

DESPATCH

EAST AFR. PROT
No. 37782

G.O.
37782
REC
R. 23 N.T. 15

1905
70
12299

(Subject)

Mr Barthe's app't as Judge

Instrument drawn up app't when
The Judges are doubtful as to the validity of
the instrument. Deane's copy letter from Mr Barthe
in the subject States arrangements to pay Commission
that he should draw pay as 2nd class from 1st April 1905

(Minutes)

Mr Risley

J.R.

5/5

Mr Cox
Mr Anstey

Putting on one side colonies (such as London & Straits) where
Judges are appointed by L.P. under the Act of the colony, named
in pursuance of Royal Warrant under Sign Manual, I think
I think that it will probably be found that our practice
as to appointment in other colonies (as described in minutes
on 12299) is in most if not in all cases prescribed in
express terms by the laws of the colony.

This is the case as regards Gold Coast, Lagos, N.W.S.
Nigeria (and therefore probably throughout W. Africa) and
also as regards Bahamas, B. Guiana, B. Honduras, &
Jamaica (where S.P.'s instructions is an allusion to
Royal Warrant) - and no doubt elsewhere in W. Indies.
So also in Hong Kong.

In S. Africa, on the other hand, the Com. usually were - being
Judges shall be appointed by H.M. and as the legends

Printed copy 126/10 to be sent
to avoid the 28/9 ca. - 05 at

1055/6

One is similar on this point and the validity of judicial appointments is a matter of solid importance we must think seriously consider whether our usual practice of appointment by instrument under the Protector's seal in absence of instruction by the King or behalf of HM is justified in Africa & Legation by the terms of the Oath These instruments however in various times another no usual practice was a Royal warrant and I am not at all clear that the instrument suggested by Sir N. Holt on 12/2/99 can be drawn from this & hence

Before discussion is taken I think the history suggested is asked to be noted whether our usual practice stands in the case of this colony or not the law of which I think suggested necessary to be appointed by

25/10

Mr. Antrobus

I think a Judge of the High Court of the Colonies is appointed by HM and may be desirable to refer to the

20/11

11/11

10/11/11

Mr. Risley

be that that Mr.

having my head made out here with

CA 28/11

Mr. N. Holt

Please see the above minutes of the Library, return to result it appears that the judges in Barbados, Grenada, and

and other things in the Spectator

the Chief Justice in St. Vincent & also in St. Lucia & 218 appointed by HM.

Will you say whether a Royal warrant is dispensed with in the appointment of the above judicial officers and our usual practice of appointment by an instrument under the public seal of the colony adopted?

I think the same practice may safely be adopted in the case of B.C. Africa, Africa, Legation (and the others) And kindly pass the app. on to Mr. Cox

28/11/11

Mr. Cox

No Royal Warrant is issued in any of the above cases referred to by Mr. Risley. Whether the Governor usually issues any instrument we have no means of knowing. Sir W. Mansfield however expressed an opinion in a Georgia case Feb 17/93 that where the local law did not specify any particular mode of appointments the Statute despatch and its notification in the local Gazette was sufficient proof of its appointment though it would have been more regular for the Governor to have issued a Commission under the Public Seal of the Colony in the Governor's name

CHL 29/11

Mr. Antrobus

Mr. Bullt apparently issues a Commission under the Royal seal manual I am still of the opinion which I expressed above concerning the appointment of a Judge of the High Court of the Colonies. If the King's Commission is to be appointed by the

37782
REF
23 OCT 1905
COMMISSIONER'S OFFICE

EAST AFRICA PROTECTORATE.

No. 517

MOHRASA.

September 27th 1905.

SIR,

In obedience to the instructions contained in your despatch No. 212 of May 1905, I have the honour to report that an instrument has been drawn up under the Public Seal of the Protectorate appointing Mr. Barth to be a Judge of His Majesty's High Court of East Africa.

In view, however, of the terms of the Order-in-Council 1905, the Judges are doubtful as to the validity of this instrument. I have the honour to transmit to you herewith a copy of a minute by the Council on the subject.

As regards the matter of pay, I have issued instructions for Mr. Barth to be paid the salary of Crown Advocate (five hundred and twenty five pounds per annum) to August 3rd inclusive, and as Second Judge (seven hundred pounds per

annum

Principal Secretary of State

for the Colonies,

Downing Street,

London, S.W.

annum) from August 24th, this being the day on which Mr. Combs left England and commenced to draw pay as Crown Advocate. But as it was intimated in Foreign Office telegram No. 43 of March 2nd that Mr. Barth would be appointed to the second judgeship vacated by Mr. Hamilton, and as your despatch containing instructions for the appointment to be issued was dated May 5th 1905, and since Mr. Hamilton vacated that post and assumed the duties of Principal Judge with the higher rate of pay on April 1st 1905, I venture to recommend that Mr. Barth should draw pay as second Judge from April 1st 1905.

The reason the instrument of appointment was not issued before was owing to the non-arrival of the Crown Advocate.

I have the honour to be,

Sir,

Your most obedient,

humble servant,

Acting Commissioner.

COPY.

P.O.
37782
Recd
23 OCT 36

216

MINUTES
-----000-----

I enclose for your signature a form of appointment drafted in accordance with the instructions contained in this despatch but having regard to the terms of the Order-in-Council 1902 I am doubtful as to its validity.

Article 10 of the Order-in-Council 1902 gives the Commissioner subject to the direction of a Secretary of State, power to appoint on behalf of His Majesty such public officers for the administration of East Africa under such restrictions as he may think fit.

Article 17 sub article 1 provides that every Judge shall be appointed by His Majesty and shall hold office during his natural life. By Article 19 the provisions of Article 10 are excluded from application to the appointments of Judges of the High Court. It is therefore of the opinion that any appointment must be made by His Majesty.

In Judge Hamilton's appointment (vide copy herewith) the Order-in-Council is recited and it is especially mentioned that whereas "the Judges of the said Court" (i.e. the High Court) "should be appointed by us" etc.

It is a matter of importance that there should be no doubt as to the locality of the appointment otherwise it might be possible to upset on appeal any judgment made by me.

When a provision is made by law that any particular appointment should be made by the holder of a certain office or a certain person, do not think the power to make such an appointment can be delegated by the holder of that office or that person to some one else without an alteration in the law.

I

Reference to the Order-in-Council of
May 1902 & the Order-in-Council
of 1902 of March 1902
Indubitably
Received
by me
Appointment of Judge Hamilton
to East Africa

I therefore venture to suggest that the matter be referred home for further consideration. As such consideration may take some time I would recommend that the enclosed appointment should be signed at once. I could discuss the matter with the Colonial Office when on leave.

I have submitted this minute to Judge Hamilton and he authorizes me to say that he agrees with it.

1905.

Ed/- J.W. Barth.

Common
39/782

E.A.P.

26
11 December 1905

DRAFT.

Q. Barth Esq

Sir,
I am directed by the
Secy. by Mr. Hutton to say you

MINUTE.

- Mr. Bottomley 8/12
- Mr. Reid
- Mr. Andrews
- Mr. Cox
- Mr. Lucas
- Mr. Graham
- Sir M. O'Malley
- 7 Trustees of Marlborough

[Handwritten signature/initials]

that he has had under
his consideration the minute
which you addressed to
the late Commissioner
of the East Africa
Protectorate on the 25th of
August last on the
subject of the validity
of the instrument by
which you were appointed to be
Judge of the High Court
of East Africa.

I am to request that you

You will call at this

Office at your early

convenience in order to

understand the

substantive part of

A. I.

Comm. S.A.P.
37782

(In)

10 January 1906
~~10 Jan 1906~~

DRAFT

Ref. Prot. no. 114

CP. Publ. CA.

MINUTE.

Mr. Biggs 39/12
Mr. Kelly 10
Mr. Rand 130

Mr. Andrews 200

Mr. Cox 100

Mr. Lucas 100

Mr. Graham 100

Mr. M. O'Sullivan

For. Sec. of Marlborough

Mr. [unclear]

1/50
1/50

Sir,

I have the honor to
acknowledge the receipt of Mr.
Jackson's despatch no. 57
of the 27th of September
last, and to inform
you that I do not
consider that any
instrument other
than the instrument
which has been issued
under the Public Seal
of the Protectorate
need to be required to
give effect to the
J. W. Bartlett addit
as a page of the

High Court of

Africa

2 I have to point
Although
it is to be that the

Order in Council of
1902 provides that

every Judge shall be
appointed by H.M. & it

does not specify that
the appointment shall be
made under the

Order in Council, and

I consider that any

Judge who is

appointed by H.M.

is appointed

by H.M.

is appointed

is appointed

is appointed

has been enacted
preventing that 220

Judicial Officers should
be appointed by H.M.

it has not been usual
to issue a Commission

under the Sign Manual,
and, I have if such

an instrument were
given to Mr. Barth,

it would be necessary
to pass a ^{law} ~~statute~~ validat-

ating all his past
actions, as doubt

would be cast
on their validity

4. With regard to the
question of Mr. Barth's

salary I regret that
I am unable to answer

