

DESPATCH

EAST AFR. PROT.  
No. 26675

G. O.  
26675  
Dec 20 1895

No. 161  
1905  
8 July  
previous Paper.  
has  
26/92

(Subject.)

Case of Alaa Wehner

Reports regarding constitution of Court  
wh told case and sends terms of judge's  
memorial to Commissioner.

(Minutes)

To Percy

Dfg has with a minute with

WBB  
28/7

Set to examine cows 2 Aug  
Copy Comm. 28/7 - 7 Aug

Mr. Cox

- 1/ Act 4 of the OMC of 1899 constituted the Protectorate Court a Sessions Court, and this provision applies to us saved by act 28(1) of the OMC of 1902, but it might well be argued that acts 15 & 16 of the latter OMC made full provision as to the Courts and so it repealed in fact the Orders of 1897 & 1899 and the "Protectorate Court" was thereby abolished, these consequences being assumed as "Sessions Court" to be saved.
- However, we must rely on act 28(1) of the 1902 OMC.
- 2/ The practice as to trial by jury in the Sessions Court has been irregular and as far as I can see, entirely unauthorised by law.
- There is a by-law in the Court Rules and also, I think, in the Rules of the Court, which provide for a trial by jury in the Sessions Court.
- I think this is a fatal objection to the validity of the proceedings against Coburn.
- 3/ There remain 2 other objections, unexpressed of -
- (a) The witnesses were induced to speak the truth. They did have under affirmations. Indian Courts Act 10 of 1873, s. 25.
  - (b) If truly jury, say the court procedure, the jury were not sworn at the time laid down by Crim Proc Code sec 20, but in the middle of the proceedings, and after the 2 most important witnesses had given evidence! (See Petition para 11/4).
- 4/ There also remain other legal objections as to jurisdiction etc.

? Send immediately to Mr Greenwood copies of our telegram (for conversion of rupees) copy of the Commissioner's letter showing, if you agree as above. I understand OMC of 1899 & 1902 (1899 OMC we have not a single copy of in the office and it is not really relevant here as act 14 was repealed by the 1902 OMC) & R. 101

Accepted

C. O.  
26675

Telegram.

Commissioner Sir Donald W.K. Stewart to Mr. Hamilton.  
(Received, Colonial Office, 5.0.P.M. 28th July, 1905.)

Your telegram of 25th July Hamilton did not place on record anything concerning his jurisdiction to try Wagner. From Indian code of Criminal Procedure as applied to British East Africa Protectorate chapter 33 relative to trial of Europeans is excluded. Hamilton in fact sat as sessions judge. A sessions Court within the meaning of paragraph 9 of the code of Criminal Procedure was created under Article 14 Order in Council 1899 (1897). This was re-affirmed by Article 4 Order in Council 1899. Though old Protectorate Court was nominally made High Court by Article 18 Order in Council 1902 a judge continued to sit as sessions Judge under Article 14 Order in Council 1897 and Article 4 Order in Council 1899; this old procedure is kept alive by virtue of Article 28 (1) Order in Council 1902 there having been to this time no provision made for alteration of practice or procedure. This matter was considered and provision made in draft Judicature Ordinance sent home immediately after Order in Council 1902 appeared. The draft is still under consideration. Under code of Criminal Procedure as applied to protectorate all Sessions cases are triable by Judge with assessors except where local Government provides that any class of offences shall be triable by Jury. Trial by Jury not having been ordered by local Government under section 269 code of Criminal Procedure no order has consequently been made under section 254

fixing

REPLIES SHOULD BE ORDERED "VIA EASTERN."  
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11 & 12, PARLIAMENT STREET, S.W.

Parliament Building, CONVENT PLACE, W.C.

140, STRAND, W.C.

C.O.  
 26675  
 29 JUL 05

Following Telegram Received via EASTERN, at

NAIROBI 222 22 10.40 AM. GOVT.

GRANCHERIES LONDON

*From tel of 25 July*

RUMOURING HOOGSTERS HAMILTON *deduct* PLACE ON RECORD  
 DETRIMENT PARENTHIA

CONCERNING HIS *jurisdiction* HOOGSTALL TO TRY OTHER PANGKUVUNG

INDIAN CEREMONIAL AS APARTMENT *Code of Criminal Procedure* ALEKHOFFING CHAFFER 22

INDUCERS EUROPEAN IS EXCLUDED PANGKIVING HAMILTON

SAT AS SESSIONS JUDGE PANGKIVING A SESSIONS

REPLIES SHOULD BE ORDERED "VIA EASTERN."  
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10, BISHOPSGATE, LONDON, E.C. 4.

OLD KING STREET, LONDON, E.C. 4.

THE EASTERN TELEGRAPH COMPANY, LIMITED  
10, BISHOPSGATE, LONDON, E.C. 4.

The following Telegram Received via EASTERN, at <sup>4</sup> CHANCERIES, m.

19

ORDER WITH ASSESSORS EXCEPT WHERE LOCAL GOVERNMENT  
PROVIDES THAT ANY CLASS OF OFFENCES *shall be* BICORPORAL TRIABLE  
JULY FAMEGIVING *Trial by* SEDUCERS JURY NOT HAVING BEEN ORDERED  
LOCAL GOVERNMENT UNDER SECTION 269 *Code of Criminal Procedure* CEREMONIAL NO  
ORDER HAS *consequently* COHERENTLY BEEN MADE UNDER SECTION 284 FIXING  
ORDER OF JURORS FAMEGIVING THE PRACTICE ALWAYS HITHERTO  
ORDERED IN COLONY EUROPEANS *conducted to* CHINKING *is recommended by* SESSIONS COURT IS

REPLIES SHOULD BE ORDERED "VIA EASTERN."  
EASTERN TELEGRAPH COMPANY, LIMITED.

SALE

11, OLD

BRANCH

ELECTRA

LANE, NEW STREET, NEW

The following Telegram Received via EASTERN, at

CHANCERIES.

19

RE LUSINGO, CONDEMNED MAN BEDIZEN A NEPOTISM CRIME,

STEWART.

Com<sup>3</sup>  
26675 E.A.P.

614

By Messrs this  
morning 29/7

2 copies

29<sup>th</sup> July 1905

DRAFT

Mr. Sanderson, Adkins,  
Lee and Eddis

Gentlemen, Ind.

I am directed by  
Mr. Beer; by letter to  
transmit to you, with  
ref. copy letter of  
the 24<sup>th</sup> of July the  
accompanying  
abstract from a ledger  
which has been received  
from the Com<sup>3</sup> of the  
E.A.P. Part to accompany  
reporting the substance

MINUTE.

Mr. Bostwick 29/7

Mr. Peirce 29/7

Mr. Andrews

Mr. Cox

Mr. Lucas

Mr. Graham

Sr. M. Osmanney

The Duke of Marlborough

Mr. Lyttelton

Amount 2786

26675

for 336. 7 Aug. 1905

W & L 26675

the party in the case  
of Messrs. & Co. Ltd.

Com SAT  
26675

615

By receipt this money  
1911

*2 copies*

DRAFT.

The Treasury Solicitor  
(Com. and Branch)  
Room 276 Royal Courts of  
Justice

MINUTE.

- Mr. *Brook* 29/7
- Mr. *Perby* 29/7
- Mr. Antrobus
- Mr. Cor.
- Mr. Lucas.
- Mr. Graham.
- Sir M. Osmanney.
- The Duke of Marlborough.
- Mr. Lyttelton.

*In com*  
*Com*  
 Tel: 26675  
 (26675)  
 Tel: 161  
 (26675)

1877  
 C. 1702

*Com*  
 338  
 2046

29<sup>th</sup> July 1905

Sir

Sir:

I am directed by  
 Mr. Secy. Lyttelton to  
 transmit to you the  
 copy of your letter of the  
 25<sup>th</sup> of July, the  
 enclosed copy of a petition  
 which has been received  
 from the Com. of the  
 E.A. Prot. on the subject  
 of the points raised  
 by the solicitors for  
 Max Herman Wehner  
 in connection with his  
 petition to the  
 Com. to appeal to  
 the Privy Council from  
 the Court of Appeal  
 in *Ex parte* a *firm*, a copy

Com. of the E.A. Prot.



of the telegram which  
was sent to Sir D.  
Sims on the 25<sup>th</sup> of  
July is also enclosed  
for convenience of  
reference, together

with copies of the  
East Africa Orders in  
Council of 1899 and 1902

2. It is to be observed  
that article 4 of the O.  
C. of 1899 constituted the  
Protectorate Court a

Sessions Court, and that  
this provision appears  
to be saved by article

28(1) of the O. C. of 1902,  
but it might well be  
argued that articles 15  
and 18 of the latter Order  
made full provision  
as to the Courts and, as  
it appeared in 1899  
the Orders of 1899 and 1902

and that Protectorate Court  
was thereby abolished,  
there consequently remained  
no 'Sessions Court' to be  
saved under article 28(1).  
It seems necessary, however, to  
rely on that article.

3. The practice as to trial  
by jury in the Sessions  
Court has been irregular  
and as far as can be  
ascertained, entirely  
unauthorized by law.  
Under sections 268, 269  
and 284 of the Code of

no order having been made  
under sec 269.

Criminal Procedure, the  
trial should be by  
assessors. Mr. Haffelton  
regards this as a fatal  
objection to the validity  
of the proceedings against  
Behmer.

4. Mr. Haffelton also observes  
that the witnesses, who were