

DESPATCH

EAST AFR PROT

No. 37782

37782

Ref. No. 23 J.T. 35

(Subject)

1905

7c
12299

Mr Barth's app't as Judge.

Statement drawn up application.

The above are doubtful as to the validity of the instrument. Encloses copy letter from Mr Barth on the subject. States arrangements to pay him and that he should draw pay as 2-1/2 d.p.s from 7th June 1905.

(Minutes)

Mr. Wesley

JR

15/6

box
her Ant wh.

Putting on one side claims (such as Beaton & Stark) where judge is appointed by L.P. under the law of the colony concerned in favour of Royal Comptroller under S. 54 of General Order 25th Oct. 1895 that it will probably be found that our practice as to appointment in other colonies (as described in minutes on 12299) is in most if not in all cases prescribed in express terms by the laws of the colony.

This is the case as regards Gambia, Lagos, N.W. Nigeria (and therefore probably throughout W. Africa) and also as regards Bahamas, B. Guiana, B. Honduras, & Jamaica (where S. 54's instruction is an alteration to Royal Comptroller) - and no doubt elsewhere in L.S. India. So also in Hong Kong.

In S. Africa, on the other hand, the Govt. simply says "any judge shall be appointed by H.M." and as the legends

1055/66

Colonial practice on this point and the validity of judicial appointments is a matter of vital importance. We must I think seriously consider whether our usual practice disapproved by instrument under the Proclamation makes the Proclamation itself an instance of instructions by the Govt on behalf of H.M. to justify his in S Africa & Uganda by the terms of the Order. These instruments however in which terms no such instructions were in a Royal warrant and it is not at all clear that the inferior magistrates by Mr. G. Scott on 12/9/99 can't draw from this & hence

Before a decision is taken, I think the following ought to be asked. Whether our usual practice stands in the case of this colony or not the law of this State - being fully prepared to afford us

H.M.

25/10

In Antwort.

I think a Judge appointing his commandant is appointed by H.M. may be desirable to refer to the 20th of October Library of Congress

26/10

1/11

10/11 - 1/12 18

Mr Risley
We find that Mr.
Risley has made out
here with C.A. 28/11

Mr. Scott

Please see the above minutes of the library return to result
of opinion that the judges in South Africa, and

and Other Govts in the British
the Chief Justice in St. Vincent and also in St. Lucia, etc. 213
Appointed by H.M.

Will you say whether a Royal warrant is required with
the appointment of the above judicial officers and our
usual practice of appointment by an instrument under the
Proclamation of the colony adopted?

I would like to know procedure may safely be adopted
in the case of S.C. Africa, S Africa, Uganda (and others).
The kindly pass the info on to Mr Cox.

28/10/99

Mr. Cox

No Royal Warrant is issued in any
of the inferior cases referred to by Mr. Risley.
Whether the Government usually issue any
instrument we know no means of knowing.
Sir Wm. Fielden however, expressed an
opinion in a Grenada case See 16/11/93 that
although Local Law did not specify any
particular mode of appointment the 3d/23
despatch and the notification in the local
Gazette was sufficient proof of the appointment
though it would have been more regular
for the Governor to have issued a
Commission from the King & the Colony
in the Governor's name.

Mr. Cox
28/11

In Antwort

The Ballot apparently deserves
a Commission under the Royal sign manual
I am still of the opinion which I expressed
above being strongly of the opinion of a
written form for the whole process. If the high
Court direction for the appointment of the

is the affo[r]tment made except
by the King? All the Ova C.
(Article 17(2)) says is that
every judge shall be affo[r]t by
H.M. It does not go on to say
by warrant under the Royal sign
manual.

I would give Mr Barth
however the opportunity of
discussing it publicly if he has
another view still to see.

4/2
2/1/11

Gov. Mr. Barth to call
and see but Gov. to allow
Irene Fletcher

Mr. C. 2

as well

Mr. Justice

I have discussed this with
Mr. Barth. He does not I think
agree with my view & would like
the same kind of instrument as
was given the other judges. I pointed
out to him that if a commission
were given him a law we'd be
necessary validate all his first
decisions as doubt we'd be contentious

new validity.

It has since discussed the
matter with Mr. Davidson of the FO
& he agrees with my view.

I see no necessity for consulting
the L.O.

H.D.C.

13 Dec

Petty to be drafted
accordingly for const.

Mr. Justice 23
at once

Mr. Read

With regard to the question of salary, I
see no reason to give the high salary
from Apr. 1st just because it was available.
We know now when Mr. Barth quitted
the date of Commissioner, but, I
further, it was not until after
Mr. Conder arrived. If this was so, we
should be giving for enough an allowance
of his salary the high salary from
the date of Mr. Conder's embarkation.
Paragraph added as follows

6/6/11

2/1/11

H. J. R.

30/1/11

Report called to - say
that he acted as
judge from the 15th of April
duly & accordingly the date
of Clerk Advocate will be from beginning of

57782
S. A. 1
EAST AFRICA PROTECTORATE.

REF.
RE 23.61.5
COMMISSIONER'S OFFICE,

MOMBASA,

No. 517

September 27th 1908.

SIR,

In obedience to the instructions contained in your despatch No. 218 of May 11, I have the honour to report that an instrument has been drawn up under the Public

Law of the Protectorate appointing Mr. Barth to be a Judge of His Majesty's High Court of East Africa.

2. In view, however, of the terms of the Order-in-Council 1908, the judges are doubtful as to the validity of this instrument. I have the honour to transmit to you herewith a copy of a minute by myself on the subject.

3. As regards the matter of pay, I have issued instructions for Mr. Barth to be paid the salary of Crown Advocate (five hundred and twenty five pounds per annum) to August 3rd inclusively, and as Second Judge (seven hundred pounds per

Principal Secretary of State,

Minium

for the Colonies,

Downing Street,

London, S.W.

annum) from August 4th, this being the day on which Mr. Combe left England and commenced to draw pay as Crown Advocate. But as it was intimated in Foreign Office telegram No. 43 of March 2nd that Mr. Barth would be appointed to the second judgeship vacated by Mr. Hamilton, and as your despatch containing instructions for the appointment to be issued was dated May 5th 1905, and since Mr. Hamilton vacated that post and resumed the duties of Principal Judge with the higher rate of pay on April 1st 1905, I venture to recommend that Mr. Barth should draw pay as Second Judge from April 1st 1905.

For reason the instrument of appointment was not issued before you owing to the non-arrival of the Crown Advocate,

I have the honor to be,

Sir,

Your most obedient,

Humble servant,


Acting Commissioner.

D.O.
37782

Rec'd
23/07/05

216

COPY.

M T N U I N .
----000----

I enclose for your signature a form of appointment drafted in accordance with the instructions contained in this despatch but having regard to the terms of the Order-in-Council 1908 it is doubtful as to its validity.

Article 10 of the Order-in-Council 1908 gives the Commissioner subject to the direction of a Secretary of State, power to appoint on behalf of His Majesty such public officers for the administration of East Africa under such instructions as he may think fit.

Article 17 sub article 1 provides that every Judge shall be appointed by His Majesty and shall hold office during pleasure. By Article 19 the provisions of Article 10 are not to be applied for application to the appointments of judges of the High Court. Therefore of the opinion that appointment must be made by His Majesty.

In Judge Hamilton's appointment (vide copy herewith) the Order-in-Council is recited and it is especially mentioned that whereas "the Judges of the said Court" (i.e. the High Court) should be appointed by His Majesty.

It is a matter of importance that there should be no doubt as to the legality of the appointment otherwise it might be possible to upset on appeal any judgment made by me.

When a provision is made by law that any particular appointment should be made by the holder of a certain office or a certain person I do not think the power to make such an appointment can be delegated by the holder of that office or that person to some one else without an alteration in the law.

I therefore venture to suggest that the matter be referred home for further consideration. As such consideration may take some time I would recommend that the enclosed appointment should be signed at once. I could discuss the matter with the Colonial Office when on leave.

I have submitted this minute to Judge Hamilton and he authorizes me to say that he agrees with it.

1-5.

Ed/- J. W. Barth.

Commr

EST P

39782

218

DRAFT.

Sir,

(96) 11 December 1905

Mr. Barr & Co.

MINUTE.

Mr. Bodenbury F.H.
Mr. Read
Mr. Antrobus
Mr. Cross
Mr. Lucas
Mr. Graham
Sir M. Osmannay.
T. Prince of Marlborough

I am directed by Mr. Lucy, by Hutton to inform you that he has had under his consideration the minute which you addressed to me & late Commissioner of the East Africa Protectorate on the 25th of August last on the subject of the validity of the instrument set by which you were appointed as Judge of the High Court of East Africa.

1. I am requested that you

You will call at the
Office at your early

convenience in order to

discuss the matter

verbally, and to

arrange the

DRAFT

1st Inst no. 14

G. Castle, C.S.

MINUTE.

At Boston 4th Sept 1862
A. M.
W. Read \$150

Mr. Hubbard

Mr. Cox

Mr. Lewis

Mr. Graham

Mr. H. Donnaney

For Town of Marlborough

Mr. C. Weston

Conn' S.A.P.
37752

219

(J.W.)

January 10, 1906
Gloucester

Sir,

I have the honor to
acknowledge receipt of Mr.
Jackson's despatch No. 577
of the 27th of September
last, and to inform
you that I do not
consider that any
instrument other
than the instrument
which has been issued
under the Public Seal
~~of the Commonwealth~~
of the Protectorate
need be required to
give effect to the
J. W. Barth's affidavit
as a ~~copy~~ of the

High Court of
Africa.

2. I have found
it necessary to
stop short of the

Order in Council of
1902, provide that
every judge shall be
appointed by H.M., & it
does not specify that
triffling must be
made under the
Op. Manual, and
I consider that any
judge who is
appointed by H.M.
comes into my hands

3. H.M. will be asked to give his opinion on the question of the validity

of the parts of

the Op. Manual

which relate to the

220
has been enacted
prescribing that
judicial officers should
be appointed by H.M.
It has not been usual
to make a Commission
under the Op. Manual,
and, I have if such
an instrument were
given to W. Barth,
it would be necessary
to pass ~~a law~~ validating all his past
decisions, as doubt
would be cast
on their validity
4. With regard to the
question of W. Barth's
salary, I regret that
I am unable to give you

off his receiving the
 salary of his new afft.
 for any period prior
 to the date of his
 Consecration
 unless that date was
 later than that of
 his assumption of his
~~curates~~
 duties as Judge of
 the High Court. I shall
 be glad to receive
 definite information
 on the point.

of Judges in Crown Colonies

S.S. Secretary of State
 H.M. His Most Majestys
 P.P.S. Letter Patent Commissioners
 221

West Indian.

Commonwealth of
 New South Wales
 Victoria
 Queensland
 South Australia
 Western Australia
 Tasmania
 New Zealand

Australasian.

Commonwealth of Australia
 New South Wales
 Victoria
 Queensland
 South Australia
 Western Australia
 Tasmania
 New Zealand

H.M.

British New Guinea
 W. Pacific High Commission

Falkland Islands

See II more important
Appeal by Governor P.

Eastern.

Ceylon
 Hong Kong
 Singapore
 Mauritius
 Seychelles
 Straits Settlements
 Federated Malay States
 Perak
 Selangor
 Negeri Sembilan
 Pahang
 Labuan

L.P.P.S.
 L.P.P.S.
 H.M.
 Native Govt.
 Native Ordinance
 L.P.P.S.

Mediterranean.

Crete
 Gibraltar
 Malta

Provinces of
 Chios, Samos, &c.,
 &c.,
 &c.

West African.

Sierra Leone
 Gambia
 Gold Coast Colony
 Fiume
 Northern Nigeria
 Southern Nigeria

L.P.P.S.
 Ch. of Magistrate
 L.P.P.S.
 L.P.P.S.
 L.P.P.S.
 M. & R. Com. p. 18
 f. 2 5 4 5

East African.

East Africa Protectorate
 Uganda Protectorate
 Somaliland Protectorate

H.M.
 H.M.

American.

District of Columbia
 Virgin Islands
 Porto Rico

40
 41
 42
 43
 44
 45
 46
 47
 48