

1931.

Kenya.

No. 1720

SUBJECT

C0533/413

Native Liquor (Amendment) Bill.

Ordinance No. 36 of 1930.

Previous

16247/30.

Subsequent

18023/32.

Propose changes in regard to amendments to Ordinance suggested by the S of S

The [amendments] satisfactory I think, with the two minor points made at the end of the S.S.'s draft.

But the arguments he advances in favour of § 15 (2) are decidedly thin.

Unless Mr. Burke can suggest some satisfactory compromise, there appears to be no alternative to directing the amendment of the Ordinance ^{sub.} the omission of the ^{sub.} section. ? to Mr. Burke for decision.

[NB. 6 copies of Ord. to go to 70 for forwarding to Annex 5]

(Burdett S
26.6.31

W. J. Burke

Thank you very much concerned when we had the Ord. under consideration - see 16 May/30

Wish we had your views, please refer to the...

Mr. Robert Tracy

Would you see whether the instances quoted there is a real precedent in this?

I don't if there is - but even if there is we must stop somewhere in the process

HFB
7/7

Mr. Bucke

In my opinion the answer is a definite negative. The following table shows the effect of the enactments quoted by the Governor:

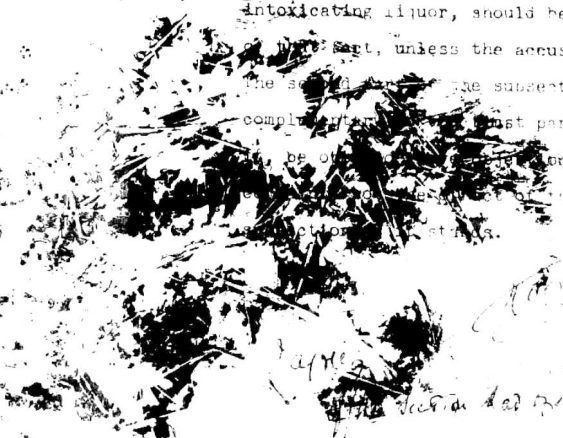
<u>Trainings:</u>	Matters in respect of which burden of proof is on defence:
Section 14:	Facts which constitute a defence, or possession of permit or licence.
Section 330:	Lawful authority of excuse.
Section 332:	When the Crown have proved giving of, e.g., money to person employed by public body, by or on behalf of a contractor or would-be contractor, burden of proof is on the person charged to prove that gift was not corrupt.
Section 333:	The Ordinance provides penalties for adulteration of food and sale of adulterated food. Section 20(a) merely empowers the Governor to make regulations determining what deficiency of pure ingredients or what addition of extraneous matter is to raise a presumption that articles are not genuine.
Section 334:	Permit to possess liquor, without which possession is prohibited.

In

In each case the Crown has to prove a prima facie case, and I do not see how any of them can be relied upon for a precedent.

It is presumably on account of the advice referred to in paragraph 1 of the despatch (which is clearly incorrect) that the Governor relies upon these sections as precedents. In looking for grounds upon which that advice may have been given, it occurs to me that the first part of the offending subsection was probably intended to provide only that the averment that the possession or use by a person of sprouted grain, liquid yeast, or any other process of the manufacture of intoxicating liquor, should be sufficient without proof of intent, unless the accused proves the contrary.

The second part of the subsection would be merely complementary in that part, and would not, I take it, be of any effect. That, however, is the effect of the first part of the subsection.



Handwritten notes:
The section had been drafted
according to the...
of the...

If the section had necessitated the Crown or the possession of these articles, provided that that having been done, the showing that they were not intended for the manufacture of liquor, I should not, in view of the precedents, object to its use, in my view, that is not the intention of the section, and if drafted, it goes beyond all limits.

Dr. C. H. ...
You asked to see the reply
to ...
We showed ... to
the Governor the views
expressed by ...
as to the effect of
§ 15(2) - say that ...
was not object to the
section if recorded as in
the last part of ...
...
+ direct that the section
be now repealed or
amended accordingly.

...
13/1/51
So proceed. But the distinction
between this and the other ...
... must be explained, or
we should get the views of
the ...
The ...
...
... that we should ...

When ... has been ...
... should go
... authority, ...
that the ... (to ...
we have found no objection) ...
be ...
...
... on a point of difference of ...

... 1/4. 8. 31

... 1/2?

... Gau 585 - 1 ... - 22 ... 1931

John ...
...
No. 6

17208/31.

5

Mr. Eastwood. 14/8.
Mr. Preston 15.
Mr. Bush 17/8.
Mr. Allen. 18/8.
Mr. Tomkinson.
Mr. C. Bottomley.

DOING STREET.
18 22 August, 1931.
19

Sir,

X Sir J. Shuckburgh. 18/8/31
Sir G. Grindle.
Permt. U.S. of S.
Parly. U.S. of S.
Secretary of State.

DRAFT.
KINYA
NO. 585

GOVERNOR.

333

For conser. see Mr. C. Bottomley's minute of 14 August.

I have the honour to acknowledge

the receipt of your despatch No. 248 of the 11th May on the subject of the Native Beer Ordinance No. 19 of 1931.

2. I have had your advice which

I have received as to the interpretation of Section 15 of the

Ordinance is the same as that given you by my advisers. If the Section be, in fact, as you are advised, first to be applied by

the Crown or possessor of land of special gain, liquor, or any other process for the manufacture of

intoxicating liquor, and then provided that, ~~that~~ ^{such proof} having been ~~con-~~ ^{provided}

the onus of showing that ~~they~~ ^{such articles} were not possessed or used for the manufacture ~~they~~ ^{may be used for} or used for the manufacture of liquor

(h. B. Received hereby as follows (by the Director))

~~the~~ the accused, I should not in view of the various precedents have raised any objection. I am, however, advised that this is not the effect of the Section, since it expressly states that the mere averment of possession shall be sufficient, without proof, unless the accused prove the contrary. The question of intention is dealt with in the latter part of the sub-section. Such a provision is *not that* *Do not feel able* ~~I feel~~ *unable* to accept. I have therefore to request that you will be good enough to arrange for the repeal of the Sub-Section, or for its amendment so as to make proof of possession or user necessary.

3. I would add that in each of the cases quoted in paragraph 3 of your despatch as precedents for Section 15 (2) the Crown has to prove a prima facie case, and I cannot regard the ordinances there quoted as exact precedents

for the provision to which I am now raising objection, *but bound to take exception.*

4. Pending the passage of an amending ordinance, my advice will be rendered to His Majesty

in regard to Ordinance No. 36 of 1930.

I have, etc.

(Signed) PASSFIELD.

Curran

KENYA.

No. 248



GOVERNMENT HOUSE,
NAIROBI,
KENYA.

RECEIVED
30 MAY 1931
COL. OFFICE

J. H. May
MAY 1931.

My Lord,

*Not in
624*

I have the honour to refer to your Lordship's despatch No. 176 of the 14th March, 1931, on the subject of the Native Liquor Ordinance 1930.

*186/222-221-1931
285 - 221-1931*

2. With regard to Section 15(2) of the Ordinance I am advised that the Crown is not relieved of the necessity of any proof but has to prove a prima facie case under this Section of possessing or using processes for the manufacture of liquor, and the onus is upon the accused to prove innocent possession or user.

3. Such provision is not uncommon in dealing with proof of matters, positive evidence of which is almost impossible to obtain and which is usually exclusively within the knowledge of the accused. In addition to those cases mentioned by Your Lordship in which the principle of placing the onus of proof on the accused has been admitted, similar provision appears in the following Ordinances:- The Abuse of Opiates (Prevention) Ordinance, Section 14; The Penal Code, Section 338(3) (Coining); Chapter 57 (Counterfeit Stamps), Section 359 (Corrupt Practices), and the Food and Drugs (Adulteration) Ordinance, 1930. ...

THE RIGHT HONOURABLE
LORD PASSFIELD, P.C.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON. S.W.1.



GOVERNMENT HOUSE,
NAIROBI,
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THE RIGHT HONOURABLE
LORD PASSFIELD, P.C.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON. S.W.1.

181
624
22 AUG 1931
585

Ordinance, 1930, Section 20 (B) and the Native Liquor (Amendment) Ordinance, 1927, Section (4), now repealed. In view of the above explanation I trust that Your Lordship will now find it possible to accept this principle in the case of the Native Liquor Ordinance 1930.

4. With regard to Your Lordship's criticisms of Section 22 I am advised that the insertion of the words "as soon as possible" after the word "magistrate" in the fourteenth line is unnecessary as provision is made in the Criminal Procedure Code for taking persons before a Magistrate without unnecessary delay.

The omission of the words after "liquor" in the last sentence has already been noted.

I have the honour to be,
My Lord,

Your Lordship's most obedient
humble servant,

J.
S. G. G. G. G. G.
S. G. G. G. G. G.

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