powers of a superior Court of record within the jurisdiction laid down by the Order, i.e. that conferred by Protectorate Ordinances.

2. As regards the Zanzibar Order in Council, 1914, I am not inclined to think that there is much in the ^{substance of the} objection made by Mr. Hamilton and shared by the Attorney-General and Mr. Woodward, that it provides for matters of procedure in the Court of Appeal which should be laid down by Rules of Court made by the Court of Appeal itself.

Article 30 provides for the transmission in cases of criminal appeal of all the documents constituting the record of a criminal case tried in Zanzibar to the Court of Appeal.

All the further procedure in the appeal is left to be settled by the Court of Appeals ^{own} ~~under~~ Rules of Court.

Article 42.

Security to the satisfaction of "the Court" means the Zanzibar Court (cf. Article 16(1) of the Order in Council), which is the proper Court to take security, provision for which [is therefore in my opinion] properly made by Zanzibar law, i.e. by the Zanzibar Order in Council rather than by Rules of Court made by the Court of Appeal.

The latter part of the Article is perhaps more open to objection, but [I think] the "Rules of Court" (to be made by the Zanzibar Court) must be construed as

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to the single matter of giving security dealt with immediately above.

I adapted the above Articles from existing articles of the 1906 Zanzibar Order in Council, under which appeals from Zanzibar lay to the High Court of Bombay. It may be that they should have been altered though the general principles remain the same. [It also seems probable that in view of the reference to Protectorate Ordinances at the end of Article 2 of the 1909 Order in Council that all the provisions as to Appeal now contained in the Zanzibar Order in Council 1914, should have been transferred to a Sultan's Decree made under and by virtue of the Zanzibar Order in Council 1914.]

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As Mr. Mufson is now home on leave I think that we might well have his observations on the criticism which has been levelled against the Zanzibar Order in Council 1914, and also, as he also is a Judge of the Court of Appeal, generally on the memorandum of his Brothers, Hamilton, Carter and Erhardt.

Perhaps it would be hardly fair to send him the Attorney-General's minute as well, but I think we might say that as at present advised the Secretary of State is not satisfied that the words added to Article of the 1902 Order in Council by the corresponding article of the 1909 Order in Council have increased the powers of the Court of Appeal as suggested in the memorandum, and ask for his observations generally on the matters raised therein, including the objection made to Articles 30 and 42 of the Zanzibar Order in Council 1914.

W.C.S. 13/5/14
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EAST AFRICA PROTECTORATE
No. 118.

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MAR 16 1916
GOVERNMENT HOUSE,
NAIROBI,
BRITISH EAST AFRICA

February 15th, 1916.

Sir,

I have the honour to transmit herewith for your consideration a copy of a letter I have received from the Chief Justice together with a memorandum dealing with the interpretation of the Court of Appeal Order in Council 1909, Article 2.

2. This memorandum has been read and approved by the Chief Justice of Uganda, and Mr. Justice Ehrhardt.

3. The Attorney General, however, differs from Chief Justice Hamilton in the view expressed by the latter in paragraph 24 of the memorandum, and I enclose a copy of his letter on the subject.

I have the honour to be,

Sir,

Your humble, obedient servant,



By instruction from
the GOVERNOR

THE RIGHT HONOURABLE
ANDREW BONAR LAW, P.C., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET, LONDON, S. W.

From C. Justice
with encl.
4-1-16
From A.G.
19-1-16

Triplicate

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OSURE Pro. 1
113 of Febry 15th 1916

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H. S. ...

Bombay,

15th January 1916.

Sir,

I have the honour to advise herewith that the Hon'ble the Chief Justice of the Court of Appeal in Council 1908 ...

The diversity of opinions that have been entertained with regard to the ...
... by the various members ...
... the Hon'ble the Chief Justice ...
... the Hon'ble the Chief Justice ...

3. The matter has to be considered owing to the necessity that exist for redrafting the Rules of procedure of the Court of Appeal. The experience of the past few years has not only shown that the existing Rules are ...
... with advantage but also that they require to be amplified to a considerable extent to meet the requirements of the law ...
... the Court.

4. Before this work, however, can be taken in hand it is necessary that doubts should be removed and existing conflicts between Rules and Ordinances be cleared out of the way so that the Rule-making body of the Court of Appeal may be sure of the ground on which they wish to build.

5. I have the honour to request that

the

(2)

the accompanying memorandum may be submitted to
the Secretary of State.

I have the honour to be,
Your Excellency's,
most obedient and humble servant,

R. W. HAMILTON

SENIOR MEMBER.

J. H.

To

His Excellency

The Governor,

East Africa Protectorate.

17

(Triplicats)

MEMORANDUM RELATING TO NEW RULES OF COURT OF APPEAL.

(1) By article 2 of the East Africa Protectorates Court of Appeal Order-in-Council 1909 it is provided that the Court "shall exercise such appellate jurisdiction and such other powers in relation to the High Courts and other Courts as may from time to time be conferred by Ordinance".

(2) Jurisdiction has been conferred in civil matters on the Court of Appeal by the various protectorates concerned in the following manner:-

EAST AFRICA.

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Courts Ordinance 1909 Section 18.
"Unless otherwise expressly provided by this Ordinance or by any law for the time being in force in the Protectorate an appeal shall lie from the decrees or from any part of the decrees and from the Orders of the High Court to the Court of Appeal for Eastern Africa".

(3) UGANDA.

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Moffet*

Courts Ordinance 1911 Section 13.
"subject to the general provisions of the Civil Procedure Code relating to appeals, and to the provisions of this Ordinance or any other law for the time being in force in the Protectorate, an appeal shall lie to the Court of Appeal in civil cases from the decrees, or from any part of the decrees, and from the Orders of the High Court whether made in the exercise of its appellate jurisdiction".

(4)

SIAMALAND.

Section 7.

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H. Gold*

Appeal Ordinance 1911 Sections 7, 8.
"In civil cases an appeal shall lie
"to the Court of Appeal from any
"final or interlocutory judgment,
"decree, or order of the High Court
"in a suit whereof the subject matter
"exceeds 500 in value, or in any case
"by leave of the High Court or of the
"Court of Appeal".

Section 8.

"In civil cases the Court of Appeal
"may exercise all the powers con-
"tained in the Rules of Court made
"by the Court of Appeal under the
"Eastern African Protectorates
"(Court of Appeal) Order-in-Council
"1909 or under any Order-in-Council
"substituted therefor".

(5)

ZANZIBAR.

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Section 41.

Zanzibar Order-in-Council 1914
Sections 41, 42.

"Unless otherwise expressly pro-
"vided by any law for the time
"being in force in Zanzibar, an
"appeal shall lie from the decrees
"or any part of the decrees and
"from the orders of the Court for
"Zanzibar to the Court of Appeal.

Section 42.

"Where any person entitled to appeal
"to the Court of Appeal from any
"decree or order made by the Court
"for Zanzibar in the exercise of
"civil jurisdiction under this Ordinance
"desires to appeal, he shall

(2)

By the Court

"security to the satisfaction of
"the Court, and to such amount as
"the Court thinks reasonable, for
"prosecution of the appeal and for
"payment of any costs that may be
"ordered by the Court of Appeal on
"the appeal to be paid by the
"Appellant and shall comply with such
"terms and conditions and take such
"steps as shall be prescribed by
"Rules of Court".

(3)

In civil matters therefore East Africa and Uganda have by Ordinance stated in what cases an appeal shall lie to the Court of Appeal without attempting to define in what manner the jurisdiction so conferred shall be exercised.

(4)

Nyasaland has also by Ordinance conferred jurisdiction on the Court of Appeal, but has gone further and purported to authorize the Court of Appeal to exercise the powers contained in its own Rules of Court.

(5)

Zanzibar has proceeded by Order-in-Council to confer jurisdiction on the Court of Appeal, without as -
fining the powers of the Court, but ~~has~~ ~~not~~ ~~attempted~~ ~~to~~ ~~define~~ ~~the~~ ~~powers~~ ~~of~~ ~~the~~ ~~Court~~, of pure procedure as to an Appellant giving security on appeal, which matters are provided for in the Rules of the Court of Appeal.

It is also provided that an Appellant shall comply with such terms and conditions as shall be prescribed by Rules of Court, i. e. of the Court for Zanzibar.

(6)

In criminal matters the various Protectorates concerned have conferred jurisdiction in the following

manner:-

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Section 220.

Criminal Procedure Ordinance 1914.
Defines in what cases an appeal
shall lie.

Section 224.

"His Majesty's Court of Appeal for
"Eastern Africa may exercise in an
"appeal from the High Court any of
"the powers conferred by this Ord -
"nance upon the High Court in the
"exercise of its appellate juris -
"diction. Provided that nothing shall
"authorize such Court of Appeal to
"alter or reverse the verdict of a
"jury unless it is of opinion that
"such verdict is erroneous owing to
"a misdirection by the Judge or to
"a misunderstanding on the part of
"the jury of the law as laid down
"by him".

The powers above referred to are contained in
Section 225. The Court may dismiss the appeal or
may

- (a) in an appeal from a conviction (1) reverse
"the finding and sentence and acquit or
"discharge the accused, or order him to be
"retried by a Court of competent juris -
"diction or commit him for trial or (2)
"alter the finding maintaining the sentence
"or with or without altering the finding
"reduce the sentence or (3) with or without
"such reduction and with or without alter -
"ing the finding alter the nature of the
"sentence but subject to the provisions of
"section 226 so as to enhance the same.

Notes to security for keeping the same on conviction.

- (b) in an appeal from any other order alter or reverse such order.
- (c) make any amendment of any consequential or incidental order that may be just or proper".

(10) **UGANDA.****Section 18.****Courts Ordinance 1911.**

"Subject to the general provisions of the Criminal Procedure Code relating to appeals an appeal shall lie to the Court of Appeal for Eastern Africa (herein - after called the Court of Appeal) from any finding sentence or order recorded or passed by the High Court in the exercise of its original criminal jurisdiction. But the Court of Appeal shall not have any power of revision or appeal, other than as hereinbefore provided, except in cases in which the High Court has convicted on an appeal from an acquittal".

(11) **SIERRA LEONE.****Appeal Ordinance 1911.**

Sections 2, 3 and 4 shall in what cases an appeal shall lie to the Court of Appeal Section 3 continues as follows:-

"(1) In original cases the Court of Appeal may dismiss the appeal or may

"(a) in an appeal from the order of acquittal reverse such order, and direct that further enquiry be made, or that the accused be retried or committed for trial, as the case may be, or find the guilty, and pass sentence on him

"according to law.

"(b) In an appeal from a conviction re -
 "verse the finding and sentence, and
 "acquit or discharge the accused or order
 "him to be retried by a Court of competent
 "jurisdiction or committed for trial; or
 "(2) alter the finding maintaining the
 "sentence, or with or without altering
 "the finding, reduce the sentence; or (3)
 "with or without such reduction, and,
 "with or without altering the finding,
 "alter the nature of the sentence, but
 "not so as to enhance the same.

"(c) In an appeal from any other order:
 "alter or reverse the order.

"(d) Make any amendment or any conse -
 "quential or incidental order that may
 "be just and proper.

"(e) Call for a report from the Judge
 "who tried the case.

"(2) Nothing herein contained shall
 "authorize the Court of Appeal to alter
 "or reverse the verdict of a jury, unless
 "it is of opinion that such verdict is
 "a misdirection by the Judge, or is
 "erroneous, owing to a misunderstanding
 "on the part of the jury of the law as
 "laid down by him.

"Section 6. Appeals in criminal matters
 "shall abate on the death of the accused
 "or convicted person".

(12)

SANJIVAR.

Order - in - Council 1914.

The articles of the Order-in-Council

dealing with criminal appeals to the Court of Appeal are 28 - 31.

Articles 28 and 29 provide in what cases an appeal shall lie.

Article 30 continues as follows:-

"where a person entitled to appeal to the Court of Appeal from any finding sentence or order recorded or passed in the exercise of criminal jurisdiction under this Order desires to appeal, he shall present his petition of appeal to the Court for Zanzibar, and the petition shall with all practicable speed be transmitted by the Court for Zanzibar to the Court of Appeal, with certified copies of the charge (if any) and proceedings, of all documentary evidence admitted or tendered, or the depositions, of the notes of the oral testimony, and of the finding sentence or order, and any argument on the petition of appeal that the Appellant desires to submit to the Court of Appeal".

Article 31 deals with the postponement of sentences pending appeal.

(18)

In criminal matters therefore East Africa, Uganda and Nyasaland have defined by Ordinance in what cases an appeal shall lie to the Court of Appeal.

In Zanzibar this has been done by Order-in-Council.

(14) East Africa and Nyasaland have both in similar but not identical terms purported to define the powers of the Court of Appeal in the exercise of its appellate jurisdiction.

(15) Uganda and Tanganyika have said nothing about the powers of the Court of Appeal in the exercise of the Appellate Jurisdiction conferred by them.

(16) Tanganyika was in its Order-in-Council based orders of pure procedure relative to the filing and forwarding of an appeal, which are dealt with by the Rules of the Court of Appeal.

The existing position with regard to both civil and criminal appeals will be best described in the following tabulated form:-

Jurisdiction conferred on the Court of Appeal, without definition of powers in the following paragraphs:

Jurisdiction conferred on the Court of Appeal with definition of powers by the following paragraphs:

Directions added as to procedure by Order in Council:

in civil matters	in criminal matters	in civil matters	in original matters	in civil matters in criminal matters
East Africa			East Africa	
Uganda	Uganda			
Zanzibar	Zanzibar	Zanzibar		Zanzibar
	Myasaland	Myasaland	Myasaland	

(17)

see Sec 40441
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The Rules of the Court of Appeal issued under the provisions of the Court of Appeal Order-in-Council 1906 in January 1910 deal generally with the procedure to be followed on filing an appeal, as to giving security, and as to the making up and forwarding the records.

(18)

Rule 28 dealing with its civil powers is as follows:-

- "In civil appeals the Court of Appeal shall have power:-
- "a. to dismiss an appeal
 - "b. To reverse a decree on a preliminary point and on such reversal to remand the case to the Court against whose decree the appeal is made with directions to proceed to determine the case on its merits.
 - "c. To re-settle issues or finally to determine a case, notwithstanding that the judgment of the Court against whose decree the appeal is made has proceeded wholly on some other ground than that on which the Court of Appeal proceeds.
 - "d. To call additional evidence or to direct the Court against whose decree the appeal is made or any other subordinate Court to take additional evidence.
 - "e. To make any amendment or any consequential or incidental order that may be just and proper.
 - "f. To confirm reverse or vary the decree against which the appeal is made.
 - "g. To order that a decree shall be set aside and a new trial be had.

(17)

see 32
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(18)

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- "a. to dismiss an appeal
- "b. To reverse a decree on a preliminary point and on such reversal to remand the case to the Court against whose decree the appeal is made with directions to proceed to determine the case on the merits.
- "c. To re-settle issues and finally to determine a case, notwithstanding that the judgment of the Court against whose decree the appeal is made has proceeded wholly on some other ground than that on which the Court of appeal proceeds.
- "d. To call additional evidence or to direct the Court against whose decree the appeal is made or any other subordinate Court to take additional evidence.
- "e. To make any amendment or any consequential or incidental order that may be just and proper.
- "f. To confirm reverse or vary the decree against which the appeal is made.
- "g. To order that a decree shall be set aside and a new trial be had.

- "h. To make such order as to costs in the appeal court and in the court or courts below as may be just".

Rule 29 deals with the power of the court in original matters:-

- "In a criminal appeal the court of appeal shall have power"
 - "a. to dismiss the appeal.
 - "b. in an appeal from an order of acquittal to reverse such order and direct that further enquiries be made, or direct that the accused be retried, or find him guilty and pass sentence on him according to law.
 - "c. in an appeal from a conviction to
 - "i. reverse the finding and sentence and acquit or discharge the accused or order the accused to be retried;
 - "ii. alter the finding maintaining the sentence or, with or without altering the finding, reduce the sentence;
 - "iii. with or without such reduction and with or without altering the finding alter the nature of the sentence but not so as to enhance the same
 - "d. in an appeal from any other order alter or reverse such order.
 - "e. Make any amendment or any consequential or incidental order that may be just and proper.
 - "f. Call for a report from the Judge who tried the case.

(20)

From the foregoing it will be seen that there is not in fact any serious difference between the powers as laid down by the Court of Appeal in its own Rules and those with which certain Protectorates have purported to endow the Court.

But the fact remains that there is a vital difference of opinion as to the origin of the powers which the Court may exercise in disposing of an appeal.

(21)

Before any attempt can be made to re-draft the Rules of the Court of Appeal this difficulty must be cleared out of the way, for otherwise a conflict might at any time arise between powers granted by a Protectorate Ordinance and powers defined by Rules of the Court of Appeal.

It is also of the highest importance that the powers of the Court of Appeal should be exercised in accordance with one form of procedure only, from whatever Protectorate the appeal before it may have emanated.

(22)

The article dealing with the constitution of the Court of Appeal is article 2 of the Court of Appeal Order-in-Council 1909 which is as follows:-

"A Court shall be constituted called the Court of Appeal for Eastern Africa - - - which shall be a superior Court of record, and shall, for the purposes of and subject to the provisions of this Order have full power to determine in accordance with this Order any questions necessary to be determined for the purpose of doing justice in the case before the Court, and shall exercise such appellate jurisdiction as may be conferred on it by the Order in Council."

Taken from
Crown and Appeal
Act 1909, sec 171.

"in the said Protectorates as may from time to time be conferred by Ordinance passed under the provisions of the Order-in-Council relating to the said Protectorates respectively".

- (23) The question therefore at once arises as to what is the meaning of the words "such other powers" in the foregoing article.

Do they mean powers other than those incidental to the exercise of appellate jurisdiction, e.g. such as powers of revision, or do they mean powers to dispose of an appeal in addition to and apart from jurisdiction to entertain it?

- (24) It is submitted that the Court of Appeal being invested with "full power to determine any questions necessary to be determined for the purpose of doing justice in the case before it" and with power "to make rules of Court with respect to all matters of procedure relating to the exercise of its jurisdiction" is the proper authority to decide in what manner it will exercise its powers in disposing of an appeal, and that it is not contemplated by the Order-in-Council that a Protectorate in addition to conferring jurisdiction on the Court should also declare in what manner that jurisdiction is to be exercised.

A fortiori it seems clear that matters which are obviously of pure procedure, such as have been dealt with by the Zanzibar Order-in-Council, should be left to the Court of Appeal to regulate by Rules of Court.

- (25) Having regard to the different views that have been taken of the meaning of article (2) of the Court of Appeal Order-in-Council 1909 it might be desirable to

remove doubts by amending it in the following manner, i.e. by striking out the words "and shall exercise such appellate jurisdiction and such other powers" and substituting therefor after the words "for the purpose of doing justice in the case before the Court" and may make any Order therein which may be necessary for the proper determination of such questions, and shall exercise such appellate or other jurisdiction - - - - -

(26)

The effect of this amendment would be that while a Protectorate could by Ordinance confer on the Court of Appeal either Appellate or revisional jurisdiction or both, the Court would be clearly left free to exercise its "full power of determining any question necessary to be determined in a case before it" subject to the provisions of the Order, that is to say in accordance with the rules framed by it for its own guidance.

(27)

It has been suggested that this would entail an amendment of the rule making power contained in article 9 (1) of the Order-in-Council by the omission of the words "of procedure" so that the article should read:-

"Three members of the Court of Appeal, one of whom shall be the Senior Member, may make Rules of Court with respect to all matters relating to the exercise of its jurisdiction".

The reason offered is that certain matters to be contained in the Rules would of necessity relate rather to the exercise of powers than to pure procedure. In the latter opinion would

appear to be that, if the Court has full power to dispose of the matter before it, Rules declaring how it will exercise that power become Rules of procedure and an amendment of this article would therefore not be necessary.

(28)

In the event of it being thought desirable to amend the Order-in-Council on the lines indicated in paragraph 25 the addition of a further article similar to article (28) of the appeal to Privy Council Order-in-Council 1909 might be considered at the same time, viz. to the effect that

"A court in the said Protectorates shall conform with and execute any Order which the Court of Appeal may think fit to make on an appeal from a judgment of such court in like manner as any Original judgment of the Court should or might have been executed".

The same reasons which make such an article desirable in the case of the Privy Council would appear to apply also *mutatis mutandis* the case of the Court of Appeal.

(29)

It is further submitted for consideration whether, if the above proposals are approved, it might not be opportune to repeal the existing Orders-in-Council dealing with the Court

viz The Court of Appeal Order-in-Council 1909

and

The Court of Appeal Amendment Order-in-Council 1914

and issue a new consolidating Order.

(20)

In any event the necessity is suggested of amending the Zanzibar Order-in-Council 1914 in so far as its provisions deal with procedure in matters in the Court of Appeal; and if the suggestions in this Memorandum are correct it will also be necessary for East Africa and Nyassaland to amend their Ordinances which purport to confer on the Court of Appeal "powers" in addition to "jurisdiction".

4 Jan 1916

R.W. HAMILTON

January 19th 1916.

The Hon: Chief Secretary,

Reference No. S. 11608.Re The Eastern African Protectorates
(Court of Appeal) Order-in-Council, 1909.

With reference to the memorandum of the Senior Member of His Majesty's Court of Appeal for Eastern Africa dated the 4th instant it would appear that the Court is desirous of construing the Eastern African Protectorates (Court of Appeal) Order-in-Council, 1909, as giving it power to determine by rules of Court made under the Order what jurisdiction it shall exercise in regard to appeals before the Court. I regret to differ from the view expressed by the Senior Member in para 24 of his memorandum. In my opinion under Article 2 of the Order the Court of Appeal can only exercise such jurisdiction as may be conferred upon it by Ordinance. The term "jurisdiction" as used in the Article includes, in my opinion, not only the class of case in which an appeal shall lie to the Court of Appeal but also the powers to be exercised by such Court when dealing with an appeal. In any event the addition of the

words

words "and such other powers in relation to the High Courts and other Courts" appears to make it clear that the intention of the framers of the Order was to give the Court of Appeal only such jurisdiction and power as may be conferred upon it by Ordinance in the case of any Protectorate to which the Order applies.

2. It is difficult to draw a hard and fast line between pure procedure and the powers of a Court but I submit that Article 9 of the Order only gives the Court power to prescribe ^{such matters as} by Rule 102, the method in which an appeal shall reach the Court, the procedure of the Court at the hearing, how the Court's orders shall be dealt with by the lower Court and any other matter of pure procedure relating to the exercise of its jurisdiction.

3. I am not convinced that the amendment suggested by the Senior Member in paragraph 20 of his memorandum would effect the purpose which he appears to have in view. The power of the Court would still be subject to the jurisdiction conferred upon it by Ordinance and would not take away the right now exercisable by a Protectorate Government to determine by Ordinance what that jurisdiction shall be that is to say what powers the Court of Appeal shall exercise in relation to an appeal properly before the Court.

4. I am not satisfied that it is desirable that the Court of Appeal should have the right to determine what powers it shall exercise with regard to appeals. In my opinion the legislature of the Protectorate concerned should have the opportunity and right to

... mine what the powers shall be. It is to be noted that the powers of the Court of Appeal given by the different Protectorates concerned will vary slightly but such variation is, I think, not sufficiently strong argument to support the Senior Member's view that the Court of Appeal should have the same powers.

The Senior Member in *Case 1*, 1914, appears to have influenced on the powers of the Court of Appeal given by Article 2 of the Eastern African Protectorates (Court of Appeal) Order-in-Council, 1909, and to have deprived the Court of Appeal of the power to regulate its own procedure in so far as appeals from *Magistrates* are concerned.

It is of opinion that the legislation enacted by Nyassaland in civil matters and by Nyasaland of East Africa in criminal matters whereby the powers of the Court of Appeal are defined and given to such Court by Ordinance is proper and within the power of the legislatures of these Protectorates.

In his paragraph 14 the Senior Member has left out of his quotation the words "in accordance with this Order". A proper construction of the Clause "and shall exercise such appellate jurisdiction and such other powers in relation to the High Courts and District Courts in the said Protectorates as may from time to time be conferred by Ordinance" is correct when

the

mine what those powers shall be. It is to that
the powers of the Court of Appeal also vary in
different Protectorates concerned will vary slightly
but each variation is, I think, not sufficient
strong argument to support the Senior Member's view
that the Court of Appeal should possess its
own powers.

5. The Senior Order-in-Council, 1914, appears to
have infringed on the powers of the Court of Appeal
given by Article 2 of the East African Protectorates
(Court of Appeal) Order-in-Council, 1900, and
to have deprived the Court of Appeal of its right to
regulate its own procedure in so far as appeals from
tribunals are concerned.

6. I am of opinion that the legislation enacted by
Nyasaland in civil matters and by Nyasaland and
East Africa in criminal matters whereby the powers of
the Court of Appeal are defined and given to such
Court by Ordinance is proper and within the power of
the legislatures of these Protectorates.

7. In his paragraph 24 the Senior Member was left
out of his quotation the words "in accordance with
this Order". If by construction of the clause "and
shall exercise such appellate jurisdiction and such
other powers in relation to the said Courts and other
Courts in the said Protectorates as may from time
to time be conferred by Ordinance" is correct then

the

the "full power" to determine in accordance with this Order any questions means that such power must be exercised in accordance with the provisions of any Ordinance regulating the Courts jurisdiction and other powers.

W. J. W. B. T. P.

ATTORNEY GENERAL.
R.

19 May 1916

DRAFT

DRAFT

J W Morrison Esq.

MINUTE.

- Mr. Cooke 17/5/16
- Mr. Bottomley 17/5/16
- Mr.
- Mr.
- Mr. G. Edies.
- Mr. H. Just
- Mr. J. Anderson.
- Mr. Steel-Maitland.
- Mr. Bonar Law.

I am to transmit
 to you herewith a copy of a
 letter from the Chief Justice
 of the E.A.P. and the
 enclosed memorandum enclosed
 dealing with the question
 of the interpretation of
 Article 2 of the E.A. Protectorate
 Court of Appeal Order in Council
 1909. The memorandum has
 been read and approved by
 the Chief Justice of Uganda,
 and by Mr Justice E. Richardt,
 Puisne Judge of the E.A.P.

(2) As at present
 advised, the S of S is not
 satisfied that the words
 added to Article 2 of the
 previous Order in Council, 1902,

Mr. V. Hamilton 4/1/16

Memorandum
 to orig^s for return
 Dec. 11202 (SA. Carl of Akhul)
 " 1904
 " 1914 (Z'bu)
 for return

1914

by the corresponding
Articles of the Order in Council
of 1907 have increased
the powers of the Court of
Appeal as suggested in
the memorandum. He would
be glad to be furnished
with your views generally
on the matter raised ^{in the memo} ~~therein~~
including the objection made
to Articles 30 & 42 of the
Zanzibar Order in Council
1914.

3 Copies of the Order
in Council are enclosed for
circulation of reference
and return

1914

AT THE COURT AT BUCKINGHAM PALACE,

The 15th day of February, 1909.

PRESENT,

THE KING'S MOST EXCELLENT MAJESTY

ARCHBISHOP OF YORK
LORD PRESIDENT
LORD CHAMBERLAIN
LORD SANDHURST

LORD NORTHBOTE
MR SECRETARY GLADSTONE
MR MARCOURT
SIR J. C. BIGHAM

WHEREAS by Treaty, grant, usage, sufferance, and other lawful means His Majesty has power and jurisdiction within the territories of Africa known as the East Africa, Uganda, and Nyasaland Protectorates (in this Order referred to as "the said Protectorates")

And whereas it is expedient that a Court should be established for the hearing and determining of appeals from His Majesty's Courts in the said Protectorates:

NOW, THEREFORE, His Majesty by virtue and in exercise of the powers in this behalf by "The Foreign Jurisdiction Act, 1890" or otherwise in His Majesty vested, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as the "Eastern African Protectorates (Court of Appeal) Order in Council, 1909"

2. A Court shall be constituted, called His Majesty's Court of Appeal for Eastern Africa (in this Order referred to as "The Court of Appeal"), which shall be a superior Court of record, and shall, for the purposes of and subject to the provisions of this Order, have full power to determine in accordance with this Order any questions necessary to be determined for the purpose of doing justice in the case before the

Court, and shall exercise such appellate jurisdiction and such other powers in relation to the High Courts and other Courts in the said Protectorates as may from time to time be conferred by Ordinances passed under the provisions of the Orders in Council relating to the said Protectorates respectively.

3. The Court of Appeal shall have a seal bearing the style of the Court and a device approved by His Majesty's Principal Secretary of State for the Colonies (in this Order referred to as "the Secretary of State") and until such a seal is provided the existing stamp and seal bearing the words His Britannic Majesty's Court of Appeal for Eastern Africa may be used instead thereof.

4. The members of the Court of Appeal shall be the Judges and Acting Judges for the time being of His Majesty's High Courts of the said Protectorates respectively, and such other competent person or persons, if any, each being a member of the Bar of England, Scotland or Ireland, of not less than five years' standing, as the Secretary of State may from time to time appoint.

5. The seniority of the Members of the Court of Appeal shall be determined according to the instructions to be given from time to time by the Secretary of State.

6. For the hearing and determining of Appeals, three members of the Court of Appeal shall sit together; but provision may be made by Rules of Court for the hearing of any specified classes of cases by less than three members of the Court of Appeal.

7. The Court of Appeal may sit at such places in any of the said Protectorates as may be fixed by Rules of Court.

8. The Secretary of State may appoint a Registrar and such other officers of the Court of Appeal as may be necessary.

9. (1) Three members of the Court of Appeal, one of whom shall be the senior member, may make Rules of Court with respect to all matters of procedure relating to the exercise of its jurisdiction.

(2) Rules of Court when allowed by the Secretary of State shall have effect as if contained in this Order: Provided that in case of urgency declared in the Rules, the same shall take effect before such allowance, and shall continue so to have effect unless and until they are modified or altered by the Secretary of State, and are published by the Court of Appeal as so modified or altered.

(3) Rules of Court made under this Order and allowed by the Secretary of State, may, with the approval of the Secretary of State, be rescinded, revoked, amended, or varied by Rules of Court.

10. On the commencement of this Order the Eastern African Protectorates (Court of Appeal) Order in Council 1902, and the Eastern African Protectorates (Court of Appeal) Order in Council 1906 shall be repealed. Provided as follows:—

(1) In all appeals and proceedings whatsoever which shall have been fully heard by the Court of Appeal established under the said Orders (in this Article referred to as "the former Court") and in which judgment shall not have been given, or having been given shall not have been signed, drawn up or otherwise perfected at the commencement of this Order, any judgment, decree, rule or order may be given or made, signed, drawn up or perfected respectively after the commencement of this Order in the name of the former Court by the Court of Appeal established by this Order, and shall take effect to all intents and purposes as if the same had been duly perfected before the commencement of the Order.

(2) Every judgment, decree, rule or order of the former Court which shall have been duly perfected at any time before the commencement of this Order may be executed and enforced and, if necessary, annulled or discharged by the Court of Appeal in the same manner as if it had been a judgment, decree, rule or order of the said Court of Appeal.

(3) All appeals, matters and proceedings whatsoever, whether civil or criminal, which shall be pending in the former Court at the commencement of this Order shall be continued and concluded before the Court of Appeal according to the form and manner of procedure of the said Court of Appeal.

11. This Order shall commence and have effect on such day as may be fixed by notification by the Secretary of State, published in the London Gazette.

And the Earl of Crewe, K.G., one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

A. W. FITZROY.

ORDER IN COUNCIL.

EASTERN AFRICAN PROTECTORATES (COURT OF APPEAL) ORDER IN COUNCIL, 1902.

Buckingham Palace, 11th August, 1902.

At the Court at *Buckingham Palace*, the 11th day of *August*, 1902.

PRESENT,

The KING's Most Excellent Majesty
in Council.

WHEREAS by Treaty, grant, usage, sufferance, and other lawful means His Majesty has power and jurisdiction within the territories of Africa known as the East Africa, Uganda, and British Central Africa Protectorates (in this Order referred to as "the said Protectorates"):

And whereas it is expedient that a Court should be established for the hearing and determining of appeals from His Majesty's Courts in the said Protectorates:

Now, therefore, His Majesty, by virtue and in exercise of the powers in this behalf by "The Foreign Jurisdiction Act, 1890," or otherwise in His Majesty vested, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as "Eastern African Protectorates (Court of Appeal) Order in Council, 1902."

2. A Court shall be constituted, called His Majesty's Court of Appeal for Eastern Africa (in this Order referred to as "the Court of Appeal"), which shall exercise such appellate jurisdiction and such other powers in relation to the High Courts and other Courts in the said Protectorates as may from time to time be conferred by Ordinances passed under the provisions of this Order in Council relating to the said Protectorates respectively.

3. The members of the Court of Appeal shall be the Judge or Judges for the time being of His Majesty's Court for Zanzibar, and the Judge or Judges for the time being of the High Courts of the said Protectorates, respectively, and such other members as may be appointed by His Majesty's

order, a member of the Bar of England, Scotland, or Ireland, of not less than five years' standing, as the Secretary of State may from time to time appoint.

4. The precedence of the Judges of the Court of Appeal shall be determined according to instructions to be given from time to time by the Secretary of State.

5. For the hearing and determining of appeals, three Judges of the Court of Appeal shall sit together; but provision may be made by Rules of Court for the hearing of any specified classes of cases by less than three Judges.

6. The Court of Appeal may sit at such places as Zanzibar, or in any of the said Protectorates as may be fixed by Rules of Court.

7. The Secretary of State may appoint a Registrar and such other officers of the Court of Appeal as may be necessary.

8.—(1) The Court of Appeal may make Rules of Court with respect to all matters of procedure relating to the exercise of its jurisdiction.

(2) Rules of Court when allowed by the Secretary of State shall have effect as if contained in this Order: Provided that in case of urgency declared in the Rules, the same shall take effect before such allowance, and shall continue to have effect unless and until they are modified or altered by the Secretary of State, and are published by the Court of Appeal as so modified or altered.

9.—(1) When a final judgment or order of the Court of Appeal made in a civil action involves the amount or value of 10,000 rupees or upwards any party aggrieved thereby may, within such time as may be prescribed by Rules of Court, if no time is prescribed, within three months after the same is made or given, apply by petition to the Court of Appeal for leave to appeal to His Majesty the King in Council.

(2) The applicant shall give security to the satisfaction of the Court of Appeal to an amount

not exceeding the amount or value of 5,000 rupees for prosecution of the appeal, and for such costs in the event of the dismissal of the appeal for want of prosecution as the Court of Appeal may award, and for payment of all such costs as may be awarded to any respondent by His Majesty in Council, or by the Lords of the Judicial Committee of His Majesty's Privy Council.

(3.) He shall also pay into the Court of Appeal a sum estimated by that Court to be the amount of the expense of the making up and transmission to England of the transcript of the record.

(4.) If security and payment are so given and made within such time as may be prescribed by Rules of Court, then, and not otherwise, the Court of Appeal shall give leave to appeal, and the appellant shall be at liberty to prefer and prosecute his appeal to His Majesty in Council according to the Rules for the time being in force respecting appeals to His Majesty in Council from his Colonies, or such other Rules as His Majesty in Council from time to time thinks fit to make concerning appeals from the Court of Appeal.

(5.) In any case the Court of Appeal if it considers it just or expedient to do so, may give leave to appeal on the terms and in the manner aforesaid.

10.—(1.) Where leave to appeal to His Majesty in Council is applied for by a person ordered to pay money or do any other act, the Court of

Appeal shall direct either that the order appealed from be carried into execution, or that the execution thereof be suspended pending the appeal, as the Court thinks just.

(2.) If the Court of Appeal directs the order to be carried into execution, the person in whose favour it is made shall, before the execution of it, give security to the satisfaction of the Court for performance of such Order as His Majesty in Council may think fit to make.

(3.) If the Court of Appeal directs the execution of the order to be suspended, the party against whom it is given shall, before an order for suspension is made, give security to the satisfaction of the Court for performance of such Order as His Majesty in Council may think fit to make.

(4.) This Order shall not affect the right of His Majesty at any time, on the humble petition of any person aggrieved by a decision of the Court of Appeal, to admit his appeal on such terms and in such manner as His Majesty in Council may think fit, and to deal with the decision appealed from in such manner as may be just.

And the most Honourable the Marquess of Lansdowne, K.G., one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein.

A. W. FitzRoy.

AT THE COURT AT WINDSOR CASTLE,

The 21st day of January, 1914.

PRESENT.

THE KING'S MOST EXCELLENT MAJESTY

- | | |
|--------------------------|-------------------------|
| ARCHBISHOP OF CANTERBURY | LORD PARMEOR |
| LORD PRESIDENT | SIR FRANCIS HOPWOOD |
| VISCOUNT ALLENDALE | SIR C. FLEETWOOD WILSON |
| LORD STAMFORDHAM | MIR. W. H. DICKINSON |

WHEREAS by an Order of His late Majesty King Edward the Seventh in Council, bearing date the 15th day of February, 1909, and entitled the "Eastern African Protectorates (Court of Appeal) Order in Council 1909," in this Order referred to as the "Principal Order," provision was made for the constitution of a Court, called His Majesty's Court of Appeal for Eastern Africa, for the hearing and determining of Appeals from His Majesty's Courts in the East Africa, Uganda and Nyasaland Protectorates (in that Order referred to as "the said Protectorates");

And whereas by treaty, grant, usage, sufferance, and other lawful means His Majesty the King has jurisdiction within the dominions of His Highness the Sultan of Zanzibar;

And whereas it is expedient that provision should be made for the hearing and determining of Appeals from His Britannic Majesty's Court for Zanzibar (in this Order referred to as "the Court for Zanzibar") by His Majesty's Court of Appeal for Eastern Africa (in this Order referred to as "the Court of Appeal"), and for the constitution of the Judge and Assistant Judges of the Court for Zanzibar as members of the Court of Appeal;

(Extract from the London Gazette of Friday, August 15, 1902.)

NOW, THEREFORE, His Majesty, by virtue and in exercise of the powers in this behalf by "The Foreign Jurisdiction Act, 1890," or otherwise in His Majesty vested, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as "The Eastern African Protectorates (Court of Appeal) Amendment Order, in Council, 1914," and shall be read and construed as one with the Principal Order.

2. The Court of Appeal shall exercise such appellate jurisdiction and such other powers in relation to the Court for Zanzibar as are conferred upon the said Court of Appeal by the Zanzibar Order in Council, 1914, or as may from time to time be conferred by any Order in Council amending the said Order.

3. The Judges and Acting Judges for the time being of the Court for Zanzibar shall be members of the Court of Appeal.

4. For the purposes of Article 7 of the Principal Order Zanzibar shall be deemed to be one of the said Protectorates.

5. On the commencement of this Order the High Court of Bombay shall cease to exercise appellate jurisdiction or other powers in relation to the Court for Zanzibar. Provided as follows:—

- (1) In all Appeals from the Court for Zanzibar, and in all proceedings whatsoever relating thereto, which shall have been fully heard by the High Court of Bombay (in this Article referred to as "the former Court"), and in which judgment shall not have been given, or having been given shall not have been signed, drawn up or otherwise perfected at the commencement of this Order, any judgment decree, rule or order may be given or made, signed, drawn up or perfected respectively after the commencement of this Order in the name of the former Court by the Court of Appeal, and shall take effect to all intents and purposes as if the same had been duly perfected before the commencement of this Order.
- (2) Every judgment decree, rule or order of the former Court which shall have been duly perfected at any time before the commencement of this Order may be executed and enforced and, if necessary, amended or discharged by the Court of Appeal in the same manner as if it had been a judgment decree, rule or order of the said Court of Appeal.
- (3) All Appeals, matters and proceedings whatsoever, whether civil or criminal, which shall be pending in the former Court at the commencement of this Order shall be continued and concluded before the Court of Appeal according to the form and manner of procedure of the said Court of Appeal.

6. This Order shall commence and have effect on such day as may be fixed by notification by the Secretary of State, published in the London Gazette.

And the Right Honourable Lewis Harcourt, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

ALMERIC FITZROY.