

38032

CO 533/464

38032

KENYA

Legislative Council.

Disqualification of electoral candidate following
conviction under Legislative Council Order.
Orders of Governor as to remission.

Previous

Subsequent

		R 297	9/11
		R 297	9/11
		Mr. How	2/11
			7/5
			7/5
			7/5
		Mr. How	7/6
			7/11
		Mr. How	7/11
		R 298	7/11
297	8/11	Mr. 297	7/11
Mr. Gurnea	2/11	Mr. Gurnea	7/11
Mr. Lockin	11/11	12/11	7/11
Mr. Duncan	11/11	R 80	7/11
Mr. How	11/11	R 299	7/11
Mr. Gurnea	7/11		7/11
Mr. Gurnea	12/11		7/11
Mr. How	17/11		7/11
297	7/11		7/11
Mr. Gurnea	13/11		7/11
297	7/11		7/11
Mr. Gurnea	9/11		7/11
Mr. Lockin	7/11		7/11
Mr. Gurnea	11/11		7/11
Mr. How	7/11		7/11

Ch. Reg. Co.
Memorial

11.6.36
2
Your Memo 307
divides letter from the Elected Members
Organization seeking advice of the legal
advisers as to whether the Gov's action
in removing the disqualification imposed on
Mr. Willingdale following conviction for a breach
of the Reg. Co. Order was intra or ultra vires
& whether he has power to alter the terms of
the Order.

This is just another instance in
the Elected Members' Campaign
against the Governor.

Presumably the letter must be
regarded as a petition and
handled accordingly.

The
Case for legal opinion is
clearly set out. Subject
to legal advice, I would suggest
that the reply to the Elected
Members should be on the
seven lines of paragraph 18
of the Attorney-General's memorandum
i.e. that the Gov. is advised
that the Governor's action in
removing that part of
Mr. Willingdale's sentence which
related to his disqualification
was Constitutional, legal [+just].

C. J. Greenwood
1/17/37

J. J. P. [unclear]
11/17

In my opinion the Governor's action
was illegal and has no effect. This is a

statutory

statutory disqualification. It is not the sentence of a court and the suggested precedent of a minimum sentence is not an apt one since all that the law which prescribes a minimum sentence does is to limit the Judge's discretion as to passing sentence.

You cannot alter a Statute by executive action and if the Governor wishes these disqualifications to be removed he must go to the Legislature. I have not considered what would be the effect if he granted the man a free pardon since that would be a most improper action. Free pardons are not granted for the purpose of defeating the law, but for the purpose of relieving a man of a conviction which the Executive are satisfied should never have been obtained. If Mr. Lillywhite relies upon the Governor's action the matter will certainly be tested in the courts, and I think therefore that you had better let the Governor have our observations on the matter.

You will see from some attached papers that in a similar case in Ceylon we are proposing to pass a special Order in Council.

16.7.36

This is of course local Kenya politics

(a) They are very vindictive against Mr Lillywhite who beat the great brogan in the Mombasa by election (Votes cast 56 spoilt by Lillywhite 28 brogan 24)

(b) They want to discredit the Governor

The "very important question of principle" is raised it is true but the actual case is in no way important. Still there can be no doubt that it is not possible to remove the disqualification except by an Ordinance from a Council or Act of Parliament. The Ordinance does not say that the offender may be sentenced to disqualification, it says that on conviction the offender shall be disqualified. Mr Lillywhite has been convicted, and though the law may require the fine he can't remove the bar.

What would happen with a successful conviction which was not appealed against? Apparently legislation would be necessary.

D. H. M. W.

16.7.36

Handwritten notes: "Advice to the Governor" and other illegible scribbles.

Yes - I have had in regard to the and.

The circumstances are set out in the first part of the above journal. Minute [unclear] of the [unclear] that there is no doubt that the [unclear] with him, we must [unclear] that we shall have to [unclear] to the [unclear] to [unclear] [unclear] that the [unclear] [unclear] Lord Francis Scott mentioned this

Best not to remove the disqualification

The case involving Blum
has little value as a creature
of the Government - with the
impression that if it had
been kept from the
Board the disqualification
would have stood without
question.

WES 17736

2 So Kenya 547 (No. 100) - 24 JUL 1936

THE GOVERNMENT... 25.10.36.
Petitions S. of Sta consideration in the matter
and if necessary will forward Memoranda of the
actual happenings up to the present time.

Personally notified...
must be treated as a petition
received direct from a person in
Kenya and referred to the
Governor with a request that
he will call the High Commissioner
attention to Colonial Regulation
No 184

Ch. W. ...
9/11/36

This will be the normal action to
take, but I am inclined to think that
it will be unfortunate, on the top of his
other troubles, to cause him with the
feeling that he was not being made the
victim of red tape. After all, we have
seen the facts & arguments, so why need
persist in referring it to the Gov. or to
the Executive Committee or not be considered
that legislation should be introduced to
enable the High Commissioner's disqualification
to be removed.

It is to be noted that
this disqualification is only for removal
by legislation and is not a
ground for removal of the
High Commissioner. It is
not the case of a person
who is removed from office
by the Governor. It is
a matter for the Executive
Committee to consider.
The High Commissioner is
not a person who is
removed from office by
the Governor. It is a
matter for the Executive
Committee to consider.

J.P. ...
2/11/36

By Air Mail
19/11/36
To Kenya 935 (1/c 3) 19 NOV 1936

Invites attention to notice of motion, as indicated, given verbally in Leg. Co. on 4.11.36 by Lt. Col. Lord Francis Scott, and comments thereon requesting that, before accepting or disallowing the motion, he may be given a ruling on the matter by C.O. Legal Advisers. Requests reply by Air Mail.

I attach a note giving the relevant facts. It is somewhat difficult to discuss a thing like this in a temperate manner because the whole thing exhibits such a schoolboy mentality that it is difficult to believe that serious grown men can take part in it. We all know that Kenya is always looking for constitutional issues, and that rulings on points of order and procedure are very dear to the hearts of the unofficials: but this sort of thing is too ludicrous for words. The Governor was advised that he could remit the disqualification. The Attorney General, by the way, still sticks to it that he can: and yet this "tuppenny-ha'penny" performance is now being made a constitutional question and rulings are ~~set~~^{ought} as to what the powers of the Governor are. In the local press they have talked about the Governor's "breaches of the Constitution" by which ^{mean} they this, and it is very annoying that we should have to waste our time over it.

Of course the whole thing is petty spite, as Mr. Wade points out, and it serves to show the ~~vindictiveness~~^{petty} vindictiveness of Lord Francis Scott. Mr. Lillywhite's offence was, of course,

that he dared to oppose the great Major Grogan, and ^{his} still greater offence that he succeeded in beating him. The fact that he gave notice of his contract six days before the election instead of fourteen is not a serious crime and the whole thing is simply too silly for words. I am informed that the common informer was not Major Grogan himself, but somebody acting on his instigation, which again goes to show pettiness, because the election had been declared void before the proceedings were taken by the common informer.

*
of the Standing
Orders of Council

However, I suppose we must consider the question at issue. Under Section 22(x) a question may be disallowed when it is an abuse of the right of questioning. There can be no doubt that the question as put down was such an abuse and was merely calculated to give an opportunity of personal abuse of the Governor. It was, therefore, I think, quite proper to rule it out. The passage of the proceedings in Parliament here to which they refer is simply that the Speaker said that, if a member had any complaint to make as to his conduct in the Chair, he must put it down as a substantive motion. This raises the question whether the person who has the power to disallow questions is the President of the Council (who is normally the Governor) or is the Governor as such. Assuming that it is the President of the Council who has the power of

disallowing

disallowing questions, then a motion to criticise his conduct in disallowing an abusive question might be in order, though I hesitate to say so. At the same time, it appears to me that it is not the President of the Council but the Governor as such who has the power. The rules as regards questions are that questions may be put to any official member relating to public affairs connected with his department and to other members connected with the business of the Council in which such member may be concerned. The object of a question shall be to obtain information on a matter of fact and the right to ask questions is governed by the ten rules laid down, as to the interpretation of which the Governor shall be the sole judge.

No. ix of the rules is that a question may be disallowed when, in the opinion of the Governor, it is an abuse of the right of questioning, and No. x says that a question may be disallowed when, in the opinion of the Governor, the publication thereof would be contrary to the public interest.

I think the last is rather important, because it would not be within the capacity of the President of Council (if he were not the Governor) to decide whether a question would or would not be in the public interest. This is important

important as showing that Governor means the Governor qua Governor. In Rule 29(iii) and (ix) the President is referred to. In Rule 22 it is again the President who decides upon whether a motion for adjournment may be debated. In Rules 4, 6, 7, 11, 35, 37, 38, 40, 42, 43, 45, 49, 101 and 108, the President is referred to and not the Governor, and the only other places that I can see where the Governor comes in are in Rule 5 which says that no member shall sit or vote unless he has taken the Oath before the Governor or some person authorised by the Governor, and Rule 88 which refers to the case when a Bill is returned to the Council by the Governor for amendment. It is, I think, quite clear that in these cases it is the Governor as such and not as President of the Council who is taking action: and from this, and from the fact that everywhere else it is the President who is mentioned, I think it can fairly be contended that the decision in regard to Rule 22 rests with the Governor in his executive capacity as Governor and not with him as President of the Council. I think therefore it can be contended that the motion may properly be refused in that the Governor is the sole judge and that his actions are not taken as President of the Council but as Governor.

In saying so I think it would also be well to

*Rule 87
says that Bills shall
be referred to the
Governor for the report
which reinforces my view*

to call attention to the childish foolish nature of the whole proceeding and express the Secretary of State's disgust that responsible persons should so far forget their sense of dignity and public decorum as to pursue petty private quarrels in such a manner as this.

I thought at first that the references to the Governor in one place and the President in another was only the result of muddled drafting, but on further consideration I agree with Mr. Flood that that is not so.

In Rule 88 "the Governor" clearly must mean "the Governor". In Rule 5 the same thing is probable, and therefore I think that we can say that in Rule 22, which is the only other rule where the Governor is mentioned, it is the Governor as Governor outside the Council who is to have the powers therein conferred.

My difficulty, however, is to take the next step to which Kenya invites us at the beginning of paragraph 5 of the despatch. I do not know why, even assuming that the power of disallowance is vested in the Governor as Governor, the proposed motion should be out of order. Upon what precedent, rule or principle

principle is that based?

(1st) H.C. ...

Sir G. Laffey.

As this is a precedent, I send it to you. On Sir G. Bushe's question - precedent - I have hunted up - without much hope. As to rule - we can say with confidence that there is no such rule in Kenya. The Standing Orders do not limit the power of proposing motions as they do in the case of questions. As to principle - that would have to be that it is improper to discuss the King's representative in debate. No doubt in the House of Commons the Speaker would disallow a motion reflecting on the Sovereign personally: can that be extended to the King's representative in a Colony? As a matter of decency, I should like the answer to be "yes". But I doubt it. An M.P. unable to bite the Sovereign, can bite the appropriate Minister. A Colonial Governor is the sole Executive.

We have two points to answer:

(1) Can the motion be disallowed?

Sir G. Bushe advises that it cannot, and I find no argument against that view.

(2) What should be said in reply to it?

Here it seems clear that the government spokesman can say that the Governor was acting under the powers clearly invested in him by the Standing Orders and that no question of abuse can arise.

I think we must reply to the two points on those lines: there seems no way of saving the Governor from the indignity of a debate (an

indignity

indignity which may be repeated in the case of
any future Governor) but the issue, at all
events, should be satisfactory. I have no
doubt that the Attorney General will make clear the
extent to which the point is due to his
advice.

I do not advocate any attempt to get
the motion withdrawn. However much I like the
Elected Members I should hate to be under an
obligation to them.

Went
25.11.86

J.M.
26.11.86

I agree with the ...

27.11.86

AIR MAIL
28/11/86

To Kenya - 957 (5 Quere) - 301 - 938

Handwritten notes and signatures

C. O.

Mr. Hood - < 8/21.

See G. B. Swale 26/11

Mr.

Mr C. Parkinson

Mr G. Tomkinson

X Mr C. Bottomley 30/8

Mr J. Shuckburgh

Permt. U.S. of

Parly. U.S. of S.

Secretary of State.

AIR MAIL
D 30

8. Nov 1936

DRAFT.

Kenya

No. 957

Gov.

of the Standing Orders

Sir

I have the honor to acknowledge the receipt of your

despatch No 587 of the 7th of November on the subject of the motion of which notice has been given in Council by Lord Francis Scott

2 In the first place I am advised, Sir and I agree, that the power to disallow a question is ^{Rule} ~~the Standing Order~~

22 (17) is vested in the Governor ^{and} ~~and~~ the President of the Council. In ⁽⁸⁷⁾ rule 88 "the Governor" clearly

does not mean the President of the Council and a similar interpretation should be given to Rule 5. In most of the other rules

the phrase "the President" is used and it is therefore fair and in accordance with legal construction to contend that, in Rule 22, the ^{term} ~~words~~ "the Governor" must be distinguished from "the President". It

follows that you had the power to disallow the question ^{under the Standing} ~~under the Standing~~ Orders to disallow the question as put and no question of abuse can arise since the Governor is expressly stated to be the

FURTHER ACTION.

...to the interpretation of Rule 22.

3. The case is different, however, as regards a formal motion in Council. The ruling given by the Speaker of the House of Commons, to which you refer, is that if a member wishes to call his conduct in the Chair into question he must do so by a motion. ^{See} Debates in the House of Commons of Sir Robert Croker's May's Parliamentary Practice (1924 edition). ~~it is pointed out that the practice of disallowing motions has long since been discarded~~ ~~at the same chapter a list is given of various questions which can only be debated on motion and then another~~ ~~observes that there is in fact no matter which may not~~ ~~form the subject of a motion when properly put and~~ ~~seconded. Even the conduct of the Sovereign, or of his~~ ~~Heir to the Throne, or of the Judges, may be discussed~~ ~~upon a motion, but by no other persons. It follows~~ ~~therefore that you have not the power to refuse to~~ ~~allow a motion to be put even though it~~ ~~reflects upon your own conduct either as President~~ ~~of the Council, or as Governor.~~

4. I do not in this despatch wish to discuss the merits of the case. Your action in annulling the disqualification imposed by Law No. 174, which was due to a ^{wholly reasonable} ~~(partially) mistake~~ in regard to the powers possessed by the Governor and I have no desire to rehearse it, beyond pointing out as I did in my despatch No. 557 of the 24th of July that it was, in fact, mistaken.

...no one can challenge the effect of this ruling. It can hardly occur but no one...
Criticism of...
115

Should discuss it

I am, Sir,
Yours,
W. G. GORE

(Signed) W. G. GORE

4a
9

The cause of this trouble was the late case of the bye-election in the Coast District of Kenya. The two candidates were Mr. Lillywhite and Major Grogan. Under the Legislative Council Ordinance of Kenya a candidate who has a contract with Government for an amount exceeding £75 has to publish the fact at least fourteen days before the date appointed for the election.

Mr. Lillywhite had a contract to pump water to Kilifi for which he received more than £75, but he did not publish the fact (of course it was well-known) until six days before the date of the election.

The election resulted in 56 votes being cast. Four votes were spoiled. Mr. Lillywhite got 28 and Major Grogan 24. Thus Mr. Lillywhite was returned as elected. His return was, however, petitioned against, and in view of the provisions of the relevant section of the Ordinance, his election had to be declared invalid. Subsequently with a view to vindictiveness a private informer laid information against Mr. Lillywhite who was brought up before the Resident Magistrate under the penalty clause of the Ordinance, which prescribes that a person found guilty shall be liable on conviction to a fine up to £50 and shall be disqualified for seven years from the date of his election from voting or being elected a member.

Mr. Lillywhite

Mr. Lillywhite was, of course, convicted as the facts were not in doubt, was fined £1 and the Magistrate at the same time pointed out that he was disqualified.

Mr. Lillywhite then petitioned for a free pardon which the Governor refused, but he proceeded to remit the disabilities imposed on Mr. Lillywhite.

The elected members then proceeded to contend that this was unconstitutional (a very favourite word in Kenya) and said that, though the fine could be remitted, the disqualification which was statutory could not be remitted. The Attorney General in Kenya said that the argument that the disfranchisement was not part of the sentence was idle and that the Governor had power to remit that penalty. We were compelled to support the view of the elected members. We said that the Governor had power to remit the fine, but not to remit the disqualification which would have to be done by legislation.

The elected members have made a good deal of capital out of this alleged unconstitutional action of the Governor, and ^{Mr Justice Wright} Lord Francis Scott put down a question in Council asking "For what public purpose His Excellency the Governor purported to set aside the law on the subject of the remission of the disqualifications imposed on

Mr. Lillywhite

Mr. Lillywhite, which action has since been declared by the Secretary of State to be illegal." At the time the question was put, the instrument remitting the disqualification had been revoked, so that, of course, the only purpose of the question was to endeavour to abuse the Governor. The Governor accordingly disallowed the question in accordance with Standing Orders 22(ix), where a question may be disallowed when, in the opinion of the Governor, it is an abuse of the right of questioning. Lord Francis Scott has now put down a motion to the effect that in the opinion of the Council the action of the Governor in refusing to accept the question is an abuse of the prerogative conferred upon him by that section.

AIR MAIL

KENYA

No. 587

RECEIVED

18 NOV 1936

C. O. REGY



GOVERNMENT HOUSE

NAIROBI

KENYA

7th. NOVEMBER, 1936.

Sir,

I have the honour to invite your attention to the following notice of motion which was given verbally in the Legislative Council on the 4th November, 1936, by Lieutenant Colonel Lord Francis Scott, the member for the Rift Valley Electoral Area:-

"That in the opinion of this Council the action of His Excellency the Governor in refusing to accept the following question:-

"For what public purpose His Excellency the Governor purported to set aside the law on the subject of the remission of the disqualifications imposed on Mr. W.G. Lillywhite, which action has since been declared by the Secretary of State to be illegal".

put by the Honourable Member for Aberdare, was an abuse of the prerogative conferred on him by Section 22(ix) of Standing Rules and Orders of Legislative Council."

2. This motion is the outcome of the disallowance by the Governor, Sir Joseph Byrne, on the 26th September, 1936, of the question incorporated therein, on the grounds that:-

"A question may be disallowed when in the opinion of the Governor it is an abuse of the right of questioning."

As regards the object of this question I would refer you to your despatch No. 247 of the 24th July, 1936, on the subject of the remission by the Governor of Statutory penalties incurred

THE RIGHT HONOURABLE

W. ORMSBY-GORE, P.C., M.P.,

SECRETARY OF STATE FOR THE COLONIES,

DOWNING STREET,

LONDON, S.W. 1.

by

despite the fact that the reference in Standing Rules and Order 22(ix) is specifically to 'the Governor', the intention of the phrase may be interpreted to mean the office of 'President of the Legislative Council' as divorced from the Governor's constitutional discretion.

5. If the power of disallowance is employed by the Governor, as Governor, the proposed motion, which calls his actions in question, would appear to be out of order. It is, however, the intention of the Standing Rules and Orders is not to refer to the Governor, as such, but to the person exercising one of the functions with which the Governor is statutorily invested, namely the office of President of the Legislative Council; the right to disallow the proposed motion would seem to be open to doubt. In this connection, I am advised that the action taken by the Member for Rift Valley, is in accordance with a ruling given by Mr. Speaker on the 23rd November, 1962, which appears in columns 213 - 214 of Volume 272 of the fifth series of Hansard Debates, and which, in the absence of specific provision, in accordance with Kenya Legislative Council Standing Rule and Order 1, forms a precedent for local practice.

6. In view of the fact that it will be desirable to take early action on this motion I shall be glad if a reply to this despatch may be sent by Air Mail.

I have the honour to be,
Sir,

Your most obedient, humble servant,

Ad. M. W. O. D. E.

GOVERNOR'S DEPUTY.

F. R. H. Y. Esq.

Downing Street.

NO. 935

19 November, 1886.

Sir,

25.10.86.

With reference to my despatch No. 527 of the 24th of July, I have the honour to transmit to you the accompanying copy of a letter from Mr. Lillywhite in regard to his disqualification, under Section 23 of the Legislative Council Ordinance, following from his conviction of an offence under Section 12 (3) and (5) of the Ordinance.

I request that Mr. Lillywhite may be informed that I have received his letter and have given it my careful consideration. I am, however, advised that, under the law as now in force in Kenya, there is no executive action by which his disqualification can be removed. His attention should also be drawn to the provisions of Colonial Regulation No. 164.

In the event of Mr. Lillywhite submitting a definite request that legislation should be introduced to enable his disqualification to be removed, you will no doubt furnish me with your views.

I have the honour to be,
Sir,
Your most obedient,
 humble servant,

GOVERNOR,

BRIGADIER GENERAL,

SIR JOSEPH BYRNE, G.C.M.G., K.B.E., G.S.

etc.

etc.

etc.

JP
C.O.

C.D.
R 19 NOV
3 1906

AIR MAIL

5
1906

- Mr. Packer 17/11
- Sup. Buxton 19/11
- Mr. Bond 19/06
- Sir C. Parkinson.
- Sir G. Tomlinson.
- Sir O. Balamley.
- Sir J. Shuckburgh.
- Permt. U.S. of S.
- Patry. U.S. of S.
- Secretary of State.

DRAFT

Wm
No. 935
Gov.

From M. Dillywhite 25/11
(No. 3)

(2)

With ref. to Insp. No. 527
 of the 24th of July, I have the
 pleasure to con the accy. copy
 of a letter from Mr. Dillywhite in
 regard to his disqualification,
 under Sec. 23 of the Legislative
 Council Ord., following from
 his conviction of an offence
 under Section 12 (3) & (5) of
 the Ord.

I would not
 be surprised if you had
 received the letter by the
 time of your receipt of this
 copy. I have
 advised the
 Gov. as well as inform
 Wm. There is no
 by which his disqualification
 can be removed. His

FURTHER ACTION

Please proceed with
your dept.

action

attention shd. also be drawn to the
provisions of Cal. Reg. No. 184.

In the event of Mr. Lillywhite
submitting a definite report that
legislation shd. be introduced to
enable his disqualification to be
removed, you will no doubt forward
me with your ^{views} ~~recommendations~~.

W. C. MASON

The Right Hon. W. Ormsby-Gore P.P.

P. O. Kilifi

163

His Majesty's Sec. of State for the Colonies

Via Mombasa

C/o The Colonial Office, D.

Colony & Prot. of Kenya

LONDON

REC-111
3/2
C. O. REGY

Oct. 25th 1952

A few weeks ago I received a letter from His Excellency the Governor, Sir Joseph B. Gurney, with a copy of a Pardon which he had granted me, in connection with a small (a very small) error which had inadvertently made in the Rules governing an election in this Colony & Protectorate.

Without going categorically to the subject, I feel sure that, as I received this pardon from His Excellency in all good faith & exercising my rights as a free citizen, and the fact that His Excellency has been ruled as exceeding his authority, should not place me in the position of remaining behind the prison bars as it were. I explain Sir, that the Pardon should stand in full as it relates to myself, even though the action has been declared illegal.

I do not wish to make any derogatory statements, but will say that there would have been the slightest need for pardon by anyone, had it not been for the fanatical wish of one individual member of the Legislative Council.

I now learn that His Excellency's reason for granting a pardon-elective, was founded on the fact, that there was just the possibility that my notice of one small item may have had a bearing on the result of the first election which the Coast elected me.

Had it been a serious breach of the Rules, His Excellency could have declared my election null & void & declared my opponent elected, also for the same reasons, the Attorney General could have instituted a prosecution, but neither of these actions were considered warranted.

A prosecution was then instituted by the party concerned so as to make certain that I would not offer myself again, this was left until within three days of nomination day, so as to preclude the possibility of any other candidate being put forward.

The prosecution was of course a foregone conclusion as the Court only has to administer the word of the Law & the fact that the election had been annulled was sufficient grounds for a conviction. The learned Magistrate said in his judgment that one case will not call for heavy penalty & I was fined one-fiftieth of the amount a serious case would have cost.

The whole matter was very serious itself into a double parallel world, the bigger battle of the two being used to abuse His Excellency & the other to keep me out, no one being being lost to make references to it. In conclusion Sir, my own opinion is that the movement was a very personal one right through, I crave your consideration in the matter & should you deem it necessary, am prepared to send you a Memorandum of the actual happenings up to the present time.

Yours faithfully

W. C. Kilifi

W. C. Kilifi (H)

G. O.

38052/Kamp

27

Mr. H. 11.7

Mr. G. B. 17/7

Mr.

Sir C. Parkinson.

Sir G. Tomlinson.

* Sir C. Bottomley. 17

Sir J. Shuckburgh.

1. P. U. S. of S. 2/7

2. P. U. S. of S.

Secretary of State

24 JUL 1936

Sir

I have the honor to acknowledge the receipt of

DRAFT

Kamp

No 547

... No 307 of the 18th of June
 ... considered that
 the collection ...
 ...
 ...
 to remit the disqualification imposed
 by sections 21 & 25 of the Legislative
 Council Ordinance. The latter section
 does not empower the Council to grant
 a remission of disqualification but
 to remit the same. It is, however,
 a matter to determine whether the
 disqualification follows automatically
 while the Governor has power to remit
 the fine he has no power to remit
 the statutory disqualification which

FURTHER ACTION

most serious in violation of the findings of
the Court, even though the monetary penalty
may have been remitted.

2. There is, I consider, no real analogy
with cases where a minimum sentence
for a crime is prescribed by law. In
such cases the law limits the Court's
discretion in passing sentence, but the
Governor has full power to reduce or
remit the sentence passed by the Court.
In this case it is not the sentence of a Court
but is a statutory consequence of the finding.

3. If it were desired to remove the disqualification
from the bill while it would have to be done
by ~~legislation~~
~~by a Bill in Council or Act of the~~
~~Legislative Council~~, and, while it is not
the case of any importance, I do not suppose
that you will wish to take legislative action
of the kind of principle has been some
importance ~~through the Department of Justice~~
~~desirable that the Chairman of that Council~~
~~should be a member.~~
Members Organization should be improved
of any kind.

(Signed) W. ORMSBY GORE.

KENYA
No. 307



RECEIVED
6 JUL 1936
GOVERNMENT HOUSE,
NAIROBI,
KENYA

16 June, 1936

Sir,

I have the honour to forward a letter of the 30th May, 1936, from the Chairman of the Elected Members Organization of the Kenya Legislative Council on the subject of the by-election in the Coast Constituency during 1936, together with a Memorandum by the Attorney General and a copy of the record of the case in which Mr. Hillywhite was convicted.

I have the honour to be,

Sir,

Your most obedient, humble servant,

BRIGADIER-GENERAL
GOVERNOR

THE RIGHT HONOURABLE
W. GEMSBY-GORE, F.O., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET
LONDON, S.W.1.

ELECTED MEMBERS ORGANIZATION

P. O. BOX 825.

NAIROBI,
KENYA COLONY.

TELEPHONE: 2996.

TELEGRAMS: "SETTLEMENT"

REFERENCE NO.

30th May.

198 6.

The Right Honourable,
The Secretary of State for the Colonies,
Through His Excellency the Governor of the Colony
and Protectorate of Kenya.

Sir,

I have the honour, on behalf of the
European Elected Members of the Kenya Legislative Council,
to draw your attention to the following facts:-

1. As the result of the death of the Member for the
Coast Constituency, an election for that Constituency
was ordered to be held under the provisions of the
Legislative Council Ordinance, Chapter 24 of the
Laws of Kenya (Revised Edition).
2. The said election duly took place on the 20th day
of November, 1935, the Candidates being Major E.S.
Grogan and Mr. W.G. Lillywhite, and as a result of
the election the latter was elected.
3. On the 21st day of December, 1935, as a result of a
Petition by an elector addressed to His Excellency
the Governor in Council, the said election was
declared void on the grounds that Mr. Lillywhite had
committed an offence under Section 12, Sub-section 3,
of the above Ordinance, and another election was
ordered to take place.
4. Prior to this election taking place, information had
been laid by an elector, as the result of which
Mr. Lillywhite was prosecuted for an offence under
the said Section 12, Sub-Sections 3 and 5 which read
as follows:-

"12 (3) A candidate for election who has undertaken either directly or indirectly himself or by any one in trust for him any contract with a Government Department for which the consideration exceeds seventy-five pounds, shall not be disqualified for election provided that at least fourteen days before the date appointed for the election he shall publish in the electoral area for which he is a candidate the fact of such contract, giving particulars thereof. The publication shall be by means of a notice in a newspaper circulating in such electoral area.

(5) The election of any candidate who fails to comply with the provisions of Sub-Section (3) of this Section shall be invalid, and the seat shall be deemed to be vacant and the candidate shall be liable on conviction to the penalty specified in Section twenty three of this Ordinance and shall be disqualified as there in provided.

The penalty for the conviction of an offence under this Section is set out in Section 23 (1) of the Ordinance, which reads as follows:-

"23. (1) Any person who corruptly by himself or by any other person, either before, during, or after an election, directly or indirectly gives or provides, or pays wholly or in part the expense of giving or providing any meat, drink, entertainment, or provision to or for any person, for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at the election, or on account of such person or any other person having voted or refrained from voting, or being about to vote, or refrain from voting at such election, shall be guilty of treating, and shall be liable on conviction

to a fine which may extend to fifty pounds, and shall for seven years from the date of his conviction be disqualified from voting at any election under this Ordinance and from being elected a member."

5. Mr. Lillywhite pleaded guilty to the summons, and the Magistrate imposed a fine of Shs.20/- adding as an obiter dictum to his Judgment that Mr. Lillywhite was disqualified from voting or sitting as a member for a period of seven years.

6. On the 1st day of March, 1936, His Excellency the Governor purported to remove from Mr. Lillywhite the disqualifications as to voting and being eligible for election above referred to.

7. On the 19th day of May, 1936, in answer to a question asked in the Legislative Council as to the authority under which His Excellency purported to act in removing such disqualifications the Honourable the Attorney General referred the asker of the question to Article XVII of the Kenya Order in Council 1920, which reads as follows:-

"When any crime or offence has been committed within the Protectorate or for which the offender may be tried therein, the Governor may, as he shall see occasion, in His Majesty's name and on His Majesty's behalf, grant a pardon to any accomplice in such crime, or offence who shall give such information and evidence as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further, may grant to any offender convicted of any crime or offence in any Court or before any person having jurisdiction to try any such crime or offence within the Protectorate, a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence, for such period as

4

the Governor thinks fit, and may remit any fines, penalties, or forfeitures which may become due and payable to His Majesty."

8. I am requested by the Elected Members respectfully to submit to you that the Article in question confers no such powers on the Governor as were purported to be exercised by him, and further to submit that the action of the Governor was in fact ultra vires Article XVII of the Kenya Order in Council 1920 which gives the Governor of Kenya Colony certain powers of pardon and remission of sentences.

9. The disqualifications to which Mr. Lillywhite became liable were not by virtue of any sentence of the Court but were the automatic result of his conviction by virtue of Section 12, Sub-Sections (3) and (5) and Section 23 Sub-Section (a) of the Legislative Council Ordinance as above quoted.

10. It is, therefore, in my submission clear that the action of the Governor has been in fact to alter the law in that so long as the convict or suitor (and no conviction can be upset except on appeal) the disqualification is automatic and no power is given to the Governor under the said Ordinance to interfere with such disqualification.

11. I understand that it may be argued that as the Magistrate in his Judgment announced that Mr. Lillywhite was disqualified as above stated this disqualification becomes part of the sentence of the Court, but for the reasons above stated it seems clear that any such argument is erroneous.

12. Elected Members naturally bear no feeling of animosity against Mr. Lillywhite but are of the opinion that these facts raise a very important question of principle, and that the Order in Council above referred to does not

the Governor thinks fit, and may remit any fines, penalties, or forfeitures which may become due and payable to His Majesty."

8. I am requested by the Elected Members respectfully to submit to you that the Article in question confers no such powers on the Governor as were purported to be exercised by him, and further to submit that the action of the Governor was in fact ultra vires Article XVII of the Kenya Order in Council 1920 which gives the Governor of Kenya Colony certain powers of pardon and remission of sentences.

9. The disqualifications to which Mr. Lillywhite became liable were not by virtue of any sentence of the Court but were the automatic result of his conviction by virtue of Section 12, Sub-Sections (3) and (5) and Section 23 Sub-Section (1) of the Legislative Council Ordinance as above quoted.

10. It is, therefore, in my submission clear that the action of the Governor has been in fact to alter the law in that so long as the conviction stands (and no conviction can be upset except on appeal) the disqualification is automatic and no power is given to the Governor under the said Ordinance to interfere with such disqualification.

11. I understand that it may be argued that as the Magistrate in his Judgment announced that Mr. Lillywhite was disqualified as above stated this disqualification becomes part of the sentence of the Court, but for the reasons above stated it seems clear that any such argument is erroneous.

12. Elected Members naturally bear no feeling of animosity against Mr. Lillywhite but are of the opinion that these facts raise a very important question of principle, and that the Order in Council above referred to does not

and cannot confer upon the Governor any power arbitrarily to alter the provisions of any Ordinance, having particular regard to the fact that His Majesty himself has no such power.

13. I would also emphasise the fact that the candidate in question still has, and has had for many years contractual relations with the Government, and that apparently the legislature when passing the above Ordinance considered the offence of non-disclosure of contractual relations with Government by a candidate for election to Legislative Council was an offence under that Ordinance sufficiently important to be punished by penalties similar to the penalties for bribery and other corrupt practices.

14. Under these circumstances I have the honour to request that you will refer the matter to your Legal Advisers for their opinion:

- (1) As to whether the action of the Governor was intra or ultra vires;
- (2) As to whether the Governor has power to alter the terms of an Ordinance;

15. The reason for the above request is that no decision of the Kenya Courts on the matter can be obtained until another election is held at which Mr. Lillywhite elects to stand or to exercise the franchise or possibly upon a revision of the Voters' Roll.

I have the honour to be,
Your humble and obedient servant,

J. C. ...

CHAIRMAN,
ELECTED MEMBERS' ORGANIZATION

On the Coast Bye Election,
1935;

Disqualification of Mr. W.G.
Lillywhite.

Under section 12(3) of the Legislative Council Ordinance (Chapter 24) a candidate for election, who holds a contract with a Government Department the consideration for which exceeds £75 and publishes the fact at least fourteen days before the date appointed for the election.

2. At a By-Election in November, 1935, Mr. Lillywhite was a candidate for the Coast District and failed to comply with the above mentioned section in that he did not publish the fact that he held a contract with the Public Works Department to pump water to the Kilifi Government Station, the consideration for which amounted to over £75, until six days before the election and it was suggested that even then the necessary particulars were not stated.

3. Mr. Lillywhite was duly elected but on a petition from an elector to the Governor in Council under section 28 and in view of section 12(5) of the above mentioned Ordinance the election was declared invalid.

4. On January 24th, 1936, Mr. Lillywhite was prosecuted before the Resident Magistrate, Mombasa, by a private informer with having contravened section 12(5) of the above mentioned Ordinance and pleaded guilty.

5. The penalty for the offence is to be found in section 23(1) of the Ordinance the

relevant portion of which reads as follows:

"shall be liable on conviction to a fine which may extend to fifty pounds and shall for seven years from the date of his conviction be disqualified from voting at any election under this Ordinance and from being elected a member."

6. The Magistrate convicted Mr. Lillywhite and fined him Shs.20/- at the same time pointing out that under the Ordinance Mr. Lillywhite was disfranchised for seven years as a result of ~~the~~ conviction.

The Magistrate further remarked that "it is with regret that I find myself called upon to impose a penalty which is followed by consequences so serious."

7. On the 16th February, 1936, Mr. Lillywhite petitioned His Excellency for the grant of a free pardon. This was refused by His Excellency but in exercise of his powers under Article XVII of the Kenya Protectorate Order in Council, 1920, His Excellency remitted the disabilities imposed on Mr. Lillywhite by section 23 as a result of his conviction. It is against this remission that the European Elected Members Organization are now petitioning to the Secretary of State for the Colonies.

8. With regard to the equity of His Excellency's action there can be no two opinions. Mr. Lillywhite an old and respected citizen omitted to give to his electorate the full fourteen days notice of a contract as required by the Ordinance, whereby he committed a technical offence.

This provision of the law is similar to other enactments all over the Empire and though

in theory it is a necessary provision to retain, it is obvious that in practice the penalty, which is intended primarily to apply to offences such as bribery, may in cases of technical omissions be unduly severe.

9. The Elected Members in their petition do not suggest that His Excellency's decision is inequitable but base their whole case on the submission that His Excellency's remission is illegal having regard to the present state of the law and asserting as is usual in all their arguments or petitions that a "very important question of principle" is involved.

10. The authority for His Excellency's remission is contained in the Kenya Protectorate Order in Council, 1920, which reads as follows:

"When any crime or offence has been committed within the Protectorate or for which the offender may be tried therein, the Governor may, as he shall see occasion, in His Majesty's name and on His Majesty's behalf, grant a pardon to any accomplice in such crime or offence who shall give such information and evidence as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further, may grant to any offender convicted of any crime or offence in any court or before any person having jurisdiction to try any such crime or offence within the Protectorate a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence, for such period as the Governor thinks fit; and may remit any fines, penalties, or forfeitures which may become due and payable to His Majesty."

And it is suggested that as the part of the sentence which refers to disfranchisement follows the conviction automatically by law it is not part of the "sentence passed on such offender."

11. It has never been suggested that His

Excellency has not the power to grant a pardon "either free or subject to conditions" to any offender convicted of any crime or offence and as the wording of the Article is in effect "pardon . . . or any remission of the sentence passed on such offender" I am of the opinion that His Excellency has equal powers with regard to a remission as he has with regard to a pardon and that it is idle to suggest that as the disfranchisement is directed by law that it is not part of the sentence.

In other words the powers of the Governor are no where limited to the remission of a sentence which has been imposed at the discretion of a Magistrate or Judge as opposed to a sentence automatically imposed by law by virtue of the conviction.

12. The same point has occurred oft in the past in rape and stock theft cases where a minimum sentence was prescribed by law and it has never been suggested that His Excellency had not the power to remit such penalties.

13. In my opinion His Excellency's action in remitting that part of Mr. Lillywhite's sentence which related to his disqualifications was constitutional, legal and just.

A. H. H. H.
 Attorney General



COLONY AND PROTECTORATE OF KENYA

In the Court of the Resident Magistrate at Mombasa.

TRIAL OF MINOR OFFENCE.—Section 187, Criminal Procedure Code

Serial Number	122 of 1936.
Date of commission of offence	20. 11. 35.
Date of the complaint	17. 1. 36.
Name of complainant	Francis Stephens Lync.
Name, parentage and residence of accused	William Gilbert Lillywhite.
Offence complained of	Under Section 12(5) and 25 Cap. 24 Laws of Kenya.
Offence proved	
Value of property (if any)	
Plea of accused in his own words	See within.
24/1.	
The finding and where evidence has been taken, or judgment embodying substance of evidence	See within.
Sentence or other final order	F. 20/-.
Signature and date of sentence	24th Day of January, 1936.

Sd. D.V. Shaw.
Resident Magistrate.

Ev. page 1.

17.1.36.

Anderson for complainant.

Head complaint of F. Stephens-Lyne dated 17.1.36.

Order - Summons to issue on W.C. Lillywhite under Section 12(5) and 23 Cap. 24 for 24.1.36 at 2 p.m.

Sd. B.V. Shaw.

Resident Magistrate.

24.1.36, 2.5 P.M.

Anderson for Complainant, who is present in Court.

Accused absent - served.

Accused's letter is read out.

Anderson addressed Court.

J U D G M E N T.

Mr. W.C. Lillywhite is charged under Section 12(5) and 23 of the Legislative Council Ordinance (Cap. 24). The charge is to the effect that upon standing for election as a Member of the Legislative Council for the Coast Electoral Area at the election held in Mombasa on 20th November, 1935, he failed to publish a notice in the Coast Electoral Area, fourteen days before the date appointed for the said election, to the effect that he had undertaken a certain contract with a Government Department for which the consideration exceeded seventy-five pounds, together with particulars of such contract as required by Section 12(5) of the Ordinance.

He has pleaded guilty by letter to this charge.

In his letter he states that he does not admit any wilful breach of the law, as the greater contracts with Government had been fully published in time, and that it was only by an unfortunate oversight that the lesser contract was omitted from his first notice. He states further that as soon as this was realised an extra notice was inserted in both the local newspapers but too late.

A consequence of a conviction for the offense with which he is charged is that the person convicted is barred, by the provisions of Section 25 of the Ordinance, from voting at any election under this Ordinance and from being elected a member, for seven years from the date of his conviction. I see no reason for not accepting the statements made in Mr. Lillywhite's letter, and they are not disputed by Mr. Anderson who appears for the complainant, and it is with regret that I find myself called upon to impose a penalty which is followed by consequences so serious.

It is not a case that calls for a severe penalty. I sentence Mr. Lillywhite to pay a fine of shs.20/- (twenty).

Sd. B.V. Shaw.

Resident Magistrate.

P. A. 86.

DRJ.

IN THE RESIDENT MAGISTRATE'S COURT AT MOMBASA.

ORIGINAL CASE NO.122 OF 1956.

FRANCIS STEPHENS-LYNE COMPLAINANT.

VERSUS

WILLIAM GILBERT LILLYWHITE ACCUSED.

COMPLAINANT.

I, FRANCIS STEPHENS-LYNE made oath and say as follows

1. I am a Planter residing at Diani Estate near Mombasa and am registered as a voter for the Coast Electoral Area.
2. The accused is a Planter residing in the Kilifi District of the Protectorate of Kenya.
3. The accused stood for election as a member of the Legislative Council for the Coast Electoral Area at the election held in Mombasa on the 20th day of November 1955 and did not comply with the provisions of Section 12 Sub-Section 3 of the Legislative Council Ordinance, Chapter 24 of the Revised Edition of the Laws of Kenya in that he failed to publish a notice in the said Electoral Area fourteen days before the date appointed for the said election to the effect that he the accused had undertaken a certain contract with a Government Department for which the consideration exceeded seventy five pounds together with particulars of such contract all as required under Section 12 Subsection 3 of the said Ordinance.

SWORN at Mombasa this
 Seventeenth day of January 1956 Sd. F. Stephens-Lyne.

BEFORE ME:
 Sd. S.V. Shaw,
 17. 1. 56.

Sd. H.V. Anderson.

Filed by: for Atkinson, Bown, Morrison & Ainslie,
 Advocates for the Complainant.

Dated this 17th day of January 1956.

P.O. Kilifi.

January 21st 1956.

To
The Resident Magistrate,
Resident Magistrate's Court,
MOMBASA.

RE: CRIMINAL CASE NO. 188 -

Dear Sir,

I plead guilty to actual fact, but not to any wilful breach of law, as I think is proved by the fact that the greater contracts with Government were fully published in time and only by an unfortunate oversight this lesser contract was omitted from my first notice, as soon as this was realized, an extra Notice was inserted in both the local newspapers, but as stated was late.

This is all I can say in the matter as I am still completely in the dark as to reasons etc.

I will attend Court if it is possible to be in Mombasa on that day.

Yours faithfully,
Sd. W.G. Lillywhite.

R.M.'s Court
24 Jan 1956
MOMBASA.

32
END
P.O.Kilifi.

January 21st 1936.

TO
The Resident Magistrate,
Resident Magistrate's Court,
M.O.M.B.A.S.A.

RE: ORIGINAL CASE NO. 122 -

Dear Sir,

I plead guilty to actual fact, but not to any wilful breach of law, as I think is proved by the fact that the greater contracts with Government were fully published in time and only by an unfortunate oversight this lesser contract was omitted from my first notice, as soon as this was realized, an extra Notice was inserted in both the local newspapers, but as stated was late.

This is all I can say in the matter as I am still completely in the dark as to reasons etc..

I will attend Court if it is possible to be in Mombasa on that day.

Yours faithfully,

Sd. W.G.Lillywhite.

R.M.'s Court
24 Jan 1936
MOMBASA.