1935 Kenya

No. 38008.

SUBJECT CO533/453

Aviation Flight - Pilot's Log

Previous

23040/34.

Subsequent

1936-

FILE C

D. Governor Byrne 129 ——— 4th May 36.

Submits an amending Bill & furnishes observations on various points raised on No 17 on 23040/34.

61. Taxation - Native Hut & Poll Tax

See No 10 23040/34.

The immediate necessity for the introduction of Ordinance XL of 1934 arose from a Supreme Court judgment to the effect that under the provisions of Chapter 51 of the revised edition, no woman was liable to pay tax. We now have a copy of the judgment. The arguments will no doubt be of interest to the Legal Advisers.

The draft Bill enclosed in the despatch does away with the ambiguity in sub-sections 1 and 2 of Section 4 of Ordinance XL (see paragraph 3 of No. 17 on 23040/34).

? Subject to legal obsons. the introduction of the draft Bill may be approved.

As regards the second paragraph of the Governor's despatch it is considered that the special circumstances in Kenya render desirable the retention of Section 6(i) of Ordinance XL of 1934. I think it is clear that if a native satisfies the Court that he has made every effort to obtain the money for his tax and failed for good and sufficient reason, he will not be sent to prison, but will be allowed the remission of the whole or a portion of the tax as the case may require.

? We should defer to the Governor's view.

The circular letter to all Provincial Commissioners and officers in charge will ensure that tax is only exacted from such women as are in independent possession of sufficient property.

This is satisfactory.

C A Smith

W B Frank 16/4

16.4.36.

The draft Bill meets our former criticism on s. 4. Will regard to s. 6(1), I do not quite follow the Govr's reasoning. Is the District Officer under s. 8 in fact the magistrate of the Court under s. 6? Unless he is, the magistrate cannot exercise the powers of exemption conferred by s. 8. If they are the same persons, the object proposed is exactly what we desired.

Not necessarily

(W.L.) 17.9.

Mr. Bushe.

You are familiar with things in Kenya and I should like you to look at this. The draft Ordinance now submitted is quite all right for its purpose and the first paragraph of the despatch shows that it was really not necessary, though it may well be enacted to remove ambiguity. Mr. Lucie-Smith's judgment is also interesting and it is rather unfortunate in many ways that though Kenya never told us of its existence until they took legal measures to reverse it. That, however, is by the way. I am not at all happy about the second paragraph of the Governor's despatch. Under Section 6(1) of the Ordinance, in 23040/34, the natives hut tax is due on the 1st January each year and he is given up to the 31st January to pay. On conviction after the 31st January, the amount is recoverable by distress and in default of distress the Court may order imprisonment or detention up to three months. There is a proviso

to

to the effect that if the Court is unable to ascertain any property of the person convicted, the Court may, instead of issuing the warrant of distress, commit him to prison or to a detention camp unless the hut or poll tax is paid immediately or within such period as the Court may order.

Under Section 8 of the Ordinance, a District Officer has power to remit the whole or a portion of such tax as the case may require on it being proved, to his satisfaction, that the native was without means to pay. In our despatch of the 20th of November, we suggested that a proviso might be added to the effect that if the Court is satisfied that the native is and at all times since the due date, has been unable to pay, he should not be sentenced to imprisonment. We put up the alternative suggestion that the Court should have power to exempt similar to a District Officer. Kenya demurs to this and I must say I cannot see why.

The reason adduced is that at the present time difficulty is being found by the administration in making full collection of the tax due, and it is said to be due to the fact that numbers of natives make no effort to find money for their tax though they have funds or are in a position to obtain them. Now this is an old story when there is heavy or unjust taxation. In feudal times, if we are to believe our historical novelists, it was a common place for the Lord to assert that his villeins, serfs, or whatnot had any amount of money but would not pay it up, and I am somewhat surprised to find similar statements made in Kenya. They are common form and were recently aired in Council when the amount to be expected from the native poll tax was under consideration, and Canon Burns suggested that the tax was a bit too heavy and should be

reduced.

reduced. That, however, is again a side issue and I suppose we must accept the Government's opinion though I am not happy about it. Kenya is so hard up for revenue that there must be a tendency to be unduly rigid, not to say harsh, in collecting native poll tax. If a native applies to the District Officer (who is charged with the collection of tax) for exemption, the District Officer has power to exempt him under Section 6, and I suppose that if he did not make application but came before the District Officer in his magisterial capacity, the District Officer could, as the despatch says, proceed to exempt the native from payment. But suppose that owing to some reason or other, a District Officer has refused to exempt a native and the case came before another Magistrate or before himself acting as Magistrate, then would there be power to import Section 8? I rather doubt it. It is quite possible that a District Officer in a fit of bad temper or through misfortune, might refuse exemption in a deserving case and a Magistrate might consider that since exemption had been refused by the proper officer of the district in which the native lived, he was debarred from ordering exemption under Section 8 even though he might also be a District Officer. If he were not a District Officer, I don't think he would have any power.

I cannot understand the argument that the insertion of a proviso empowering the Court not to direct imprisonment if it was satisfied that the native has not, and at all times since the due date has not had the means to pay, will result in evasion of payment. If the Court has no such power, it follows that every case brought before the Court

Court where it is proved that the native has not paid, must result in a distress order or in imprisonment if the native has no ascertainable property. This, I think, is all wrong. It is a cardinal principle of I think, law as well as common sense, that you cannot take the breeks off a Highlandman, and the position under the Kenya law would be that the Highlandman would be sent to gaol for not having any breeks, to which I object as being contrary to natural justice. To argue that the insertion of such a proviso would have disastrous effect upon native development, leaves me cold. I do not like interference in internal administration, but I do think that the miserably poor Kenya natives are entitled to as much protection as we can give them. We know from what Canon Burns said that there is at any rate some feeling to the effect that the poll tax is a bit heavy and statements that they could pay if they wanted to, or could easily get the money if they chose, do not carry much conviction in my mind.

For these reasons I think that it should be made clear that any Magistrate before whom a case is brought can exercise the power of exemption under Section 8. This would, I think, give everything that was necessary without the addition of our suggested proviso which, indeed, was only an alternative to giving the exemption power.

The principle underlying Section 8 and the principle which we want introduced into Section 6 are, I think, quite different. In my view Section 8 is a power conferred upon the District Officer not as Magistrate

Magistrate but as the Executive, to remit taxation. The principle which we want introduced into Section 6 is not to secure the remission of the liability for the tax, but to ensure that a native is not sent to prison merely because he is through poverty unable to pay the tax. (his liability remains (keeps per any debt)

I think I am right in saying that in East Africa to-day (Protectorate) all natives are sent to prison who don't pay the tax, whether they can pay it or whether they can't. I agree with you that that is all wrong. I discussed it with a number of people in East Africa, especially in Northern Rhodesia, where the problem was acute, and their defence is that unless you put all natives into prison who don't pay, and refuse to differentiate between those who can and those who can't, you will get an amount of tax evasion. I don't myself believe it. The proposal is to put the onus upon the native to show that he is unable to pay, and I think Courts can be trusted to see that he properly discharges that onus. After all, what is gained by putting natives into prison merely because they are so poverty-stricken that they cannot find the money for this tax? The Government loses the tax because the man in prison cannot earn money wherewith to pay it, and in addition, the Government has the expense of keeping the man in prison.

The sensible thing, of course, would be to exact from such natives a certain amount of work on Government undertakings in lieu of the tax, but this is said to be contrary to the Forced Labour Convention.

I think you should insist on the inclusion of the proposed proviso to Section 6.

If

If it is found not to work well, we can review it in the light of such facts and information as will be gained.

1.8.30.

one that I cannot follow. [redacted] will be necessary for the native to satisfy the Magistrate that he ~~is~~ has not got and has never had money enough to pay and if those conditions are satisfied then no tax could have been got out of him and he won't be able to pay anyhow. I agree then with Mr. Bushe and I submit a draft for consideration if you share my view. Mr Bushe has seen it.

[illegible initials]

Yes - I think that we must ask them to consider it further. They may not object: in view of the previous despatch, we implied (at least) that the onus of proof would lie on the Government ("the creditor"), but the present draft lays it on the native.

W.C.B.
9.5.35

To Kenya, 334 — Conf. (1 enclosure)

10/10
10 MAY 1935

Parliamentary Question by Mr Banfield No 1 on P.Q. File. 6

[illegible] Ag Gov's Despatch Pilling 355 Air Mail - 8 Aug 1935

Trs. copy of a Bill to amend the Native Hut & Poll Tax Ordinance 1934 which has passed its 3rd reading in the Legislative Council.

Subject to legal obsns ? Convey to the Ag. Gov. H.M.'s instructions to assent to the Bill.

C. Grossmith
7/8/35

[signature]

No legal obsns

[initials]

3A I asked Mr Grossmith to set out the position and attach his note, but after all the point is simply that the anomaly he noticed has only arisen since 1934 and would in any case disappear very soon. There is no reason to [illegible] [illegible] and policy. As proposed.

W.C.B.
6/8/35

To Kenya, 614 (3 annexes) 14 AUG 1935

DESTROY UNDER STATUTE

5 Govr. Byrne – No 492 – 18.7.35
[illegible] 2 authenticated & 12 printed copies of Ordinance No. XII of 1935 entitled "An Ordinance to amend the Native Hut & Poll Tax Ordinance 1934"

DESTROY UNDER STATUTE

To [illegible] authority to assent to the Ordinance in H.M.'s name, in No 4

? Now Sanction [illegible]

C. [illegible] 19/7/35

[illegible] 19 [illegible]

To Kenya [illegible] (3 annexes) [illegible] 24 OCT 1935

7 [illegible]

DESTROY UNDER STATUTE

[illegible] for [illegible]

Put by C. [illegible] 30/10/35 [illegible]

3A

N O T E.

Under the Detention Camps Amendment Ordinance 1930 sentence of detention may be given in lieu of fine and/or imprisonment under any ordinance. But no sentence of detention may exceed six months, and in no case exceed the period of imprisonment to which the prisoner could be sentenced if the Detention Camps Ordinance had not been passed.

Section 3 of the Detention Camps Ordinance 1926 provides that :-

"The period of detention imposed by a Court under this Ordinance in respect of any sum of money adjudged to be paid by a conviction or in respect of the default of a sufficient distress to satisfy any such sum, shall, notwithstanding any enactment to the contrary in any past Ordinance be such period as in the opinion of the Court will satisfy the justice of the case, but shall not exceed in any case the maximum fixed by the scale shown in the Schedule hereto.

Schedule.

Where the amount of the sum or sums of money adjudged to be paid by a conviction as ascertained by the conviction.	The said period shall not exceed.
Does not exceed Shs. 10 ...	Seven days.
Exceeds Shs. 10, but does not exceed Shs. 20	Fourteen days.
Exceeds Shs. 20 but does not exceed Shs. 100	One month.
Exceeds Shs. 100, but does not exceed Shs. 400	Two months.
Exceeds Shs. 400	Three months."

It has been held by the Supreme Court that the period of detention which may be awarded in default of payment of hut and pole tax due under the repealed Native Hut & Pole Tax Ordinance (chapter 51 of the Revised Edition) is subject to the scale prescribed in the above schedule. The

/Attorney -General

Attorney-General says that this was never the intention of the law, and the object of the present bill is to render defaulters under chapter 51 subject to the penalties laid down for non-payment of tax under the Native Hut & Pole Tax Ordinance 1934.

The penalty clause for the non-payment of tax under chapter 51 was:-	The penalty clause for the non-payment of tax under the Native Hut & Pole Tax Ordinance 1934 is:-
The amount due from each native shall be payable on the first day of January in each year and shall be recoverable at any time on conviction before a Magistrate by distress and in default of distress, the Court may order the imprisonment of either description for any period not exceeding three months.	The amount due from each native for hut tax or pole tax shall become due and payable on the first day of January in each year, and shall, if not paid on or before the 31st of January in that year on conviction be recoverable by distress at any time after the latter date, and in default of distress the Court may order imprisonment or detention for any period not exceeding 3 months: Provided that if on conviction the Court is unable to ascertain the whereabouts of any property of the person so convicted the Court may, to this end, instead of issuing a warrant of distress, commit such person to prison or to detention in a detention camp for any period not exceeding 3 months unless the hut or pole tax, as the case may be, is paid immediately or within such period as the Court may order.

The crucial words both in chapter 51 (repealed) and in the Native Hut & Pole Tax Ordinance 1934 are "and in default of distress the Court may order imprisonment or detention for any period not exceeding 3 months."

It will be seen that under the Detention Camps Ordinance a sentence of three months detention could only have been given when the sum due exceeded Shs. 400. And for a debt not exceeding Shs. 20, only 14 days detention could be given. I imagine that the latter is regarded as too lenient by the Kenya Government, hence their desire to remove the Native Hut and Pole Tax Ordinance from the scope of the Detention Camps Ordinance.

AIR MAIL

KENYA
No. 355

GOVERNMENT HOUSE
NAIROBI
KENYA

RECEIVED
25 JUL 1935
C.O. REGY

18th July, 1935.

Sir,

I have the honour to transmit the accompanying copy of a Bill to Amend the Native Hut and Poll Tax Ordinance, 1934, which passed its third reading in Legislative Council on the 1st of July, 1935, and the Acting Governor's assent to which has been reserved for the signification of His Majesty's pleasure, in accordance with Article XXXIV of the Royal Instructions dated the 29th March, 1924.

The Legal Report by the Attorney General, together with a Comparative Table, is also enclosed.

I have the honour to be,

Sir,

Your most obedient, humble servant,

ACTING GOVERNOR'S DEPUTY.

THE RT. HON.
MALCOLM MACDONALD, P.C., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET, LONDON, S.W.1.

LEGAL REPORT

THE NATIVE HUT AND POLL TAX (AMENDMENT) BILL, 1938

It has been held by the Supreme Court that the period of detention which may be awarded in default of payment of hut and poll tax due under the repealed Native Hut and Poll Tax Ordinance (Chapter 81 of the Revised Edition) is subject to the scale prescribed by the Schedule to the Detention Camps (Amendment) Ordinance, 1928.

This was never the intention of the law, and the object of this Bill is to render defaulters under Chapter 81 subject to the penalties laid down for non-payment of tax under the Native Hut and Poll Tax Ordinance, 1934.

It has also been thought advisable to make it quite clear that the provisions of section 203 of the Criminal Procedure Code do not apply to the institution of proceedings for the recovery of hut and poll tax.

A Comparative Table is attached.

In my opinion, this Bill should be reserved for the signification of His Majesty's pleasure thereon.

Secretariat,
8rd July, 1938.

ATTORNEY GENERAL.

COMPARATIVE TABLE

THE NATIVE HUT AND POLL TAX (AMENDMENT) BILL,1930.

Clause	Remarks.
1.	Short title.
2.	New.
3.	New.

COLONY AND PROTECTORATE OF KENYA

A BILL TO AMEND THE NATIVE HUT AND POLL TAX ORDINANCE, 1934

635—No. C.C.—17-5-39

PRINTED BY THE GOVERNMENT PRINTER, NAIROBI

Section 22 of the Principal Ordinance which it is proposed to amend :—

Repeal.

22. The Native Hut and Poll Tax Ordinance (Chapter 51 of the Revised Edition) is hereby repealed, but such repeal shall be without prejudice to the collection of any arrears of tax due and payable under that Ordinance

A Bill to Amend the Native Hut and Poll Tax Ordinance, 1934.

BE IT ENACTED by the Governor of the Colony of Kenya, with the advice and consent of the Legislative Council thereof, as follows :—

Short title.

1. This Ordinance may be cited as the Native Hut and Poll Tax (Amendment) Ordinance, 1935, and shall be read as one with the Native Hut and Poll Tax Ordinance, 1934, hereinafter referred to as the Principal Ordinance.

No. 40 of 1934.

Amendment of the Principal Ordinance.

2. The Principal Ordinance is hereby amended by inserting therein the following new section, to be numbered 21A :—

"21A. The provisions of section 263 of the Criminal Procedure Code shall not apply to any proceedings instituted for the recovery of tax due and payable under this Ordinance or due under the Native Hut and Poll Tax Ordinance repealed by the next succeeding section."

No. 11 of 1930.

Cap. 51.

Amendment section 22 of the Principal Ordinance.

3. Section 22 of the Principal Ordinance is hereby amended by substituting a colon for the full stop which occurs at the end thereof, and by adding to the section immediately after such colon, the following proviso :—

"Provided always that any tax due and payable under such Ordinance shall be recoverable in like manner, and subject to the like penalties for non-payment as the tax due and payable under this Ordinance."

OBJECTS AND REASONS.

It has been held by the Supreme Court that the period of detention which may be awarded in default of payment of hut and poll tax due under the repealed Native Hut and Poll Tax Ordinance (Chapter 51 of the Revised Edition) is subject to the scale prescribed by the Schedule to the Detention Camps (Amendment) Ordinance, 1926.

The object of this Bill is to render defaulters under that Ordinance subject to the penalties laid down for non-payment of tax under the Native Hut and Poll Tax Ordinance, 1934.

No additional expenditure of public moneys will be involved if the provisions of this Bill become law

38088/35 Kenya.

C. O.

Mr. Flood. 2.5
Mr. Bushe 3/5
Mr.
Mr. Parkinson.
Sir G. Tomlinson
Sir C. Bottomley. 9.5
Sir J. Shuckburgh.
Permt. U.S. of S.
Parly. U.S. of S.
Secretary of State.

Will this do?

Annex 1/38088/36

DRAFT.

KENYA.
NO. 334
O.A.G.

Downing Street,
10 May, 1935.

O.D.
R 9-MAY
D 10

Sir,

I have etc. to acknowledge the receipt of Sir Joseph Byrne's despatch No.129 of the 7th of March forwarding a draft of a Bill to amend the Native Hut and Poll Tax Ordinance in the sense suggested in paragraph 3 of my despatch No.966 of the [illegible] of November last.

2. The Bill appears to effect the desired purpose of clarifying the ~~[illegible]~~ intention of the Ordinance and I have no ~~comment~~ observations to offer on it. I do, however, desire to comment further upon the point raised in the second paragraph of the Governor's despatch. I am advised that, under the Ordinance as it now stands, a Magistrate has not the power to grant exemption under Section 8 even though he may be a District

FURTHER ACTION.

C. O.

Mr.
Mr.
Mr.
Mr. Parkinson.
Sir G. Tomlinson.
Sir C. Bottomley.
Sir J. Shuckburgh.
Permt. U.S. of S.
Parly. U.S. of S.
Secretary of State.

DRAFT.

FURTHER ACTION.

Court that he has not and has not had since the due date the necessary means of discharging his obligation.

6. I therefore request that you will consider the matter further in the light of the foregoing observations, and unless further objection is seen, take steps to secure the addition of the necessary proviso to Section 6 of the principal Ordinance. Section 8 gives power to the Executive to remit taxation but the object of the suggested addition to Section 6 and the principle which I wish to see established in Section 6 is not to secure remission of the tax but to ensure that a native is not sent to prison simply because he has not and has never had the means to pay. In such a case, though the Court may not order imprisonment, the liability for payment will remain and, should the native subsequently acquire sufficient means to pay, then payment can be recovered.

I have, etc.

(Sgd.) P. CUNLIFFE-LISTER

KENYA.

No.129.

GOVERNMENT HOUSE,
NAIROBI,
KENYA.

7th March, 1935.

RECEIVED
8 APR 1935
C. O. REGY

Sir,

I have the honour to refer to your despatch No.966 of 20th November, 1934, on the subject of the Native Hut and Poll Tax Ordinance, 1934, and to transmit, for your observations, an amending Bill which clarifies the point made in paragraph 3 of your despatch and provides that a native having more wives than huts must pay tax in respect of each wife, and that if he has more huts than wives he must pay a tax in respect of each hut.

It is now the invariable custom for each wife to live in her own hut. In practice, therefore, the number of huts in a village, on which tax in the absence of a special exemption is due, is the same as the number of women, no payment being exacted on the huts known as "Thingira" huts in the Central Province, and "Simba" huts in the Nyanza Province, which accommodate the young unmarried males, visitors, or children.

The case, therefore, of a taxpayer paying for more huts than the number of his women seldom, if ever, arises.

2. As regards paragraph 4 of your despatch, I consider that Section 6(1) of the Ordinance which provides/

THE RT. HON.
MAJOR SIR PHILIP CUNLIFFE-LISTER, P.C., G.B.E., M.C., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET, LONDON, S.W.1.

addressed to all Administrative Officers.

I have the honour to be,

Sir,

Your most obedient, humble servant,

BRIGADIER-GENERAL.
GOVERNOR.

KENYA.

No. 129

GOVERNMENT HOUSE.
NAIROBI,
KENYA.

7th March, 1935.

RECEIVED
- 8 APR 1935
C. O. REGY

Sir,

I have the honour to refer to your despatch No.966 of 20th November, 1934, on the subject of the Native Hut and Poll Tax Ordinance, 1934, and to transmit, for your observations, an amending Bill which clarifies the point made in paragraph 3 of your despatch and provides that a native having more wives than huts must pay tax in respect of each wife, and that if he has more huts than wives he must pay a tax in respect of each hut.

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The case, therefore, of a taxpayer paying for more huts than the number of his women seldom, if ever, arises.

2. As regards paragraph 4 of your despatch, I consider that Section 6(1) of the Ordinance which provides

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DOWNING STREET, LONDON, S.W.1.

provides for the recovery of the amount due in respect of taxes and for the penalty in case of default, should be retained without amendment. My reason is that, at the present time, in a large number of districts in the Colony, difficulty is being found by the Administration in making a full collection of the tax. This is in large part due to the fact that numbers of natives make no effort to find sufficient money to pay tax although most of them have funds or are in a position to obtain them.

In cases where the Magistrate is satisfied that a native liable for tax has made every effort to obtain the money and failed for good and sufficient reason, he can and does avail himself of the powers of exemption under Clause 6.

Should the Ordinance be amended by the addition of a proviso to the effect that if the Court is satisfied that a native has not, and at all times since the due date has not had, the means to pay, it will result in an increasing number of natives evading payment of the tax. This would have a disastrous effect upon native development and might, through the accretion of individual indebtedness lead to a situation resembling peonage restrictions.

3. As regards the terms of Section 6, the effect of the words "for such period" is that a District Officer may remit the tax for any time that he may think fit.

4. With reference to paragraph 4 of your despatch, I enclose a copy of the Order made by Mr. Justice Lascelles in Supreme Court Criminal Revision Case No. [illegible] of [illegible] on the 11th May, 1933.

5. Steps have been taken to ensure that the application of the new Ordinance will be enforced with discretion and in this connection I enclose a copy of a Circular Letter addressed

addressed to all Administrative Officers.

I have the honour to be,

Sir,

Your most obedient, humble servant,

BRIGADIER-GENERAL.
G O V E R N O R.

A BILL TO AMEND THE NATIVE HUT AND POLL TAX ORDINANCE,1934.

BE IT ENACTED by the Governor of the Colony of Kenya, with the advice and consent of the Legislative Council thereof, as follows -

Short title. 1. This Ordinance may be cited as the Native Hut and Poll Tax (Amendment) Ordinance, 1938, and shall be read as one with the Native Hut and Poll Tax Ordinance, No.40 of 1934. 1934, hereinafter referred to as the Principal Ordinance.

Repeal and replacement of section 4 of the Principal Ordinance. 2. Section 4 of the Principal Ordinance is hereby repealed and the following section is substituted therefor -

"Hut tax. 4.(1) Every native being the owner or occupier of a hut in any district in the Colony shall pay a tax (hereinafter referred to as "the hut tax") for each year at the rate prescribed under section 3 of this Ordinance in respect of each hut owned or occupied by him or her in such district during any portion of that year.

Provided that if a native has more wives than huts he shall be deemed to be the owner of a separate hut in respect of each wife.

(2) Every male native shall be liable for the hut tax in respect of any hut or huts owned or occupied by his wife or wives.

Objects and Reasons

Doubts have arisen as to the interpretation of section 4 of the Principal Ordinance, and the object of this Bill is to replace that section and to make it clear that, if a native has more wives than huts, he must pay a tax in respect of each wife and if he has more huts than wives he must pay a tax in respect of each hut.

No expenditure of public moneys will be involved if the provisions of this Bill become law.

IN HIS MAJESTY'S SUPREME COURT OF KENYA AT MOMBASA

REVISION CASE (CRIMINAL) NO.24 OF 1933.

Crown per Mbarak Ali .. Prosecutor
versus
Mwana Ngomeni ..... Accused.

ORDER:

This case comes before the Court for revision on the petition of Mwana Ngomeni who was convicted and sentenced in the lower Court under section 8 (1) and (2) Chapter 51.

A minor point taken by the accused's advocate was that the form of alternative imprisonment was wrong, presumably because no distress warrant has issued, and that the issue of such distress and default therein is a condition precedent to any order of imprisonment. The case of Mace reported in 10 K.L.R.page 7 was quoted in support. It is clear from section 8 of Chapter 51 and the case referred to that imprisonment can only be ordered in default of distress so that in this case the form of sentence and order will have to be varied in any event.

The next point taken by learned counsel was a submission that a female is not liable to hut tax under section 3 of Cap.51 the material part of that section reads as follows -

"There shall be paid annually by every native a tax in respect of every hut owned by him" - had the section stopped here there would be no difficulty in interpretation with the assistance of the definition of the term "native".

The section however continues "and if any such native has more than one wife living in one hut, he shall pay a further tax etc."

The term "native" unless inconsistent with the context means "any native of Africa not being of European or Asiatic race or origin and includes any Swahili" - and under Cap.1 words importing the masculine gender shall include females unless the contrary intention appears. Maxwell in his work on the subject (7th Edition) states that statutes which encroach on the rights of the subject whether as regards person or property are subject to a strict construction and again "It is presumed, where the objects of the act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property, or to encroach upon the right of persons, and it is therefore expected that, if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt." This statement is based on the dictum of Lord Watson in the Privy Council in Eastern Countries Rly.Co.v Windsor and Annapolis Rly.Co.7 A.C.at p.188. I understand that Maxwell was cited with approval in a case before the Court of Criminal Appeal last November but I have been unable to refer to the case as these reports are with the bookbinders.

Rex v Chapman,25 Q.B.D. page 88 at page 94.

In the case of the Queen v Barclay 8 L.R.D.306 Field J.at p.312 lays down that "it is a very well established rule for the construction of statutes that, if they impose a charge on the subject, they must be strictly construed as against the party in whose favour the charge is imposed" and this exposition of the law was quoted with approval by Grove J.in Davis v Evans 8 Q.B.D.338 at p.342. What is perhaps the leading case on this question of construction is Tennant v Smith (1892) A.C.150 per Lord Halsbury at p.154. In his judgment the learned Lord

Chancellor quotes with approval the words of Lord Wensleydale in In re Micklethwait 11 Ex. at page 456 "It is a well established rule, that the subject is not to be taxed without clear words for that purpose: and also, that every Act of Parliament must be read according to the natural construction of its words".

The judgment of Lord Halsbury on this point was quoted with approval by L.J.Smith in Attorney General v Beech (1898) 2 Q.B.D.147 at page 15[illegible], and also by Chitty L.J. at page 155. This judgment of Lord Halsbury was again quoted with approval by Sankey L.J. in Tilling Stevens Motors Limited v Kent County Council 97 L.J.Ch.D.391 at page 393 and again by the same learned Lord Justice in I.R.Commissioners v Dalgety & Co. 93 L.J.K.B.D. 642 at page [illegible]. In his judgment in this case the L.J. says at page [illegible] "In construing taxing Acts one must not forget the canons to be employed. The Court is not to be guided so much by the objects which they think such acts are to achieve, as by considering whether the words of the Act have reached the alleged subject of taxation".

Bearing in mind the principles above enunciated let me proceed to an examination of section 3 of the Ordinance - The first part of that section would appear to impose a tax in respect of every hut owned by natives but the use of the word "such" in line four of the section would appear to limit the class of native to those who may have wives - i.e. male natives - for the section goes on to say and if any such native (that is a native liable to pay a tax on his hut), has more than one wife ~~[illegible]~~ living in one hut, he shall pay a further tax of six shillings in respect of each additional wife living in such hut.

Bearing in mind then the words above quoted of Sankey L.J. in I.R.Commissioners v Dalgety and Co. it appears to me that the subject of taxation aimed at is primarily huts owned by male natives and secondarily (if such male native has more than one wife living in a hut) each additional wife so living in such hut.

Sections 3 and 13 would appear to bear out the proposition that it is the huts of male natives that are aimed at by the Legislature for purposes of taxation. If my interpretation be correct the liability of women to pay any tax under this Ordinance is not merely questionable: that they are not so liable is beyond doubt. It therefore follows that section 8(1) which is the penalty clause for breach of section 3 can only apply to the class of natives to which section 3 is addressed viz male natives.

Had the Legislature intended that women should be taxed in respect of huts owned by them such intention could have been put beyond doubt by omitting the last three lines of the section from the words "and, if any such native etc" and inserting a proviso to the effect that if any male native had more than one wife living in a hut owned by him then he should pay an additional tax in respect of each such additional wife.

Having arrived at this conclusion there is no need for me to deal with the other point raised by Mr. [illegible] as to whether the accused herein is a "native" within the definition laid down by the Ordinance and more particularly the question of what is a Swahili within the meaning of that definition.

Taking into consideration the importance which may very possibly apply to this case I think it a matter of great regret that the Crown were not represented at this Revision.

The conviction and sentence is quashed.

18.5.33. Sd.J.LUCIE SMITH

I certify that this is a true copy of the original.

[illegible]

(Copy)

THE SECRETARIAT,
NAIROBI.

31st December, 1934.

CIRCULAR LETTER.
Ref: No.S/T/ADM.9/1/1.II.

NATIVE HUT AND POLL TAX ORDINANCE 1934.

Reference Government Notices Nos.838 and 840 of the 18th December, 1934, bringing into force the Native Hut and Poll Tax Ordinance, 1934, which makes possible the taxation of women, I am to say that care should be taken that the tax is only enacted from such women as are in independent possession of sufficient property.

JUXON BARTON

For COLONIAL SECRETARY.

To -

All Provincial Commissioners,
Officers-in-Charge
(with sufficient copies for District Commissioners).