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EAST AFRICA.

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Recd } 7 Sept. 1910

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CONCESSIONS..

Extract from Report on case of Somaliland Fibre Company respecting the grant of monopoly rights as to making agreements with natives and dispensation from duties.

Mr. Butler.

I feel somewhat doubtful as to the precise meaning of the rider which the Solicitor General and Mr. Rowlatt have added to their report on the Somaliland Fibre Company's claim. They presumably understand that, in making an agreement of this nature, the Crown Agents are not acting on their own authority but under instructions from the Secretary of State - the preamble to the concession in question runs "An agreement made..... between Sir Ernest Blake & Co.....acting for and on behalf of the Government of the Somaliland Protectorate". The real question then at issue would appear to be whether the Secretary of State had legal power to grant a concession of the nature of the Fibre Company's concession in the Somaliland Protectorate. The question raised is not the old one of the rights of the "protecting" Government over land in a "protected" country.

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country, but rather that of the right of the "protecting" Government to interfere in the dealings with land, acknowledged to belong to native owners, by such owners. For the concession, it will be observed does not follow the usual form of contract on the concessionaires the lease of a certain area of land for a certain purpose - it does not purport to grant any land to the company but only to give them power to make agreements and arrangements with natives for the cultivation of fibre, occupation of lands and other subsidiary matters within a certain prescribed area, and at the same time to stipulate that no similar grant should be made to any other company for a term of 15 years within the prescribed area. If the concession were the ordinary one of a lease of so much "Crown" Land no difficulty would arise, as the case would appear to be covered by article 7 of the Somaliland Order in Council 1904, which conferred on the Commissioner the right to make grants or leases of any "Crown" lands, or permit them to be temporarily occupied, on such terms as he may think fit. Crown Lands are defined in Article 2 of the 1904 Somaliland Order in Council as "public lands in the Protectorate which are subject to the control of His Majesty by virtue of any Treaty, Convention or Agreement, or of His Majesty's Protectorate, and all lands which shall have been acquired by His Majesty for the public service or otherwise howsoever" viz. waste lands not subject to any native ownership, as distinguished from "lands in the occupation of any native tribe, or any Members thereof" (Article 7(4), of the 1904 Order in Council). The ordinary concession in a Protectorate is of course only concerned with these Crown Lands and care is usually taken to exempt from the area granted any land over which "native rights" exist. In such a case, as pointed out above, no difficulty arises as the Protectorate is armed with sufficient legal power in the Order or Orders in Council

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creating such Government. But in the present case there would appear to be no intention to treat the concession as a grant of Crown Land - it expressly speaks (clause 2) "any natives or native or any native tribe or any owner or occupier of land in the prescribed districts". That being so, what legal power existed to enable the Somaliland Government to confer "such rights". I have searched the Somaliland Orders in Council, but have not been able to find any, nor is there so far as I have been able to discover, any King's Regulation or Ordinance conferring such power. It may be argued that there is nothing to prevent the Government saying that it is prepared to recognize the rights of one company and not prepared to recognize the rights of another, but, if another company were to turn up and commence operations, what legal power would the Government have to turn the intruding Company out? The question has become academic in Somaliland now with our withdrawal to the Coast, but the position would be the same in any other Protectorate. In the East Africa Protectorate <sup>or in Kenya</sup> I cannot see that we should have any power to grant such a concession.

The question of exemption from Customs duties is similar. Here it seems to me that the Law Officers have certainly fixed on a weak spot. The concession promises the concessionaires a dispensation from customs duties on machinery imported into the Protectorate for the purpose of working the fibre, but I cannot find anything in the Customs Ordinance empowering the Government to grant such a dispensation - machinery is not included in the list of exemptions in Ordinance

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o.4. of 1907. To meet similar difficulties in the future, the simplest plan would appear to be to pass a short amending ordinance, empowering the Commissioner to exempt any particular goods from duty - it would of course be an instruction to him not to do, except with the sanction of the Secretary of State. I would suggest that a similar amendment would prove useful in the Customs ordinances of the other East African Protectorates.†

As to the last words of the paragraph "and even that could not be protected from liability to repeal", I am afraid that I entirely fail to understand the Law Officers' meaning. Any Government can of course dishonour its obligations, but no civilised Government would dream of following such a course.

? Is general questions relating to Concessions are involved, the paper should be brought before the Concessions Committee.

Mr. Biscoe

Mr. Read,

The Concession of the British Somaliland Fibre and Development Company purports to give them within a certain district of the Protectorate, a monopoly of the right to make, vary, and renew agreements and other arrangements with natives <sup>in specified parts</sup> of native lands in respect of lands owned or occupied by <sup>and native lands</sup> them. It thus differs fundamentally, as Mr Batterbee has pointed out, from the other concessions with which we are familiar in the East African Department, all of which, so far as my recollection goes, are concerned with the lease <sup>or sale</sup> of lands of which the Government has a right to dispose or <sup>the</sup> lease of rights over such lands.

The Court is already armed with discretionary power in Nyasaland see para. 5(c) of Ord. No. 9 of 1906, but I can find any such provision in A.P. or Uganda ~~land~~.

lands. The position assumed by the Somaliland Government in granting this particular concession would be <sup>apparently</sup> only be regular <sup>apparently</sup> if ~~there existed~~ :-

(a) A <sup>law</sup> ~~law~~ <sup>specified</sup> ~~existed~~ declaring that no agreement of this kind made with natives of the Protectorate <sup>was</sup> ~~was~~ valid until they had been approved by the Commissioner. This would be a tenable position, not dissimilar from that existing on the Gold Coast, where concessions granted by natives are not valid until they have been certified as such by the Court. This position contains, I think, the implication that any such concession will be recognised as valid if it has been secured on fair and reasonable terms.

It is going a long way beyond this to take what would be the second necessary step to regularise the position with regard to the Somaliland concession under discussion, namely :-

(b) A contract made by the Commissioner with the Concessionaires that he would not recognise as valid any agreements made with the natives in the particular district <sup>to make such a contract</sup> except by the concessionaires themselves. This would be to arrogate a right of interference in the disposal of native owned lands which could not be sustained in the face of adverse criticism.

I do not think that the question is of very great importance now. This particular concession is dead, and the Somaliland Government are not likely to be in a position to grant similar, or indeed any concessions in the near future. So far as the other East African Protectorates are concerned, I am not aware of any concession of a similar kind, nor can I conceive that there is likely to be any proposal that such a concession shall be granted.

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As to dispensation from Customs duties, I agree with Mr Batterbee that it is desirable to have a provision in the Customs laws of all the East African Protectorates similar to section 5 (b) of the Nyasaland Ordinance No. 8 of 1906, under which ~~expressly~~ <sup>(B.C.A.)</sup> the Governor can remit duties in the case of any particular importation or exportation of goods, subject to disallowance by the Secretary of State. The question of remitting duties in particular cases crops up not infrequently, as in the case of Scientific Missions, Members of the Royal Family, and foreigners of distinction. We have recently instructed the Governor of the East African Protectorate to admit free of duty the equipment of the Commissioners who will start next month to delimit the boundaries on the Eastern border of the Congo. I am not quite sure how he will do it under the existing law. It is evidently desirable that there should be power to meet these exceptional cases, so long as the exercise of that power is carefully safeguarded.

To Concessions Committee as proposed as to the first point raised in these Minutes.

*H.B.*  
*Oct 7*  
*H.R. 8/10*

Address

*So passed?*  
*H.R.*  
*8/10* *alone* *W. 10*

*I am not*  
*sure*  
*the*  
*reference*  
*is to*  
*the*  
*above*  
*mentioned*  
*cases*  
*or to*  
*some*  
*other*  
*cases*

Mr. Fiddes

With regard to the Fiddes' benefit above  
 please see Govt 3274 of 1907. Ceylon and benefit  
 thereon. According to the decision in  
 that case the proposal is for the  
 Government power to grant exemption from  
 customs duties in any  
 Colony or Protectorate possessing a legislative  
 power to grant exemption to goods imported  
 into the colony or Protectorate. Section 5 (c)  
 of the Regulations made under the Act of 1906 (which  
 was passed before the Legislative Council  
 came into being) - unless the Fiddes  
 goods are the case of a Protectorate  
 like East Africa or Nyasaland differ from that  
 of a colony like Ceylon.

Mr. Redley  
 Mr. Read  
 Mr. Fiddes

JTB  
 14/10

In view of the mistakes & loss

We must

Give a special Ord<sup>r</sup> of each line that  
dispensation from Customs duties  
is granted this in itself will be a  
safeguard against abuse  
We cannot make allowances  
regularly for goods which dispensations  
occasionally

Chas

25/10

J.R.

15/10

Mr Cox I don't see the necessity for  
giving better quarters at present.

As to the Customs exemption, no practical  
particular is likely to arise in either any of the  
Cases Particulars & I don't think the  
idea of granting a dispensing Order will  
require any special proposals for dispensing.

I let it sleep

P.W. 18/10

Chas  
Sept

W.P.  
18/10

P.W. 19

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SOMALILAND  
CONCESSION IN CONNECTION WITH THE CULTIVATION OF  
FIBRE TO THE BRITISH SOMALILAND FIBRE AND DEVELOP-  
MENT COMPANY LIMITED.

OPINION OF H.M. SOLICITOR GENERAL  
AND MR S. A. T. ROWLATTE.

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If the claim is pressed and no reasonable arrangement can be come to (assuming the Secretary of State to be willing to deal with the matter in this way) we think an arbitrator should be appointed under article 23.

We ought further to point out that in any event this concession contains, in our opinion, some very questionable stipulations. By Articles 2, 10, 16 and 23 the Company are given monopoly rights for 15 years as to making certain agreements with natives and a dispensation from duties for 5 and 15 years in different respects. We have not had brought to our attention anything which empowers the Crown Agents by Contract to confer such rights, which prima facie require legislation, and even that could not be protected from liability to repeal.

Law Officers' Department,  
8th August, 1910.