

1925

KENYA

C. O.
33320
21 JUL 25

From *ag. Sec.*
Wenda m Tel.

DATE
30 July, 1925

FOR CIRCULATION:—
Mr. *Bryfe*
Mr.
Mr.
Asst. U.S. of S.
hr Stochey
*Perms. U.S. of S.
*Part U.S. of S.
*Secretary of State

Railway Order in Council

Submit further observations as to details and request to be made at possible reply

Previous Paper
O.C. 3178

MINUTES
Clause 1. This is purely legal, & so long as the H.C. is not beyond to be used in his personal capacity I have no objection in this matter

*and Tel. 28 July/25 ✓
Tel. from 28 July/25 ✓*

*Clause 4(B). The precedents quoted (see in volume below) seem to be exact parallels - *yes* *for this* *can* *is* *is* *them*, the Council would be *advised* for the *delay* of *details* in accordance with *a* *Order* and with *best* *advantage*. Perhaps, as they pass for the clause, it might be *altered*. *altered*, with a "list in constant" proviso. It would be possible, but inconvenient, to lay down*

Subsequent Paper
O.C. 33950

that such Ord^s must be
reversed for H. His assent.

Clause 22. If they insist on this

rather absurd provision, I think
they should have it. There is

no need to be troubled with it. Co. - eg. on

clause 31, and if we

can find a way to do so

it will be better so.

C. G. Rowland

21/7/25

With regard to the deletion of the provision
creating the High Commissioner, "Corporation Sole", I
consider that any misunderstanding which is likely to
arise would arise on account of its omission. The
whole scheme and intention is to create an office
separate and distinct from the Government of Kenya, or
Uganda. If you are not going to do this, but merely
to provide that the High Commissioner shall be the
Governor of Kenya, why have anything about a High
Commissioner at all? You may just as well at once
provide that the Governor of Kenya is to do whatever
is to be done. I really do not know why we should
have to discuss this point at this stage, because it
really goes to the basis of the whole scheme. Moreover,
although we are not vesting property in the High
Commissioner

a distinct legal
entity

Commissioner, I see no reason whatever why it should
not be necessary for him in the future to own
property. If the Railway were to buy a piece of
land for a siding, or a house for some offices, or
what not, this would surely be held not by the
Government but by the High Commissioner.

As regards Section 4(2) I do not think
that the provision in the Kenya Letters Patent
is in any way similar. Clause 3 of the Letters
Patent simply authorises and commands the Governor
to do what he is empowered and told to do by the
Letters Patent, and by the Law of the country. Those
are obviously the general powers and duties of the
Governor. As regards references to the Kenya
Order-in-Council I cannot find anything which is
even remotely relevant. Clause 4(2) of this

draft Order-in-Council is a totally different thing.
The provision means one of two things. Either
that the duties and powers of the High Commissioner
are to be exercised in accordance with the laws
to be passed, no matter what such laws contain, and
even assuming they are contrary to the provisions
of the Order-in-Council; or it means that he is to
carry out his duties in accordance with those
laws if they are not inconsistent with the Order-in-
Council. In the former case the Clause is quite
unacceptable, and in the latter case quite un-
necessary. Nor do I understand what the Attorney
General means when he says that there will be a
doubt as to the validity of laws which were passed

on

on Railway matters, having regard to the fact that we have provided for this very point in Clause 25.

I am afraid that so far as I am concerned I shall never agree to the inclusion of Clause 22. Curiously enough I can now illustrate the objection which throughout I have urged to this Clause from something which has actually happened within the course of the last few weeks in Palestine.

* old numbering

At the instance of some political body or other there was inserted in the Palestine Order-in-Council a clause to the effect that no laws should be passed which were contrary to the Mandate. Now the Mandate consists simply of a collection of platitudes and generalities. Among them is a provision that the Mandatory will preserve the civil and religious rights of the inhabitants. The Government recently, in order to relieve the water famine in Jerusalem, passed an Ordinance giving the Water Authority power to draw water from some springs upon compensating the owners therefor. The owners at once applied to the Courts, and the Courts have held that to take water from the owners of the wells is an infringement of their civil rights, is contrary to the Mandate, and, therefore, that the Ordinance is ultra vires. Unless we can persuade the Privy Council that this is unsound, it will mean that the greater part of the Ordinances which have been passed in Palestine to date are in a similar position. The moral of all this is, and it applies most particularly to this Clause, "do not put a political claptrap into a legal document."

I am sorry that I am against the Kenya contentions on all points, but there it is.

P.S. Contrary to what is stated in this telegram there

there is no clause similar to 22 in the Union Act. Mr. Enhardt tells me that he thinks there was a similar clause in a purely temporary Act of the Transvaal or the Orange Free State, but we cannot trace it at the moment. But his recollection is that it was only inserted because the powers were being conferred upon a temporary body for a temporary period.

H.B. 23/7

P.S. I wonder if it would meet the obj of (ref: cl 4 (2)) we add to cl 25

" and all laws at present applying to the services shall continue to apply thereto, save in so far as they may be inconsistent with the provisions of this clause, until repealed or amended by the Legislature of Kenya or Uganda."

H.B.

I would suggest attaching to the "Corporation Sale" adopting Mr. Brooke's suggestion at "A" above and in regard (old) 22, I am disposed - in spite of Mr. Brooke's view - but Kenya have been very I quite appreciate the objection from a legal point of view, but I do not see how any difficulty could

in this case X

C.S.

23.7.25

12/23/25

I think we should put Mr. Bush's arguments against old 22 to the O.A.G. & say we would greatly prefer not to include it, but if on reconsideration he considers something is essential to satisfy local opinion we hope Mr. Bush's suggestion for adding to clause 25 will suffice do not propose to insist.

Otherwise as proposed
not 23.7.25
J.M.V.

X yes.
Eg: Ry: increased rate on maize.
Injunction applied for on ground that this not having regard etc.
The Court will be to decide JTB
advising. 27/1-

instead of the reduction in railway rates there is about 2%

Sir E.Grigg called on July 25th and said that he thought that the simplest way of making Europeans contribute substantially to revenue would be to ~~make~~^{have} a royalty payable by the railway in respect of various classes of goods that they carried. I pointed out various difficulties, including the fact that ~~as regards~~ the struggling farmer, he would be taxed on his gross income instead of on his net receipts, that it would be necessary to prevent this royalty being, in fact, a tax on natives as well. More particularly, I explained to him the position about this Order in Council, and pointed out that if the Order were promulgated, with Clause 22 in it, ~~his~~^{his} proposals would be made impossible. His plans

are, of course, necessarily indefinite at this stage, but he hoped they would not be put out of Court from the beginning. Consequently, I ^{have} drafted a separate confidential telegram to Mr. Denham for this purpose, but I have made it clear that the general objection to Clause 22 is independent of Sir E.Grigg's plans.

As regards the general objection, I have not, in the open draft, explained fully the Palestine position, as it would be impolitic to allow the difficulties of this position to become publicly known.

C. G. Stoney
27.7.25

33320

21 JUL 25

TELEGRAM from the Officer Administering the Government of Kenya to the Secretary of State for the Colonies.

Dated 20th July 1925.

644

(Received Colonial 10 p.m. 20th July 1925.)

642

322. 20th July.

Yow.
despatch of 30th May, 1925, re railway Order-in-Council, Clause 1 Attorney General urges deletion of reference to Corporation sole in view of the fact that it is not now proposed to vest property in the High Commissioner. He considers that creation of High Commissioner as Corporation sole likely to lead to misunderstanding of High Commissioner's status as an official is only created corporation sole for the purpose of holding property. Attorney General presses for retention of Clause IV Sub 2 and maintains that similar provisions usual in such legislation for example Kenya Letters Patent 1920, Article III Kenya Colony Order in Council 1921 2 Sub 2 and 9) sub 1. Unless clause retained no certainty that any Ordinance which deals with such subjects as liability of railway as carrier, undue preference etc, would be valid. General Manager strongly urges retention of Clause 22 similar clause is in the Union Act and has been recommended by Royal Commission of enquiry into Australian Railways. Support proposal and consider useful as indication of line of railway policy. Its omission would be likely to lead to criticism and misunderstanding. Request earliest possible reply propose to put the Order in Council before the Legislative Council at the session commencing on 11th August.

*g.w.
8/14/25*

12

Mr. Bottomley. 27/7 - *Reading minute*
today

Mr. *Burke* 27/7 Sec regional note to Mr. J. Strachan *min. re.*

Mr. S. Mackey. 27/7

Sir J. Shuckburgh *Ind*

Sir C. Davis.

Sir G. Grindle. *27*
18/11/50

Sir I. Mackintosh *GMTA.*

Mr. Ormsby-Gore. *at once*
28/7.

Mr. Amery.

Call a sat.
28/7/50

DRAFT. TELEGRAM.

192

GOVERNOR

~~xxx~~

NAIROBI.

18 July. Your telegram of 20th

July 322 your telegram of 24th July

33950

330 Clause 1, I ^{*agree to view*} ~~agree with you~~ that High

Commissioner should be created corporation

sole and do not consider that any misunder-

standing should arise. If separate

entity is not to be created reason for

appointment of High Commissioner dis-

appears. Further, railway will acquire

land for sidings or offices etc., and

this should be held not by Govt. but by

High Commissioner. Clause 4 (2) I am

not satisfied that illustrations con-

tained in your telegram are on the same

footing, and I should prefer to omit as

previously

2 drfts.

previously proposed, but at the same

time to add to Clause 25 (begins)

"and all laws at present applying to

the services shall continue to apply

thereto save and insofar as they may

be inconsistent with the provisions

of this Ordinance^{er} until repealed or

amended by the legislatures of Kenya

or Uganda" (ends.) Clause 22, I have

not found similar provision in Union

Act and I fear that insertion of vague

provision as in first part of Clause 22

will give rise to trouble later.

Result is that Courts at instance of any person aggrieved
Experience shows that legislation con- have power to determine
taining generalities of this kind lead the policy of the Railway

to dispute of most important character and

^{& litigation}
in one instance serious difficulty

exists at the present moment. Should therefore

greatly prefer not to include this

Clause but if on reconsideration you

consider that something is absolutely

essential to satisfy local opinion

~~essential to satisfy local opinion~~

I do not propose to insist.

~~644~~

Mr. Bottomley. 27/7 - see my minutes of 27/7

Mr. *Smith* 27/7 *and*

Mr. Strachey. 27-

Sir J. Shuckburgh.

Sir C. Davis.

Sir G. Grindle. *Smith-Lambert 27/7*
Sir J. Macartney-Smith

Mr. Ormsby-Gore. 29-7 *at once 20/7*

Mr. Amery.

10 copies

*Could be sent
J.C. 12-50 pm
26/7/25*

J. D.
28 JUL
D

DRAFT TELEGRAM.

DO NOT GO IN CONFIDENTIAL CODE.

Confidential. 28th July.

GVERNOR

NAIROBI.

2 drfts.

Since terms of my telegram of even date Railway Order in Council ~~Clause 22~~ were settled Governor designate has drawn attention to possibility of widening basis of taxation in Kenya and arranging for some sort of royalty to be paid by railway to Govt. out of goods carried of particular kinds. He has no intention of developing his idea until he can consider matter fully on the spot but you will realise that if Clause 22 is inserted in Order in Council any action in this direction will be impossible. That is an additional reason for your endeavouring to secure that it remains

omitted but you will of course make
no statement as to the Governor's
views.