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# Report of the Commission of Inquiry into the Administration of Justice in Kenya, Uganda and the Tanganyika Territory in Criminal Matters May, 1933 and Correspondence arising out of the Report

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# Report of the Commission of Inquiry into the Administration of Justice in Kenya, Uganda, and the Tanganyika Territory in Criminal Matters

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**To the Right Honourable Sir Philip Cunliffe-Lister, G.B.E., M.C., M.P., Secretary of State for the Colonies.**

## I.—INTRODUCTION.

SIR,

We have the honour to submit the report of the Commission appointed by you to inquire into the Administration of Justice in Kenya, Uganda and the Tanganyika Territory in criminal matters.

2. Our terms of reference were as follows :—

To inquire into the administration of the criminal law in Kenya, Uganda and the Tanganyika Territory in relation to the procedure and practice of :—

(*a*) the Courts (other than Native Courts), and

(*b*) the Police Authorities,

and to consider whether in regard to the procedure of such Courts or Authorities any alterations are desirable,

(*a*) in the case of natives, and

(*b*) generally.

3. We held our first meeting in Nairobi on the 27th March and our last in Dar es Salaam on the 27th May, 1933. Details of our itinerary will be found in Appendix I.

4. In response to invitations published in the three territories seventy-seven Memoranda were submitted and eighty-six witnesses appeared to give evidence. We desire to convey our thanks to those who assisted us by preparing Memoranda for our consideration, and by giving evidence before us. A list of the witnesses who appeared before us is given in Appendix II.

5. We are indebted to the Director of Surveys of Tanganyika for the maps* which accompany our report. The total area of the three territories is approximately 700,000 square miles or about the combined size of France, Germany, Austria, Spain, Portugal, Switzerland, Belgium, and Holland.

6. Kenya, the area of which is 225,000 square miles, falls into three main divisions in so far as communications are concerned :—

(i) the Coastal belt,

(ii) the Highlands and Lake Victoria littoral, and

(iii) the Northern Frontier and Turkana Provinces.

The Kenya-Uganda Railway runs westward from Mombasa to Nakuru where it forks, one branch going on to Kisumu on Lake Victoria and the other passing round the northern end of the Lake

* Not reproduced: a general map of East Africa has been substituted on grounds of economy.

into Uganda, the terminus being at Kampala. There are a number of branch lines connecting places in the Highlands with the main line and a fairly complete road system whereby most places in the Highlands and Lake littoral areas can be reached all the year round. Communications on the Coast are, however, less good, depending on coasting steamers and a rudimentary road system. There is for instance no communication by road between Mombasa and Lamu; we understand that such a road is projected but we are informed that when it is completed it will probably be open only for about half the year.

7. The Northern Frontier and Turkana Provinces are arid areas, bordering on Abyssinia, in which distances are great and communications bad and, though it is not difficult to reach the capital of either Province by road, even when the capital has been reached great distances are involved within the Provinces themselves.

8. The area of Uganda is 90,000 square miles and the country is admirably served by a road system which is not subject to interruption in the rainy season except in a few outlying parts or on rare occasions of emergency. In addition to this road system, there are branch railways to Namasagali and Soroti and there is a steamer service to Lake Albert and from there down the Nile to the frontier. The only parts of the Protectorate which are in any way remote and difficult of access are Karamoja and the West Nile. If these two districts are excluded the area of the Uganda Protectorate is about the same as that of the Central and Iringa Provinces of Tanganyika.

9. Tanganyika, which is more than four times the size of Uganda and much less well provided with permanent roads, presents a quite different problem. There are two railway systems, one from Tanga to Arusha with a branch connexion from Moshi to the Kenya-Uganda Railway at Voi, and the other from Dar es Salaam to Kigoma on Lake Tanganyika, a distance of 781 miles, with a branch line at Manyoni to Singida and another from Tabora to Mwanza on Lake Victoria, Mwanza being 762 miles from Dar es Salaam. It is interesting to note that a journey from Dar es Salaam to Kigoma or Mwanza is roughly the same distance as from London to Madrid or Vienna. Lateral communications on the Coast consist of mere tracks liable to interruption by rain for prolonged periods and, though there is a fairly frequent steamer service between Tanga and Dar es Salaam, the smaller places such as Bagamoyo, Kilwa, Lindi and Mikindani, are much less well served and suffer from the general disadvantage that a visit must be curtailed to the few hours during which the steamer lies in the port or extended for a fortnight until its next visit.

10. In the Tanga and Northern Provinces, however, communications are fairly good with the exception of the remoter parts of the Handeni, Masai and Mbulu districts, and all the district headquarters can be reached by rail or road at all seasons of the year

with the exception of Mbulu; two sub-stations in the Masai district (Lolbene and Loliondo) may also be difficult of access for considerable periods. In the Eastern Province, Utete, the headquarters of the Rufiji district, may be cut off from Dar es Salaam for a month at a stretch by floods and Mahenge is usually accessible by motor transport only for five or six months in each year and, if the rains are exceptionally severe, only for four months.

11. From Dodoma, the capital of the Central Province, all stations in the Central and Iringa Provinces can usually be reached by road or rail throughout the year, though Kondoa-Irangi and Tukuyu may be quite cut off during exceptionally heavy rains for as much as a month at a time. Ufipa, however, in the Western Province, has no means of communication with the rest of the Territory other than a precarious motor road from Sumbawanga, the district headquarters, to Lake Tanganyika, and the fortnightly sailings of the Tanganyika Railway steamer on the Lake, which connect it with Kigoma. The other stations of the Western Province are within reasonable distance from the railway, but to the south, the Province, though very lightly inhabited, and having no permanent Government station, extends for 250 miles. An all-weather road, however, is being constructed from Mbeya in the Iringa Province to the Lupa Goldfields which adjoin southern Tabora. It is interesting to note that the Western Province is 10,000 square miles larger than the Uganda Protectorate.

12. The Lake Province of Tanganyika consists of the densely populated areas adjoining the southern half of Lake Victoria, the population of the Province being 1,400,000. Except for Bukoba, Biharamulo and Musoma, and the two sub-stations of Bugufi and Tarime, road or rail communications permit of all the stations being visited throughout the year from provincial headquarters without difficulty. Musoma and Bukoba are dependent upon the Lake steamer service of the Kenya and Uganda Railways and Harbours Administration with the usual difficulty of infrequent services and inconvenient periods in between steamers. Biharamulo is 113 miles south of Bukoba by road, and Bugufi 114 miles west of Biharamulo.

13. In the south of the Territory the Lindi Province extends from the Indian Ocean to Lake Nyasa, a distance by road of close on 500 miles. There are three stations on the Coast (Kilwa, Lindi and Mikindani) and five inland (Masasi, Newala, Liwale, Tunduru and Songea). The only communications are earth roads which are liable to interruption by heavy rain and are generally impassable for nearly half of each year. Songea is connected by road with Lake Nyasa, where there is the usual infrequent steamer service. The routes, shown on maps, connecting Songea with Njombe and Mahenge are now no longer maintained and cannot be regarded as passable with certainty at any time of the year.

14. In one respect Tanganyika has an advantage over its neighbours, and that is in the matter of aerodromes which are to be found at almost every station of importance. Air travel is a normal means of communication in the Territory.

## II.—MAJOR DEFECTS IN THE ADMINISTRATION OF JUSTICE.

15. We began our sittings in Kenya and our first inquiries were directed to the working of the system for the administration of justice in criminal matters in that Colony. Thence we passed through Uganda into Tanganyika Territory. Comparatively early in our investigations the major defects in the administration of justice became apparent, and we think it desirable to indicate at the outset what they are.

16. Generally speaking the British conception of a system for the administration of justice in criminal matters would involve a sufficient number of judges, who would have the assistance of experienced counsel, and who would try all serious crime. Magistrates would be concerned only with the trial of less serious crimes and with the holding of preliminary enquiries in indictable offences, and their powers of punishment would be comparatively small. Such a system would be organized so as to try offenders without undue delay, to be easy of access to those members of the public who as complainants or witnesses were brought into contact with it, and would be generally familiar to the people.

17. In theory a system of this kind has been set up in the three territories, and indeed obtains at their capitals and at a few of the larger centres. If it were to be found in operation generally, the principal defects to which we shall draw attention would not exist; indeed we would go further and say that only when it is able to function effectively over the whole area will it be possible to regard the situation as completely satisfactory. As regards serious crime we are satisfied that trial by the High Court according to established forms and rules is the best system, but there is abundant evidence to show that incidental thereto there may be serious abuses due, not to the system itself, but to the impossibility of operating it properly with present resources. The evidence discloses that in any case it is not the judges but the magistrates, who with few exceptions have no legal training, who try most of the cases of serious crime.

18. It is no exaggeration to say that the machinery for the administration of justice as apparently set up by law in these territories does not work, and, as at present constituted, cannot work. This is a grave statement, but is fully supported by the evidence which we have heard. No machinery, however perfect it may be in itself, can perform its primary function of meting out justice to the people unless it takes justice to the people and administers it with despatch, with independence, with certainty, and with skill.

It may have to be admitted that financial considerations do not permit of a complete reform immediately, but no possible effort should be spared to make the machine work satisfactorily, so that prolonged delays in trials and undue hardship to witnesses and parties may be avoided.

If Magistrates of the subordinate Courts had less extensive powers over natives, there would not be the same occasion for the constant interference by the Judges on Confirmation and Revision, and the Judges themselves would not be confined to the trial of a small part only of serious crime.

At present the system in its working is so remote and impersonal as to be little understood and appreciated among the twelve million natives over whom it is supposed to function.

19. To ensure an appreciation of these defects in the administration of justice, their causes and consequences, it is necessary shortly to describe how the courts work in each of the territories, but before proceeding to do so we desire to state concisely the respects in which the system has failed. They are :—

(i) The conferring of excessive jurisdiction on magistrates of the Subordinate Courts.

(ii) The excessive use of the power of investing magistrates with the jurisdiction of the High Court.

(iii) The fact that the High Courts of the territories are understaffed, with the result that circuits are held at too infrequent intervals and at only a few of the larger centres of population.

(iv) In the case of Tanganyika the centralization of the High Court at Dar es Salaam.

## The Existing System, Kenya.

20. For convenience the term High Court is used throughout this report to include the Supreme Court of Kenya as well as the High Court of Uganda and Tanganyika Territory.

21. In Kenya there is a Supreme Court consisting of a Chief Justice and three puisne judges, one of whom is stationed in Mombasa, while the others have their headquarters in Nairobi. Throughout the country there are Subordinate Courts, that is to say courts presided over by magistrates. The Subordinate Courts are of three classes, and their jurisdictions over natives are set out in the Criminal Procedure Code as follows :—

*Section* 10.

(1) Subordinate Courts of the first, second and third class may try natives for any offence under the Penal Code or any other law other than offences under Sections 36, 37 and 38 of the Penal Code (treason and analogous offences), murder,

manslaughter, rape or attempts to commit or aiding, abetting, counselling or procuring the commission of any such offences.

(2) Subordinate Courts of the first and second class may pass on any native so tried any sentence authorized by the Penal Code or any other law.

(3) Subordinate Courts of the third class may pass on any native so tried a sentence of imprisonment for a term not exceeding six months or a fine not exceeding twenty pounds or both.

22. The magistrates of the Subordinate Courts are either Resident Magistrates who are officers of the Judicial Department with legal training, and of whom there are eight in the Colony, or Administrative Officers who rarely have any legal qualifications and who exercise judicial functions *ex officio* according to their rank in the administration. Sir Jacob Barth, Chief Justice of Kenya, described the situation to us in these words :—

" . . . They can try for any offence except certain offences set out in the ordinance and can give any sentence. There is no limitation at all and you have subordinate courts consisting of unqualified people, i.e. a great many of them have had no experience in legal matters at all. So far as Kenya is concerned, once an Administrative Officer has passed his law examination, the tendency is to make him a second class magistrate and second class magistrates have full jurisdiction over natives . . ."

23. So far as natives are concerned, therefore, the Supreme Court tries only cases of treason and analogous offences, homicide, and rape, which, in Kenya, is a capital offence.

24. In Mombasa criminal sessions are held every other month and in Nairobi monthly. In addition, judges of the Supreme Court go on circuit every quarter to Nyeri, Meru and Embu, Nakuru, Kisumu, Eldoret and, if necessary, Kitale.

25. The Northern Frontier Province and the Turkana Province are special districts under Sections 14 and 15 of the Criminal Procedure Code which read :—

*Section* 14.

The Governor in Council if satisfied that the necessity exists may, by order, direct that any area in the Colony shall be a special district for the purposes of this Code.

*Section* 15.

The Governor may, by appointment in the Gazette, confer upon any officer in charge of a special district, holding a Subordinate Court of the first or second class, power to try natives for offences under section 36, 37 and 38 of the Penal

Code, and for the offences of murder, manslaughter and rape, and for attempts to commit or aiding, abetting, counselling or procuring the commission of any such offences:

Provided that all such offences shall be tried with the aid of assessors, and shall be inquired into and tried in the manner prescribed for the trial of such offences by the Supreme Court.

26. Cases in these two Provinces are committed for trial to the Supreme Court, but unless it is practicable to send a judge to take the case at an early date the Provincial Commissioner is directed to hear it so as to avoid delay.

27. In Kenya there is no unreasonable delay up to the determination of a case by the Supreme Court, but the country, even excluding the two special districts, is of considerable size and a system which concentrates the administration of justice in a few of the larger towns must at times entail long journeys and prolonged absence from home for many witnesses. Every effort should be made to bring justice to the people by holding assizes at least at every district headquarters.

28. We desire, however, to draw attention to the fact that the Supreme Court of Kenya is enabled, with reasonable expedition, to deal with the criminal cases committed to it for trial only because so many cases of serious crime are dealt with by magistrates of the first or second class, and the number of cases committed for trial is therefore relatively small. With this aspect of the situation in Kenya we deal in a subsequent part of this chapter.

## The Existing System, Uganda.

29. In the Criminal Procedure Code of Uganda there is a provision regarding special districts similar to that in the Kenya Ordinance. In Uganda, however, much greater use of the section has been made and, of the eighteen districts in the Protectorate, thirteen are special districts into which in practice the High Court seldom penetrates, its jurisdiction being in effect confined to the Buganda Province and part of the Eastern Province.

30. The High Court consists of a Chief Justice and one puisne judge. Assizes are held in Kampala as occasion demands and at Jinja, Soroti and Mbale quarterly. Throughout the rest of the Protectorate all serious criminal charges are tried by magistrates, by virtue of the provisions of the law relating to special districts.

31. The jurisdiction of magistrates over natives in Uganda is the same as that prevailing in Kenya, except that in Uganda a magistrate may not impose a sentence of more than two years imprisonment unless he sits with assessors.

## The Existing System, Tanganyika.

32. In Tanganyika the High Court consists of a Chief Justice and two puisne judges. The jurisdiction of magistrates, which is the same over persons of all races, is limited by sections 7, 8, and 9 of the Criminal Procedure Code which provide as follows :—

*Section* 7.

A Subordinate Court of the first class may, in the cases in which such sentences are authorized by law, pass the following sentences, namely :—

Imprisonment for a term not exceeding two years. Fine, not exceeding three thousand shillings. Corporal punishment :

*Section* 8.

A Subordinate Court of the second class may, in the cases in which such sentences are authorized by law, pass the following sentences, namely :—

Imprisonment for a term not exceeding twelve months. Fine, not exceeding one thousand five hundred shillings. Corporal punishment, not exceeding twelve strokes :

*Section* 9.

A Subordinate Court of the third class may, in cases in which such sentences are authorized by law, pass the following sentences, namely :—

Imprisonment for a term not exceeding three months. Fine, not exceeding five hundred shillings. Corporal punishment on juveniles only, not exceeding eight strokes :

33. The Territory is a vast one, and the restrictions placed on the powers of magistrates, not only by the limitation of their powers of punishment but also by the reservation to the High Court of certain classes of criminal offences, necessarily entails more work for the High Court.

34. The Tanganyika statute book contains no provision for special districts but there is in Sections 14 and 15 of the Criminal Procedure Code an analogous provision empowering the Governor by order to invest any Resident Magistrate, Provincial Commissioner or District Officer with power to try any class of offence. An Extended Jurisdiction Order was made in 1930. The effect of that Order, as from time to time amended, is :—

Pending the holding of assizes of the High Court for the trial of cases in the districts mentioned below :—

(*a*) the Resident Magistrate at Mwanza, within the districts of Bukoba and Biharamulo; and

(*b*) Provincial Commissioners holding a court of a Provincial Commissioner and District Officers other than Assistant District Officers and Cadets in the districts of Arusha, Mbulu, Bukoba, Biharamulo, Musoma, Ufipa,

Mahenge, Songea, Lindi, Masasi, Mikindani, Kilwa, Newala, Tunduru, Iringa, Rungwe, Mbeya and Njombe,

are hereby invested with powers to try any class of offence and to impose any sentence which could lawfully be imposed by the High Court.

35. This, however, does not confer on a magistrate the automatic right to try any case. After a preliminary enquiry all cases which the law reserves to the High Court, no matter where they arise, are committed for trial to the High Court. In theory the High Court exists for the trial of all such cases, but in practice it is obvious that in many cases from the more remote parts of the Territory it cannot possibly adjudicate. In these cases the system causes unnecessary delays.

36. It is important to remember that in all three territories the Court of Appeal for Eastern Africa makes considerable calls on the time of the Chief Justice and, at times, of some of the puisne judges also. Sir Joseph Sheridan has stated in evidence* that in 1932 the Court of Appeal took up 95 days of his time. It follows that the same amount of time was spent on the Court of Appeal by its other members, and such an encroachment on the available judicial time of small benches such as those in the territories with which we are dealing is a serious matter.

## Defects in the Existing System.

37. Such, then, is the judicial system obtaining for the trial of criminal cases in these territories. It remains to set out in greater detail the evils which have been proved to result from this system and to consider what remedy is possible.

38. We have already drawn attention to the evils which flow from the inability of the judicial machine to work properly in these territories. The chief evil is the delay in trial by the High Court, and its consequences are far reaching. Some delay between arrest and final determination of the charges is inevitable, but there is no justification for making it excessive. In Kenya a period of three months is not unusual; in Uganda the average lapse of time is greater than in Kenya. A return prepared for us by the Registrar of the High Court discloses delays of as much as seven, nine and eleven months. In Tanganyika delays are considerable and constant. A return of cases committed for trial in the Lake Province showed an average period of three and a-half months and individual cases where a man was kept awaiting trial for six or seven months. A large proportion of these cases are capital charges, and a system which allows a man to remain in custody for months awaiting trial for murder cannot escape condemnation.

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* Minutes and Evidence, page 144.

39. A further consequence of delay is the effect on the memory of a witness of the lapse of some months between the time at which he tells his story to a police officer or a magistrate and the time when he is called upon to repeat that story to a judge. An illiterate native witness is unable to refresh his memory from any written record of the evidence which he gave at the preliminary enquiry. He has probably discussed the case in all its bearings with his neighbours. His recollection of what he himself saw and deposed to and what he has subsequently been told by others becomes hazy. Such a witness, when the trial is ultimately held, is genuinely confused and is easily discredited.

40. Bad as are the delays involved in the system, there is another and a worse defect inherent in it which affects a large number of people against whom there is no charge laid. This defect arises directly from the inability of the High Court to bring justice to the people. If a trial is to be held in a place remote from where the crime was committed witnesses have to make long journeys in order to give evidence. Such journeys may, especially in Tanganyika, involve a witness walking for hundreds of miles in all sorts of weather, as well as prolonged detention in a strange environment, among an alien tribe and with the knowledge that, while he is waiting to give evidence, the planting season is rapidly passing and he may be faced with virtual starvation in the coming year. Is it unnatural, in such circumstances, that natives show extreme unwillingness to give information to the police or to admit to any knowledge of a crime that has been committed in their village?

41. We have been impressed by the unanimity of witnesses of all classes and races in Tanganyika on these problems. From all sources we have had evidence of the very real hardships which they cause. Every chief who appeared before us in Tanganyika had the same complaint to make; all spoke with feeling and distress of the hardships which their people had to endure in the interests of justice. In the prison at Bukoba we saw three men who had been four months awaiting trial. Their trials will take place in Bukoba, but the crimes with which they are charged were committed at Biharamulo, so that the witnesses will have to travel more than a hundred miles each way to give evidence.

42. Mr. Hignell, the Provincial Commissioner of the Central Province of Tanganyika, who has long administrative experience of the territory, gave evidence* as follows:—

CHAIRMAN: Mr. Hignell, you are the Provincial Commissioner, Central Province?

WITNESS: Yes, Sir.

CHAIRMAN: You deal with the question, in the first paragraph of your memorandum, of expedition in trials and the place of trial. Tell me, during the last few years has there, in your view, been considerable delay in getting cases from this Province tried by the High Court?

---

* Minutes and Evidence, page 123.

WITNESS: Very great delay, Sir, up to this last session when they have been quickened. Up to then, we had to complain several times of serious delay.

(The witness handed the Chairman a document indicating cases of serious delay.)

CHAIRMAN: Will you look at the document I have now returned to you. Does it appear from that that in January, 1932, there were twenty-three persons in this gaol awaiting trial of whom three were committed for trial in April, 1931, two were committed for trial in May, 1931, two in June, 1931, three in July, 1931, and six in August, 1931?

WITNESS: That is so.

CHAIRMAN: You have three persons who have been nine months awaiting trial, two who have been eight months, two who have been seven months, three who have been six months and six who have been five months.

WITNESS: Yes, Sir.

CHAIRMAN: You have told us that since then matters have improved.

WITNESS: Certainly, Sir.

CHAIRMAN: I dare say that you have realised that there are only three judges in this Territory. It must entail a considerable strain on the judiciary if they are to go round this country at frequent intervals?

WITNESS: It can't be done, Sir.

CHAIRMAN: And, of course, as you know, they have to lend a judge to the East African Court of Appeal four times during a year.

WITNESS: It has been proved in the past, Sir, that it cannot be done.

CHAIRMAN: Is it your experience that these delays cause real dissatisfaction to the natives, the native population?

WITNESS: Undoubtedly, Sir.

CHAIRMAN: You plead for a Resident Magistrate or District Judge to be stationed in the Province?

WITNESS: I do not see any other way in which we are to get through the work and avoid these delays.

CHAIRMAN: If that can be arranged, would you be satisfied if he could travel about, as no doubt he could, and take all the cases which are at present taken by the High Court in its exclusive jurisdiction, and all the cases which are committed to the High Court by a subordinate court—by all subordinate courts?

WITNESS: Yes, Sir.

CHAIRMAN: Would you agree that if you had that system, extended jurisdiction would not be necessary?

WITNESS: No, Sir. I feel about extended jurisdiction that it is not a part-time job for anyone.

CHAIRMAN: It is not a part-time job, nor is it a job for a man who has not been trained in law?

WITNESS: That is the point I wish to make. In my opinion extended jurisdiction is not a remedy.

* * * *

Mr. MACGREGOR: *You have told us about the hardships which the present delays of the circuits of the High Court involve, and we have heard it said that the hardships are so great that witnesses are actually reluctant to come in and give evidence. They prefer to say that they know nothing whatever about a case.

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* Minutes and Evidence, page 123.

WITNESS: They do more than that, Sir, they refuse to come.

Mr. MACGREGOR: That to your knowledge is so?

WITNESS: Yes, that is so.

* * * *

Mr. MITCHELL: There is one other thing. Would you just give us roughly the distances from which accused and witnesses and assessors have to be brought, within your Province, to come to an assize at Dodoma?

WITNESS: From Mkalama—since the new railway in last September they can come all the way to Manyoni by rail, but until then they had to come one hundred and sixty miles by road in the care of askaris. They must be kept under control, otherwise the case breaks down. At Manyoni now, of course, they are put on the train for the rest of the journey. Sometimes they arrive here three days before the High Court is due to sit. They may stop here nine days, ten days, twenty-one days, and meanwhile they are given twenty cents a day posho money, and they are brought up each day, counted and so on until the trial is over. Then they have that journey back again. We have all sorts of things happen on the road: premature births. We have had deaths—and it must be so where you are bringing young women along, and old men and women. Also it is against the feeling of the tribe to have its cases tried in an alien area. The people there may quite easily be their hereditary enemies.

From the north—Kondoa area—there is about one hundred and forty miles of which every bit has to be done by road, and in the rains possibly on foot.

Mr. MITCHELL: You said that witnesses were found refusing to give evidence. Is it, this disinclination to be brought in, in your experience so widespread that it is commonly said that if you say you know anything about it, you will be kept walking about for months, and that, if it is in the planting season, means considerable hardship?

WITNESS: It means starvation for them. Last year we had the Boma yard full of them and every one of them there knew that the locusts were eating their crops.

43. Things in Tanganyika are admittedly better to-day than they were a few years ago. Many witnesses have testified to the improvement in this respect which has been effected by the Chief Justice, but Sir Joseph Sheridan would be the first to admit that much yet remains to be done before the system can be regarded as reasonably satisfactory. Even now, though judges work for very long hours, the calendar is so heavy that the work cannot be completed in the time allotted. Either, then, the court is late at the next and every succeeding assize centre, which again means additional delay, or cases have to be left untried, to be subsequently taken by a magistrate in extended jurisdiction. Moreover, in spite of the great efforts made by the judges in the last year or two they are still only able to visit stations in about half the Territory, and even these not frequently enough. Admittedly, conditions are worse in Tanganyika than in the other territories, but in both Kenya and Uganda there is room for improvement in this respect. The problem is acute and urgent.

**Alternative Remedies.**

44. What, then, is the solution for this state of affairs? A number of witnesses have suggested that if delays are to be minimized and hardships obviated by holding a trial at or near the place at which the crime was committed, the only remedy is the extension of the system of special districts or extended jurisdiction so as to enable the Administrative Officer on the spot to try all cases that arise in his district. In support of this contention it is argued that to the natives the High Court is a remote and impersonal abstraction and that they only understand and appreciate justice when it is meted out to them by the officers whom they know and respect. It is further argued that an Administrative Officer's unfamiliarity with the " technicalities of law and legal procedure " is more than compensated for by his knowledge of the native law and custom of the tribe among whom he is working, and of their language, mentality, outlook on life and environment. Above all, say the advocates of this system, justice, though it may be rough and ready, will be speedy and intelligible to the native mind. A further point that has been advanced is that a District Officer owes much of his prestige to his exercise of judicial functions and his power to punish, and that a diminution of those powers will adversely affect his standing with the natives.

45. Such arguments are, in our opinion, fundamentally unsound. Administrative Officers in all three territories deserve the utmost praise for the manner in which they endeavour to discharge what at times must be a difficult task. A District Officer is an Administrative Officer first and foremost. Law and order in his district must be maintained. His is the responsibility for the proper policing and control of his district and an outbreak of crime is, as Mr. Wade, Chief Native Commissioner for Kenya, put the position regarding stock theft, the bane of his life. It is often difficult for him not to be aware of the details of the police investigation of crime—in some cases he has himself conducted that investigation. In such circumstances it cannot always be easy for him to assume a judicial role and to proceed calmly and dispassionately to apportion responsibility and arrive at a proper sentence. Perhaps the best way of emphasizing our point is to take the case of stock theft, which in many parts of Kenya and Tanganyika is very prevalent. Until a few weeks ago the statutory law of Kenya provided for a minimum fine for the theft of stock or produce by a native of ten times the value of the stock or produce stolen, such fine being in addition to any other punishment imposed. This provision of the law as regards fines has, we are happy to say, been repealed at the last session of the Legislative Council. Stock theft in several districts has assumed the proportions of a major political issue, and some of the sentences passed by Administrative Officers sitting as magistrates are so severe as to be, in our opinion, unjustifiable.

46. A return of confirmation cases from Kenya contains the following instances of such sentences :—

| *Offence.* | *Sentence.* | *Order in Confirmation.* |
|---|---|---|
| Theft of stock value 40s. | 3 years and fine of 400s. | 18 months and fine of 400s. |
| Misappropriation of stock value 60s. | 21 months and fine of 600s. | 12 months and fine. |
| do. | 15 months and fine of 600s. | 9 months and fine. |
| Theft of stock value 80s. | 5 years and fine of 800s. consecutive to sentence of 3 years. | 1 year and fine. |
| Theft of stock value 30s. | 3 years and fine of 300s. | 9 months and fine. |
| Theft of maize value 10s. | 3 years and fine of 100s. | 1 year and fine. |
| Theft of stock value 60s. | 3 years and fine of 600s. | 12 months and fine. |
| Theft of maize value 1s. | 1 year and fine of 50s. | 1 month and fine of 10s. |
| Theft of stock value 16s. | 18 months and fine of 160s. | 2 months and fine of 160s. |
| Theft of stock value 30s. | 4 years and fine of 300s. | 2 years and fine. |
| Theft of stock value 250s. | 5 years and fine of 2,500s. | 2 years and fine. |
| Theft of stock value 70s. | 3 years and fine of 700s. | 1 year and fine. |

47. The Chief Native Commissioner of Kenya stated that Resident Magistrates as a general rule passed sentences which were very considerably lighter than those which a District Officer would impose in similar circumstances. Such a discrepancy is, in our view, almost inevitable under the present system, and any extension of the system would only tend to accentuate it. When it is argued, moreover, that an Administrative Officer's unfamiliarity with the " technicalities of law and legal procedure " is more than compensated for by his knowledge of the native law and custom of the tribe among whom he is working, the following Article, common to the Orders in Council of all three territories, must not be overlooked :—

> " In all cases, civil and criminal, to which natives are parties, every court shall (*a*) be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance ; and shall

(*b*) decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

48. The effect of this Article is that the Penal Code is the criminal law of each territory, so that native law and custom, as has been frankly admitted by most witnesses, seldom has to be considered as a matter of substantive law in a criminal trial. It might be relevant on such an issue as motive or extenuation or as supporting or detracting from the credibility of evidence, but in such cases it should be a matter for formal proof and not be assumed to be within the judicial knowledge of the court.

49. The difficulties that arise in this respect may be well exemplified by the following quotation from the evidence* of Mr. McMahon, District Officer, Musoma :—

CHAIRMAN: There was only one point I was puzzled about. You are dealing with a High Court judge who is sitting in Dar es Salaam, and, you say, does not know the people and their ways, and you then gave us a little instance—

> "A High Court judge sitting in revision is scarcely able to judge the 'weight of evidence'—a ground sometimes offered for revision. Only some one who knew the people and their ways and saw them in court can assess this. For instance, the type of village constructed by a certain tribe may show inevitably that a statement, otherwise uncontradictable, is false. The fact that a certain tribe only move their cattle out to graze at 8 a.m. or so may be extremely significant in the case of a man found herding his cattle at sunrise, and in whose herd stolen cattle are found."

Surely both these facts, and I can well believe their relevance, ought to have been produced in evidence?—I mean they should have been proved in evidence.

WITNESS: They are proved sometimes, Sir.

CHAIRMAN: If they are not proved you have no right to take notice of them. You see, if you get a court deciding cases not on the evidence but on what they know or think they know you are getting into a difficult position.

WITNESS: It may be a question of balance. When some of these points arise it is on a question of balance that very often a magistrate can fix a man, because he knows the particular tribe or village in the case and knows that you would not meet a man at five o'clock in the morning herding cattle, or with stolen cattle in his herd. The man is questioned about it. He may say, "I am herding my cattle "——

CHAIRMAN: You have put this case—would you think it right to convict him because you know that that particular tribe only move their cattle out at 8 a.m.? Supposing you know it, but no one has said it, and there had been no evidence on that point, would you think it right to use that knowledge in order to convict anyone?

WITNESS: Not entirely on that, Sir, but with strong evidence it would be enough. It is a question of degree.

CHAIRMAN: Supposing at the end of the case, on the evidence there is a reasonable doubt as to the guilt of the man, would you think it right in order to resolve that doubt against the accused to use a knowledge which is in your mind but which has not been proved?

WITNESS: It depends on the doubt, Sir. If it was very grave I would certainly not use it, but if it was a slight doubt——

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* Minutes and Evidence, page 99.

CHAIRMAN: I am dealing with a doubt which would on the evidence as recorded induce you to acquit the man.

WITNESS: I think I would acquit the man if it was a question of doubt.

CHAIRMAN: In those circumstances you would not use your knowledge?

WITNESS: No, Sir.

CHAIRMAN: When the High Court comes to deal with these things, surely it ought to be in exactly the same position. It should not use its knowledge even if it had it. Unless the facts, the customs that you know of, have been proved, I suggest to you that the High Court should not use that knowledge, even if it had it.

WITNESS: In reducing sentences, or in quashing cases? When I raised that point it was a question of reducing sentences rather than of quashing cases.

CHAIRMAN: I don't think, Mr. McMahon, that your memorandum supports that, because it starts with, "A High Court judge is at a great disadvantage in deciding the weight to be attached to evidence which he has not heard delivered in his presence"—that is hardly a matter of sentence?

WITNESS: Generally speaking, it is on a question of revision—reducing and quashing of sentences.

CHAIRMAN: You see the difficulty and danger of it? If, instead of relying on evidence courts relied on what they know or think they know, there would be no certainty about justice at all. One might know a lot and another a little. One might know everything that is right and another everything that is wrong.

WITNESS: I quite agree with you that it would not be possible for the High Court, or for any magistrate, to use his knowledge alone, but his knowledge together with the evidence before him——

CHAIRMAN: I know your great difficulties. You have no one capable of adequately conducting prosecutions. You have to deal with these things under conditions which I have no doubt are very trying. But I am suggesting to you that if there are in a case important and relevant questions of native mentality or custom, those ought to be proved so as to get them on the record, and if they are not on the record you ought not to expect the High Court either to know of them or to use them even if they did know of them. That is so?

WITNESS: If they have to be proved every time you will have to lengthen considerably the proceedings in order to call direct evidence to prove such facts. It would lengthen every case that one deals with.

CHAIRMAN: I wonder if it would. Take the thing that you have mentioned here, that a certain tribe only graze their cattle at a certain time. You will probably get a witness from that tribe, if it is a question of a few cattle stolen from the tribe, who will give you your evidence in his reply to the question, "Is it a custom of your tribe to do so and so." This is only one question.

WITNESS: That is so, and very often if an accused gives evidence, I have often asked him that question myself.

50. Sir Donald Cameron, G.C.M.G., K.B.E., in his address to the Legislative Council of Nigeria on 6th March, 1933, in discussing a similar problem, said:—

> "The old argument will no doubt be used, too, that owing to his closer daily contact with them, the Administrative Officer must know more of the habits and mentality of the natives than a judicial officer can, and must therefore be better equipped to correct their faults. This issue seems to be a very closely defined one. If the judgment of the Court is to be the judgment of an officer experienced in the art of sifting and weighing evidence and is to be based solely on the evidence which has been laid before him in the case, it does not matter a great

deal to me what he is called. Administrative Officer or Magistrate, or what the Court may be called; it is sufficient that the Court is a judicial tribunal and the trial officer a judicial officer. But if the decision of the Court may properly be swayed by political or other non-juridical considerations within the knowledge of the Administrative Officer and is therefore not to be based solely on the evidence which has been led, then, in my judgment the Court has ceased to be a judicial tribunal and the officer has ceased to be a judicial officer. Change the system of law, if you will, and punish the people by Administrative Officers exercising a kind of parental correction because the people are primitive; but remember always, pray, if you do so that you will thereby be depriving the natives of the protection of any judicial court and any judicial system of law. That has not in the past been the policy or the practice which has governed the acts of the Nigerian Government."

51. With these arguments we find ourselves in complete agreement. We regard it as a fundamental necessity, from the point of view of law and order, that there should be a strong and adequate judiciary which the people of the country understand and respect. It is of equal importance that judicial work should be performed by persons with adequate experience who are trained in the weighing of evidence and the requirements of legal proof.

52. On the question of the prestige of Administrative Officers, we desire to say only this. There are in all three territories certain classes of offences which are triable by the High Court, and no one has suggested that by reason of that fact administrative prestige has suffered. In Tanganyika Territory magistrates have a considerably lower jurisdiction than their confrères in Kenya and Uganda, and many more cases are in consequence committed for trial. Yet the Administrative Officer in Tanganyika Territory enjoys the respect and affection of the natives whom he governs to no less an extent than do District Officers in Kenya and Uganda. A quotation from the evidence* given on this point by the Chief Justice of Uganda may be of interest :—

Mr. MacGregor: Distances are fairly easy here. It has been suggested to us that the judicial functions of the Administrative Officer are an extremely important part of his work—that he gains very greatly from having these powers of punishment, and that to take these powers away from him or substantially to diminish them would involve an immediate loss of prestige.

Witness: This point came up in the Gold Coast just before I left. We had it from a very senior Provincial Commissioner and it was actually endorsed by the Governor himself that it did not make any difference whatever. I must admit to throwing out a challenge on this point because I invited the Commissioner of Ashanti to prove it to me that when the Commissioner of Ashanti and the Chief Commissioner of the Northern Territory Protectorate, who were the principal judicial officers in that Territory, were replaced in the exercise of their judicial functions by a circuit judge, they had not lost at all in prestige or authority by the removal of those judicial powers. I got the answer I expected. What applies in one country would apply in another. I can also recollect a similar instance. When Sir Charles Griffin, my predecessor, proposed to open a

* Minutes and Evidence, page 75.

circuit to visit Fort Portal to try murder cases, the then Provincial Commissioner complained that the removal of jurisdiction in murder cases from the District Commissioner in Toro might result in the loss of authority. Sir Charles Griffin took the trouble to ascertain from the principal Administrative Officers of the various districts where the High Court had jurisdiction whether they had anything to complain about as regards loss of prestige. With one dubious exception, they all said, "No, certainly not. We like the High Court."

53. A decrease in the judicial duties of Administrative Officers would mean more time to devote to purely administrative duties, to establishing and maintaining contact with the people, and to the maintenance of law and order. If they were relieved of such judicial duties they would be able to devote their attention to the preparation of the case for the prosecution which, under the present system, must sometimes suffer. It is on personality and the force of example that prestige ought to depend and not on the power to punish.

54. It is not without significance that Administrative Officers in Tanganyika think that the limited jurisdiction conferred on them as magistrates of Subordinate Courts is sufficient for the maintenance of law and order. Mr. Allsop, District Officer, Bukoba, said* :—

CHAIRMAN: As I understand it, you are satisfied with the jurisdiction that the Subordinate Courts have?

WITNESS: I am, Sir.

CHAIRMAN: And, generally speaking, the powers of punishment they possess are sufficient for the purpose?

WITNESS: They are, yes.

Mr. Wyatt, Acting District Officer, Biharamulo, on the same point states† :—

CHAIRMAN: The jurisdiction which the Subordinate Courts have is up to two years. Is that, in your opinion, sufficient to enable them to deal with such crime as comes before them?

WITNESS: Yes, Sir. In the Belgian Mandated Territory the man who corresponds to me in rank can only give six months.

Mr. Lamb, District Officer, Shinyanga, expressed his views thus‡ :—

CHAIRMAN: While I am on that, do you find this power sufficient to deal with such cases? You are limited to two years.

WITNESS: Yes, for ordinary everyday life, most certainly.

Mr. Cheyne, District Officer, Dodoma, said§ :—

CHAIRMAN: The limit of your powers of punishment is two years. Generally speaking, do you find that sufficient to enable you to deal adequately with the cases which you try, and to maintain law and order in your district?

WITNESS: Quite adequate.

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* Minutes and Evidence, page 90.
† Minutes and Evidence, page 91.
‡ Minutes and Evidence, page 111.
§ Minutes and Evidence, page 122.

## Recommendations.

55. The solution which we propose is to make it possible for the High Court to discharge properly the functions which it is its duty to perform. These functions, in so far as its exclusive criminal jurisdiction is concerned, ought to extend to the trial of all cases in which a sentence in excess of two years' imprisonment is proper. We therefore recommend that the jurisdiction of magistrates in Kenya and Uganda be reduced to the limits which obtain in Tanganyika Territory. We further recommend that magistrates in all three territories be empowered to try any non-capital charge which can, in the opinion of the trying magistrate, be adequately dealt with within the limits of his powers. All more serious cases will be committed for trial to the High Court after preliminary enquiry.

56. In Kenya the decrease in the existing powers of magistrates so far as natives are concerned will necessarily mean some increased work for the Supreme Court in its criminal jurisdiction. Such increase need not, however, be very great, for magistrates will still have considerable powers of punishment and the measure of control exercisable by the Attorney-General over Subordinate Courts will tend to prevent unnecessary committals for trial.

57. We regard it as most important that trials by the High Court should be held in the district in which the crime was committed and the witnesses reside. The High Court should be so constituted that it can hold assizes at frequent intervals not only at provincial headquarters but at district headquarters also.

58. The ideal to be aimed at is that the High Court should so arrange its sessions that it will never be necessary for witnesses to have to travel more than fifty miles from their homes to the place of assize. We propose to recommend the appointment of additional judges, and we desire to emphasize that our reason for so doing is to enable the High Courts to attain something very near to this ideal. It will be no remedy for the existing state of affairs if on the appointment of a new judge occasional circuits are arranged over areas now declared to be special or extended jurisdiction districts unless, in the first place, existing assizes are held more frequently and at many more centres. Even if effect is given to all our recommendations, it will still be necessary for the system of extended jurisdiction or special district courts to continue in parts of these territories. Our acquiescence in its continuance may seem illogical after the views which we have expressed. We realize, however, that the present financial position of these territories must, at least for some years to come, preclude the setting up of High Court benches numerically adequate to cover all parts of the territories. As we have already stated, more frequent decentralized circuits are in our view essential. The increases in personnel which we advocate are sufficient to enable this to be done in those parts of the territories which the High

Court now visits, but, except in Uganda, the High Court will not be able, if our recommendations are carried out, to cover a much larger area than they now do. Special districts and extended jurisdiction must, therefore, still be maintained as an integral part of the system of administration of justice, but only as an expedient which should be discontinued as soon as circumstances permit.

59. We have had evidence to the effect that in special districts and in extended jurisdiction serious delays in trial do occur. We desire to point out that one of our objects in recommending that trial by special district courts or in extended jurisdiction should continue is to avoid delay, and officers exercising such jurisdiction should realize the necessity for dealing with cases promptly, and not subordinating this work to their administrative duties.

## Recommendations: Kenya.

60. We recommend that the strength of the Supreme Court bench be increased by one judge. Such an appointment will enable the Court adequately to travel the country on circuit at frequent intervals and to visit district headquarters, which at present it is unable to do. The additional judge should have his headquarters either in Nairobi or at some place on the "Railway" circuit, as may be found most convenient. We do not advocate any change in the present system whereby the Northern Frontier Province and the Turkana Province are declared to be special districts. The proposed limitation of the powers of magistrates may necessitate the declaration of Lamu as a special district.

## Recommendations: Uganda.

61. We recommend that an additional judge of the High Court be appointed for Uganda. Even under the present system the bench of the Protectorate is understaffed. The Chief Justice is frequently absent at the Court of Appeal for Eastern Africa or on circuit and the other judge has circuit work to do. At times, therefore, there is no judge in Kampala, and often the absence of one judge makes it impossible for criminal appeals to be heard. We cannot but regard the way in which the Government of Uganda has made use of the provisions for the declaration of special districts as an improper use of what was clearly designed to be a provision for emergencies. In Uganda the special district is the rule rather than the exception. The increase in the judiciary which we recommend will enable the High Court to hold assizes in all important centres in the Protectorate with the exceptions of Karamoja and possibly the West Nile District, which should continue to be regarded as special districts.

62. We have already recommended that the jurisdiction of magistrates in Uganda be reduced to the limits which prevail in Tanganyika Territory.

## Recommendations: Tanganyika.

63. In Tanganyika the problem is a more acute one owing to the size of the Territory and the difficulties of communication. We propose that two more judges of the High Court be appointed. One of these should be stationed at Mwanza and from that centre should go on circuit to all district headquarters and sub-stations in the Lake Province and also to that part of the Western Province which lies on or to the north of the railway line. The second additional judge should be stationed in Tanga or in the Northern Province as may prove to be most convenient for the prompt despatch of business. His primary duty in any case would be to hold circuits throughout the Tanga and Northern Provinces at regular and frequent intervals. Such a distribution of work will leave the existing High Court bench of the Chief Justice and two puisne judges to hold assizes in the Eastern, Central and Iringa Provinces. It will still be necessary for the Lindi Province and that portion of the Western Province to the south of the railway line, from which cases cannot conveniently be taken at Kigoma or Tabora, to be administered in extended jurisdiction.

64. We have already referred to the unnecessary delays involved in the system of committing all cases for trial in the High Court. We recommend that cases from those districts which the High Court under our recommendations will not be able to visit should be tried in extended jurisdiction without reference to the High Court.

## General Recommendations.

65. A matter on which we desire to comment is the use made of Resident Magistrates throughout these territories. We have it in evidence that much of their time is taken up in trying minor statutory offences and small civil suits. This seems to us to be a waste of the time of a professional magistrate who might more usefully be engaged on the trial of important and difficult cases, and we suggest that steps might be taken to make this possible, and to extend the jurisdiction of a Resident Magistrate to cover a wide area of his territory, as we understand is now the practice in Kenya.

66. For many years to come the great bulk of magisterial work must be performed by Administrative Officers, but as time goes on and circumstances permit, we think that this work should gradually be taken over by professional magistrates.

67. A scheme such as we have outlined in the preceding paragraphs will considerably reduce delays, will render it unnecessary for witnesses to travel more than a reasonable distance to the place of trial, will ensure the trial of offenders in the district in which the offence was committed and will tend to make the administration of justice through the High Court a living reality to the people of the three territories.

## Appeals from the Subordinate Courts.

68. It is important that every judge of the High Court when on circuit should hear appeals from Subordinate Courts in each district. The present system regarding the right of appeal from the decision of a Subordinate Court and the hearing of such appeals is by no means satisfactory.

69. From every conviction by a Subordinate Court where the sentence exceeds imprisonment for one month or a fine of five pounds an appeal lies to the High Court. In Kenya and in Tanganyika it is obligatory on the convicting Court at the time of passing sentence to inform the convicted man of his right of appeal. There is no such provision in the law of Uganda and we suggest that the law might well be amended to bring the practice in the Protectorate into line with that in the other territories. An appellant prosecutes his appeal by way of petition which in practice is usually drafted by an Administrative Officer and sent to the Registrar of the High Court. In Tanganyika provision is made for the waiving of the fees payable on appeal on production of a certificate of lack of means from a District Officer. We have no evidence of the practice in this regard in Kenya or Uganda but we suggest that the Tanganyika practice might well be adopted generally.

70. In Kenya and Uganda appeals are heard by two judges sitting either at Nairobi or Mombasa or in Kampala and in Tanganyika Territory by one judge in Dar es Salaam. The necessity for convening a court of two judges at Mombasa or in Kampala tends to unnecessary delay in the hearing of appeals, and we recommend that in all three territories provision be made for the hearing of appeals from Subordinate Courts by one judge.

71. The greatest defect of the present system is that the right of appeal is not sufficiently understood. Except in Tanganyika, an appellant, if in custody, is not entitled to be present on the hearing of his appeal unless the appeal Court considers that the sentence should be enhanced or that some other order to his prejudice should be made. Even if he had the right to be present, however, that right would in practice be largely illusory so long as appeals are heard at headquarters, for the cost of a journey, say, from Kisii to Nairobi or from Mwanza to Dar es Salaam is an effective bar to its exercise. We are convinced that every appellant should have the right to be present when his appeal is heard, and should be enabled to do so at the minimum of expense to himself. It has been argued that the average appellant gains nothing from being present for the reason that he cannot understand the proceedings or effectively prosecute his appeal. Be that as it may, we are convinced that every person who appeals to the High Court is entitled to an assurance that his complaint has in fact been investigated by the High Court and to an opportunity

of saying what he can on his own behalf. It is not sufficient in territories such as these that justice should be done: it is equally important that the natives should realize that it is being done. If appeals are taken by a single judge when he is at district headquarters on circuit, many of the defects of the present system will at once disappear, and the right of appeal will become a reality instead of a mere paper privilege. It is also important, in our view, that the result of an appeal should at once be conveyed to the appellant and also to the Subordinate Court from which the appeal lies.

72. It may also prove convenient in practice for a judge on circuit to exercise the powers of revision and confirmation in respect of cases heard by Subordinate Courts of the district in which the judge is on circuit. Such an exercise of authority would prove particularly valuable in cases in which sentences of a short term of imprisonment or of corporal punishment have been imposed.

73. Schemes for the more accelerated disposal of criminal cases by judicial officers subordinate to judges of the High Court have been put before us by several witnesses. We regard it as essential that such work, which is the proper province of the High Court, should be performed by officers of the status of, and with the qualifications and experience necessary for, judges of the High Court. We would, however, point out that it is not necessary that such additional judges should receive the emoluments now paid to High Court judges in these territories. In some of the West Indian Colonies, for example, it is customary to grade judges as first, second or third puisne judge with different scales of salary for each.

## Appeals from the High Courts.

74. In dealing with delays, we have up to this point in our report confined ourselves to those which occur between the date of arrest and the verdict of the High Court. Delay, however, does not stop there, for under the existing practice appeal to the Court of Appeal for Eastern Africa involves further delay which may extend to more than three months. This delay is particularly to be deplored for the reason that most of the appeals are against sentence of death, and a man who has been condemned to die is kept waiting in strict confinement and under guard day and night for many weeks.

75. The Court of Appeal for Eastern Africa is constituted by Order in Council and all judges of Kenya, Uganda, Zanzibar, Tanganyika and Nyasaland are *ex officio* members of the Court. In practice, however, the Court is normally constituted of the Chief Justices of Kenya, Uganda, Zanzibar and Tanganyika with the assistance, if necessary, of the judges of the territory in which the Court is sitting. The Court meets four times a year, in March in Kampala, in June in Mombasa, in September alternately in Zanzibar and Dar es Salaam and in December in Nairobi.

76. A person convicted by the High Court has thirty days in which to appeal to the Court of Appeal, so that a person convicted in November may not lodge his appeal until December, in which case, if the record is of any length, his appeal will not be taken until the March Court. We appreciate the importance, in cases in which a substantial point of law is involved, of getting as strong a court as possible for the hearing of the appeal, but such advantages cannot outweigh the manifest disadvantages of keeping persons under sentence of death for long periods. We recommend, therefore, that for the hearing of criminal appeals the Court of Appeal should be convened locally every month. Such a Court can be constituted, without the trial judge being a member, with the increase of staff which we have recommended, in all the territories except Uganda, and Uganda appeals could be heard in Kenya or, with the assistance of a Kenya judge, in Uganda.

77. In this connexion we would quote the provisions of the Criminal Procedure Codes governing appeals from the High Court to the Court of Appeal:—

> "Any person convicted on a trial held by the High Court may appeal to His Majesty's Court of Appeal for Eastern Africa:—
>
> (*a*) against his conviction on any ground of appeal which involves a question of law alone; and
>
> (*b*) with the leave of such Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and
>
> (*c*) with the leave of such Court of Appeal against the sentence passed on conviction unless such sentence is one fixed by law."

We are informed that in practice every person who is sentenced to death by the High Court appeals, and his appeal is entertained although it is usually on a question of fact alone. We suggest that there is nothing to be gained by encouraging a number of frivolous appeals on fact, and that the Court of Appeal might well insist on the certificate of the trial judge that the case is a fit one for appeal, or on a formal application for leave to appeal.

### Proceedings prior to Trial by the High Court.

78. We have so far been concerned with the delays and hardships caused by the failure of the judicial system as exemplified in the High Court. There are, however, other causes of hardship regarding which representations have been made to us and which may conveniently be dealt with at this stage of our report.

79. These are the fact that before a case comes to trial there have been a police investigation and a preliminary enquiry, each

of which has necessitated the attendance of witnesses. As a remedy for this tripartite procedure, which in Tanganyika at least undoubtedly causes hardship, two suggestions have been made to us.

80. The first of these proposals was that the police investigation and the preliminary enquiry should be combined, this joint enquiry to be conducted by a police officer with magisterial powers, the file of the enquiry being sent to the Attorney-General who would, after reading it, decide whether a prosecution was justified.

81. This suggestion does not commend itself to us. It is obviously designed to decrease the number of journeys to be made by witnesses, for in Tanganyika police investigations are conducted not at or near the scene of the crime but at district headquarters which may be many miles away. We are doubtful whether in practice it would have the desired effect. In many cases considerable investigation is made by the police and many witnesses are interrogated before there is any justification for making an arrest. In such cases it would be necessary to recall all such witnesses after the arrest of the accused in order that he might have an opportunity of putting questions to them. Moreover, the file of a police investigation must contain many recorded statements which are not given on oath and much that is irrelevant and inadmissible in law. It may even contain confessions made by the accused to the Native Authorities or the police which, in Kenya and Tanganyika Territory, are inadmissible in evidence.

82. As an alternative to this proposal it has been suggested that after police investigation of a reported crime the accused be tried by a magistrate or by the High Court without preliminary enquiry.

83. We regard the preliminary enquiry as a valuable safeguard to an accused person. During the course of it he hears exactly what is the case against him; if committed he is tried on an information which clearly states the details of the charge which he has to meet, and he has ample time in which to prepare his defence and summon his witnesses. We should be reluctant to approve anything which would deprive an accused person of such advantages and we cannot regard as satisfactory a proposal to take up much of the time of the High Court judges in the investigation of cases which may prove to have no substance in them.

## III.—PROCEDURE FROM ARREST TO TRIAL.

84. A number of points relating to the details of criminal procedure have been made by witnesses which may conveniently be dealt with together at this stage. In this chapter they are dealt with in the order in which they would arise in the course of the investigation and trial of an offence, whether such trial be by a Subordinate Court or by the High Court.

## Police Investigation.

85. Under this heading there fall to be discussed four matters which have been the subject of representations by witnesses; the place of investigation, the power of search, the right of the police to compel the attendance of persons for interrogation, and the admissibility in evidence of confessions made to police officers.

86. As regards the place of investigation, the practice varies in the different territories. In Kenya an offence is investigated as far as possible at the scene of the crime. The Kenya police normally have no responsibility for the detection of crime or the punishment of offenders in native reserves, where such work is undertaken by the Tribal police. In settled areas and in other parts of the Colony in which the police force operates the practice is for an officer to visit the scene of a reported crime and there take the statement of potential witnesses, so that the minimum of inconvenience is caused to the public. In Uganda offences are normally first investigated by the native authorities. When a crime is reported it is customary, we are told, to detain anyone who may know something about it and to send them to the police for interrogation.

87. In Tanganyika investigation takes place at the police headquarters of the district, so that persons required for interrogation may have long distances to travel, and may be taken away from their ordinary avocations for considerable periods. Admittedly this system is necessitated by shortage of staff, and it may be difficult to effect any change in the near future. It should, however, be changed as soon as possible and a system of investigation at or near the scene of the crime substituted. Witnesses will not voluntarily come to the assistance of the police so long as such assistance is likely to involve them in obvious hardship. It is in the interests of the police themselves to effect a change at the earliest possible moment.

## Police Powers of Search.

88. Police officers have made representations to us regarding the difficulties which they encounter by reason of the provision of the law insisting on a search warrant issued by a court on sworn information.

89. It has been pointed out that in these territories where distances are considerable and police officers and magistrates are few in number such a provision as this must at times operate to prevent effective police work. A police officer may be perfectly certain that stolen property is in a house within a few yards of his station, yet he cannot search for it without a warrant, and getting a warrant may entail a journey of many miles or a search for a magistrate or waiting until a magistrate is disengaged, which may occupy some hours, the result being that the suspected person has

ample time in which to dispose of the stolen property. The position is even worse in those districts where no police officer is stationed and police duties are undertaken by an Assistant District Officer. If the District Officer is absent on tour, as he frequently is, then the Assistant District Officer is both police officer and the sole magistrate available. In such circumstances it is confidently asserted that there is a sufficient case for the amendment of the law to enable the officer in charge of a police station himself to issue such warrants. This was permissible under the law in force prior to 1930 and we consider that a reversion to such a system is justified. We would, however, suggest that wherever possible a magistrate's warrant should be obtained and that when in an emergency a police officer himself issues a warrant the circumstances should be reported to a magistrate as soon as possible after the search.

90. We have also been asked to approve the system of search in the presence of reputable witnesses, a list of all property found being prepared and signed by such witnesses. While such a system is manifestly of advantage to the police and to the proper administration of justice, we are not convinced that it is expedient to make it a statutory obligation. Searches under warrant are doubtless at times made by illiterate constables in villages in which there are no literate inhabitants. Such a contingency may be remote but it is certainly not impossible. A statutory provision might, therefore, operate in practice to prohibit searches in certain parts of the territories, but we suggest that the police authorities in their own interests might be well advised to arrange to make this system operative whenever possible.

### Power to compel the attendance of persons for interrogation.

91. Police officers in Tanganyika Territory have urged the necessity of conferring on them the power of compelling the attendance at the police station for interrogation of persons whom they desire to interrogate. Such a power was possessed by the police in all three territories until the enactment of the present Criminal Procedure Code in 1930. No representations for a return to the old system were made by police officers in Kenya or in Uganda nor do we feel convinced that any case for such an amendment of the law has been made out in Tanganyika. Indeed, under the system described in paragraph 87 of this chapter there is a real danger that police investigation may cause great hardship, and the remedy ought to lie not in giving the police further and arbitrary powers but in getting the public to realize that it is their duty and their interest to co-operate with and help the police in the detection of crime.

### Confessions to the Police.

92. In Kenya and in Tanganyika, where the Indian Evidence Act is in force, no confession made to a police officer is admissible in evidence. In Uganda, on the other hand, the Evidence

Ordinance makes any statement made to a police officer admissible in evidence, provided that it is made in circumstances which would justify its admission in evidence according to the practice of the English courts. Much evidence on this controversial issue has been recorded. The reasons which prompted the enactment of Section 25 of the Indian Evidence Act, which reads :—

> " No confession made to a police officer shall be proved against a person accused of any offence "

are stated in the First Report of the Indian Law Commissioners as follows :—

> " A police officer, on receiving intimation of the occurrence of a dacoity or other offence of a serious character, failing to discover the perpetrators of the offence, often endeavours to secure himself against any charge of supineness or neglect by getting up a case against parties whose circumstances and character are such as are likely to obtain credit for an accusation of the kind against them. This is not infrequently done by extorting or fabricating false confessions; and when this step is once taken, there is, of course, impunity for the real offenders, and a great encouragement to crime. The police officer is henceforth committed to the direction he has given to the case; and it is his object to prevent a discovery of the truth and the apprehension of the guilty parties, who, as far as the police is concerned, are now perfectly safe."

93. The object, to put it shortly, is to avoid the risk of admitting false confessions or confessions improperly extorted. The rank and file of the police force are drawn from the native population, to whom such niceties as formal caution or abstention from inducement, threat or promise are practically unintelligible. In R. *v.* Thompson (1893, 2 Q.B. 12) Cave, J. said, " It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession, a desire which vanishes as soon as he appears in a Court of Justice."

94. It must be remembered that it has been held by the local courts in Kenya and Tanganyika and by the Court of Appeal that the prohibition extends to confessions made to any person who, though not a member of the force, was in relation to the person making the confession, in the position of a police officer in that he had him under arrest and detention. Thus confessions made to tribal police, native authority messengers, or chiefs who have ordered arrest or detention are inadmissible in Kenya and Tanganyika Territory and are admissible in Uganda.

95. In the evidence recorded by us there is a strong body of opinion in favour of relaxing the rigidity of the rule in Kenya and Tanganyika. Mr. Cavendish, Commissioner of Police, Kenya, would have confessions made to members of the Colony police admissible, but not those made to tribal police. Mr. Deck, Provincial Commissioner, Nzoia, would make admissible only confessions made to European police officers, and this only when the

person making the confession had not been in contact with any subordinate police officer. Mr. Clark, Superintendent of Police, Bukoba, would limit admissibility to confessions made to a European police officer, though he admitted that there might be dangers attached even to this relaxation of the rule. Mr. Olliver, Inspector of Police, Dar es Salaam, would restrict it to confessions made to a European or Asiatic Officer before arrest. Mr. Johnson-Davies, Advocate, of Kampala, would admit only confessions made to a European commissioned officer. Mr. Macken, another Kampala Advocate, who is an ex-police officer, would prefer to see the Kenya rule in force in Uganda, as would the Law Society of Uganda. Major Tremlett, Commissioner of Police, Uganda, admits that there are dangers in the Uganda system, and Mr. Scott, an Administrative Officer in Uganda, told us that confessions adduced in evidence aroused in his mind lively suspicion. Mr. Turton, Attorney-General, Uganda, Mr. Reece, Crown Counsel, and Mr. Gray, Acting Judge of the High Court, consider the Uganda law satisfactory in practice, while Mr. Abrahams, Chief Justice, Uganda, said* :—

WITNESS: I have had experience of both systems, Zanzibar with the Indian Evidence Act and the Gold Coast with English law. I prefer the Indian Evidence Act. I think you must have a general feeling of security—rightly or wrongly. Admission of confessions to the police is unwise.

Mr. MACGREGOR: With native askaris you would always have an uneasy suspicion that all was not well?

WITNESS: Yes, especially if he has been to the native authorities first. I had a case the other day. The accused had been first to the native authority and then to the various authorities making confessions to each of them. Unfortunately for him, he finally made a confession to a magistrate. I felt much of the difficulty was caused by the first confession which, it transpired, had been bullied out of him, and he felt he could not alter it.

The opinion of the Bukoba Chiefs was expressed in the following words† :—

CHAIRMAN: If a man goes to a chief and confesses to him that he has committed a crime (in cases of serious crimes) do you think that that confession ought to be admissible before the court that tries him?

WITNESS (F.X. Lwamgira K.M.): We consider that the law should remain as it is at present, that confessions to chiefs are not admissible, because immediately after the commission of a crime, and the man is arrested and taken before a chief, he may be in a state of fear and say anything that comes into his head, and the witnesses will very often come along to help him and support his random statement made immediately after the crime. By the time he comes in here to the Boma he has ceased to be in a state of fear and can make a coherent statement, and that is the statement that should be admitted.

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* Minutes and Evidence, page 79.

† Minutes and Evidence, page 95.

Sir Joseph Sheridan, Chief Justice of Tanganyika Territory expressed his opinion thus* :—

Mr. JUSTICE LAW: What is your opinion with regard to statements to the Police? I understand in this Territory they are not admissible in evidence?

WITNESS: They are not, I am glad to say.

Mr. JUSTICE LAW: That answers my question. You feel strongly that they should not be under any circumstances?

WITNESS: Yes, even where a confession is voluntary, one has to examine the depositions, and the surrounding circumstances, questions of opportunity of committing the particular crime and whether the confession may not have been made for the purpose of notoriety—all those reasons go to strengthen my view that there should be no alteration of section 25.

Mr. JUSTICE LAW: The law is the same in Kenya as here?

WITNESS: I am glad to say it is so.

96. With such conflicting views expressed by the persons best qualified to express an opinion it is difficult to come to any firm conclusion on this difficult matter. It seems to us that the law in Uganda goes too far in making admissible confessions which may in the first instance be made to chiefs or native police constables to whom the Judges' Rules and a formal caution are meaningless. On the other hand the position in Kenya and Tanganyika is perhaps rather too rigid. There are in both these territories police officers of long experience who can be trusted to take a confession properly and with fairness to the person making it, and also to test whether the person expressing a desire to make a confession has just prior to his expressing such desire been in confinement or under restraint in such circumstances that he may have been subject to some threat, promise or other inducement, the effect of which has not yet fully passed. The European personnel of these forces are accustomed to appreciate the necessity for the safeguards imposed by English law, and we feel that they can be relied upon to give the full benefit of such safeguards to accused persons who are disposed to confess. In such circumstances we incline to the view that in Kenya and Tanganyika the rule might be relaxed to render admissible a confession properly made to certain European police officers, in Kenya to any officer of or above the rank of European police constable, and in Tanganyika to a commissioned officer. Possibly if this were done Uganda might be disposed to come into line in the interests of uniformity of practice, and procedure.

97. In support of the Uganda system it has been urged that many confessions tell in favour of an accused person, and that the exclusion of such a confession would adversely affect him. This is far too sweeping a statement. Occasionally, no doubt, a confession coupled with an explanation as to motive and circumstances may serve to minimize the gravity of the offence, but such a confession even if it is not admissible in evidence as part of the case for the Prosecution is known to the police, its truth can be

* Minutes and Evidence, page 150.

tested, and the benefit of any matter or extenuation or excuse will be given to the accused, who can in any case elicit evidence of such a confession in cross-examination.

## Place of Trial.

98. The provisions of the Criminal Procedure Codes of the territories relating to the place of trial are shortly that a person must be tried by a competent court within the limits of whose jurisdiction the cause of complaint arose. If a person is arrested in one district on a charge of having committed an offence in another district, he must be sent for trial to such other district unless the High Court on application empowers the court of the district of arrest to adjudicate. It would, in our opinion, be of practical advantage in the avoiding of delay and inconvenience if an offence could be enquired into or tried in the district in which the offence was committed or in that in which the offender was apprehended, and if the power vested in the High Court to transfer a case if it appears to it that such a transfer is expedient for the ends of justice or for the convenience of the parties or witnesses were delegated to Subordinate Courts of the first class. The practical difficulties that may arise are those described by Mr. Hall, Acting District Officer, Maswa.*

Mr. MacGregor: May I take you now to the second point—the Place of Enquiry or trial. A trial is held in the place where an offence is committed. Do you find many cases where the person, having committed an offence in the jurisdiction of one court is apprehended in the jurisdiction of another?

Witness: That has happened recently in one case.

Mr. MacGregor: In that case there is a transfer—does that give rise to much difficulty?

Witness: This occurred on the border of my District. The case was in regard to stolen cattle and the cow was found in the other District—most of the witnesses came from the other District, chiefly the witnesses for the defence, because the accused sought to prove firstly an *alibi* and secondly that the cow was his property. That case would have been very much more conveniently tried in the other District.

Mr. MacGregor: You have power to apply to the Supreme Court?

Witness: Yes, Sir.

Mr. MacGregor: But that would have caused some considerable delay?

Witness: Yes, Sir. It means reference to Dar es Salaam and inevitable delay. If it had been arrangeable between the First Class Subordinate Magistrates it might have been dealt with very rapidly. Another case—I can hardly call it a case because the accused has not yet been apprehended—occurred in the south of my District on the border of Shinyanga. To have heard the case at Shanwa would have involved the calling up of witnesses from the south end of Shinyanga, whereas Shinyanga is much more central. Fortunately we were able to find an alternative charge which would enable the case to be heard in Shinyanga.

Mr. MacGregor: Mr. Hall, you have told us about these two particular cases. What was the mileage involved?

Witness: May I ask Mr. Lamb a question, Sir?

Mr. MacGregor: Certainly.

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* Minutes and Evidence, page 108.

WITNESS: Can you tell me the distance from Tinde to the border?

Mr. LAMB: About fifty-five miles.

WITNESS: Fifty-five miles to the border near to which the offence took place, and a further twenty-five miles to my Court, making eighty miles in one case. In the other case the place where the offence was committed was one mile from the border, twenty-four miles from the Station and eight miles from Ngudu.

Mr. MACGREGOR: So that if the trial had taken place at Ngudu it would have been much more convenient?

WITNESS: Yes, Sir.

Mr. MACGREGOR: I take it that what you would like would be for the trial to take place either in the District in which the offence was committed, or in the District in which the offender was apprehended?

WITNESS: Generally having regard to the convenience of the witnesses in the case.

Mr. MACGREGOR: Your chief test would be the convenience of witnesses?

WITNESS: The test would be that laid down in the Criminal Procedure Code.

Mr. MACGREGOR: You would give the power of deciding that to a Subordinate Court without reference to the High Court as at present?

WITNESS: Yes.

99. We feel that unless the interests of justice, which must be paramount, otherwise require, the guiding principle in determining the place of trials should be the general convenience of the parties or witnesses.

## Contents of Summons or Warrant.

100. One witness complained* that the practice was to state in the body of a summons little more than a reference to the Ordinance and the Section, breach of which constituted the offence charged. He suggested that a summons should contain the gist of the offence with sufficient detail to enable the accused to appreciate just what the charge against him was. Summonses should, in his opinion, be written in both English and Swahili.

101. As this complaint concerned the Subordinate Courts in Kenya, we took the matter up with Mr. Edwards, Resident Magistrate, Eldoret, whose evidence† on this point was as follows:—

CHAIRMAN: It has been suggested to us that the summonses which are issued do not convey to the person summoned what is the offence of which he is accused. Can you produce some summonses issued by your court?

WITNESS: Yes, Sir. I should like to say that summonses issued from my court contain a very full statement of the facts and circumstances alleged. I am prepared to believe that summonses issued from other courts may not do so. I think that there is probably in the minds of some people a misapprehension as to what they are meant to do. Section 89, sub-section (2) of the Criminal Procedure Code says the summons shall state shortly the offence with which the person is charged. Some people believe that that means merely a citation of the law. I myself have never thought so. I have always taken it to mean a short statement of the offence and then the

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* Minutes and Evidence, page 37.

† Minutes and Evidence, page 48.

section of the law under which the accused is charged. This might be got over by a short circular to magistrates by the Chief Justice.

(Here witness produced a completed form No. 92 which gave in sufficient detail the particulars of the offence for which a summons was being issued and in addition referred to the relevant section under which the charge was brought.)

MR. MITCHELL: Are these summonses translated to the native, do you know?

WITNESS: It is given to him by the police. In practice I think the native would take it to his European manager or possibly to an Indian clerk who reads English.

CHAIRMAN: Do you know whether those are the forms which are adopted by the Subordinate Courts other than the Resident Magistrates' Courts?

WITNESS: I cannot say. I am afraid that some summonses issued would only set out the section of the Ordinance.

CHAIRMAN: Where people are arrested and not summoned, do you explain to them when they arrive exactly what the case is?

WITNESS: Yes, Sir.

CHAIRMAN: Is this done by the other Courts?

WITNESS: Yes, Sir, I think it is universal.

102. We realize the importance of conveying to a person charged with an offence adequate information of the exact nature of the charge which he has to meet. It may be that the system which we found in use in Eldoret, which was in every respect satisfactory, is of universal application, but in case this is not so, we consider that steps should be taken to direct the attention of magistrates to the desirability of embodying in every summons or warrant sufficient detail to make it clear just what the charge against an accused person is.

## Plea.

103. Under the system now in force in these territories the accused is called upon to plead to the charge at the outset of the case. It has been represented to us that this system operates to the disadvantage of an accused person, firstly because until he has heard the evidence he is unable fully to appreciate the nature of the charge which he has to meet, and secondly because having pleaded and then heard all the evidence for the prosecution he is called upon to enter on his defence at a time when he has forgotten what the charge against him is. We have been asked to advocate a system under which no charge was framed and no plea was taken until the evidence for the prosecution had been recorded. In many cases where the accused admits the offence and pleads guilty, such a system would entail unnecessary waste of time to the court and to witnesses. Under the present practice there is no reason why a magistrate should not remind the accused of the charge which he has to meet when he opens his defence, and we feel confident that magistrates will do so if they have any reason to think that an accused person is prejudiced by not fully appreciating the nature of the charge which has been laid against him.

## Acceptance of Plea of Guilty.

104. One witness has represented to us that magistrates are reluctant to accept a plea of guilty and that much time is consequently wasted. In territories where the language of the people is not the language of the court and where interpretation is usually required, it is proper in our opinion that a magistrate should not accept as a plea of guilty anything which falls short of a full admission of responsibility for all the ingredients which go to make up an offence. Sir Alison Russell, a former Chief Justice of Tanganyika, in his Handbook for Magistrates writes :—

> "42. The misinterpretation of one or two other Swahili expressions which are the source of constant misunderstanding may be referred to.
>
> "On a native being asked to plead to a charge he is often asked, 'Do you admit doing this?' or 'Is it true that you struck him?' To which the accused replies 'Yes'. This is interpreted as 'pleads guilty'. Again, the reply is often 'nilikosa', 'I have done wrong'. A magistrate should be very chary of convicting on such pleas and he should first ascertain if the accused does in fact admit guilt. This can always be done by a further question as to whether the accused has any excuse to offer for his action. If he says he has, a plea of 'not guilty' should be entered, noting the accused's own words, and the trial should proceed."

105. Judicial time is well spent if it prevents the conviction on his own plea of a native who has frankly admitted the doing of an act which when judged by the motive which actuated him is no offence in law.

## Unfitness to Plead.

106. Our attention has been drawn to the provisions of sections 157 and 161 of the Tanganyika Code of Criminal Procedure which read :—

*Section* 157.

(1) When in the course of a trial or preliminary investigation the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of such unsoundness.

(2) If the court is of opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.

(3) If the case is one in which bail may be taken, the court may release the accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person, and for his appearance before the court or such officer as the court may appoint in that behalf.

(4) If the case is one in which bail may not be taken, or if sufficient security is not given, the court shall report the case to the Chief Secretary, and the Governor may order

the accused to be confined in a lunatic asylum or other suitable place of custody, and the court shall issue a warrant in accordance with such order.

*Section* 161.

If a person is confined in a lunatic asylum under the provisions of this Code and the medical officer in charge of such asylum certifies that the accused lunatic is capable of making his defence, such accused shall be taken before the court at such time as the court appoints to be dealt with according to law, and the certificate of such medical officer shall be receivable in evidence.

107. We have in evidence two cases in the Lake Province of Tanganyika in which, after nearly two years in a lunatic asylum, persons were certified to be capable of making their defence and had to be put on trial, though after such a lapse of time the collection of the necessary witnesses presented considerable difficulty and memories were naturally vague as to the details of the crime charged.

108. We suggest that in such cases it would be sufficient if, before the discharge of a person from a lunatic asylum, the facts of his case were reported to the Attorney-General who would direct a prosecution only when there was a reasonable likelihood of such prosecution being successful.

## Bail on Arrest or Remand.

109. The law of the territories provides that either a responsible police officer or a magistrate may, except in cases of very serious crime, grant bail either on arrest or on remand. We learn that use is made of this power in comparatively few cases, although remands are long, extending to as much as fifteen days, and delays between arrest and final trial are considerable. We realize the difficulties with which officers are faced in that it is often not practicable to take the name and address of a native and also because it is frequently very difficult to find sureties for the appearance of an accused person. Nevertheless, it is important that until an accused person is found guilty he should if possible not be detained in custody. We were interested to learn that in one district in Tanganyika Territory the District Officer made considerable use of the power of releasing on bail* :—

Mr. MacGregor: To what extent in your district do you find it possible to grant bail?

Witness (Mr. Wyatt): I can grant it almost in every case without any difficulty.

Mr. MacGregor: So far as the accused is concerned, that minimizes the hardship of delay before trial?

Witness: Yes.

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* Minutes and Evidence, page 92.

Mr. MacGregor: Do you find that it is reasonably safe to do this?
Witness: I have always taken the risk and I have never been stung.
Mr. MacGregor: Do you find sureties?
Witness: No. If he is a stranger we take him to the police lines, but they do not like taking this responsibility. I grant bail except in murder cases.

110. While it is impossible to lay down any hard and fast rule in a matter such as this, we consider that unless there are really strong reasons to the contrary bail should be granted. The chiefs and elders in Tanganyika Territory assured us that they would be willing to stand surety for their own people, and even if sureties are not forthcoming, where an accused person is known to have property and a permanent home in the district, bail might be granted on the accused man's personal recognizances or a deposit in cash or kind might be taken. Even the risk of finding that an occasional accused person has absconded is worth taking as an alternative to keeping in custody, sometimes for considerable periods, numbers of persons some of whom when subsequently tried are acquitted.

## Oath or Affirmation.

111. Evidence in all criminal cases is normally given on oath or affirmation. One witness has submitted that the taking of an oath or affirmation is a meaningless rite which merely has the effect of bewildering the native and that evidence in all cases should be unsworn. It may be an unfortunate fact that oath or affirmation carries little sanction but it is important to remember that it is only when testimony is given on oath or affirmation that the penalties provided for perjury can be incurred, and further that an accused person can avoid cross-examination by electing to make an unsworn statement.

112. We wish to point out that it is not necessary when dealing with primitive peoples to put to them, or to insist on receiving from them, an affirmation in a set form of words. It is sufficient if the witness promises to speak the truth.

## Examination of Witness.

113. The system of examining a witness by means of question and answer has been criticized on a number of grounds. We have been told that this method of obtaining evidence is almost universal, and that it is open to the objection that a native witness who is not allowed to tell his story in his own way but is constantly interrupted and called upon to reply to questions which come in a sequence which he does not understand, becomes confused and is apt to give the answer which he thinks the questioner wants, whether such answer is the truth or not. It is further argued that, as a witness has already told his story to the police, he is likely, in answer to what are sometimes leading questions, merely to repeat that statement. It is not suggested that in the

course of the police investigation a witness is invited or indeed allowed to say what is not true, but that a native witness is better able to tell a story which carries conviction if he is allowed to tell it in his own way, and that a statement so made is more intelligible to the accused and can be better tested by him in cross-examination. We have been told by Crown Counsel in Kenya that witnesses are usually invited to tell their own story in their own way. We realize that the adoption of such a course will probably involve more lengthy hearings, and that much will be said which is irrelevant, and inadmissible, but we regard it as important that natives should understand the method of administration of justice, and we recommend that witnesses be allowed to give evidence in a manner which they understand and which is best calculated to get the whole truth from them.

114. We are impressed by the earnestness with which experienced officers spoke on this subject, and we regard the subject as far from unimportant. But if a change is to be made, two things must be borne in mind: the witness should be allowed to tell his story so far as possible without interruption, and the magistrate must of course record only such parts of it as strictly comply with the requirements of the law of evidence.

## Cross-Examination by the Accused.

115. Several witnesses have assured us that the right of cross-examination is meaningless to an accused native, and that the invitation to put to a witness any questions which he desires to ask does an accused person more harm than good in that he at once begins a long rambling statement, whereupon he is stopped and told that at the moment he must only ask questions but that at a later stage he will have an opportunity of making a statement. At the close of the case for the prosecution he is invited to make his defence, but, having unsuccessfully attempted to make a statement, he says that he has nothing further to say and his defence, therefore, remains undisclosed.

116. As a solution of this difficulty, it has been suggested that, following the practice of native courts, an accused person should be called upon to make a statement outlining his defence as soon as the complainant has given his evidence, and that such statement should be recorded in evidence.

117. Such an alteration in procedure we are unable to accept or recommend. It is open to the obvious objection that whereas under the British system of criminal justice a conviction must depend on the strength of the case for the prosecution and not on the weakness of the defence, the proposed system would enable a magistrate to convict where a weakness in the Crown case was fortified by an incautious admission by the accused. The following extract from the evidence* given by Mr. Cheyne, District

* Minutes and Evidence, page 122.

Officer, Dodoma, exemplifies the difficulties that might befall an accused person if the suggestion were adopted :—

CHAIRMAN: I want to clear up, if I can, the suggestion about the accused making a statement. You say one man accuses, then the accused will be able to make his statement in reply. Well now, it occurs to me that in a great many cases you would not get the position of one man accusing at all. Take, for example, a murder case. The first witness would probably be the doctor who gives formal proof of death. On that is the accused to weigh in at once with his whole statement?

WITNESS: It is a detail which I have not worked out fully, but I do not see that there would be any great hardship in it.

CHAIRMAN: Might there not be some danger in it? Tell me, you have tried many cases, have you not noticed that even an innocent man, if he sees what he thinks is a short cut to a defence, may very often adopt that defence although it is not a true one?

WITNESS: That is certainly true.

Mr. MACGREGOR: Let us assume that the first witness called for the prosecution is an accomplice. He says, "the night before last the accused and I went out together to go and steal from that house, and the accused had a spear with him." That evidence obviously requires corroboration. The accused is invited to make a statement, and he says, "I went out with that witness: I had no spear at all." Would he not be convicting himself? Whereas, if he had waited you might have been unable to find any corroboration.

WITNESS: That is true, but, on the other hand it means that unless he is telling something false, he is going to be released if there is no evidence against him.

Mr. MACGREGOR: Is there not that risk that, by inviting him to make a statement, you may get him to fill up any gaps?

WITNESS: I realize that there is that danger, but in native cases, judging from what I have seen in native courts, I think that such procedure would simplify the trial of an accused person.

118. We have been informed that many magistrates make a practice of allowing an accused person to make a statement when he is invited to cross-examine a witness, but instead of recording his statement they ask, on behalf of the accused, such questions as arise in the course of it. This practice commends itself to us, and we should be glad to see it more universally followed. Other magistrates, we have reason to believe, are of the opinion that because the accused has the right to cross-examine and not to make a statement at that stage, he should be prevented from making any statement or saying anything which does not take the form of a question to the witness. That attitude we desire to discourage. Many accused persons even in England are incapable of putting their defence in the form of questions relevant to the testimony given by each witness for the prosecution. If a native, to whom our procedure is strange, attempts to make a statement at the earliest opportunity, and is prevented from doing so there is a risk that he will imagine that he can never make his defence, and when at the close of the Crown case this opportunity comes, he may content himself with stating that he has nothing more to say. Needless to say any statement so made by an accused person should not be recorded except in the form of relevant questions to a witness put by the magistrate on behalf of the accused.

## Interjections by Accused.

119. If during a trial or preliminary enquiry an accused person makes an interjection which is relevant to the proceedings, it can be proved by the evidence of any person who heard such interjection, but it is not admissible for or against the accused as part of the record. We have been invited to endorse a proposal so to amend the law as to render such interjections admissible as part of the record or depositions. In our opinion, no case for such amendment has been made out. A statement made by an accused person in a preliminary enquiry has to be proceeded by a statutory caution. In the case of interjections, no such caution is possible, and the present legal position is, in our opinion, adequate for the proper administration of justice.

## Power of a Magistrate to call Additional Witnesses.

120. The Criminal Procedure Code of each territory contains a section in the following terms:

> "Any court may at any stage of any inquiry, trial or other proceeding under this Code examine any person in attendance though not summoned as a witness; or recall and re-examine any person already examined; and the court shall examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

121. In addition it is provided that in a trial before a Subordinate Court, "If the accused person adduces in his defence any evidence, other than evidence as to character, the prosecutor may adduce evidence in reply thereto."

122. When a case has been committed for trial the Attorney General, if he considers that further evidence is necessary, may either require the Subordinate Court which committed the accused person for trial to call and take the evidence of such witnesses or call such witnesses before the High Court, subject to his notifying the Registrar of the High Court and the accused person of his intention to do so, and furnishing them with copies of the evidence which each such witness will give.

123. What, then, is the case for empowering a magistrate to call a witness who is not present in court and whom neither of the parties is desirous of calling? We have been told that accused persons refuse to call witnesses who apparently can give evidence favourable to them and that a defence is often prejudiced by such refusal. The proposal, however, is not to enable a court to call additional evidence for the defence, but to empower magistrates generally to compel the attendance of any person to give evidence and at any stage of the proceedings. Such a wide discretion conferred on magistrates is likely to operate to the disadvantage of accused persons and we do not consider that a case for such an

amendment of the law has been made out. In many cases it would, of course, be helpful if the magistrate were to suggest to either of the parties that additional evidence would be useful. We have no doubt that in practice this course is usually followed.

## Preliminary Enquiry.

124. With certain aspects of this enquiry and with suggestions for its abolition or its fusion with the police investigation we have dealt in the preceding chapter. At this stage we desire only to comment shortly on two proposals that have been made to us. It has been suggested that a committing magistrate might usefully record, for transmission with the depositions, any question of native custom or local circumstance which might have a bearing on the case, or help to explain the motive of an accused person. This suggestion we welcome. We view with concern the problem of the defence of natives, with which we deal in a subsequent chapter, and anything from one conversant with the mentality and environment of an accused native may be of real value as indicating a line of defence or extenuating an admitted act.

125. The second point is also one which has our approval. The Criminal Procedure Codes provide that at the close of the case for the prosecution the charge shall be read and explained to the accused person, and that he be informed that he has a right to give evidence on oath, or to make a statement. He must then be cautioned in the following form :—

> " Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence upon your trial."

126. One of the weaknesses of a British system of administering justice in criminal matters is, we are told, that an accused native cannot appreciate the difference between the preliminary enquiry and the subsequent trial. To him all courts are alike. He may either at the preliminary enquiry unnecessarily outline his defence, or having said nothing then he may make no defence on his trial. How much substance there is in this argument we cannot say, but anything that will tend to make the position clearer to an accused African must be to the good. We therefore endorse the suggestion that the form of statutory caution should be somewhat as follows :—

> " This is not your trial. You are not being tried now. You will be tried later on in another Court and before another Judge, where all the witnesses you have heard here will be produced and you will be allowed to examine them and ask them questions. You will then be able to make any statement you may wish. If, understanding this, you want to make a statement to me, I will take it down, and it may be used as evidence at your trial."

## The admissibility of Depositions in Certain Cases.

127. The deposition of a witness may, subject to the usual safeguards, be read as evidence in a trial if it is proved at the trial by the oath of a credible witness that the deponent is absent from the territory or dead or insane, or so ill as not to be able to travel, or to be kept out of the way by means of the procurement of the accused or on his behalf.

128. The relevant section which is common to all three Codes closely follows section 13 (3) of the Criminal Justice Act, 1925, save that the English Act contains no provision relating to the deposition of a witness who is absent from the United Kingdom.

129. It has been represented to us that in the circumstances which obtain in these territories many depositions are useless because the deponent cannot be found or his absence from the territory cannot be proved, and that the principle of admitting the reading of depositions on a trial should be extended to cases where it is proved that the witness cannot be found or is incapable of giving evidence, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable. Where the delay or expense involved in calling a witness is excessive, the High Court has power to order his examination on commission and evidence so taken may be read as a deposition, subject to all just exceptions.

130. That being the case, we are unable to appreciate why the deposition of such a person taken in the ordinary course should not be equally admissible in evidence, and we suggest that the amendment of the law proposed to us might properly be made. An illustration from Tanganyika will serve to indicate the difficulties inherent in the present position. A witness gives evidence at a preliminary enquiry at Kigoma, and subsequently goes to Songea. In the rains Songea is more remote from Kigoma than is London. The journey from one place to the other involves a walk of four hundred miles to Lindi over difficult country, a wait at Lindi for the call of an infrequent steamship, a journey by sea to Dar-es-Salaam occupying two days, and a train journey of 781 miles to Kigoma.

## Interpretation.

131. In territories such as these where English is understood by only an infinitesimal percentage of the native population and where there is a large number of vernacular languages in common use, interpretation is essential in judicial work. We have received a volume of evidence as to the low standard of interpretation and it is difficult to overstate the dangers which may result to the administration of justice from faulty interpretation, especially in the cases in which double interpretation, for instance from Masai into Swahili and again from Swahili into English, is necessary.

It is not suggested that interpreters do not conscientiously do their best, but we are struck by the unanimity of witnesses as to the limited knowledge of English possessed by interpreters, or their inability correctly to convey the true purport of the proceedings. In these countries good interpretation is a vital consideration and every effort should be made, by the establishment of a corps of interpreters on terms and conditions of service which will attract suitable candidates, to ensure that interpretation from and to as many languages as possible will be faithfully and intelligently done.

## Assessors.

132. Much has been said during our sittings on the subject of assessors. Generally speaking, assessors are regarded by judges and magistrates as helpful, though obviously they have their limitations. Several witnesses have stressed the haphazard method of selection of assessors, which, we are assured, frequently results in unsuitable persons being chosen who are ignorant of the purpose for which they are brought to court, are incapable of giving any real assistance, and are only anxious to know when the case is over whether they pleased the judge or not. Sometimes, too, assessors are chosen who already know all about the case and give their opinion not on the evidence but on that foreknowledge. One witness has urged that, before an assize, assessors should be carefully selected for their intelligence and knowledge and should sit on every case in the calendar. Another proposal is that an Administrative Officer from the district concerned should be one of the assessors, but we doubt whether it would be practicable to second an officer for so long a time from his ordinary duties, or whether his ability to sift and weigh the evidence and his knowledge of native custom and mentality would be sufficiently valuable to compensate for the harm done to his district by his withdrawal from his ordinary duties. We are advised, also, that one assessor should always be a person with a working knowledge of the language of the court and the language of the accused. In so far as the services of such an assessor would help to check interpretation, there can be no question of the usefulness of the suggestion, but we are unable to recommend that it should be a statutory obligation, for we doubt if there exist natives with a sufficient knowledge of, say, the West Nile dialects or Lugishu and English.

133. Many witnesses have stressed the importance of preparing a panel of suitable native assessors. In this connexion it is interesting to note that the Criminal Procedure Code of Tanganyika which provided that:—

> The Register of the High Court shall, before the first day of March in each year and subject to such rules as the High Court may from time to time prescribe, prepare a list of suitable persons in the territory (including natives of African extraction) liable to serve as assessors.

was amended in 1931 to make it no longer obligatory to keep a roster of Africans.

134. We think it sufficient to say that though we are not prepared to go so far as to advocate a statutory provision for the keeping of a list of suitable African assessors, we regard it as important that the best men available should be employed as assessors, and we consider that District Officers might well keep a list f suitable men which would be revised at regular intervals. The nature of the duties of an assessor could then be explained to them, so that it could no longer be said that they go to the court entirely ignorant of their duties and rights and leave it no wiser than they were when they entered it.

135. Certain Tanganyika witnesses advocate keeping assessors apart in special camps while the case in which they are serving is being tried.

136. No sufficient case has been made out for treating as a jury assessors whose functions and powers are dissimilar to those of jurymen. It is important to inculcate in the African mind the idea that it is the duty of responsible members of society to assist in the administration of justice. Service as an assessor is not likely to become more popular with a man who knows that while he is an assessor he will be kept separate from and forbidden to mix with his fellow citizens.

### The Judge's Note and Shorthand Writers.

137. We have it in evidence that in Uganda a judge is expected to record in longhand the whole of the evidence given and that anything of the nature of a judge's note is unknown. We understand that the position is the same in Tanganyika Territory. While it is important that the substance of all evidence should be recorded in narrative form, we cannot resist the conclusion that the laborious writing down of all that is said, be it relevant and admissible or not, not only taxes the time of a court unnecessarily but makes it extremely difficult for the court to study the demeanour of witnesses and the manner in which they give their evidence. In the Supreme Court of Kenya, shorthand writers are employed. We suggest that the employment of really expert stenographers in the High Courts of the other territories would prove a real economy in the time of judges, advocates, parties and witnesses.

### Confirmation and Revision.

138. Confirmation is the system whereby sentences in excess of a prescribed limit passed by Subordinate Courts have to be reported to the High Court and confirmed by it. The Kenya provision regarding confirmation is contained in section 11 (1) of the Criminal Procedure Code :—

> "No sentence imposed on a native by any Subordinate Court exceeding six months' imprisonment (whether such

sentence shall be a substantive sentence of imprisonment or a sentence of imprisonment in default of payment of a fine or a combination of such sentences) or twelve strokes shall be carried into effect, and no fine exceeding fifty pounds shall be levied, until the record of the case or a certified copy thereof has been transmitted to and the sentence has been confirmed by the Supreme Court."

139. In Uganda the statutory provision is the same as in Kenya, but a High Court circular calls for the submission, for scrutiny and confirmation by the High Court, of the records of all cases tried by magistrates in their first six months of service, and of all other cases in which a sentence exceeding three months' imprisonment is passed. In Tanganyika the necessity for confirmation varies with the powers of the Subordinate Court concerned. A Subordinate Court of the first class has to submit for confirmation every case in which a sentence exceeding twelve months' imprisonment, a fine exceeding £50 or a sentence of corporal punishment exceeding twelve strokes is passed. For a Subordinate Court of the second class the limits are six months' imprisonment, a fine of £37 10s. 0d. or eight strokes.

140. The procedure is that the record of the case is sent to the Registrar of the High Court and examined by a judge. In confirmation a judge may, in addition to his power to direct the taking of further evidence,

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a court of competent jurisdiction or commit him for trial; or

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without such reduction or increase and with or without altering the finding, alter the nature of the sentence or alter or reverse any other order.

141. In Uganda a judge in confirmation may also reverse an order of acquittal.

142. The High Court may also call for and examine the record of any criminal proceedings before any Subordinate Court, and may then on revision exercise any of the powers which it has in confirmation.

143. In Kenya we heard much evidence in criticism of the way in which the Supreme Court exercised its powers of confirmation and revision, and of the consequences which ensued from such exercise. The great majority of the Subordinate Courts of the Colony are presided over by Administrative Officers who have no technical training in law. They are not only magistrates but District Officers responsible for the welfare of their districts and the maintenance of law and order. They are often responsible for the prosecution of crime in their districts if there is no police officer

and when a criminal has been arrested, put on his trial and convicted, it is galling to them in their administrative capacity to find that the conviction is quashed on what they may regard as a technicality.

144. The position from this point of view may be summarized in a quotation from the evidence* given by Mr. Montgomery, Provincial Commissioner, Nyanza Province, Kenya :—

CHAIRMAN: In the first paragraph of your memorandum you say, " . . . the idea being to have as few courts as possible and to have due regard to the Order in Council 1921, which lays down that the law shall be administered without undue regard to technicalities and procedure." What does this mean?

WITNESS: In revision cases, a judge of the High Court sitting in revision probably would pay more regard to technicalities than the rough and ready justice which natives get in the lower courts. There have been cases where on a pure technicality a judgment has been quashed but where if the court, as suggested in the memorandum, were sitting, they would probably, in the interests of justice, pass over that technicality.

CHAIRMAN: What do you mean by technicalities?

WITNESS: Small errors in procedure which may vitiate the whole case.

CHAIRMAN: Do you think the Supreme Court would quash a case on a small error of procedure?

WITNESS: It has been done.

CHAIRMAN: You would not regard it as a technicality if the accused had not been heard in his own defence or if the court came to the conclusion that there was no evidence against him, or if the evidence which had been admitted was so inadmissible as to embarrass a fair trial of the case?

WITNESS: No.

CHAIRMAN: What I am wondering is whether when you speak of technicalities you are thinking of those safeguards which experience has shown to be necessary if a man who is accused of an offence is to be sure of obtaining justice?

WITNESS: No; that was my idea in suggesting a court consisting of a qualified lawyer and an administrative officer.

CHAIRMAN: You are not suggesting that the Order in Council is to be operative so as to refuse to the native the benefit of these technicalities or safeguards which other people are entitled to claim?

WITNESS: No. Surely it is the other way about. The Order in Council would act in favour of the accused.

CHAIRMAN: So that when you say that the court is inclined to interfere on technicalities, if the native is to have the same rights as other people the court is bound to take notice of technicalities?

WITNESS: Up to a point, yes.

CHAIRMAN: Have you any case in mind where a conviction has been quashed on a pure triviality?

WITNESS: I think it has happened in some of the stock theft cases. I cannot quote at this moment but I think some of the District Officers who have these cases before them day after day would be able to give you more information about them.

CHAIRMAN: We have been looking at some returns, I don't know if you have seen them. I do not think anyone has yet suggested that any of these cases were interfered with on trivialities.

WITNESS: No. If you wish for information on that point I could send the District Commissioner Kisumu, who is intimately acquainted with this kind of work, to appear at Nakuru.

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* Minutes and Evidence, page 16.

CHAIRMAN: Certainly, if he has any suggestions to make on the embarrassments which are caused him on the question of revision . . . .

Mr. JUSTICE LAW: What have you got to say as regards revision generally?

There is provision in the Criminal Procedure Code for irregularities in procedure?

WITNESS: Yes.

Mr. JUSTICE LAW: Do you favour it?

WITNESS: There must be revision definitely.

145. Again, Mr. Wade, Chief Native Commissioner for Kenya, said in his evidence:—*

WITNESS: The next item is:

The system of revision. I do not think I have anything very useful to say about that except to point out that from the point of view of Administrative Officers there is a general feeling that it is not quite satisfactory. There is a certain amount of inconsistency about it, or there seems to be, and District Officers do not quite know where they are. I think in particular that there is a good deal of exasperation when convictions are simply quashed when it is thought that there might have been a re-trial ordered. I know as regards stock theft, which is the bane of a District Commissioner's life who is trying to keep his district in law and order, if, after a great deal of trouble by Police and Administrative Officers, as regards a theft which has occurred, a native has been found guilty and even admitted it, the case is quashed, there is a great deal of dissatisfaction. The released stock thief goes off shouting in triumph and steals again. He reckons that his luck is in and that somehow he has defeated the Administration. It is some years since I was a magistrate and I do not know how much reason there is for this feeling, but I am quite sure that there is a feeling that revision is not entirely satisfactory. There have certainly been decisions that seem quite impossible for an ordinary Administrative Officer to understand . . . .

146. In further explanation of his evidence† Mr. Wade added the following remarks:—

CHAIRMAN: The next point is the system of revision. On my notes you thought the general feeling in the Subordinate Courts was that it was not very satisfactory and I understood you to say that they felt some exasperation with regard to the sort of revisions that had affected their prestige and that they disliked the idea of the High Court interfering on technicalities. I am not sure if you said all that but all that has been said to us. Do you think that is a fair summary of the objections?

WITNESS: I think it is, Sir. I think, perhaps, if I might make it clear I am not making any charge or any attack on the revision system which for all I know may now be quite good. I have merely gathered the impression that it is not entirely satisfactory and might possibly be improved.

CHAIRMAN: Were you rather supporting it or not? I think I should rather like to get your help and advice on it. On the question of prestige, what we are aiming at is the best system we can get, by which justice should be done, and you probably agree that in the pursuit of that we ought not to consider the prestige of individuals?

WITNESS: Personally, if I may say so, it is very easy to overdo the argument about prestige.

CHAIRMAN: Do you think that it is not so much the Administrative Officer's prestige in his capacity as judge as in his capacity as District Officer that is affected?

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* Minutes and Evidence, page 14.

† Minutes and Evidence, page 20.

WITNESS: Probably the latter, but I do not think I should support that line of argument myself.

CHAIRMAN: If that is at the back of it, it is not a matter which we ought to take into account?

WITNESS: I think it is, Sir. And if Administrative Officers do say that they suffer in prestige it probably means the Government loses a certain amount of respect and authority when guilty people are allowed loose. Probably that is what they are thinking of.

CHAIRMAN: You use the word "guilty" in a curious sense. May I suggest that nobody knows whether a man is guilty except the man and his Maker. The only thing anybody can know is whether, according to rules which have been laid down, the human intellect is satisfied that he is guilty.

On the question of technicalities you would not regard anything as a technicality which was such as to make the court think that an injustice had been done? So long as the High Court acts upon a ground which to their mind indicates that injustice has been done on account of that particular matter, you would not regard that as a technicality?

WITNESS: No, Sir, certainly not.

CHAIRMAN: What I presume you would regard as a technicality is one of those little things which does not affect the case from the point of view of justice but which is some point of rigid law?

WITNESS: Something which really has not prejudiced the accused in any way.

CHAIRMAN: When you see cases quashed because the accused has not been heard at all, you would not regard that as a technicality?

WITNESS: No, Sir. Again I am not much in favour of an argument on this ground.

CHAIRMAN: We have not found any technicalities and indeed there is a section in the Ordinance which directs the court not to take notice of any.

WITNESS: I agree with that.

147. Mr. Deck, the Provincial Commissioner, Nzoia, took the point, also referred to by other witnesses, that a judge who has nothing but the record to go by is at a disadvantage, and that his actions may be prejudicial to law and order.

On this point Mr. Deck's evidence* was as follows:—

Mr. MACGREGOR: What is the real objection to revision by the Supreme Court in the interests of the native?

WITNESS: I think the revision acts very much in the interests of the native. I am concerned with revision by the High Court as it affects law and order in the district. Revisions are made, I think, sometimes on account of an inadequate record by the magistrate. It does not convey to the Supreme Court the impression that the evidence probably quite rightly conveyed to the trying magistrate and he has simply not recorded his case in full. I think the general effect is that a large number of people who are guilty get off.

Mr. MACGREGOR: Do you know what the present system on revision is? Are you aware that no order is made for revision without prior reference to my office?

WITNESS: I understand that.

Mr. MACGREGOR: Do you regard that as an additional safeguard for the preservation of law and order?

WITNESS: Yes, but at the same time your office cannot see it in the same way as the trying magistrate sees it, and it seems to me that to quash a case on a possibly inadequate record is somewhat dangerous as far as the maintenance of law and order is concerned. The magistrate has no chance of saying anything in support of his judgment.

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* Minutes and Evidence, page 46.

Mr. MacGregor: But from the point of view of the native you regard revision as a very useful thing?

Witness: The native must benefit more than he suffers from it undoubtedly.

148. Obviously a High Court judge in exercising this power of confirmation and revision is in a difficult position. He is at a disadvantage in that he probably knows nothing of the district in which the crime was committed or of the mentality of the natives, and he has not seen and heard the witnesses. In such circumstances it would be wrong for a judge to interfere arbitrarily either with conviction or with sentence. There are, however, many grounds on which interference is justified and indeed essential. We have made a careful examination of the records of work done in confirmation and revision by all three High Courts and we are fully satisfied that the work is well done and the powers properly exercised. We have found no case in which a conviction has been quashed on what is only a technicality. Cases, however, are numerous in which a conviction has to be quashed for such reasons as misjoinder of parties or of charges, which the Judicial Committee of the Privy Council has declared not to be a technicality but an irregularity so grave as to make the proceedings void *ab initio*, or a court acting on the uncorroborated evidence of accomplices or on the evidence of a wife when her husband's consent to her giving evidence has not been obtained.

149. Sentences are reduced either because the sentence passed was so severe as to be unjust or proceeded upon a wrong principle, or because it is in excess of the maximum allowed by law, as, for example, sentences in excess of three months passed under the special procedure for the trial of minor offences.

150. Other witnesses have urged that even when the record discloses an irregularity, which is so grave as to cause manifest injustice, a judge in confirmation should not quash the conviction and direct an acquittal but should order a re-trial. Mr. Symons representing the Lessos Farmers' Association gave evidence* as follows:—

Chairman: Supposing a court inflicts a punishment which it is not authorised to inflict, don't you think there ought to be some procedure for revising it?

Witness: When that power of revision is exercised, it should take the form of ordering a re-trial. It seems to me that it must be very difficult for anyone in Nairobi to envisage the circumstances of the case.

Chairman: He can envisage the question as to whether, in his view, there has been such irregularity as to cause injustice?

Witness: If it goes so far as to be definitely an injustice, I think a re-trial should be ordered, but that a native should get off on a technicality of law seems to me definitely bad.

Chairman: If a man has been convicted under circumstances which make that conviction an injustice, do you think it is fair that he should be put in peril again? The fault there is with the convicting court.

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* Minutes and Evidence, page 38.

WITNESS: I think it is a legal point. I merely say that if a native receives a sentence, whether light or heavy, and knows he has done wrong, he accepts it.

CHAIRMAN: The question is, has he done wrong? If the court has so conducted the case as to render that doubtful or improbable, is not a native like anyone else entitled to have the position rectified?

WITNESS: Certainly, but I say he should have a re-trial. If he has been found guilty he cannot be found anything else.

CHAIRMAN: At home, if a court makes an error, the accused has the benefit and there is no re-trial.

WITNESS: I should have thought the results would have been better, in this particular case anyway, if, instead of letting the accused off, the magistrate had been pulled up and been shown where he had gone wrong.

CHAIRMAN: But he may have gone so wrong that he has convicted an innocent man.

WITNESS: I say that the man in Nairobi cannot have so much opportunity of judging as the man on the spot, and, if there was injustice I should order a re-trial.

151. As regards this suggestion we desire to state that the legislature has, in our opinion properly, conferred upon a judge powers either to order an acquittal or to order a re-trial, and we have no evidence that these powers have been improperly used so as to cause any injustice either to accused persons or to society.

152. A further suggestion made in this connexion was that sentence should not be pronounced until after confirmation. In that case the accused person would be aware that he had been convicted and, if the conviction were quashed, the same harm would be done to administrative prestige, if harm there is. We cannot accept this suggestion.

153. Another aspect of the feeling against confirmation and revision is concerned with the reduction of sentences. Again, this is confined almost entirely to Kenya, where we were struck by the severity of sentences passed as disclosed in the registers of confirmation and revision cases. No appellate tribunal is entitled arbitrarily to interfere with a sentence. It is not sufficient for a confirming judge to feel that had he been the magistrate he would not have passed so severe a sentence. It is right, however, that sentences should be reduced when they appear manifestly to be harsh and unjust or to have been imposed upon a wrong principle, and we have been unable to find any cases in Kenya in which the power of confirmation or revision has been improperly exercised in this respect.

154. The views of the Chief Justice of Kenya on confirmation and revision generally were expressed thus:—*

CHAIRMAN: There are two or three specific points about which I should like to speak to you. First of all revision. It has been suggested to us that confirmation and revision of cases is embarrassing to the Subordinate Courts, that it does not really serve any useful purpose and that they could carry on their business if it were abolished.

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* Minutes and Evidence, page 33.

WITNESS: I think confirmation and revision are both necessary because as at present constituted Subordinate Courts have practically full jurisdiction over natives. They can try for any offence except certain offences set out in the Ordinance and can give any sentence. There is no limitation at all and you have Subordinate Courts consisting of unqualified people, i.e., a great many of them have had no experience in legal matters at all. So far as Kenya is concerned, once an Administrative Officer has passed his law examination the tendency is to make him a second-class magistrate, and second-class magistrates have full jurisdiction over natives. It is necessary, therefore, to have some supervisory authority who can check both the decisions and sentences. As you know, sentences of more than six months, whipping over 12 strokes and fines of over £50 have to come up for confirmation.

155. In Uganda and Tanganyika the feeling with regard to confirmation and revision was entirely different. With very few exceptions witnesses expressed the view that the High Court in that capacity was not only assisting to have justice done, but was helpful to magistrates in pointing out the mistakes they had made and in giving guidance for the future.

156. In stating the conclusions which we have formed on this question we cannot do better than to quote a judgment of Mr. Justice Thomas.

In Kenya Confirmation Case No. 97 of 1933 delivering the judgment of the Court (Thomas and Gamble, JJ.) he said:—

> " In the appendix to Vol. I of the Kenya Law Reports appears the following:—
>
> > ' The valuable provisions of Article 20 of the Order in Council of 1920 are not to be misconstrued into an authority for administering justice to the native in the rough and ready style of which some affect to think highly, but which is generally but the sign of lack of experience or of sympathy and patience and not infrequently results in what is in reality rough and ready injustice.'
>
> " These words meet with my entire approval and I repeat them here and give them even greater force, if possible, than they had in the early history of the Colony. This I deem necessary for some would still seem to think that the language of the Order in Council is to be treated as a charter of liberty to allow any breach of regularity in the administration of justice and more especially to excuse errors in the proper conduct of trials on the part of authority.
>
> " Such cannot be the interpretation which has been placed upon these words by the Supreme Court, otherwise the constant insistence in revision of the requirements of the Criminal Procedure Code being given effect to would not take place."

157. With that opinion we are in complete agreement. What the magistrate of a subordinate court may regard as a mere technicality unworthy of serious notice may cause grave injustice and vitiate the whole proceedings. Confirmation and revision are admittedly not a perfect system, and may in time become unnecessary as more professional magistrates are appointed in these territories and as the ordinary native becomes better aware of his right of appeal and that right becomes more easy to exercise. These powers will be less frequently used if the jurisdiction of magistrates in Kenya and Uganda is reduced. At present, however, powers of

confirmation and revision are essential, are wisely and temperately used, and should remain as part of the system of the administration of justice.

## Punishments.

158. Much has been said to us in support of a system of administrative courts to replace the present High Court system, at least so far as natives are concerned. Witnesses have also advocated the substitution for the Penal Code and Criminal Procedure Code of codes based on native law and custom and the methods of procedure to which natives are accustomed.

159. Mr. Bentley of Kitale put the case thus :—*

CHAIRMAN: . . . . Now as regards High Court trials. This, I think, can be summarised in this way, that you would like to see High Court trials held before a senior Provincial Commissioner and two other Administrative Officers sitting with him on the bench. This is for the purpose of trying serious crime?

WITNESS: Yes.

CHAIRMAN: Is the court so composed to be guided by rules of law and evidence?

WITNESS: Absolutely, Sir.

CHAIRMAN: What difference do you think it would make having three Administrative Officers instead of a judge?

WITNESS: I think it would make absolutely all the difference. I speak as an ex-Administrative Officer who has lived all his life with the natives not in a settled area like this but in a native reserve. Another way of saying it is that if I myself was a native being tried for my life and had a chance of being tried by one of my Administrative Officers or by a High Court judge, I would choose the Administrative Officer every time.

CHAIRMAN: We are trying to see which would procure the most satisfactory results.

If the court is to be guided by law and the rules of law and evidence, do you think a court so composed would be more competent than a court composed of trained judges?

WITNESS: Yes, Sir, because of its additional knowledge.

CHAIRMAN: What additional knowledge are you referring to?

WITNESS: I am living in a native area, I have been there two or three years and know the people, their language, I talk to them and get to know them in a way that a man who works as a High Court judge in Africa cannot possibly get to know them.

160. Mr. Forsyth Thompson, District Commissioner, Entebbe, gave the following evidence :—†

CHAIRMAN: . . . . I gather that you don't like the existing Criminal Code?

WITNESSS: Yes, Sir.

CHAIRMAN: Do you like the Indian Penal Code?

WITNESS: Yes, Sir. It seemed to me more suitable for the natives of Uganda than the present one.

CHAIRMAN: In what way did it fit the case better?

WITNESS: Because I think the punishments were more understandable for the natives than those provided by the present code.

CHAIRMAN: You say you want a system of justice, "understood and accepted by an African tribe with the elimination of the palpably grosser

* Minutes and Evidence, page 41.
† Minutes and Evidence, page 57.

elements which must be considered repugnant to justice and morality" and that this "is a primary essential to the contentment of that tribe." In paragraph 5 you complain that "it is decided that cases of theft shall be met by fine or imprisonment"; and then you point out in paragraph 6 that "a theft of a bunch of bananas at night from a banana garden is adequately met, under the present system, by a small fine (3s. or 4s.) or a fortnight's imprisonment. Forty years ago such a thief would have been killed, a plantain tied round his neck and his body thrown into the road unclaimed even by his nearest relatives . . . ."

Would this be part of what you call "the palpably grosser elements"?

WITNESS: Yes.

CHAIRMAN: Why do you mention this? You don't want to go back to the old practices?

WITNESS: No, Sir.

CHAIRMAN: What is wrong with imprisonment or fine for theft?

WITNESS: I don't think in most cases that a fine or imprisonment are severe enough and I think the natives would pay more regard to a whipping.

and again:—*

WITNESS: I think native law and custom ought to be taken into consideration. I have a case here, which I did not mention in the memorandum. I have seen such cases. The theft of a fowl worth about 50 cents was punished with a fine of 40s. and three months. On the face of it the fine seems preposterous. But the natives explained that the stealing of fowls is a very serious matter because it is one of the things used in witchcraft. If you steal a man's fowl it is rather like stealing a man's nail parings or hair, you have some influence over him and are perhaps able to work evil on him.

Mr. JUSTICE LAW: But you cannot introduce these considerations into British legislation?

WITNESS: I think these things ought to be taken into consideration. No doubt in time, they will be able to think as we do.

Mr. JUSTICE LAW: Your objection would be in this case from the point of view of the punishment not the form of the law?

WITNESS: Yes.

Mr. JUSTICE LAW: But there is this difficulty, that what might be an offence, say to the Buganda native system of law might not be to another system in a different part of the country. So that it would be rather difficult to introduce any suggestions which might not meet other cases?

WITNESS: Yes, Sir; but there seems to me to be a great similarity between all these tribes of Uganda. I think an average might be found and a system adopted understandable by natives of other tribes. In many cases the punishments we impose are to them inexplicable.

161. Mr. Willis, advocate of Mwanza, who through illness was unable to appear before us, in his memorandum advocated the following changes:—

To relieve His Majesty's High Court and the courts of Resident Magistrates of all jurisdiction in criminal and civil matters between natives of Africa and to transfer wholly such jurisdiction to the Administration, i.e., Provincial Commissioners, District Officers and Assistant District Officers with appeal to His Excellency the Governor and that only in murder cases.

It is further suggested that so far as criminal and civil cases between natives of Africa are concerned the criminal and civil codes in force in this Territory be repealed and that native law and custom be the only code in force in so far as it does not offend against public morality (as understood by the natives of Africa) and does not involve cruelty to the person; when

* Minutes and Evidence, page 58.

it does then the officer presiding as Judge would inflict such punishment as in his discretion he thought proper.

That there be no law of evidence but that all statements tending to throw light on the issues before the court be accepted for what such statements are worth in the opinion of the officer presiding as judge; a dropped aside or a chance remark made by some apparent stranger may be of more value and often is (although not accepted as evidence by the courts under the law) than the sworn evidence of half-a-dozen alleged eye witnesses of the alleged crime.

That except in cases of long premeditated and savage killing the death sentence should be abolished and compensation awarded to the deceased's relatives and payable by the whole of the clan of the accused and that all other sentences should be in accordance with punishment as far as practicable with native law and custom except as herebefore mentioned.

162. On close examination it appears to us that the material difference between native substantive law and the Penal Code is in respect of punishment. To the native mind what the British system regards as a crime against the public peace was essentially a private wrong. It might be an offence against the community also but it was always a tort and usually was punishable as such. Homicide, we have been told, was frequently punishable with death if the killer was caught by the relatives of the deceased man: if, however, he got to a chief and reported the homicide, the matter was adjusted between the families by the payment of blood money. Rape among some tribes is regarded as a comparatively venial matter which can be settled by the payment of compensation. Stock theft, when it consisted of raiding the stock of a neighbouring community, was like war, an international matter, and the successful stock thief so far from being regarded as a criminal, was acclaimed as a hero and a benefactor to his tribe whose wealth he had materially increased. At the other end of the scale we find such cases as those instanced by Mr. Forsyth Thompson in the evidence which we have just quoted. Clearly a system of substantive law which proceeded on such principles as these could not be tolerated in any part of the British Empire. It is the duty of Government to civilize and to maintain peace and good order, and this can only be done by the introduction of British concepts of wrong doing. Revenge and retribution as methods of punishing criminals must go, and crime must be regarded first and foremost as an offence against the community if the peoples of these territories are to advance in enlightenment and prosperity.

163. With rare exceptions, however, such as those instanced above, the native code of criminal law would not materially differ from such a code as that now in force in the territories. It is in the conception of the appropriate punishment for an offence that the real divergence in point of view arises. On this issue we cannot do better than quote the Tanganyika Government memorandum on Native Courts, second edition, paragraph 25, which reads as follows:—

"When jurisdiction is given to Native Courts to try offences against the Ordinances or laws of the Territory (for example, the Native

Authority Ordinance) their powers of punishment extend to the punishments, set out in such Ordinances or laws, provided of course that they may not impose sentences in excess of the powers expressed in their warrants. In the case of native law and custom, section 15 of the Ordinance authorizes punishments in the form of imprisonment or fine because those are the sanctions which civilized nations accept as permissible for the class of offences with which native courts deal. Every effort should be made to make it clear to Chiefs and Elders that those sanctions are in substitution for the barbarous sanctions of their own law, such as mutilation, sale into slavery, ordeal by poison, and so on, the use of which no European government can permit. In some courts there seems to be an impression that the power to make use of those sanctions implies an obligation to do so, with the result that imprisonment or fine is ordered in lieu of the compensation or reparation which native law would have required; it should be explained that this is not the case and that fine or imprisonment should in general only be ordered where, but for the British Government, a more severe sanction of which we do not permit the use would have been imposed. In addition to the power to fine or imprison, section 15 of the Ordinance gives power to the Native Courts to inflict, for breaches of native law and custom, any punishment authorized by that law and custom provided that such punishment is not repugnant to natural justice and humanity."

164. Our conclusion is that, save in so far as we later advocate the use of reconciliation and compensation for minor offences and damages for certain more serious offences by way of civil suit before the native courts, the punishments sanctioned by all enlightened systems of jurisprudence are the most suitable for these territories.

165. The punishments which, under the Penal Code, may be imposed in these territories are :—

Death;
Imprisonment;
Fine;
Corporal punishment;
Compensation;
Forfeiture;
Finding a security to keep the peace and be of good behaviour or to come up for judgment.

166. In addition the Criminal Procedure Codes all make provision for the release of first offenders on probation.

## Imprisonment.

167. On the general question of the suitability of imprisonment, fine or corporal punishment for the natives of these territories, we have heard a mass of conflicting testimony. Different witnesses have held and expressed diametrically opposite views on this subject. As regards imprisonment, we are told that to 60 per cent. of the prison population it is no deterrent; that natives incur no stigma by reason of their having been in prison; that they are well housed, clothed and fed, and that the only irksome feature of imprisonment is the deprivation of beer and tobacco, and enforced silence.

168. Sub-Chief Lwamgira, Secretary to the Bukoba Council of Chiefs, put it thus :—* 711

> "We recognize that there is no alternative to imprisonment but it is very much too comfortable for the prisoners. The prisoner gets up in the morning, has breakfast, he is shaved, his clothes are washed for him, etc. If life in the prison were made really hard it might be more efficacious."

169. Such force as there may be in these arguments must apply only to short terms of imprisonment: deprivation of liberty for a long period must be regarded as a severe punishment by all but the comparatively few recidivists who have spent most of their life in prison.

170. What then is the best alternative for a short sentence of imprisonment?

## Fine.

Some witnesses favour fines, others are opposed to fining on the ground that unless the fine is a really large one the convicted man pays it and thinks nothing of it but if it is a heavy one his relatives have to pay it for him and they may even be reduced to penury by so doing. There is here a manifest confusion of thought. If a short term of imprisonment is an unsuitable form of punishment, something must be found to take its place. If a fine is inordinately large for the circumstances of a convicted man he will not or cannot pay it and he will go to prison in default. Fines should be proportionate to the gravity of the offence and to the means of the offender. We cannot believe that the African generally likes to pay a fine, which may involve the selling of stock or other property. More use could, we feel, be made of fining for minor offences, but if people are to be kept out of prison, time in which to pay a fine must be allowed, and we have formed the opinion that time is very seldom granted.

171. Above all we desire to emphasize that a fine should be for such amount as the offender may reasonably be able to pay. The evils flowing from the now repealed provision in the Kenya Stock and Produce Theft Ordinance which enacted that every convicted native must be ordered to pay a fine of not less than ten times the value of the stolen stock and produce are thus described by Mr. Symons of the Lessos Farmers' Association :—†

> CHAIRMAN: Stock theft, you say, is very prevalent. For this there is a fixed punishment?
>
> WITNESS: So far as I know there is a fixed rate of fine of ten times the amount of the stock stolen.
>
> CHAIRMAN: Do you regard that as inadequate?
>
> WITNESS: I am only a farmer and think that if crime is steadily increasing then the sentences must be insufficient to act as a deterrent.
>
> CHAIRMAN: A fine of ten times the value of the stolen stock may amount to a very large sum?

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* Minutes and Evidence, page 95.

† Minutes and Evidence, page 38.

WITNESS: Quite.

CHAIRMAN: It may amount to as much as Shs:20,000/00. That is a substantial fine.

WITNESS: Yes.

CHAIRMAN: Can you imagine any advantage being gained from increasing that?

WITNESS: No. As a matter of fact I think that to fine is the wrong system. It seems to me that when a native is fined ten times the value of the stock, that fine is collected from him and his relations and perhaps his location in order to get the full value. When he comes out of prison he finds himself and his family very much poorer and, personally, I consider that the fine acts not as a deterrent at all but as an incentive to steal again in order to replace what he has lost.

CHAIRMAN: When he has paid the fine he has been denuded of his property and means of livelihood?

WITNESS: Yes.

The Bukoba Chiefs put the case shortly thus :—*

CHAIRMAN: As regards paragraph 4 of your memorandum "If a man commits an offence punishable with less than two months imprisonment, he should not be gaoled, but made to pay a fine which should be assessed in accordance with his means", should the fine go to the native administration or to the complainant?

WITNESS: In the case of a fine of this nature, it should be taken by the Government. We wish to emphasize that in such cases a man's condition should be examined so that he should not be fined an amount which he is unable to pay and which would drive him into prison.

172. Other arguments may be conveniently summarized in the following extract from the Report on the question of Imprisonment in Tanganyika Territory (Sessional Paper No. 2 of 1932) :—

> "The majority of the witnesses examined and a large proportion of those who submitted written reports for the consideration of the Committee are of the opinion that fines are, in many cases, too heavy, both in the European and the Native Courts. The fines inflicted often are beyond the capacity of the average native to pay and the option of a fine in lieu of imprisonment is thus rendered illusory in such cases . . . .
>
> "It is, perhaps, pertinent to emphasize the fact that, where fines are paid, the hardship, in many cases, falls upon the relatives and friends of the convicted person. Money although it cannot be held to be in the same category as food, the possession of which is largely communal, passes freely when available and therefore, even if a large proportion of fines is paid, there is no proof that those fines are within the capacity of the individual sentenced to pay them."

and in the following from the Kenya Native Punishment Commission's Report of 1923 :—

> "Fines, if inflicted, should have some relation to the earning capacity of the accused. It is in most cases futile to fine a native for a breach of the Native Registration Ordinance in e.g., Shs:60, which represents three or four months' earnings."

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* Minutes and Evidence, page 95.

## Corporal Punishment.

173. Corporal punishment has its protagonists for and against. As the law now stands, a male juvenile under the age of sixteen can be whipped for any offence for which he might have been imprisoned without the option of a fine. In this connexion it is noteworthy that while the Penal Codes of Kenya and Uganda authorize corporal punishment for a juvenile in addition to or in substitution for any other punishment to which he is liable the Tanganyika Corporal Punishment Ordinance of 1930 provides for such punishment only in lieu of any other punishment. This latter provision is to our mind preferable to that in force in the other two territories as tending to prevent the imprisonment of juveniles. Adult males, not over the age of forty-five, may be whipped or flogged for certain serious offences only, in the main offences of gross immorality or involving violence or brutality.

174. One school of thought regards corporal punishment as the most suitable punishment for all Africans for all offences. The argument of those who hold these views may be summarized thus :—*

Mr. M. WILSON: What about whipping?

WITNESS: I think there would be nothing to touch it. It would get over all the difficulties. If the native is worth whipping, whip him. If he is useless sack him. I consider their character goes up 50 per cent. if treated rightly in this way. It is the one thing they understand. In every case, I think it has done its job.

Mr. M. WILSON: The law allows it for juveniles. You suggest that it should be applied to people over sixteen for certain crimes?

WITNESS: I think it might be used in almost every case of first offenders. It is infinitely preferable to prison. Though a whipping has to be a whipping that the native will not like, it must be something he feels.

and†

Mr. MITCHELL: . . . . About whipping, you would like to see it reinstituted here in Uganda where you have a large proportion of people living up to a certain standard of civilization. If a well known native of good standing was had up for some minor offence, you would not care to order him to be whipped, would you?

WITNESS: I think the law should allow the option of a heavy fine. A differentiation could be made in the same way as with Europeans.

Mr. MITCHELL: There would be difficulty in deciding the different grades of society. There would have to be a certain grade up to which you could whip and a grade you could only fine. It would make it difficult.

WITNESS: I do not see any objection to having it as a punishment for even high-class natives, so long as it was a general provision.

Mr. WILSON: Your suggestion is that it would be in the magistrate's power to give either a whipping, or fine, according to the circumstances?

WITNESS: Yes, I would emphasize that I do not regard the cane as a brutal instrument.

Mr. M. WILSON: You are not suggesting that the option should be as many as 100 strokes?

WITNESS: No, many strokes are unnecessary: the indignity is sufficient. Two might meet the case.

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* Minutes and Evidence, page 38.

† Minutes and Evidence, page 66.

And again*

CHAIRMAN: As regards these inadequate punishments, are they not deterrent?

WITNESS: In cases of minor offences, such as minor assaults, I should say they are not.

CHAIRMAN: Is there not a limit to the importance of the deterrent element in punishment?

WITNESS: Not in the case of minor offences, such as I have mentioned.

CHAIRMAN: Do you not think temptation, environment, education and other matters of that sort should come into the picture?

WITNESS: No, not in the case of natives.

CHAIRMAN: You do not consider you should temper your punishments?

WITNESS: When the only alternatives are a fine and putting in prison, I think both are undesirable.

CHAIRMAN: You advocate wholesale canings?

WITNESS: No, strict control.

CHAIRMAN: If this punishment were inflicted more frequently you think it would be helpful? To be useful the cane must be sufficiently severe so that the man does not like it.

WITNESS: No matter how few the strokes, it is beneficial.

CHAIRMAN: Surely the native has self respect. Is it wise constantly to expose him to the indignity of caning? Is it going to improve his outlook?

WITNESS: I do not think it is going to deteriorate it, at any rate.

175. The advisability of legalizing corporal punishment for all offences was put to the native chiefs in Bukoba, and their replies† to this question are worthy of placing on record :—

Mr. M. WILSON: As regards whipping, do you think that if a boy under 15 does not commit a very serious offence and the sentence is under a month, he should be whipped? This would do away with imprisonment which we are told is 60 per cent. useless.

WITNESS (F. X. Lwagmira, K.M., Bukoba): Yes, caning is a much better punishment for juveniles than imprisonment. Caning is a thing they understand and are rather afraid of, whereas they are not afraid of prison. They merely go into prison and learn bad habits.

Mr. M. WILSON: If it is good for juveniles, should it not also be good for people who are not juveniles, always remembering that it is the guilty who are whipped?

WITNESS: Yes, in cases suitable for whipping, adults at the present time are whipped. But the object of whipping juveniles is corrective, to show them the right path. But if you whip a grown man, it hurts him, but it does not correct his behaviour in any way.

176. The Chiefs of Dodoma, however, hold the opposite view and are in favour of corporal punishment for adults in suitable cases. The Chiefs of Mwanza, after stating in evidence that corporal punishment was not a suitable punishment for grown men, asked leave to discuss the matter in private and submit a written reply. That reply‡ runs thus :—

> "The law of corporal punishment.
>
> "The meeting agreed that corporal punishment (lit. the punishment of the stick) is suitable for adult offenders as well as juveniles even for minor offences, because it is an admirable deterrent to people so that they should not continue to err."

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* Minutes and Evidence, page 66.
† Minutes and Evidence, page 96.
‡ Minutes and Evidence, page 105.

177. The Kenya Native Punishment Commission's Report of 1923 put the case well—

> " Flogging has been recommended by a number of witnesses for adults for technical offences. Mainly, it is thought, because it is realized by such witnesses that imprisonment is an unsuitable form of punishment.
>
> " The arguments advanced in favour of flogging are that it is inexpensive, that it is summary, that the native is a child and should, therefore, be punished as a child and that it is effective.
>
> " But it is doubtful if natives can be flogged to a higher morality. It has in the end a brutalizing effect both on the convict, on the magistrate and on the person who inflicts the punishment, and it should in our opinion be confined to juveniles, who might be caned for trivial offences, and to those who commit brutal crimes who should be flogged."

178. We are unable to subscribe to the view that caning and flogging should be made legal as a punishment for adults, whether generally or for natives only, for any but the most serious crimes. Such a form of punishment must be damaging to self respect, particularly to those Africans who have advanced to a certain stage of civilisation, and may even tend to brutalize its victims. Any extension of the use of corporal punishment we consider a retrograde step which we must oppose.

## Compensation.

179. Each of the Penal Codes contains the following provision :—

> " Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence. Any such compensation may be either in addition to or in substitution for any other punishment."

A somewhat analogous provision is made in the Criminal Procedure Codes, the material portion of which is as follows :—

> " Whenever any court imposes a fine, or confirms on appeal, revision or otherwise a sentence of fine, or a sentence of which a fine forms part, the court may, when passing judgment, order the whole or any part of the fine recovered to be applied in the payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is in the opinion of the court recoverable by civil suit."

180. So far as we have been able to ascertain, little use is made of the powers conferred on a court by either of these Sections. It is generally conceded that, at least in such minor offences as common assault, the award of compensation is a form of punishment understood by the native who, generally speaking, is unable to appreciate the British conception of a crime as an anti-social act and an offence against the state rather than a personal wrong to the person injured thereby. We have found it difficult to resist the conclusion that the legal position is misunderstood by many magistrates. The provision permitting the whole or part of a fine to be awarded as compensation was contained in the legal system which in these territories was in force before the Codes were enacted in 1930.

On the subject of the correct interpretation of that section Mr. Wade, Chief Native Commissioner, Kenya, gave the following evidence :—*

WITNESS: . . . A year or two ago we had great difficulty about Section 428 of the old Criminal Procedure Ordinance—Chapter 7 of the Laws of Kenya. I think it is repeated word for word in the new Ordinance about composite sentences of imprisonment and fine:—

> " Whenever under any law in force for the time being a criminal court imposes a fine or confirms on appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the court may, when passing judgment, order the whole or any part of the fine recovered to be applied:—
>
> (*a*) in defraying expenses properly incurred in the prosecution;
>
> (*b*) in compensation for the injury caused by the offence committed, where substantial compensation is, in the opinion of the court, recoverable by civil suit.
>
> " If the fine is imposed in a case which is subject to appeal no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal."

For years Administrative Officers have, as far as one could make out, in accordance with the directions of the Supreme Court in cases of theft in which an animal was lost, sentenced the criminal to a term of imprisonment and a fine. the fine to be paid to the plaintiff in compensation for the injury, or, say, three months hard labour in default. We always thought it was perfectly all right. Then several sentences were quashed which appeared to conform with every kind of instruction. An instance of this is Criminal Case No. 45/27 of the 3rd class court, Central Kavirondo, where a native was sentenced for theft of Shs:75/- in a dwelling under Section 380, I.P.C., to four months R.I., and a fine of Shs:75/- and in default one month's R.I. extra, and an order for Shs:75/- compensation was made to be paid to complainant. In this case the Supreme Court (His Honour Mr. Justice Sheridan) made the following order:—

> " Although a fine is a lawful punishment a magistrate should be careful that such a punishment is not awarded for the purpose of compensating a complainant who when the case between the State and the accused is finished has his remedy by way of civil action for any wrong suffered. Where a fine is considered an appropriate sentence for the offence against the State it is of course legitimate to compensate the complainant out of it under Section 428, Cap. 7."

181. In arriving at a proper punishment by way of imprisonment and fine the sentence should be one that adequately punishes the offence against the State and it would not be proper to inflate that portion of such punishment which takes the form of a fine in order to compensate the individual who has suffered. There is, however, no reason, in our opinion, why the provisions of the other section dealing with compensation should not be used nor is there anything in the judgment quoted by Mr. Wade to prevent its use.

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* Minutes and Evidence, page 14.

182. The unanimity of witnesses on this subject is so impressive as to be worthy of quotation. Mr. Abrahams, Chief Justice, Uganda, said :—*

Mr. MacGregor: Compensation Section 29 of the Penal Code deals with this.

"Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence. Any such compensation may be either in addition to or in substitution for any other punishment."

In your experience is that provision used at all in the Subordinate Courts?

Witness: I really cannot remember my previous experience. I have not met it in the five weeks I have been here now. I think it is a good provision.

Mr. MacGregor: If there is anything at all in the native mentality it is the sort of provision they would thoroughly understand. The principle of compensation to relatives of the injured party is a principle which natives understand?

Witness: Yes, and it is one which they have in France.

Mr. MacGregor: Anything that would stimulate the settlement of these minor offences by compensation would have your support?

Witness: Yes, certainly. There is a section in the Gold Coast and one in Nigeria, a pacification section. I do not think they are used as much as they might be.

Mr. Webster, Provincial Commissioner, Northern Province, Tanganyika, argued similarly :—†

Chairman: As regards compensation. You are confining that to criminal cases?

Witness: Yes, assault, theft, etc. A native has not got our conception of all offences being against the State rather than against the individual.

Chairman: You think if the court had power, instead of sending natives to prison to award compensation, it would be better?

Witness: Yes. The magistrate ought to consider the native view of expecting some compensation for a wrong done and arrange for that in the sentences imposed.

Mr. Gilbert, District Officer, Arusha, states :—‡

Mr. Mitchell: As regards compensation, if one native commits a small wrong against another, they regard compensation as the proper way to settle the case?

Witness: Yes.

Mr. Mitchell: If the law allowed one to award compensation without imprisonment for petty offences would not that go far towards solving the problem of filling the gaols with short term prisoners?

Witness: Yes.

The view of the Bukoba Chiefs was expressed thus :—§

Chairman: Do you think that some minor cases like assaults and so on could be satisfactorily dealt with by compensation of the aggrieved party without having a criminal trial?

Witness: Yes, of course if the matter can be settled by the accused paying compensation to the complainant that is a good thing to do."

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* Minutes and Evidence, page 78.
† Minutes and Evidence, page 84.
‡ Minutes and Evidence, page 86.
§ Minutes and Evidence, page 95.

Similar views were expressed by all the District Officers who gave evidence in Tanganyika with one exception, as well as by the Attorney-General of that Territory.

183. There must be many cases of so comparatively minor a character that compensation is a suitable form of punishment, and we suggest that much more use of this power might properly be made by magistrates. The disadvantage of the provision is that it involves trial and conviction in every case, though in many cases justice could adequately be done by compounding the offence or arriving at an amicable settlement between the parties.

184. The Supreme Court Ordinance of Nigeria contains a provision in the following terms :—

> "77. In criminal cases the court may promote reconciliation, and encourage and facilitate the settlement, in an amicable way, of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed."

Such a provision does not involve the recording of a conviction provided that the agreed compensation is paid, and we recommend to the Governments concerned the adoption of a similar Section in the Criminal Procedure Codes in place of the present provision relating to compensation. This proposed Section must, of course, be used with discretion, strictly within the limits to which it refers, and within those limits only in suitable cases. So used it will, we are satisfied, be understood and appreciated by the community, and will do something to stop the recording of convictions for trivial offences and imprisonment for short terms.

185. It has been represented to us that, though magistrates would like to avail themselves of the power to award compensation, they are reluctant to do so for the reason that compensation must be awarded in cash and not in kind. We are unable to see any foundation for this view. So far as compensation paid from a fine is concerned a fine must be imposed and paid in terms of cash, but the general provision for compensation is silent as to the form which such compensation may take, and we incline to the view that there is nothing in the section which we have quoted to prevent a magistrate awarding compensation in stock or other kind.

## The carrying out of Sentence of Death.

186. The justification of the death penalty is that it acts as a deterrent to others. If, therefore, it is to be a really effective deterrent it is essential that members of the community to which a condemned man belongs should realize that he does in fact pay for his crime with his life. We have heard from more than one witness that natives frequently fail to appreciate that executions are carried out. A man is found guilty of murder and condemned to death. He is removed from his district and sent to a prison

elsewhere and his tribe and relatives hear no more of him. Sometimes sentences of death are commuted, but all that the community concerned knows is that the convicted man has been taken away by the Government under sentence of death for the crime he has committed. When, after the lapse of years, he returns to his village having served a term of imprisonment, is it to be wondered at that the view should be held that the death sentence is not carried out, but that the man is taken away to work for the Government for a term of years? Among the more primitive peoples particularly we regard it is as important that there should be realization of the fact that the law in cases of murder exacts a life for a life.

187. To achieve this end we have been invited to recommend public execution in the district to which an offender belongs. We are unable to endorse this suggestion, but we consider that the system which we understand is in suitable cases employed in Kenya, whereby representative members of the community to which the condemned man belongs are permitted to visit the place of execution and to see him before and after the execution, might be adopted throughout the territories. It would also help if formal intimation of the carrying out of the sentence or its commutation were sent to the District Officer for publication throughout the district.

## Juvenile Offenders and First Offenders.

188. The problem of the young delinquent and the first offender is one which in these territories as elsewhere causes considerable anxiety. In Kenya there is a reformatory established under the Reformatory Schools Ordinance, and there has recently been placed upon the Statute Book a Juvenile Offenders' Ordinance which provides for separate trial in children's courts, probation, and detention in industrial schools or reformatories as alternatives to imprisonment for young offenders. There is also in Kenya a system of detention camps to which all males who have not two previous convictions may be sent for a term not exceeding six months. In Uganda and Tanganyika none of these means of treating juveniles and first offenders exist. It is true that in the Criminal Procedure Codes there is provision for releasing a first offender on his entering into a bond to be of good behaviour, but in practice this provision is very little used. In most of the prisons in Tanganyika it is practically impossible adequately to segregate juveniles and first offenders from hardened criminals and recidivists. We have been impressed by a suggestion made in Tanganyika that for relatively minor offences juveniles and first offenders instead of being sent to prison might be ordered to do a stated amount of work for the Government, being permitted to live at home, but being bound to work for so many hours daily. Such a system avoids the prison taint, but it is important that steps be taken adequately to ensure that persons so sentenced should be employed only on approved public

works and should not be subjected to ill-treatment. From the Chiefs of Tanganyika we received full assurance that these conditions could and would be complied with. Their evidence may be summarized thus :—

At Bukoba :—*

CHAIRMAN: As regards the proposal that juveniles should be made to do work living in their own homes, is the idea that the court should order them to do so many days work and that they should then be handed over to the chief who would see that this was carried out?

WITNESS: Yes, the court should pronounce the sentence of so many days work and the juvenile should then be handed over to the responsible native authority who would see that he did the work under suitable conditions, and he would sleep in his own house at night.

Mr. MACGREGOR: Would this be limited to juveniles or to first offenders also?

Mr. MITCHELL: They put in their memorandum that if a man commits an offence of a kind likely to get a sentence of a month he should be sent back to the native court, being sentenced to do punishment work but sleeping in his own house.

Mr. MITCHELL (to witnesses): Mr. MacGregor drew attention to the fact that the principle is already recognized in the Tanganyika Territory Hut and Poll Tax Amendment Ordinance 1930 (Section 3).

At Mwanza :—†

Mr. MACGREGOR: Now there is a very interesting proposal in this memorandum with regard to first offenders and juveniles and persons who have committed very minor offences, and that is, instead of being sent to prison they might be set to do extra-mural work under the control of the chiefs and continuing to live in their own homes. The question I would like an answer to is this. If Government were to introduce some such system as that, could we have an assurance from you that persons put to that work would be well treated, not be ill treated either by you or by your servants?

CHIEFS: We think it would be a very good thing, and we would give our assurance.

At Dodoma :—‡

CHAIRMAN: As regards first offenders or juveniles, if the court had the power to order them not to go to prison but to do certain work living in their own homes, would it be possible for you all to see that they did that work, and to see that they were properly treated while they were doing it? Would that be a good thing?

CHIEFS: Do you mean road work, building, sanitation and so on?

CHAIRMAN: Yes, work of various kinds.

CHIEFS: We think that would be a very good practice. But if the punishment consists of doing the work that the man normally does, then that would not be a good punishment. For example, if a clerk commits an offence he should be made to do hard work on the roads.

CHAIRMAN: If that system was to be adopted could you guarantee that these people would not be put upon or ill treated in any way? Could you see that they were properly looked after?

CHIEFS: We would see that they are not interfered with at all. They would be well kept and not oppressed.

189. We confidently recommend the adoption of some such system for first offenders and for juveniles until such time as modern

* Minutes and Evidence, page 96.
† Minutes and Evidence, page 104.
‡ Minutes and Evidence, page 117.

facilities for reformative training can be provided. It is interesting to note that a similar system was introduced in Palestine by the Penal Labour Ordinance, 1927.

## IV.—THE DEFENCE OF POOR PERSONS.

190. One of the major issues which has fallen within our purview in all three territories is that of the facilities available for the defence of poor prisoners committed for trial to the High Court. It is, we believe, axiomatic that for a capital offence at any rate no person should be placed on his trial without having the best available assistance in the preparation and conduct of his defence.

191. In all three territories there is in force a system whereby any person who is charged with a capital offence and who cannot afford to retain counsel has an advocate assigned to him for his defence. In practice, however, such facilities are available only at the larger centres of population in the territories where there is a resident bar. Thus in Kenya, a person who has to stand his trial at any assize centre on the Mountain circuit is undefended, as no advocate can afford to travel a hundred miles or more each way and spend possibly two or three nights at the place of trial for the fee which Government pays for such defences. In Uganda there is a resident bar only at Kampala, Jinja and Mbale, and in Tanganyika at Dar es Salaam, Tanga, Moshi, Arusha, Dodoma, Tabora, Iringa and Mwanza. Throughout all the rest of these territories no defence is practically available under the prevailing system. We cannot regard this as satisfactory, and the defects will become more apparent as soon as the High Courts are enabled to visit more assize centres in accordance with our recommendation in an earlier chapter. A further flaw in the system is that no provision is made for the presentation before the Court of Appeal for Eastern Africa of the appeal of a person sentenced by the High Court. Many advocates are public spirited enough to appear in the Court of Appeal, but such appearance is an act of grace on their part.

192. After careful consideration we recommend that the defence of poor prisoners be undertaken by a public defender who should possess adequate professional qualifications, and, if possible, some administrative experience. There is among our witnesses some support for the suggestion that the defence could better be undertaken by an Administrative Officer. With this view we are unable to agree. The presentation of a defence in court and more particularly appearance before the Court of Appeal are matters requiring knowledge and experience of legal principle and procedure. An interesting point of view was that of the Dodoma Chiefs* :—

Mr. MacGregor: There is one other thing. This morning you advocated more frequent circuits of the High Court, circuits that would go to District Headquarters. As you know, in all High Court cases, someone appears

* Minutes and Evidence, page 118.

for the Crown to prosecute, and I imagine that in most cases that would be tried by the Court at the District Headquarters it would be extremely difficult under the present position to arrange for the defence of the persons accused. Would you like to see a system initiated to provide for the defence at the State cost of all persons charged with any offence before the High Court?

CHIEFS: We think it would be an excellent thing. Very often a poor and ignorant man, with no means to pay a lawyer, or he may be able to pay a lawyer who does nothing for it, would benefit very much by being defended. If there was a public defender he would see that the various matters that had to be brought out were brought out, and the case for the defence would be put in a European way as well as the case for the prosecution, which is also put in a European way, and the judge will therefore then have the two sides of the case put from the same European standpoint.

193. We trust, however, that if such officers are appointed, Administrative Officers will interest themselves in the preparation of the defence of persons from their districts, in effect doing the solicitor's side of the defence while the public defender acts as counsel. We realize that in the present financial state of these territories this recommendation may be incapable of fulfilment for some time to come, for two or more such officers would be required in each territory if defence is to be undertaken in all cases; we do, however, regard the matter as one of great importance, and we urge that every effort be made to initiate some such system at the earliest moment. As regards work in the Court of Appeal for Eastern Africa there is a working arrangement between the Law Officers of the territories whereby the Crown in all appeals is represented by an officer of the Legal Department of the territory in which the court sits. If public defenders are appointed, we have no doubt that a similar arrangement could be concluded so far as the appellant's case is concerned.

194. A public defender might also usefully undertake the presentation before the High Court of appeals from subordinate courts, and might be consulted in confirmation and revision cases, especially where there appear to a judge to be grounds for enhancing a sentence. It will be for each of the local governments to decide to what department of government such an officer should be attached. We desire only to state that in no circumstances should he be a member of the Legal Department, the members of which are charged with the duty of representing the Crown at all High Court trials and on appeal. Against any such proposal as this it may be contended that the defence of an accused person who is not represented by an advocate is now undertaken by the trial judge, who makes a point of eliciting all that can be brought out in favour of the accused. Judges certainly do all that they can to see that both sides of the case are stated. We are confident that they will continue to do so, but they are necessarily hampered in that they can put only points which are within their knowledge, and have no opportunity of raising a defence which is not apparent on the record.

195. Before we leave this subject we may conveniently deal with two somewhat analogous proposals made to us. These are that an African legal adviser should be appointed to sit with the judge and advise him on points affecting native mentality and custom, and that African vakils should be admitted to practice before Subordinate Courts and the High Court, and especially to undertake the defence of Africans. A judge already has the assistance of native assessors who tender advice on all matters of native law and custom, and the proposed functions of the African legal advisers seem in no way to differ from those now discharged by assessors. There is nothing to prevent any African who possesses the requisite professional qualifications from being admitted to practice as an advocate in any of the territories. We cannot regard a proposal to allow unqualified men to practice as in any way satisfactory either for the court or for accused persons.

## V.—THE PUNISHMENT FOR MURDER.

196. In this chapter we propose to discuss two very difficult issues which have been raised in evidence—the advisability of providing for an alternative sentence for murder, and the case for extending the definition of provocation to cover cases which, by native standards of mentality, are likely to deprive a man of his self-control. A discussion of these matters cannot be complete without touching also on the exercise by the Governor of the Prerogative of Pardon.

197. The relevant Articles of the Tanganyika Order in Council 1920 and of the Royal Instructions (which are substantially the same for all three territories) read as follows :—

Order in Council, Article 11 :—

> " When any crime or offence has been committed within the territory, 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 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 in any Court or before any Judge or other Magistrate, within the territory, 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 due or accrued to His Majesty."

Royal Instructions, Article XXIII :—

> " Whenever any offender shall have been condemned to suffer death by the sentence of any Court in the territory, the Governor shall call upon the Judge who presided at the trial to make him a written report of the case of such offender, and shall cause such report to be taken into consideration at the first meeting thereafter which may be conveniently held of the Executive Council, and he may cause the said judge to be specially summoned to attend at such meeting and to produce his notes thereat. The Governor shall not pardon or reprieve any such offender unless it shall appear to him expedient so to do upon receiving the advice of the Executive Council thereon; but in all such cases he is to

decide either to extend or to withhold a pardon or reprieve, according to his own deliberate judgment, whether the Members of the Executive Council concur therein or otherwise; entering nevertheless, on the Minutes of the Executive Council, a Minute of his reasons at length in case he should decide any such question in opposition to the judgment of the majority of the Members thereof."

198. The punishment for murder in all three territories is death.

## Alternative Sentence.

199. The substitution for this fixed sentence of a system of alternative sentences for murder is advocated on several grounds. It is argued that to pass sentence of death in a case where the judge is certain that the sentence will not be carried out is cruel to the condemned man who is subjected to the anxiety and mental stress of knowing that he is under sentence of death, puts the court in a difficult position, and causes unnecessary delay. Those who advance this argument feel that the exercise of the Prerogative of Mercy by the Governor is unsatisfactory and that matters of sentence can best be decided by the judge who has heard the case, has seen the witnesses and has long experience in assessing punishment. In the view of judges and law officers in the territories, on the other hand, the suggestion for an alternative sentence is not sound. The responsibility of deciding on sentences as well as on the facts in so grave a matter is too heavy a one to impose on a judge. The practice of leaving the decision in such matters to the Executive is not one which we suggest should be altered.

200. On this issue we should like to quote Sir Edward Troup, K.C.B., K.C.V.O., who for fourteen years was Permanent Under-Secretary of State in the Home Office, and to express our agreement with his view that such matters can be better decided by the Executive.

". . . the exercise of the Prerogative of Mercy in its proper sense still remains one of the most important of the Home Secretary's functions. In particular, it is his duty to decide in every case of murder whether the capital sentence should be carried out. For other offences the Judge has power to mitigate the penalty to meet extenuating circumstances: but in the case of the gravest of all crimes the law gives him no choice and he has to pronounce the capital sentence, leaving it to the Home Secretary to take into account any recommendation of the jury to mercy or any circumstances which may appear to mitigate the gravity of the crime. The advantage of this arrangement is that it relieves the individual Judge from the painful duty of deciding, in the few minutes between the verdict and judgment, and possibly in the absence of full information as to the prisoner's history, character and motives, the question of life or death, and leaves that question to an authority who can, and does, make the fullest inquiry as to the character, history, motives, and mental condition of the offender, and who decides after review of the previous decisions in all similar cases. The Home Secretary may even properly take into account popular feeling in the matter and intervene in a case in which the execution of the death sentence would do more harm than good by the

shock it would give to the great mass of the public. Lord Gladstone summed up the experience of his predecessors in the following reply given in the House of Commons:

"'It would be neither desirable nor possible to lay down hard-and-fast rules as to the exercise of the prerogative of mercy. Numerous considerations—the motive, the degree of premeditation or deliberation, the amount of provocation, the state of mind of the prisoner, his physical condition, his character and antecedents, the recommendation or absence of recommendation from the jury, and many others—have to be taken into account in every case: and the decision depends on a full review of a complex combination of circumstances, and often on the careful balancing of conflicting considerations. As Sir William Harcourt said in this House "The exercise of the prerogative of mercy does not depend on principles of strict law or justice, still less does it depend on sentiment in any way. It is a question of policy and judgment in each case, and in my opinion a capital execution which in its circumstances creates horror and compassion for the culprit rather than a sense of indignation at his crime is a great evil." There are, it is true, important principles which I and my advisers have constantly to bear in mind; but an attempt to reduce these principles to formulae and to exclude all considerations which are incapable of being formulated in precise terms, would not, I believe, aid any Home Secretary in the difficult questions which he has to decide.'

"When any prisoner is sentenced to death, this is immediately reported to the Home Office by the Governor of the Prison, and the Judge also writes to the Home Secretary, forwarding a copy of his notes of the evidence and reporting any recommendation of the jury. The Judge sometimes states at once his own opinion on the case, but more frequently he waits before expressing his views until the prisoner's appeal has been heard or the Home Secretary has asked for them. In most cases petitions are received from the prisoner's solicitor or his friends, and in any case which has excited much public attention, whatever its merits, petitions from the public pour in in large numbers: but whether there are any petitions or not, minute inquiries are made through the police and otherwise into the prisoner's history and character and into all circumstances which may throw light on the motive of the murder and on any uncertain features in the crime. If the case is one in which it is obvious that the capital sentence ought not to be carried out, a decision is reached and the prisoner is informed as soon as his appeal to the Court has been heard and decided—occasionally even, as in cases of infanticide, before there is an appeal: but in most cases the Home Secretary's final decision is not announced until three days before the date fixed for the execution."

201. Another argument for an alternative sentence for murder is that the death sentence is not a deterrent, at least so far as certain communities are concerned, and that it does not benefit the relatives of the murdered man. Those who advance such arguments plead that in certain cases and among certain tribes murder is more suitably punished by a term of imprisonment together with a heavy fine which, though expressed to be payable by the murderer, will in effect be paid by his family or tribe and will so act as a real deterrent. We are further reminded that in many districts homicide gave rise to a claim for "blood money" at the suit of the relatives of the deceased. When a murderer is hanged, justice is done and the family of his victim are satisfied,

but if the death sentence is commuted the native cannot understand why compensation for the wrong done should not be payable. The dispute between the families of the murderer and his victim is not settled: trouble is likely to occur and bloodshed may ensue. Under a system of alternative punishments, it is argued, a judge could either pass a sentence of death or impose a composite sentence of imprisonment together with compensation to the aggrieved family, a sentence which would be comprehensible and acceptable to native opinion.

202. We cannot accept the thesis that part of the punishment for so serious a crime as murder should under any system of modern jurisprudence take the form of the award of compensation, but we see no reason why if the death sentence is not carried out native courts in their civil jurisdiction should not take cognisance of such a claim, provided always that the criminal proceedings in the matter from which such civil claim flows must first be completed according to law. The most important extracts from the evidence given us on this point are the following:—*

WITNESS: . . . Blood money. The point is to know how far a claim for blood money is supposed to be admissible. Actually the native custom itself has to some extent changed. In the old days the Kikuyu blood money was 110 goats quite irrespective of whether a man was murdered or killed in an accident. Then the British courts of justice came and to the bewilderment of the Kikuyu they introduced the death penalty, and that upset them as to what ought to be done with blood money. After a time they came to realize that the death penalty extinguished any claim to blood money, but in cases where a man instead of getting hanged got reprieved and imprisoned for 10 years they did not know what to do. They would argue, "He is alive and must pay". But now they think it is a bit hard to make him pay the whole if he has been imprisoned. In Nyanza, if a man is imprisoned for a long term, then they say, "All right" and claim no money, but if he is only given two years or so they say he has got off lightly and can pay the whole amount.

CHAIRMAN: There is no civil case for damages under the procedure here which runs side by side with the prosecution, is there?

WITNESS: I do not follow.

CHAIRMAN: In the Near East there may be three parties, the prosecutor, the accused, and the relatives of the deceased man. The criminal proceedings and the civil proceedings for damages by the relatives go side by side.

CHAIRMAN: Where is the claim for blood money made?

WITNESS: It is made in the native courts. We sometimes settle claims ourselves. Cases other than murder and manslaughter are sometimes tried in the magistrate's courts, but they would be cases arising out of negligence or something of the sort. What would be said is this: "There is no case for committing you for trial by the Supreme Court on this charge, but I think you had better pay blood money to the relatives". The Punishment Committee allowed no claim for blood money and one or two other Commissions have recommended its gradual abolition. As regards the legality of claims for blood money, our view is to let the Wazee† settle these matters.

CHAIRMAN: Anyhow, it is mostly in the native courts, is it not?

WITNESS: Yes.

Mr. M. WILSON: Is it really the native tribunals or only the Wazee?

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* Minutes and Evidence, page 15.

† Elders.

WITNESS: No, the native tribunals would always recommend the payment of blood money.

CHAIRMAN: Are you suggesting that as regards the practice and procedure of courts, there ought to be power to grant blood money as compensation?

WITNESS: I wanted to be certain what the Commission's view would be with regard to the legality of the awarding of blood money.

Sub-Chief Simeon wa Kokan, Moshi:—*

CHAIRMAN: In your memorandum you say that for manslaughter, in addition to the punishment, there should be a fine, do you mean murder?

WITNESS: Yes, all intentional killing.

CHAIRMAN: Do you mean that the court which tries the offender should assess damages at the same time?

WITNESS: Yes, an order for compensation should be made by the judge who tries the criminal, but of course in awarding compensation in the case of a native offender the judge should be guided by the established native custom as to what is the proper amount of the compensation.

In certain plain cases of murder, even when the accused has confessed, and in cases where there is adequate evidence, the High Court has been known to sentence a man to imprisonment or to a fine or both. That is a bad practice because it increases the committing of murder. In all plain cases of killing a man should be hanged.

In any cases where the capital sentence is carried out, according to native custom there should be no claim for blood money; but if a man is imprisoned or heavily fined or both, then blood money should be paid.

Mwanza Chiefs:—†

Mr. MACGREGOR: I would like you to think of what you have told us on the question of sentences because, if I understand it correctly, what you propose is that in every case compensation should be awarded in addition to any other punishment.

CHIEFS: We wish our own customs to be followed in payment of compensation in all cases where it is customary to be done. But all cases are not alike. In the case of murder, one man murders another and is sentenced to be killed. That is enough: a life for a life, and it is finished. But should that man's sentence be commuted to imprisonment, then compensation should be paid.

Mr. MACGREGOR: There should be blood money awarded at the same time? Do you wish to go further and have recognised in the law of the Territory the principle of blood money in cases of accidental death?

CHIEFS: Even so, we wish it in such cases. We realise that a man's life would not be forfeit in law if he has accidentally killed another, but unless payment were made to quieten down the relations there might be vengeance which would increase the trouble later.

Chief Samilla, Dodomo:—‡

WITNESS: I should like to know if it is possible for compensation to be paid over in the case where there is no execution. I agree that it is for the Government to decide what punishment such a man should undergo other than death but as he is not hanged, there should also be compensation.

203. We are informed that in practice such actions are not entertained by native courts in Tanganyika, and we have seen a ruling of the Supreme Court of Kenya to the effect that as a claim for blood money is to the native mind quasi-criminal in character, no such action can lie when the person against whom the claim

* Minutes and Evidence, page 88.
† Minutes and Evidence, page 103.
‡ Minutes and Evidence, page 117.

is made has already been punished. In these circumstances, it is sufficient to say that we see nothing inherently inequitable in a system which provides that a man may be liable civilly as well as criminally for homicide as he would be if he had been guilty of assault or of causing injury by criminal negligence.

204. A further suggestion* made was that a fine should be imposed sufficiently large to ensure that the murderer's family or tribe would have to pay it. The witness who made the suggestion qualified it by stating that it was only applicable in the case of certain tribes living on a purely communal basis. We cannot regard seriously any proposal for making responsibility for an individual crime communal instead of personal, nor are we able to appreciate the justice of a form of punishment which will fall equally heavily on the innocent and on the guilty.

205. One of the matters which has been most fully discussed before us is that of the degree of provocation necessary to reduce homicide from murder to manslaughter. It is argued that if a judge has the power to impose a lesser sentence than death, in a case of murder in which he finds extenuating circumstances which do not amount in law to provocation sufficient to reduce the offence to manslaughter, then the existing definition of provocation is sufficient. If, on the other hand, the only sentence for murder is death, then the definition of provocation ought to be relaxed to include various forms of acute aggravation which, we are told, so prey on the mind of the ordinary native as to be likely to deprive him of his self-control.

206. The relevant sections of the Penal Code are the following :—

> This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.
>
> Any person who is shown to have caused the death of another is presumed to have wilfully murdered him unless the circumstances are such as to raise a contrary presumption.
>
> The burden of proving circumstances of excuse, justification, or extenuation is upon the person who is shown to have caused the death of another.
>
> When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.
>
> The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.
>
> . . . .

* Minutes and Evidence, page 64.

207. It will be seen, therefore, that the law of murder in these territories is to all intents the same as the law in force in England. Killing is presumed to be murder unless the accused man proves affirmatively such matter of excuse or extenuation as to reduce the crime. Of these matters of extenuation, one is provocation, but provocation must be both grave and sudden. The wrongful act or insult must be of such a nature as to be likely to cause an ordinary person to lose his self-control and the killing must take place in the heat of the passion caused by such provocation.

208. On this state of the law, in its relation to the natives of these territories, two main questions have been raised. First, what is the meaning to be assigned to the words " an ordinary person " and, secondly, would it not be reasonable to extend the interpretation to be placed on provocation to embrace cases in which a native kills another because of some native custom or ingrained superstitution, or as the outcome of long continued nagging and irritation?

209. One witness* went so far as to give us six main categories of murder :—

(*a*) the brutal deliberate murder for gain or revenge;

(*b*) the vendetta murder, where a member of a certain tribe is killed because some member of his tribe had previously killed one of the murderer's tribe;

(*c*) murder which is the outcome of the native custom of blooding spears;

(*d*) the murder of a person whom the murderer honestly believed to be a witch, and by witchcraft to have killed members of the murderer's family and possibly to be likely to cause the murderer's own death;

(*e*) the murder of a person who over a long period has taunted, abused and possibly ill-treated the murderer to such an extent that, on no sudden provocation, the murderer loses his self-control and kills his enemy;

(*f*) murder committed in a drunken brawl.

210. We are asked to accept the proposition that for murders which fall within any of the first three categories the punishment should be death, but in the case of (*b*) and (*c*) the death sentence should be passed not because of the inherent savagery or deliberation of the murder, which in both cases has the sanction and commendation of well-recognised native custom, but largely for reasons of political expediency, in order to bring home to the native population the knowledge that such customs must cease and that human life in our eyes has a high value. For murders committed in the circumstances described under (*d*) and (*e*), on the other hand, it was suggested that there was such provocation, from the native point of view, as to reduce the crime to

* Minutes and Evidence, page 13.

manslaughter, or even, in a case of fear of witchcraft, to self-defence. For cases of the last class it was said to be impossible to lay down any hard or fast rules, so much depending on the degree of drunkenness, the weapon used, and the circumstances of each individual case, a proposition with which we are in agreement.

211. We have set out the categories in detail in order to indicate what we feel are the difficulties in the way of any amendment of the definition of provocation. Were the urge of native custom and superstition to be accepted as sufficient provocation, and were the insistence on the suddenness of the provocation to be waived, witchcraft homicide might be manslaughter, but so would vendetta murders and cases of blooding spears. It would, in our submission, be extremely dangerous to relax a safeguard which has been devised as the result of centuries of experience as a means of protecting human life, nor must it be forgotten in this connexion also that behind the judicial trial there is the Prerogative of Mercy which in its consideration of any case is not hampered by legal principles and precedent in weighing motive or extenuating circumstances.

212. As regards the interpretation to be placed on the phrase " an ordinary person ", we are impressed by the argument that so long as trials take place by a judge with assessors the tendency will be to judge native murderers by European standards. In Kenya Europeans have the right of trial by jury and there, as in England, the standard must be that of the jury who are assumed to be " ordinary men ". If natives were tried with a jury presumably the test supplied would be the standard of the ordinary member of the community to which the accused belonged, for it would be from that stratum of society that the jury would be drawn. It is, we think, reasonable to suggest that a judge, when directing himself as a jury should have in his mind the type of jury which would have been empanelled if trial by jury existed in the territories. He might well seek the opinion of assessors on this specific point, as in practice he doubtless does, and be guided by such opinion unless he sees very good reason for rejecting the advice so given.

213. It is interesting to note the opinions expressed by representative chiefs in Tanganyika Territory on the question of the propriety, to the native mind, of the death sentence as a punishment for certain kinds of murder. It may be argued that such opinion cannot be regarded as expressing the real point of view of the ordinary native. This may be so, for the natives are progressing with the times and the opinions of thinking and advanced chiefs are doubtless coloured by what they have learned from constant close contact with Administrative Officers. This fact cannot be held to detract from the value of such evidence, which clearly represented the considered opinions of the Chiefs

who gave it, chiefs who are the traditional representatives and spokesmen of their people. It may well be that the leaders are thinking in advance of the mass of their people, but just as they have learned from the inspiration of effective and wise administration, so in course of time they will be able by example and precept to inculcate their ideas in the community as a whole.

214. The following is the evidence* of various native chiefs:—

CHAIRMAN: What ought a man who is in fear of a witch to do?

WITNESS (F. X. Lwamgira, Bukoba): His proper course is to go to the native court and, as the native court has been told it must not touch witchcraft cases, they would immediately report it to the Boma.†

CHAIRMAN: If a man insults another man very grossly by words or gestures or in any other way which, according to native custom, is a great insult, it would be very wrong for him to kill the man, but, if he did, ought he to suffer death?

If a man in a case of a sudden quarrel killed another, in certain circumstances it might amount to manslaughter and the punishment would not be death; but if a man provoked another by a series of small provocations and offences daily over a long time until the man provoked could bear it no longer and took his spear and went and killed the provoker, ought he also to be treated as if he had committed the lesser offence for which the punishment would not be death but imprisonment?

After discussion of these questions the Chiefs asked if they might consider them among themselves and send in their answer in writing.

*Translation.*

*Chiefs' Council, Bukoba.*

"*Record of result of deliberations of Chiefs on points emerging from their evidence.*

"1. If a man insults another with gross insults before other people and the man insulted loses control of his senses because of the insults and kills the insulter suddenly without intent to kill but only to strike him with a stick but the other dies, the killer should not be hanged but imprisoned for such time as the trial judge considers proper.

"2. If a man grossly insults another and the insulted person becomes furiously angry with rage and kills the other intentionally with a spear or any weapon such as a knife which he knows to be lethal, this man will appear to have killed intentionally and if convicted should hang.

"3. If a man insults another and the person insulted goes away and after laying aside his wrath goes to the insulter with a weapon and kills him, if he is tried he should be sentenced to death, for he had the intention to kill."

The evidence‡ of the Dodoma Chiefs was as follows:—

CHAIRMAN: Suppose a man comes up to another and gives him a gross insult, by words or actions, so that the other man loses his self-control and seizes his spear and kills the man who has insulted him. Should he be hanged or imprisoned?

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* Minutes and Evidence, page 95.
† Government Station.
‡ Minutes and Evidence, page 117.

CHIEFS: The man in that case should certainly not be hanged. It is a matter for imprisonment.

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CHAIRMAN: Supposing a man, day by day, offers to another man little insults, and over a long period of time annoys and annoys and annoys him constantly. And then the man says, "I cannot stand this any longer," and goes out and kills the man who annoys him. Should he be hanged?

CHIEFS: This depends upon whether the man who is insulted and annoyed goes to complain to the native court. In these days everywhere the native court is available. The Chiefs and Headmen are available on court day, and if a man puts up with a series of minor annoyances and insults and does not go to the native court but afterwards takes the law into his own hands, he should be hanged. He has got the court and that should be able to prevent it going on.

CHAIRMAN: Is there to-day any excuse for a man killing another person because he thinks he is being bewitched by him?

CHIEFS: Certainly, if he takes the law into his own hands and goes and kills the supposed witch he should be hanged. If he has any proof that the man is a witch he should go to the native courts which are there for the purpose, and produce his proof, and if he can prove that the man is a witch then the native court will collect and burn his articles and put an end to the matter. If he takes the law into his own hands in these days, he must be hanged.

Extract from memorandum* by Mwanza Chiefs:—

*The law of murder.*

(*a*) Killing as a result of insult without using a weapon.

The meeting considered the question of a killing arising from insult, if a man grossly insults another who kills his abuser with anything that is not a weapon. The killer should not be hanged but should only be punished by imprisonment . . . .

(*b*) Killing as a result of annoyance.

The meeting considered the question of killing as a result of continued annoyance. If a man annoy and provoke another and treat him with contempt from time to time until the other man can stand the provocation no longer and, becoming enraged, kill the man who provoked him, he should not be hanged but should be sentenced to imprisonment only . . . .

(*c*) Killing because of allegations of witchcraft.

If a man kill another because he has been told by a diviner (or witch doctor) that the man is a wizard, it is just that he be sentenced to the penalty of hanging . . . .

215. It will be seen that on the question of appropriate sentence for one who kills an alleged wizard all the chiefs are unanimous in support of the death penalty. On the issue of murder ensuing on constant irritation and annoyance there is a difference of opinion. In view of the opinions expressed by the Chiefs as well as for the considerations explained in an earlier paragraph of this chapter, we feel strongly that it would be dangerous to amend the law to permit of offences which are now murder being regarded in law as manslaughter.

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* Minutes and Evidence, page 105.

## VI.—POLICE PRACTICE AND PROCEDURE.

216. Our terms of reference call upon us to enquire into the practice and procedure of the police authorities in the three territories in their relation to the administration of the criminal law, and to report whether any changes in such practice and procedure are desirable.

217. In compliance with that term of reference we have taken evidence from a number of people as to the relations of the police to the public in connexion with the prevention and detection of crime, the treatment of suspected and accused persons, and witnesses, and the prosecution and presentation of a criminal case in Subordinate Courts.

218. It may be helpful at the outset to indicate what the territorial restrictions on the duties of the police force are in each territory. In Kenya the force operates throughout the Colony and Protectorate except in the majority of the native reserves in which the Tribal Police force performs police duties, the Colony police undertaking the investigation of a crime only on invitation. In Uganda the position is thus described by Major Tremlett, Commissioner of Police :—*

CHAIRMAN: In this country am I right in thinking that the police are not the only people who have dealings with the accused before he comes to trial?

WITNESS: That is so.

CHAIRMAN: Serious crimes, are they in most cases reported to the native chiefs first?

WITNESS: In the majority of cases, serious crimes are first reported to the native chiefs, who proceed to collect and interrogate all persons who appear to have any connection with the affair whatsoever. In the case of a murder, I have known as many as one hundred people arrested and been subject to restraint for several days.

CHAIRMAN: By the chiefs?

WITNESS: Yes.

CHAIRMAN: At some stage the police take over the investigation I suppose?

WITNESS: The police take over the investigation of murder, unnatural deaths and rape.

CHAIRMAN: Is that in Buganda?

WITNESS: In all districts except the Buganda districts, in which these offences are not taken over by the police. Rape is not taken over, but murder must be investigated by the Protectorate police.

CHAIRMAN: In the Buganda Province the Protectorate police have charge of homicide, and outside the Buganda Province they take charge in all provinces of homicide, rape and witchcraft?

WITNESS: Yes, Sir.

CHAIRMAN: Let us take the Buganda Province first. If you have the right to investigate and deal with homicide there, is it helpful to you that all this preliminary spadework should be done by the chiefs?

WITNESS: It not infrequently prejudices the investigation of cases of homicide.

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* Minutes and Evidence, page 81.

219. In Tanganyika the police have exclusive powers in townships and settled areas. In the rest of the territory police are normally stationed at District Headquarters and if they consider they should intervene or are invited by the District Officer or Native Authorities to do so may undertake the investigation of any type of crime, and go anywhere in the territory for the purpose.

220. In each of the territories the force consists of a number of European senior officers, with Asiatic non-commissioned officers and African rank and file.

221. Having regard to the duties which the police have to perform it is inevitable that in such an enquiry as ours, complaints against the force should be made. To all such complaints we have given careful consideration, and in fairness to the police themselves and in the interests of public confidence, we feel that we are justified in dealing with such matters at some length.

222. Native witnesses in Kenya complained that askaris abused the right of arrest under the Native Registration Ordinance, and also illegally effected arrests for non-payment of native Hut and Poll Tax.

Mr. Wade, Chief Native Commissioner said,* on the first point :—

Mr. MITCHELL: We have been told that the police arrest natives indiscriminately for minor offences even in cases when taking their names and addresses would suffice. Do you think there is any truth in this statement?

WITNESS: Yes, there is some truth. It is difficult to know how much. There is certainly truth in connexion with the Registration of Natives Ordinance, and it is because of that that the Native Registration Ordinance has become unpopular although it is really very much in the interests of the natives, in my opinion, if the powers are not abused. But there have been one or two very bad cases, putting it very mildly. In the Reserve, they need not carry their kipandis,† but right on the borders of the Kikuyu Reserve is the township of Limuru, to which three or four respectable citizens, one an ordained minister of the Church of Scotland, were paying a visit. Some policemen raided the centre and marched them off and shut them up for the night. And of course it really was a very gross indignity and no excuse whatever. Actually they had the power of arrest because they had not got their kipandis on them. I have got a clerk in my office, an extraordinarily good fellow, been there for years, and the other day he changed his coat or something in the native location and walked across the road. I am not sure if he was arrested—at any rate he was fined. We have now got the Police Commissioner to meet us and I think now it has been arranged that no one under a certain rank shall arrest people for breaches of this Ordinance.

Mr. MITCHELL: Arising out of that question have you heard any complaints or allegations here that the power is sometimes corruptly used by the native constable, that he will arrest a man who can buy himself off not by regular bail?

WITNESS: I have only heard it suggested as probable. I have not heard any concrete cases.

Mr. MITCHELL: You have not had any specific complaints from anybody?

WITNESS: No, I have not.

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* Minutes and Evidence, page 23.

† Registration Certificate.

On the second point the native witness who made the statement subsequently qualified it by saying that he was referring to the tribal police.

223. Both the allegations were put to the Commissioner of Police, and Superintendent Peacock, a Superintendent of Police of experience.

Mr. Cavendish on the first point said :—*

CHAIRMAN: . . . I want to take something more specific. Complaints have been made to us about the system of arrest for non-production of kipandis. First of all can you tell me, is there a discretion in the police to arrest any native found without his kipandi in his possession?

WITNESS: No, Sir. There is no discretion. If a native is found without a kipandi he is liable to arrest.

CHAIRMAN: He may be arrested?

WITNESS: Yes. Generally speaking if an askari finds him without a kipandi, he should be arrested. It should not be left to the askari to decide.

CHAIRMAN: Take the case of a native who is perfectly well-known—he may have some professional work in Nairobi or be employed as a boy to some well known resident, etc.—what is the necessity to arrest in that case? Why could not his name and address be taken and a summons issued?

WITNESS: I do not think it is necessary. The police as a matter of fact very recently issued a departmental order on the request of the Chief Native Commissioner that askaris should not arrest natives without kipandis. No police officer below the rank of Inspector or Sub-Inspector should do this. As long as the askari has power to arrest, I think he ought to make some enquiry or else take him to the police officer.

CHAIRMAN: Anyway the position is now that the askari does not arrest. Let me take now the case of a man who does not pretend to hold any particular position where he could easily be found. What would an askari do, would he take him to the police station, now, under the new regulations?

WITNESS: He would have to suspect him in some way of some other offence. Now he has no right to interfere and ask for his kipandi.

CHAIRMAN: So that now the discretion is in an Asiatic—a Sub-Inspector?

WITNESS: Yes.

CHAIRMAN: You would agree that if a man can be readily found there would be no occasion to arrest him?

WITNESS: I quite agree. It was suggested to me that we should alter our procedure on the subject, and I fell in with the suggestion.

Mr. Peacock's evidence† on the second complaint was :—

CHAIRMAN: A complaint has been made that the police arrest people who have not paid their hut and poll tax. We know that that is not a matter for which the police have power to arrest without a warrant. From your experience is there any truth in the suggestions which have been made?

WITNESS: From my own experience, Sir, no. We always issue a summons in the first place and then a distress warrant. I have never known a case of arrest in the first place.

224. It will be appreciated that in the absence of specific cases of abuse it is difficult completely to prove or disprove such allegations as these. Doubtless there were abuses when comparatively untrained native constables had a right of arrest which they were incapable of exercising with discretion. That right has now been withdrawn by administrative instructions, and such complaints should not in future have to be made.

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* Minutes and Evidence, page 43.

† Minutes and Evidence, page 48.

225. For the second complaint we are satisfied that there is no foundation so far as the Colony police are concerned. The tribal police operate, without any control from the police authorities and under the sanction of native law and custom, which according to Mr. Turton, Attorney-General, Uganda, authorises wholesale arrest and detention.

226. A second and more serious set of complaints against the police are those which allege assault, ill-treatment and, in certain cases, torture of members of the public by police officers. These we regard as so important that we set each of them out at length hereunder.

227. Mr. Nathaniel Gibson of the Kenya African Civil Service Association said :—*

CHAIRMAN: As regards natives whom you say are beaten by askaris, their proper procedure in that case would be to complain to the District Commissioner, would it not?

WITNESS: An askari would be believed, Sir.

CHAIRMAN: Do you know of any case of which you could give me the details and the names where a native who was so beaten has gone to the District Commissioner and complained and the District Commissioner has made no proper enquiry but has simply believed the askari?

WITNESS: Two years ago I went to my reserve at Rabai where my house is and I saw an askari beating a native. The man was without his kipandi. When I interfered I was arrested and if it was not for my officer I would probably have been imprisoned.

CHAIRMAN: Did you complain?

WITNESS: Yes, Sir, to the Court at Mombasa. These askaris, I understand, were dismissed.

228. The Venerable Archdeacon Owen, gave the following evidence :—†

CHAIRMAN: Apart from that personal case, have you seen anything in the police methods which you wish to criticise?

WITNESS: I can only give you hearsay evidence and I do not know whether you would attach any value to that. I have been distressed at times at seeing the way in which some of the police man-handle natives.

CHAIRMAN: Native policemen?

WITNESS: No, Colonial police. Three instances occur to me, all on railway stations. I know the difficulty of the police in controlling unsophisticated Africans when a train comes in or is leaving. At Kipikori station once I saw one of the askaris kick a native in the stomach. On another occasion at Muhoroni I saw a native chased out of the station by two African police and he was given a most severe pummelling just outside the station. There was a European constable there to whom I complained.

CHAIRMAN: These are usually acts of askaris?

WITNESS: Yes, Sir.

CHAIRMAN: I imagine that the police authorities would not condone that sort of thing?

WITNESS: All I am saying is that the European police constable did not protect the native until I protested.

Mr. MITCHELL: He was a constable?

WITNESS: I do not know the grades, but as far as I know he was a police constable.

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* Minutes and Evidence, page 3.

† Minutes and Evidence, page 36.

CHAIRMAN: It is a fact that it is difficult to control the askaris?

WITNESS: It is.

CHAIRMAN: And there is some feeling between them and the native, is there not?

WITNESS: My feeling is that it filters down from the top to the bottom. I can give you an instance which occurred a few months ago when I was travelling by train. I was awakened at one of the stations by the train stopping and I heard a voice cry out "Kamata,* kamata" and then "Piga,† piga" in a most angry voice. I got into my dressing gown and got out on the platform and I beheld a poor unfortunate native in the hands of a native policeman taking him to the guard. I was nearly speechless with indignation, but I protested to the guard at the extremely irregular behaviour when, having got your man, you continue to hit him. The European guard said "I would have half killed that fellow if I had got him". I said, "Having got him, you have no business to hit him".

CHAIRMAN: Do you say that this ill-treatment of natives by askaris is not sufficiently seriously dealt with by police headquarters?

WITNESS: Yes.

CHAIRMAN: You do not think they take it enough to heart?

WITNESS: No, Sir.

CHAIRMAN: Do you think if every effort were made from headquarters there might be some improvement?

WITNESS: Yes.

CHAIRMAN: All these instances you have given me—how are the police headquarters to know about this sort of thing?

WITNESS: That is one of the difficulties. But in my opinion the tone which is set at the top would filter down to the bottom.

CHAIRMAN: Do you mean to say that there is an encouragement from the top?

WITNESS: The African sees that in the attitude of his superiors towards his fellow African which encourages him not to give his fellow African the correct treatment, or the treatment we would like him to get.

CHAIRMAN: That is a matter of example?

WITNESS: Yes.

CHAIRMAN: You do not want to go so far as to say that this treatment of natives which you have described is either welcomed or condoned by the heads, do you?

WITNESS: Human nature is various. No doubt there are men in the police service who are just as keen as I am on the correct methods. There are others who are not, I am sure. I am thinking of one particular case which, no doubt, will be brought before you. The story which was going round very widely was that an African was put under third degree methods in order to get a confession from him, and that the askari who used these methods was rewarded. If you care to follow up the case I can give you the details.

CHAIRMAN: Perhaps you can give the Secretary the name of the case, etc. (It was arranged to obtain this case file.)

WITNESS: It may have been an isolated instance, but it left an uneasy impression.

CHAIRMAN: If you can give me particulars of this case I should like to hear them.

WITNESS: I have no first-hand knowledge. I can only give you what was going round about the beginning of 1932. It was to the effect that a certain native was arrested on some charge in the Kericho district. He pleaded not guilty. The askari, in order to make him plead guilty put red pepper into his eyes and on this a confession was extorted from the man. The amazing

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* Kamata = seize.

† Piga = strike.

part of the story commented on by all who heard it was that the magistrate concerned rewarded the askari, although the askari had quite plainly stated the methods that he had used.

CHAIRMAN: Am I right in thinking that the reward was not given by the police?

WITNESS: It was given by the District Officer trying the case.

Mr. M. WILSON: The idea of the reward was for being able to get a confession. Was it known by the District Officer that he had used these methods?

WITNESS: Yes, I imagine so. The case was sent up in quite good faith in the ordinary way; the revising authority noticed this irregularity and at once proceeded to take action. But one heard that later on.

CHAIRMAN: There again, if I may say so, it does not happen to have been the Colony police?

WITNESS: Technically not.

CHAIRMAN: I am talking about the police in headquarters. Can you give me any instance of improper conduct on the part of the police which you think reflects upon the headquarters staff?

WITNESS: No. I am sure that the duties of the police are sometimes extraordinarily difficult to perform.

229. Mr. McMahon, District Officer, Musoma, related a similar case :—*

CHAIRMAN: Have you ever asked the police to co-operate and found some reluctance on their part to do so—or is it just the system that you do not like?

WITNESS: Just the system, Sir. I had one unfortunate experience. The police were sent out to investigate, and they and the Native Authority together tortured the people.

CHAIRMAN: Native Police?

WITNESS: Yes.

Mr. MITCHELL: Not a European officer?

WITNESS: No, a Non-Commissioned Officer and three men.

230. These allegations were put in detail to police officers in all territories, and their replies were as follows :—

231. Mr. Cavendish, Commissioner of Police, Kenya, dealing with the situation generally, said :—†

CHAIRMAN: . . . There has been a general allegation that the askaris are rough with the natives; that that, if not condoned by headquarters, is not sufficiently severely dealt with by headquarters, and that the attitude of headquarters filters down—the example which they get is an example of a rather overbearing attitude towards the natives.

WITNESS: I must say straight away that this is entirely wrong. We have a number of very strongly worded orders on the subject. Our main Standing Order on this, on which we rely, is C. 16, page 44 (Kenya Police Standing Orders) :—

*Complaints—against Police.*

1. Every complaint against police must be filed separately, and the papers of each complaint must read like a book.

2. Each file should be a sub-head of a main file " Complaints against Police ".

3. In every case possible the officer in charge of a district will hold personal inquiry into these cases.

4. At such an inquiry, the complainant should be given the opportunity of being present and should be notified accordingly.

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* Minutes and Evidence, page 100.

† Minutes and Evidence, page 43.

5. Nothing has a worse effect on the confidence of the public in the police, if their complaints are not the subject of complete and thorough inquiry.

6. On every occasion, the complainant must be informed of action taken, result of inquiry, punishment awarded, if any.

7. If police are found to be in the wrong apology will be invariably made and regret expressed for the act or omission complained of.

8. As soon as possible, if police have been in the wrong, the complainant should be interviewed and regret expressed in person.

9. The public will have far greater confidence in the Force if the above procedure is adopted rigorously, and on no account must a gazetted officer of police stand between his men and the public.

10. Complainants to be informed of result of case. European and Asiatic complainants in any case investigated by the police should be informed of the result of the case without delay.

CHAIRMAN: Are these orders carried out?

WITNESS: Very carefully and strictly, Sir. One of the matters which I attach most importance to when I am on my tours of inspection is to have a complete record of all complaints that may have been made against the police since the date of my last inspection, and I invariably see all the records, correspondence and files relating to them and see that they are satisfactorily disposed of.

CHAIRMAN: Do you in fact get many complaints?

WITNESS: No, Sir, very few. I can think of no serious complaint against the police.

CHAIRMAN: Suppose a complaint was made by a native, would that receive the same thought and consideration as a compiaint made by anyone else?

WITNESS: It certainly would, and should if my orders are carried out—and I have no reason to suppose that they are not carried out.

CHAIRMAN: About these askaris. Is there a little danger of their being overbearing?

WITNESS: I am afraid that is so. It is so with any partially educated man.

CHAIRMAN: Do you and your officers do what you can to educate them out of this?

WITNESS: Yes, Sir. Besides our main standing order there is another order on the subject that I would like to refer you to, Circular No. C. 21/31 of the 22nd May, 1931:—

"4.—*Ill-treatment of prisoners and witnesses to extort confessions or information.*

"The following Circular issued from this office in February, 1909, and again in August, 1928, is published again for the information and guidance of all ranks of the Force. The provisions must be strongly and continually impressed at lectures upon all subordinate officers.

"Any instance of ill-treatment of prisoners, complainants, or witnesses, or even any tendency to harsh or oppressive treatment by any policeman or police tracker, will invariably be made a matter for immediate drastic disciplinary action by officers in charge of units, or when the facts of the case warrant it criminal proceedings will be taken under the Penal Code against the policeman or tracker at fault.

"Officers in charge of Units and of police stations must be vigilant at all times for any indication of the existence of this most serious offence against police procedure which not only ruins the good name of the Force, but destroys entirely the confidence of all classes of the public in the police.

"It having been brought to my notice that cases of ill-treatment of prisoners and witnesses for the purpose of obtaining confessions and information are alleged to have occurred, I wish it to be clearly

understood that any such practice will not be tolerated and that in the event of any case of alleged ill-treatment being substantiated, drastic action will be taken.

"Attention is also particularly drawn in this connexion to the Special Force Order on this subject issued on the 20th December, 1928."

CHAIRMAN: Nothing could be plainer.

WITNESS: There is a further order on the subject of the 20th December, 1928:—

"*Special Force Order.*

"It has been brought to the notice of the Commissioner of Police that cases have occurred lately in which African police and followers have resorted to ill-treatment and assault of African suspected accused, and witnesses, in order to obtain evidence.

"2. This must be stamped out of the Force at once and ruthlessly. Should any report in this connexion be received by any superior officer the very fullest inquiry must immediately be held. Should the report of ill-treatment of a suspected accused or witness by African police or followers be found in the opinion of the investigating officer to be true, immediate action will be taken to prosecute them before a Criminal Court.

"3. In all cases the matter must be reported immediately to the Commissioner of Police.

"4. I cannot impress upon officers too emphatically the need for immediate action and the fullest possible inquiry into any case of this nature . . . ."

CHAIRMAN: And these circulars and instructions and the action which you take under them do they have their effect?

WITNESS: I am entirely satisfied. I do not know of a single case where proper action has not been taken.

232. Major Tremlett, dealing with the Uganda Police Force, said :—*

Mr. M. WILSON: Do you get many complaints about native constables—their behaviour towards the inhabitants of the country—manhandling, for instance, as we heard in Kenya?

WITNESS: There are very few instances. Whenever a complaint is made against a constable it is most thoroughly investigated and sent to the Commissioner of Police.

Mr. M. WILSON: Every individual case?

WITNESS: Yes. In any case of violence used against prisoners or public by a constable, the rule is that it must be sent to the Commissioner for adjudication or decision as to whether the party shall be prosecuted before the court. If there is any suspicion that the constable has been guilty of violence towards any member of the public I insist on public prosecution so that nothing shall be hidden from the public. Conviction automatically entails dismissal.

233. Mr. Clark, Assistant Superintendent of Police, Bukoba, gave similar evidence :—†

Mr. M. WILSON: In Kenya we have had evidence that the ordinary native constable oversteps his authority, is overbearing towards the natives, etc. Have you anything like that here?

WITNESS: No, Sir.

Mr. M. WILSON: Have you had any complaints against native constables?

WITNESS: I have had several from a village here, where the people are very mixed. They have difficulty in keeping the peace. Complaints have been made that the police are not taking sufficient interest in the complaints,

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* Minutes and Evidence, page 82.

† Minutes and Evidence, page 94.

that they do not take up cases sufficiently. One was made by an Indian tailor the other day. I went into the matter and found it was a question of an unpaid bill.

CHAIRMAN: Is it a crime not to pay your tailor?

Mr. M. WILSON: You give the askaris instructions as to their behaviour to the public and you are satisfied with the results?

WITNESS: I think so, Sir.

234. Mr. Jenkinson, Assistant Superintendent of Police, Mwanza, dealt with the Musoma case of torture :—*

Mr. MACGREGOR: There are two other matters I wish to speak about. One is a case of which we were told yesterday. It was a case in which certain police officers were sent out with native administration messengers to conduct an enquiry and they were found to have tortured the witnesses.

WITNESS: Yes.

Mr. MACGREGOR: We were informed that action had been taken.

WITNESS: It was taken by the Criminal Court. Three police were sentenced, together with the native chief and the chief's messenger.

Mr. MACGREGOR: Is that at all a common type of occurrence?

WITNESS: Most uncommon. It is the first case I have heard of since 1922 when I was in Dodoma.

Mr. MACGREGOR: And what instructions have you in your police orders about cases such as these?

WITNESS: When complaints are made against any member of the Force we have to hold a full enquiry. If it calls for magisterial action, under the Discipline Code, we have to get special permission to prosecute in the Magistrate's Court. If it is found to be an offence under the Penal Code we can carry straight on and treat the member of the Force as an ordinary citizen.

235. Inspector Olliver of Dar es Salaam, states :—†

Mr. M. WILSON: Are there many complaints made by the public as to the police—whether they exceed their duties, manhandling natives, or anything like that?

WITNESS: In my seven years service, Sir, such cases have been exceedingly few and far between, and many of those which have come to our notice have been found to be utterly groundless. Where a constable perhaps has to use force, you will get some person who rushes into print—generally an Indian.

Mr. M. WILSON: In any cases such as you have mentioned, do you make the results of the investigation public?

WITNESS: Yes, Sir, where a case is sufficiently serious it is tried before the Magistrate in open Court. The Press may be present, and natives are present. It is bound to get publicity. Had there been such cases they would have been widely known.

236. Mr. South, who in the unavoidable absence of the Commissioner of Police, Tanganyika, who had submitted a memorandum to us, appeared on his behalf, gave evidence,‡ as follows :—

Mr. M. WILSON: Mr. South, do you get many complaints about your constables?

WITNESS: Remarkably few, Sir.

Mr. M. WILSON: You get a few?

WITNESS: Yes, occasionally one comes in.

Mr. M. WILSON: And you take action against them?

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* Minutes and Evidence, page 115.
† Minutes and Evidence, page 136.
‡ Minutes and Evidence, page 141.

WITNESS: Yes, if it is a really serious complaint it comes up in the Court and the man is strictly dealt with, and, of course, any sentence of imprisonment involves dismissal from the police. A minor case of an askari boxing a man's ears would be dealt with by the Police Officer in the Orderly Room.

237. It will be observed that Mr. Gibson who gave evidence on the first instance of ill-treatment admitted frankly that the askaris responsible were dismissed from the force. We have called for and inspected the file of the case of torture referred to by the Venerable Archdeacon Owen, and we have ascertained that the witness who admitted putting pepper in the accused man's eyes in order to extort confession was not a member of the police force or the tribal police force, but a member of the public assisting a stock-owner to discover who had stolen his stock.

238. Cases of assault and ill-treatment by police askaris are hard, if not impossible, to stamp out altogether, but we are satisfied that the police system for the hearing of complaints and for the punishment of offenders is a proper one, and that no responsibility for any such assault or ill-treatment can fairly be attached to any superior police officer in these territories.

239. In view of the conclusions which we have reached on this matter, it is refreshing to hear the opinion of the police expressed by Chief Sapi of Iringa :—*

Mr. M. WILSON: Chief Sapi has mentioned the investigation of offences by the police. What have you to say about them?

Chief SAPI: I put this down about the police because I wanted to say that in my experience the police do their work very well and very impartially, and if an offence is committed which they take up, they bring it before the court which deals with it on the spot or commits to the High Court as the case may be. I only put it down because I wished to make this statement.

240. A further criticism of police procedure was raised by Mr. Bentley of Kitale :—†

CHAIRMAN: First of all you deal with police investigation. Is there anything you would like to add to supplement this heading?

WITNESS: Generally speaking, Sir, with regard to police investigation, my experience teaches me that most of the later proceedings in the trial of an accused native follow more or less the original police statement. It seems to me in a way to be almost the most important part of the different stages leading up to the trial—it is the case that they have actually prepared and presented that more or less goes right through to the end.

CHAIRMAN: That is a point you make under heading I.

WITNESS: I naturally feel, of course, that the accused native, particularly if he belongs to a backward tribe, must feel that he is in a thoroughly hostile atmosphere. What I feel is that police who are conducting these investigations are in a very powerful position. They bring the case they have prepared against the accused native into the magistrate's court and I think it goes without saying that they are intent on a conviction which is a handicap to the accused native. I think there is only one other point about police investigation, and that is that a police officer, if he finds himself beaten and cannot unravel the case before him, in my opinion, will naturally

* Minutes and Evidence, page 118.
† Minutes and Evidence, page 39.

refer it to his senior most intelligent native askari. And then I suggest, Sir, that anything may happen because the native askari has probably got it in his mind that his bwana* thinks the native in front of him is guilty and, being a native his one idea is to please his bwana and do what he can for him, and his methods will not always be as scrupulous as they should be. There is one small point which does occur to me. Often a native in front of police officers is in such a state of fright that he tells lies about a particular case, and I think he would be very reluctant to agree that he has told lies. Therefore, though he may want to change what he originally said, he feels he had better not.

CHAIRMAN: Yes.

WITNESS: I naturally consider that the police in this country, when making an investigation of a crime in a white area, could get a lot of assistance from the employer of the native.

CHAIRMAN: Yes.

WITNESS: What I would like to say is that if it were possible for the police not to be so intent on the idea of obtaining a conviction as on getting at the truth it would seem to be fairer. That is all on that point.

Mr. MACGREGOR:† The first thing it is the duty of the police to do is to put before the Court all the information in their possession, with which I entirely agree. It is a fact that the police enquiry file contains all statements?

WITNESS: I imagine so, Sir.

Mr. MACGREGOR: And that file is available to the magistrate in all cases?

WITNESS: Yes.

Mr. MACGREGOR: You had that explained on a previous occasion. You had an assurance then that the police file was at the disposal of the magistrate and contained all statements.

WITNESS: But I do remember that that file was not, in the ordinary way, allowed to be put in the hands of the defence.

Mr. MACGREGOR: So even if the police officer does not feel it within his duty to call all the witnesses that file is available for the magistrate?

WITNESS: Yes, Sir.

241. This criticism was answered by the Commissioner of the Kenya Police in the following terms:—‡

CHAIRMAN: Another general allegation which was made was that the police were inclined unduly to press cases where they prosecuted. Have you any instructions or rules about the conduct of cases by police officers?

WITNESS: Yes, Sir, we have an accumulation of rules.

CHAIRMAN: Can you tell me, generally speaking, what are the instructions given to police officers in this regard?

WITNESS: There is an order to the effect that police officers, in prosecuting cases, should do so with absolute fairness, bringing in anything which is to the advantage of the accused and that they should not press for a conviction. Mr. Spicer issued an order to the effect that an officer should, in prosecuting a case, show no suggestion that he felt keenly on the conviction.

CHAIRMAN: In so far as you know, are these instructions carried out by your officers?

WITNESS: Yes, Sir, I am satisfied that they are but I heard what was said on the subject yesterday. I cannot help feeling that if a keen officer is investigating a crime, and he may spend a long time on the investigation, one can hardly expect that that officer will not be keen on seeing his investigation and hard work justified by the conviction of the person whom he firmly believes is the culprit.

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* Master or officer.

† Minutes and Evidence, page 41.

‡ Minutes and Evidence, page 43.

CHAIRMAN: He will see that the evidence he has collected is put before the magistrate and put with proper effect?

WITNESS: Yes, Sir, and with complete fairness.

CHAIRMAN: In the course of investigations, the police must get any number of statements and a great number of these statements they must, for the purposes of the prosecution, regard as irrelevant. If there are any statements that they do not regard as relevant to the prosecution, though they have a bearing on the case, are those put before the court?

WITNESS: My impression is that they certainly would be. The police, on the other hand, can hardly be expected to go through a number of witnesses in order to obtain evidence which might be of advantage to the accused.

CHAIRMAN: But you would not, would you, condone anything in the nature of the suppression of a statement?

WITNESS: No, certainly not.

CHAIRMAN: Does the police record contain all statements made to the police?

WITNESS: No, I should hardly say so. The police go out and investigate a crime and ultimately they come to some conclusion as to who committed it, they will build up their case, and the evidence of those persons who can give evidence in support of the police theory would be recorded. In other words, the police would not try to obtain evidence from persons who might conceivably make a statement to the contrary.

CHAIRMAN: Supposing in the course of an enquiry they obtained a statement from somebody which would tend to throw some doubt upon the statement of one of the witnesses which they were going to call. The police might disbelieve this further statement and might not wish to use it as part of the case. Would that statement be recorded?

WITNESS: No, Sir. Not in practice.

CHAIRMAN: Neither the magistrate nor the defendant would have any opportunity of knowing about it?

WITNESS: No, Sir.

CHAIRMAN: Would you see any objection to making the file a little fuller so as to include anything of that sort?

WITNESS: No, Sir.

CHAIRMAN: If in the course of your enquiry you did find evidence of this kind, would you see any objection to its being recorded?

WITNESS: No, Sir. I would like to see it in the file.

242. In this case, too, we are satisfied that the police system calls for no adverse criticism. It may in practice necessarily break down owing to the failure of the human factor, but as a system it is fair and equitable to all parties, and we do not suggest any alteration.

243. In Chapter III under the heading of Police Investigation we have dealt with another essential aspect of police work which in Tanganyika cannot be said to operate without unnecessary and avoidable hardship. We are a little uneasy regarding the system in Uganda whereby in the Buganda Province the Protectorate police investigate no cases but those of homicide. The Commissioner of Police has spoken strongly against the system and we are unable to appreciate the reason for it, unless it be that all cases other than homicide are presumed to be matters for trial in the Buganda native courts. We appreciate that in all three territories, owing in part to financial considerations, the police force cannot undertake the policing of the whole country, but it seems illogical that in other parts of Uganda they can investigate cases of homicide, rape, and witchcraft, whereas in the Buganda Province in which lies Kampala,

the police headquarters, their powers are limited to cases of homicide. 745

244. We are confident that in all three territories the people have every right to congratulate themselves on their police forces. They perform arduous and difficult duties with inadequate staffs, cheerfully and well. We find that there is no foundation for any suggestion that the system in any of the territories leads to abuses. In our opinion the practice and procedure of the forces in the administration of the criminal law are entirely satisfactory.

## VII.—MISCELLANEOUS.

245. There remains for consideration a number of relatively minor and unconnected matters which have been the subject of mention by witnesses and in memoranda.

### Extension of Right of Appeal to Court of Appeal.

246. The first two are points regarding appeals which have special reference to Uganda. It was claimed by members* of the Bar of that Protectorate that the present legal position was inequitable in that while appeals from convictions by the High Court and from convictions of murder in trials by special district courts which had been confirmed by the High Court lie to the Court of Appeal for Eastern Africa, appeals against convictions for other offences in trials by special district courts lie only to the High Court of the Protectorate. The position appears to be somewhat illogical, for if a special district court is empowered to exercise the powers of the High Court there seems to be no good and sufficient reason for providing different avenues of appeal from convictions by such courts.

247. The second proposal was that an appeal should lie to the Court of Appeal for Eastern Africa from all convictions or orders of the High Court in its original, appellate or revisional jurisdiction. The proposal that there should be a right of appeal from a judge of the High Court as confirming or revising authority seems to us to be a bad one. A judge in confirmation or revision is exercising powers which are largely discretionary, and an appeal from his refusal to make any order is equivalent to an appeal against the original conviction or sentence, a right which a convicted person, in all but very minor cases, can exercise whether his case is subject to confirmation or not.

248. The suggestion that when the High Court has in its appellate jurisdiction heard and determined an appeal from a native court or a subordinate court, there should be a further appeal to the Court of Appeal equally does not commend itself to us. *Interest reipublicae ut sit finis litium;* a chain of appeals means

* Minutes and Evidence, pages 56, 67, 73.

delay and expense, and when in criminal cases the High Court has given careful consideration to all the points which the appellant has to urge and has dismissed the appeal, there is little to be said for permitting a further appeal except on a matter of law, as is provided by the Criminal Procedure Codes of Kenya and Tanganyika.

## Appearance of Advocates.

249. A third point which was made* by the same gentlemen was that advocates should be entitled as of right to appear for a convicted person when he appeals from a native court to a district court or his case comes to a judge in confirmation or revision. The law of Uganda provides that in each of these cases an advocate may appear with the special leave of the court. We are told that in practice leave is never withheld. If that is so it appears to us that the terms of the law are being ignored, for there cannot be special circumstances in every case. We see no reason why, when recourse is had to a British court, the aggrieved person and the court should not have the benefit of the assistance of trained advocates, and we suggest that the law might be amended to allow them to appear in such cases as of right.

The evidence of the Chief Justice of Uganda on these points is worthy of quotation :—†

Mr. MacGregor: The next form of appeal is that from special district courts. In these appeals, in cases of murder, after the conviction and sentence have been confirmed by the High Court, the appeal lies to the Court of Appeal for Eastern Africa, but in other cases to the High Court, and it has been suggested to us that all appeals from special district courts should lie to the Court of Appeal for Eastern Africa.

Witness: I cannot see any logical reason for differentiation. As long as they have the powers of the High Court the appeal should follow the same course. I think it would be more logical and save delay.

Mr. MacGregor: On the question of delay, I have a few questions to ask you later. But the next suggestion regarding appeals is that the appeal should lie to the Court of Appeal for Eastern Africa from the High Court in its appellate and revisionary jurisdiction.

Witness: I do not think the local Bar have complained about any injustices that have been done, but in this case it would be an appeal from two judges to three judges. I do not think the proportion is so very discrepant as to justify it. They are not judges, presumably, of superior ability as courts of appeal are generally supposed to be unless, of course, this effect is thought to be attained by a court constituted of three chief justices as is the case in the Court of Appeal for Eastern Africa. If you give an appeal from two to three it could hardly be justified merely to give the appellant another bite at the fruit.

Mr. MacGregor: Apart from these considerations, are you generally in favour of giving the appellant another bite?

Witness: No.

Mr. MacGregor: You think that the chain of appeals in criminal matters should be as short as possible?

Witness: Certainly.

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* Minutes and Evidence, pages 57, 73.

† Minutes and Evidence, page 77.

Mr. MACGREGOR: Concerning the revisionary powers of the High Court, it has been represented to us that counsel should be able, as a right, to appear on revisions from native courts. At present they must have special leave, but in practice, I understand, this is never refused.

WITNESS: Then if that is so, they have no complaint. I do not see why they should require special permission. Sometimes points on revision are of special importance. Once the High Court has indicated that it will hear a petitioner I cannot see why it should not hear his counsel.

Mr. MACGREGOR: And on appeals from native courts to the district courts, you think the same argument should apply?

WITNESS: Yes.

### Translation into Swahili.

250. Several native witnesses* have urged that the laws of the territories should be translated into and published in Swahili. While we have considerable sympathy with the arguments advanced by our witnesses, we are reluctantly compelled to reject the suggestion. The difficulties of bi-lingual legislation are too well known to need reiteration here. It would be almost impossible accurately to translate into Swahili many of the conceptions embodied in British legislation, but we trust that it will be possible, both by printing in Swahili a series of simple prohibitions and by other means of publicity, to make as widely known as possible what are legally forbidden acts and how the law regards those who commit them. This especially applies to local government rules and regulations.

### Inquiries as to Sudden Deaths.

251. Police officers have drawn our attention to the duty placed upon the officer in charge of a police station in cases of suicide or suspected felonious homicide himself to go to the place where the body of the deceased person is. We regard this provision as imposing an unnecessary burden on the officers in charge, and feel that police investigation and the interests of justice would be better served if such officer, should he be unable to leave his station, were empowered to send any responsible police officer to investigate and report on his behalf.

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## SUMMARY OF RECOMMENDATIONS.

252. In this Summary we deal only with our more important recommendations and not with small points of detail referred to in our report.

(i) The powers of punishment of magistrates in Kenya and Uganda should be reduced to the Tanganyika scale. (Paragraph 55.)

* Minutes and Evidence, pages 8, 105, 140.

(ii) Magistrates should be empowered to try all non-capital charges which can be adequately dealt with within the limits of their powers, all more serious cases being committed to the High Court. (Paragraph 55.)

(iii) The strength of the Supreme Court in Kenya should be increased by one judge to be stationed in Nairobi or at some place on the " Railway " circuit. (Paragraph 60.)

(iv) The strength of the High Court of Uganda should be increased by one judge, so that only Karamoja and possibly the West Nile District need remain Special Districts. (Paragraph 61.)

(v) The strength of the High Court of Tanganyika should be increased by two judges, one to be stationed at Mwanza and the other in Tanga or the Northern Province. The Lindi Province and the south of the Western Province should remain under extended jurisdiction. (Paragraph 63.)

(vi) Cases from Districts which the High Court will not be able to visit should be committed for trial under extended jurisdiction. (Paragraph 64.)

(vii) More use might be made of Resident Magistrates for the trial of serious cases. (Paragraph 65.)

(viii) Appeals from subordinate courts should be heard by judges of the High Court on circuit. (Paragraph 68.)

(ix) It should be possible for appeals from subordinate courts in Kenya and Uganda to be heard by a single judge. (Paragraph 70.)

(x) Appellants, whether in custody or not, should have the opportunity of appearing at the hearing of their appeals. (Paragraph 71.)

(xi) The exercise on circuit of the power of confirmation and revision may prove convenient. (Paragraph 72.)

(xii) It is not necessary that additional judges should receive the emoluments now paid to High Court judges. (Paragraph 73.)

(xiii) For the hearing of criminal appeals the Court of Appeal for Eastern Africa should be convened locally every month. (Paragraph 76.)

(xiv) In Tanganyika a system of police investigation at or near the scene of the crime should be introduced as soon as possible. (Paragraph 87.)

(xv) The officer in charge of a police station should have power to issue a search warrant where application cannot conveniently be made to a magistrate. (Paragraph 89.)

(xvi) Confessions to European police constables in Kenya and to commissioned police officers in Tanganyika should be admissible

and Uganda should consider restricting admissibility so as to conform to Kenya and Tanganyika. (Paragraph 96.)

(xvii) Power of transfer of cases might be delegated to subordinate Courts of the first class. (Paragraph 98.)

(xviii) Summonses and warrants should contain sufficient detail to make the charge clear to accused persons. (Paragraph 102.)

(xix) At the close of the case for the prosecution a magistrate should remind the accused what the charge against him is. (Paragraph 103.)

(xx) On the discharge from an asylum of a person found unfit to plead the case should be reported to the Attorney-General for directions. (Paragraph 108.)

(xxi) Bail should be granted unless there is strong reason for refusing it. (Paragraph 110.)

(xxii) Native witnesses should be allowed to give evidence in their own way, without interruption. (Paragraph 113.)

(xxiii) If accused wishes to make a statement when invited to cross-examine a witness he should not be prevented, but his statement should not be recorded. The magistrate should, however, put on behalf of accused any questions that may arise from his statement. (Paragraph 118.)

(xxiv) Magistrates should not be given a general power to call additional witnesses. (Paragraph 123.)

(xxv) The form of caution to an accused person at a preliminary enquiry might be expanded. (Paragraph 126.)

(xxvi) The deposition of a witness in a lower court should be admissible in the High Court when the delay and expense involved in calling him would be excessive, but subject to the same limitations as in the case of evidence taken on commission. (Paragraph 129.)

(xxvii) Measures should be adopted to provide an efficient corps of interpreters. (Paragraph 131.)

(xxviii) It should not be a statutory obligation for a list of assessors to be kept, but District Officers should keep a list of suitable men. (Paragraph 134.)

(xxix) Expert stenographers might be employed in the High Courts of Uganda and Tanganyika as in Kenya. (Paragraph 137.)

(xxx) Confirmation and revision are necessary and should continue. (Paragraph 157.)

(xxxi) The punishments sanctioned by enlightened systems of jurisprudence are the most suitable punishments. (Paragraph 164.)

(xxxii) Fines should be of an amount within the means of the offender to pay. (Paragraph 171.)

(xxxiii) The use of corporal punishment for adults, whether generally or for natives only, should not be extended. (Paragraph 178.)

(xxxiv) In minor cases compensation is a suitable form of punishment and should be more largely used. (Paragraph 183.)

(xxxv) The Governments should adopt a section similar to the " reconciliation " section of the Nigerian Supreme Court Ordinance. (Paragraph 184.)

(xxxvi) In order that the fact that the death sentence is carried out should be known, representatives of the community to which the condemned man belongs should be allowed to see him before and after execution. (Paragraph 187.)

(xxxvii) A system of extra-mural work should be adopted for juveniles and first offenders. (Paragraph 189.)

(xxxviii) The defence of poor prisoners should be undertaken by a public defender, who should possess adequate professional qualifications, and, if possible, some administrative experience. (Paragraph 192.)

(xxxix) A public defender might undertake the conduct of appeals to the Court of Appeal. (Paragraph 193.)

(xl) He might also appear for the appellant in the High Court, and be consulted on confirmation and revision cases. (Paragraph 194.)

(xli) There should be no alternative sentence for murder. (Paragraph 199.)

(xlii) If the death sentence is not carried out, a civil claim for " blood-money " might be entertained by the native courts. (Paragraph 202.)

(xliii) The definition of " provocation " should remain unaltered, but upon the trial of a native the conception of an " ordinary person " should be that of the community to which the accused belongs. (Paragraph 203.)

(xliv) From all convictions of special district courts in Uganda an appeal should lie to the Court of Appeal for Eastern Africa. (Paragraph 246.)

(xlv) In Uganda advocates should be entitled to appear as of right on appeals from native courts to British courts, and on confirmation and revision of native court cases by the High Court. (Paragraph 249.)

(xlvi) Such enactments as local government rules and regulations should be published in Swahili. (Paragraph 250.)

(xlvii) The officer in charge of a police station should be empowered to send another officer to inquire into a sudden death if unable to go himself. (Paragraph 251.)

253. We desire to express our appreciation of the services rendered to us by our secretary, Mr. J. B. Griffin, and our shorthand typists, Miss Mason, who has been with us throughout, and Miss Grew, who has assisted us since our arrival at Mwanza.

H. GRATTAN BUSHE (*Chairman*).
A. D. A. MACGREGOR.
W. MACLELLAN WILSON.
P. E. MITCHELL.
C. E. LAW. (Subject to reservation in regard to paragraphs 92-97.)

J. B. GRIFFIN (*Secretary*).

DAR ES SALAAM,
27th May, 1933.

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NOTE OF RESERVATION BY MR. JUSTICE LAW.

With regard to my reservation in connexion with paragraphs 92-97 of the Report dealing with the admissibility in evidence of confessions to the Police, I am unable to agree with my colleagues' view that the existing rule in Kenya and Tanganyika should be relaxed in order to admit confessions made to certain European police officers, and I am of opinion that the rule should be maintained in full force in those territories and that Uganda should fall into line with them.

Subject to this reservation I have signed the Report.

C. E. LAW.

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## APPENDIX I.

### ITINERARY.

The total distance travelled by the Commission was approximately 2,200 miles. The dates on which various places were visited appear hereunder:—

Monday, 27th March, at Nairobi.
Thursday, 6th April, left Nairobi.
Friday, 7th April, arrived Moshi.
Sunday, 9th April, left Moshi.
Monday, 10th April, arrived Nairobi.
Tuesday, 11th April, left Nairobi.
Wednesday, 12th April, arrived Eldoret.
Tuesday, 18th April, left Eldoret.
Tuesday, 18th April, arrived Kampala.
Monday, 24th April, at Entebbe.
Friday, 28th April, left Kampala.
Saturday, 29th April, arrived Bukoba.
Monday, 1st May, left Bukoba.
Tuesday, 2nd May, arrived Mwanza.
Thursday, 4th May, left Mwanza.
Friday, 5th May, arrived Dodoma.
Sunday, 7th May, left Dodoma.
Monday, 8th May, arrived Dar es Salaam.

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## APPENDIX II.

### LIST OF WITNESSES.

(Set out in the order of hearing).

KENYA.

| | |
|---|---|
| Mr. N. Gibson ... ... ... ... | Representing the Kenya African Civil Service Association. |
| Mr. H. G. Shadrack ... ... ... | |
| Mr. Ishmael Ithongo ... ... ... | |
| Mr. S. H. La Fontaine, O.B.E., D.S.O.... | Provincial Commissioner. |
| Mr. Storrs Fox ... ... ... ... | District Officer. |
| Mr. H. Thuku ... ... ... ... | Representing the Kikuyu Central Association. |
| Mr. G. K. Ndegwa ... ... ... | |
| Mr. M. M. Jack ... ... ... ... | Registrar of the Supreme Court. |
| Mr. A. de V. Wade, O.B.E. ... ... | Chief Native Commissioner. |
| Mr. H. R. Montgomery ... ... | Provincial Commissioner. |
| Mr. H. E. Welby ... ... ... | Provincial Commissioner. |
| Sir W. Morris Carter, C.B.E. ... ... | — |
| Mr. P. F. Branigan ... ... ... | Acting Crown Counsel. |
| Headman Warukia ... ... ... | — |
| Sir Jacob Barth, C.B.E. ... ... | Chief Justice of Kenya. |
| The Venerable Archdeacon Owen ... | — |
| Mr. F. N. Heyt ... ... ... ... | Representing the Society of Friends Mission. |
| Mr. J. H. Symons ... ... ... | Representing the Lessos Farmers' Association. |
| Mr. W. E. Barker ... ... ... | Representing the Uasin Gishu Farmers' Association. |
| Mr. C. Bentley ... ... ... ... | — |
| Mr. R. C. A. Cavendish... ... ... | Commissioner of Police. |
| Mr. S. F. Deck ... ... ... ... | Provincial Commissioner. |
| Mr. Peacock ... ... ... ... | Superintendent of Police. |
| Mr. D. Edwards ... ... ... ... | Resident Magistrate. |

UGANDA.

| | |
|---|---|
| Mr. Mansel Reece ... ... ... | Acting Solicitor General. |
| Mr. J. M. Gray ... ... ... ... | Acting Puisne Judge. |
| Mr. G. C. Ishmael ... ... ... | Barrister-at-Law. (Representing the Uganda Law Society). |
| Mr. A. B. Forsyth Thompson ... ... | District Officer. |
| Mr. N. K. Turton ... ... ... | Acting Attorney General. |
| Mr. L. E. Knollys ... ... ... | Acting Deputy Chief Secretary. |
| Mr. R. Scott ... ... ... ... | Assistant Secretary. |
| Mr. K. C. Johnson Davies ... ... | Barrister-at-Law. |
| Mr. C. L. Bruton ... ... ... | Acting Provincial Commissioner. |
| Mr. C. Bradley ... ... ... ... | Acting Registrar of the High Court. |
| Mr. F. J. Macken ... ... ... | Barrister-at-Law. |
| Mr. Justice Abrahams ... ... ... | Chief Justice of Uganda. |
| Major Tremlett, M.B.E. ... ... | Commissioner of Police. |

TANGANYIKA.

| | |
|---|---|
| Mr. G. F. Webster ... ... ... | Provincial Commissioner. |
| Mr. H. R. Gilbert ... ... ... | Acting District Officer. |
| Mr. L. S. Greening, M.C. ... ... | Acting District Officer. |
| Herr Muller ... ... ... ... | Representing the Leipzig Lutheran Mission. |
| Herr Raum ... ... ... ... | |
| Chief Abdiel Shangali ... ... ... | — |
| Sub Chief Simeon ... ... ... | — |
| Mr. H. H. Allsop, M.C. ... ... | District Officer. |
| Mr. A. W. Wyatt ... ... ... | Acting District Officer. |
| Mr. D. C. N. Clark ... ... ... | Assistant Superintendent of Police. |
| Mr. F. X. Lwamgira, K.M. ... ... | Secretary to the Council of Chiefs, Bukoba. |
| Chief R. J. Ruhinda, K.M. ... ... | — |
| Chief David Rugomora ... ... ... | — |
| Mr. C. McMahon, M.C. ... ... ... | District Officer. |
| Chief Masanja, K. M. ... ... ... | — |
| Chief Mgemera ... ... ... ... | — |
| Chief Makwaia, K.M. ... ... ... | — |
| Chief Majebere, K.M. ... ... ... | — |
| Chief Gabriel Mazeta ... ... ... | — |
| Ex Chief Isomba ... ... ... | |
| Chief Antonio ... ... ... ... | — |
| Headman Hasan ... ... ... ... | — |
| Mr. A. C. Davey ... ... ... | District Officer. |
| Mr. R. de Z. Hall ... ... ... | Acting District Officer. |
| Mr. J. E. S. Lamb ... ... ... | District Officer. |
| Mr. J. Jenkinson ... ... ... | Acting Superintendent of Police. |
| Mr. E. C. Richards ... ... ... | Provincial Commissioner. |
| Mr. J. W. Johnstone ... ... ... | Resident Magistrate. |
| Chief Sapi ... ... ... ... ... | — |
| Chief Samilla ... ... ... ... | — |
| Chief Mgeni, K.M. ... ... ... | — |
| Jumbe Waziri, K.M. ... ... ... | — |
| Mr. A. A. Oldaker ... ... ... | Acting District Officer. |
| Mr. J. Cheyne ... ... ... ... | District Officer. |
| Mr. H. Hignell ... ... ... ... | Provincial Commissioner. |
| Mr. C. B. Francis ... ... ... | Attorney General. |
| Mr. F. W. Brett ... ... ... ... | Provincial Commissioner. |
| Mr. Benedict Madalito ... ... ... | Clerk, Administration. |
| Headman Mwaruka Mwaruka ... ... | — |

TANGANYIKA—*continued.*

| | |
|---|---|
| Sheikh Idris Saad ... ... ... | — |
| Headman Suleman Rajab ... ... | — |
| Mr. W. L. South ... ... ... | Staff Officer, Tanganyika Police. (Representing the Acting Commissioner of Police.) |
| Mr. G. Olliver ... ... ... ... | Inspector of Police. |
| Mr. D. H. Shackles ... ... ... | Acting Registrar of the High Court. |
| Mr. G. L. Jobling ... ... ... | Crown Counsel. |
| Mr. Akida Mambo ... ... ... | Representing the African Association. |
| Mr. Mdachi Sharifu ... ... ... | |
| Sir Joseph Sheridan ... ... ... | Chief Justice of Tanganyika. |

# ANNEX

## CORRESPONDENCE ARISING OUT OF THE REPORT

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## I.

*Despatch from the Acting Governor of Kenya to the Secretary of State for the Colonies.*

Nairobi,
9th November, 1933.

SIR,

I have the honour to refer to the Report of the Commission appointed by you to enquire into the Administration of Justice in Kenya, Uganda and Tanganyika Territory in Criminal Matters, and to enclose for your consideration copies of the comments of His Honour the Chief Justice and of the Honourable the Attorney-General on the Report and also copy of a Memorandum prepared by Mr. Wade, Acting Colonial Secretary, relative thereto. The views expressed in the Memorandum have been endorsed by the Acting Chief Native Commissioner and one of the more senior Provincial Commissioners and may be regarded as generally representative of the attitude which members of the Kenya Administrative Service would be likely to adopt to the Report were it published in its present form.

2. Without all the evidence on which the conclusions and recommendations of the Commission are based an exact appreciation of the validity of such conclusions and recommendations is necessarily rendered more difficult. But a close analysis of the Report appears to reveal a tendency to indulge in generalizations of a condemnatory character which, at least so far as Kenya is concerned, I submit, are not supported by the terms of the Report. In this connexion it is significant that the list of witnesses in Appendix II includes the names of but six African witnesses from this Colony. Of these six, three represented the Kenya African Civil Service Association; two more the Kikuyu Central Association (a political body representative of a limited section of the Kikuyu tribe) and the remaining one was a Headman. In Tanganyika Territory no fewer than nineteen chiefs, ex-chiefs and headmen gave evidence, and it is presumably largely on their evidence that many of the generalizations in the Report are based. The Commission assumes that they are of equal application to Kenya. In fact they are not.

3. In chapter 2, paragraph 16 of the Report, the Commission sets out in general terms the machinery which should be adopted, if what it designates the British conception of a system for the administration of justice in criminal matters is to be administered. The Commission goes on to assume that in theory a system of this kind has been set up in the three Territories, and, indeed, obtains at their capitals and at a few of the larger centres, but adds that it is no exaggeration to say that the machinery for

the administration of justice as apparently set up by law in these Territories does not work and, as at present constituted, cannot work.

The arguments of the Commission in this connexion cannot be allowed to pass unchallenged because, if substantiated, they would constitute the severest possible indictment both of the Judicial and of the Administrative Services of this Colony.

4. I find myself in full agreement with the arguments elaborated in paragraphs 2 to 9 of Mr. Wade's Memorandum, and whatever criticisms may be passed on the present system of administering justice in criminal matters in Kenya it is not, in my opinion, either logical or fair to base such criticisms on its failure to conform with a theory which in fact the Government has never endorsed. In paragraph 50 of the Report the case for the complete separation of the Administration and the Judiciary is succinctly set out in the quotation from Sir Donald Cameron's address to the Legislative Council of Nigeria. The argument is that a Judicial Officer's sole duty is to sift the evidence actually before the Court, and that for such a duty an officer experienced in the art of sifting and weighing evidence is likely to be the most suitable. The Report itself carries the argument a step further, and suggests that, where guilt has been established, such an officer by following the legal principles laid down by the Courts at home for the punishment of offenders is more likely to pass proper and just sentences. The argument stated in that way appears convincing, but it assumes that the theory and practice of criminal law that have been gradually evolved to meet changing conditions of English life can be safely applied in their entirety to the widely different set of problems arising out of the development of the African from his primitive environment to a more civilized state. Further, that an officer who, however skilled in the legal principles of our English system, makes no pretension to an intimate acquaintance with the habits, customs or speech of those whom he is required to try, and who is not only ignorant of the repercussions which any given sentence may have on the native mind, but also is bound by his training not to allow any such considerations to influence his judgment, is more likely to interpret that system to the satisfaction of the native than an officer who, though legally less well qualified, is by the nature of his training and duties habitually required to deal with problems involving native evidence, customs and habits of thought. Any experienced Administrator could quote cases both of convictions and of acquittals which, though legally unassailable in the eyes of the trained lawyer, have amounted in natives' eyes to a miscarriage of substantial justice. Cases of the kind are bound to occur under any system, when primitive customs run counter to the ethical ideas of a more advanced civilization, but I cannot but think that such clashes are likely to be more

frequent and more unnecessarily severe, where the law is administered in well-intentioned ignorance of native habits and beliefs.

5. In paragraph 19 of the Report the respects in which this alleged system has failed are specifically set out. As explained in paragraph 10 of the Memorandum, only two out of the four defects can be said to be applicable to Kenya, namely:—

(1) The conferring of excessive jurisdiction on magistrates of the Subordinate Courts, and

(3) that the High Court is under-staffed, with the result that the circuits are held at too infrequent intervals and at only two of the larger centres of population.

6. To deal with (3) first. This is a defect not in the system itself but in its application, and, financial considerations apart, I should welcome the appointment of an additional Judge for the reasons given in paragraph 17 (iii) of the Memorandum.

7. The gravamen of the charges, at least so far as Kenya is concerned, lies in (1), and its validity is critically examined in paragraphs 11 to 14 of the Memorandum. I have no personal knowledge of the magisterial work of Administrative officers but from conversations I have had with the Attorney-General I accept his statement that frequent cases have been brought to his notice in which the sentences imposed have been, in his opinion, excessive. But the figures quoted in paragraph 12 of the Memorandum, indicate that the percentage of such cases to total convictions recorded is very small indeed, and it must be remembered that in the ordinary nature of things the very large number of cases in which appropriate sentences were imposed are not brought to the Attorney-General's notice. It appears at least doubtful whether on this ground alone a case for the alteration in the existing system has been made out, unless it can be shown that the proposed change would in other respects make for a more efficient and rapid administration of justice. The only evidence on this point contained in the Report is derived from experience of that system in Tanganyika, where it is stated that delays are considerable and constant, and that bad as are the delays involved in the system, another and worse defect inherent in it arises directly from the inability of the High Court to bring justice to the people. The Commission goes on to say that they have been impressed by the unanimity of all classes and races in Tanganyika on these problems and that from all sources they have had evidence of the very real hardships which they cause. Without, therefore, entering further upon the highly controversial question as to whether substantial justice is better administered by officers of the Administration or by magistrates with a purely legal training, it would appear doubtful, if the Tanganyika system were to be introduced into Kenya, whether it would be possible, in view of the large areas to be administered, to avoid even greater delays than occur at present, unless a much larger

addition to the existing magisterial and judicial staff were made than the present financial position of the Colony permits. If, however, in spite of these considerations, it is manifest from evidence given to the Commission—to the records of which I have not yet had access—that District Officers in Kenya are entrusted with powers in excess of their judicial ability, and if the resultant evils are adjudged to be such as to demand redress, three alternative courses suggest themselves, viz. :—

(*a*) to restrict the granting of second class powers to officers of say ten years or more service. The result of this would be that most serious crime would be tried by the District Commissioners, whereas at present this work is shared between them and their senior assistants. The effect of the change would be to tie District Commissioners more than at present to their stations with corresponding detriment to their administrative work in their districts. It is very doubtful if there would be a corresponding improvement in the judicial work because judicial ability is not necessarily dependent on length of service though doubtless the value of accumulated experience is not negligible;

(*b*) to make the acquisition of second class powers more difficult. At present second class powers are normally granted only to those Administrative officers who have completed one tour of service and who have passed all sections of the Law Examination. It would be possible to make this examination more searching but I believe it is already one of considerable severity, and moreover, I understand that the strictures contained in the Commission's Report are directed not so much against ignorance of the law as against an alleged inability to administer it with moderation and impartiality. Moderation and impartiality will not be inculcated by increased severity of examination;

(*c*) to restrict the powers of Administrative officers holding first and second class magisterial powers to a maximum of two years' imprisonment, with a proviso that in cases where, after conviction, previous conviction or convictions are proved, imprisonment may be awarded up to, say, a maximum of seven years. Such an innovation would have the effect of eliminating many punishments now held to be excessive, would limit punishments for first offences of stock theft, burglary and other serious crime, when tried by District Officers, to a maximum of two years, but would retain the power, which I believe to be very necessary, of punishing with adequate severity a criminal who by repeated acts of lawlessness has proved himself to be a serious menace to society.

8. The detailed recommendations of the Commission are summarized in paragraph 252 of the Report and are dealt with in paragraph 17 of Mr. Wade's Memorandum. Subject to what I

have written above I am in general agreement with his conclusions. I desire, however, to make special reference to the following recommendations .—

*XVI.*—I share the apprehensions expressed by the Chief Justice and Mr. Justice Law as to the advisability of relaxing the rules of evidence in respect of confessions made to the Police.

*XXII and XXIII.*—I attach special importance to native witnesses being allowed to give evidence in their own way without interruption, and in particular in the case of accused persons.

*XXIV.*—The general power granted to magistrates to call additional witnesses appears to me to be valuable and it does not appear to be suggested that the power has been generally abused.

*XXXVIII.*—While the creation of the post of Public Defender has in theory much to commend it, I foresee some practical difficulties in obtaining an officer with all the necessary qualifications required and deciding how he is to function and to what department he is to be attached.

*XLI.*—I share Mr. Wade's regret that the Commission were unable to agree to an alternative sentence to the death penalty for murder. The arguments adduced against such a proposal in the Report, though no doubt entirely sound from the legal point of view, discount altogether the radically different approach of the African to life and death, where questions of native law and custom are involved. If the justice of our administration is to be maintained in African eyes, the important thing is that in certain classes of cases sentence of death should not be passed by the Court at all. Even if the death sentence is not ultimately carried out the psychological effect, quite apart from the unnecessary mental suffering inflicted on the accused, is very different if the guilty party is first sentenced to death and then reprieved by the Governor in Executive Council for reasons unexplained.

I have, &c.,

H. M.-M. MOORE,
Acting Governor.

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*Enclosure* 1.

Law Courts,
Nairobi,

30th August, 1933.

SIR,

Re the Administration of Justice in East Africa Report.

With reference to the above, I propose to deal with the recommendations of the Commission as set out in the Summary on pages 138-140 of the typewritten copy of the Report supplied to me, and the numbers of the following paragraphs correspond to the numbers of the recommendations in such Summary:—

1. I agree with this recommendation. I have always felt that there should be no racial distinction in the method of criminal trials so far as the forum is concerned. In the past greater power in the trial of natives was accorded to magistrates in the case of natives because of the difficulties of communication and the paucity of the staff of the High Court (now Supreme Court). Difficulties of communication have disappeared, every part of the territory being accessible by rail, motor-road, or sea. It is difficult to justify on any logical ground the present differentiation which exists in Kenya between the powers of magistrates in regard to the trial of Natives, Asiatics, and Europeans.

2. I agree with this recommendation. The limitation of magistrates' powers to two years' imprisonment should give them power to deal with the great majority of cases which occur before them. In practice the recommendation will entail more work for the Supreme Court but not in my opinion an excessive amount.

3. The practice of holding Sessions of the Supreme Court at district headquarters was followed in the past but has largely been discontinued owing to the existing financial stringency. Every method of economising by cutting down travelling has been adopted. I, however, entirely agree that justice should be brought as near to the scene of the crime as possible in order that its administration may have the fullest effect. The addition of a Judge to the strength of the Supreme Court would be welcomed as giving greater freedom in the arrangement of circuits and as enabling more frequent special sessions of the Appeal Court to be held to deal with criminal appeals without bringing a Judge up from Mombasa.

With reference to paragraph 60 of the Report, in my opinion the special districts created in Turkana and the Northern Frontier Province should be abolished as soon as money becomes available for the extra cost involved for trials by the Supreme Court in those areas. I think it would be a mistake to create a special district at Lamu especially if communication by road to that post be established.

8. This recommendation does not apply, I gather, to Kenya where civil appeals are heard on circuit, and if (9) be accepted criminal appeals could likewise be heard on circuit.

9. I do not think undue delay often occurs owing to the necessity for two Judges to sit on a criminal appeal. In cases where the appellant is in custody every effort is made to avoid any delay. In my opinion it is more satisfactory to have a Court composed of at least two Judges in dealing with such appeals than to leave the matter to one Judge. Usually criminal appeals are heard at Nairobi and it is seldom two Judges are not available for the purpose.

A further point is that the confirmation of a sentence subject to confirmation does not debar the convict from appealing. It would be unsatisfactory for one Judge sitting on appeal to overrule the decision of a Judge of equal jurisdiction sitting in confirmation.

The only gain, if this recommendation be accepted, would be to make it possible for criminal appeals to be heard on circuit, but usually a hearing on circuit would cause more delay than a hearing at Nairobi where the appeal record would be prepared. The chief gain to be derived from a hearing on circuit would be in the possibility of the appellant attending the hearing of his appeal without great expense to himself or the Crown.

10. This recommendation is unexceptionable, cf. the Kenya Criminal Procedure Code Section 340 (2). But the question arises as to the expense incurred in bringing appellants in custody to the Court sitting in appeal. Is it to be borne by the appellant or the Crown? If by the latter it may involve a very considerable sum of money.

11. The only objection to this proposal is that of office organisation. The records of confirmation and revision cases are prepared in the Head Office at Nairobi or at Mombasa where any necessary copies are made, but I have no doubt that these difficulties could be overcome.

12. I regret to differ from this recommendation. If extra Judges are appointed to the Supreme Court I am of opinion that they should receive the remuneration accorded to their brother Puisnes. It is difficult to support any differentiation of salary among people who do exactly the same work and have exactly the same responsibilities.

13. This recommendation has already been put into practice and Special Sessions of the Court of Appeal for Eastern Africa are held every month save in those months when the regular Sessions are held.

15. This may prove useful and I have no comments to make.

16. I agree with Mr. Justice Law's observations in this recommendation and would maintain the existing rules of evidence relating to confessions to be found in the applied Indian Evidence Act. If an accused person were entirely in the custody of Europeans there might be something to be said for the relaxation of the rule now suggested, but accused natives are in the actual custody of natives who cannot be expected to understand the precautions necessary to ensure that a confession is voluntary and not made in consequence of any inducement threat or promise. The accused person would be produced to the European constable or officer from native custody with the suggestion that he wished to make a confession and the confession would be recorded. Although many European police officers might conscientiously investigate the reasons which induced the accused person to confess it is too much to expect of human nature that every European police officer would inquire too deeply into such reasons.

I must say that I generally feel suspicious about admissible confessions made to magistrates and regard confessions generally as evidence of a weakness in the case for the prosecution. It may be that I am too suspicious.

17. I have no objection to this provided that the power to transfer is confined to Resident Magistrates who may be expected to decide the matter on principle and not in accordance with what might be administrative convenience at the moment.

18. There can be no objection to this recommendation.

19. This recommendation is unexceptionable.

20. I agree.

21. This recommendation is not open to objection although I imagine there would be less difficulty in Tanganyika Territory in finding absconding accused persons than in Kenya where the detribalised native is probably more numerous.

22. I agree. I have always found it more satisfactory if a native witness be allowed to make his own statement before being examined by questions.

23. I agree.

24. I agree.

25 and 26. I agree. With regard to (26) cf. Sec. 33 Evidence Act.

27. This recommendation is unexceptionable, but the supply of efficient interpreters is controlled by the standard of education attained in the territory.

28. I agree. As a matter of fact at some circuit towns such as Kisumu I observe that the same individuals often appear as assessors.

30-34. I am in entire agreement with these recommendations.

35. The proposed Section to be adopted from Nigeria is in my opinion advisable, but I think it should be additional to and not in substitution for the present provision of the Penal Code dealing with compensation which is applicable to any offence.

36. This procedure has been followed in Kenya. The suggestion in paragraph 187 of the Report that the carrying out or commutation of a death sentence should be published in the District concerned is valuable.

37. The suggestion contained in paragraph 189 is interesting and should in my opinion be given a trial.

38, 39, 40. The Courts would welcome adequate representation of a poor prisoner's defence and his case on appeal whether to the Supreme Court or the Court of Appeal. The suggested Public Defender would also be useful in representing the convict in confirmation and revision cases where enhancement of the sentence was contemplated.

41. I entirely agree with this recommendation.

42. I am doubtful of the advisability of this suggestion. "Blood money" was the utmost that could be exacted under native law which did not recognise offences against the State. Offences were in the nature of private wrongs and as such the perpetrator was liable to compensate the person injured or his family. If the State punishes a wrongdoer whether by death or otherwise the sufferer should be left to his civil remedy in those cases in which a civil claim can properly be brought. It is in my opinion opposed to the principles of justice to punish an offender twice for the same offence, i.e., in the case of murder or manslaughter by death or imprisonment and also by the infliction of blood money.

43. I am in agreement with the suggestion that the nature and effect of the act relied on to support provocation should as far as possible be viewed from the standpoint of the community to which the accused belongs.

I have no observations to make on the remaining recommendations in so far as they affect Kenya.

I have, &c.,

J. W. BARTH,
Chief Justice.

The Honourable The Acting Colonial Secretary,
Nairobi.

*Enclosure* 2.

Attorney-General's Office,
Nairobi, Kenya.

28th August, 1933.

Administration of Justice Report.

As I am one of the signatories to this Report I do not consider that it would be proper for me to advance arguments, other than those contained in the Report, in favour of any of the recommendations made by the Commission. I am, therefore, in this minute, confining myself to drawing attention to those recommendations which affect the Colony, at the same time pointing out briefly the action necessary to give effect to each of them and the financial or other implications.

The more important recommendations are summarized on pages 138 to 140 of the typescript Report. Of these Nos. 2, 4, 5, 14, 28, 29, 44 and 45 have no relation to Kenya. The others vary considerably in relative importance the major recommendations being the following:—

1. The powers of punishment of magistrates in Kenya and Uganda should be reduced to the Tanganyika scale.

By Section 10 of the Criminal Procedure Code subordinate Courts of the first and second class may try a native for any offence other than treason, murder, manslaughter and rape, and may pass on him any sentence authorised by law. In Tanganyika a magistrate's powers are limited to two years' imprisonment. Experienced District Officers in that Territory are satisfied that such powers are adequate to enable them to maintain law and order (paragraph 54). The Supreme Court of the Colony repeatedly has to reduce sentences (vide paragraph 46) and the question recently assumed such proportions that the Judges took the opportunity of setting a case down for argument in open Court and delivered a judgment which has been published in Confirmation Case No. 108 of 1933. I personally argued that case at a date prior to the sittings of the Commission, because I had for long felt that magistrates of subordinate courts abused their powers of punishment, not from any improper motive but from a lack of appreciation and understanding of the principles underlying punishment.

Speaking as Attorney-General, and not, for the moment, as a member of the Commission, I have for years had to advise the Supreme Court that I was unable to support large numbers of sentences which in my opinion were so severe as sometimes to be almost savage. So far as I am aware, nowhere except in Kenya, Nyasaland and Uganda (subject in the last case to the magistrate sitting with assessors if he thinks a sentence of over two years is called for) do magistrates possess such powers. In Nigeria, under the Provincial Courts system, comparable powers were conferred on Administrative officers but that system has just been abolished.

It may be argued that the limitation of any magistrate's powers in the way suggested greatly increase the number of cases committed for trial. The answer to that is that recommendation (iiB) suggests an additional Supreme Court judge, and further that no case committed for trial is actually tried by the Supreme Court unless the Attorney-General is satisfied that it is a proper case for such trial. In many cases the depositions will be returned to the committing magistrates with instructions to deal with the case themselves.

As regards the proposal to increase the judiciary by one judge, though the existing system in Kenya is not unsatisfactory delays and hardships would be minimised if the Supreme Court could sit at District Headquarters. This is at present impossible, but one additional judge would enable the

Court not only to deal with the extra work which acceptance of recommendation (i) would entail, but also to sit at more assize centres. Such an appointment would also enable effect to be given to recommendations (viii) and (xi). Acceptance of recommendation (viii) would naturally involve acceptance of (ix). In view of the financial situation recommendation (xii) is important. It is, I think, essential that anyone exercising the functions of a judge should have the status of a judge, but there is ample precedent for paying a junior judge less than his seniors receive.

Recommendation (xiii) has already been given tentative effect to in the Colony, and the new arrangement will have the effect of shortening and so cheapening the quarterly sessions of the Court of Appeal.

Recommendation (xxxviii), (xxxix) and (xl) concern the proposal for State aid for the defence of poor prisoners. The Commission (paragraph 193) recognize the impossibility of giving effect to this recommendation in present financial circumstances. This Government has already gone some way towards accepting the principle.

Another interesting recommendation is (xxxvii) which suggests a system of extra-mural work for minor offenders. Kenya is far ahead of its neighbours in this direction, owing to the inception of the detention camp system. The recommendation goes still further. The system has been in force in Palestine since 1927.

On some of the minor recommendations I would like to comment very briefly:—

(xv) has been consistently asked for by the Police in all territories. It will be a great help to them, and I can see no objection to the proposal, although the recent Conference of Law Officers did not recommend it.

(xvi) will greatly assist Police investigation, and, although Mr. Justice Law dissents from this recommendation, the other members of the Commission after hearing a great deal of evidence, were satisfied that the adoption of the recommendation was not likely to cause any injustice.

(xx) introduces the English system and will lead to economy of time and money. At present such a person on discharge must be put on his trial though it may be impossible to find witnesses or to make any case against him.

(xxvi) will save much inconvenience and money without occasioning injustice.

(xliii) will I am sure commend itself strongly to the Acting Colonial Secretary and the Acting Chief Native Commissioner. It is, I think, logical and will greatly ease the work of the Governor in Council.

I would suggest that the views of the Acting Colonial Secretary and the Acting Chief Native Commissioner on (xix), (xxii), (xxiii), (xxv) and (xxvii) and generally on the Report would be of value.

A. D. A. MacGregor,
Attorney-General.

The Hon. the Acting Colonial Secretary,
Nairobi.

*Enclosure* 3.

MEMORANDUM PREPARED BY MR. A. DE V. WADE ON THE REPORT OF THE COMMISSION OF INQUIRY INTO THE ADMINISTRATION OF JUSTICE IN EAST AFRICA, IN SO FAR AS THAT REPORT AFFECTS THE ADMINISTRATION OF JUSTICE IN KENYA.

1. Following a preliminary chapter descriptive of the three territories, the Commission in Chapter II gives an outline of the systems of administration of justice as they exist to-day in Kenya, Uganda and Tanganyika, essays to show the major defects in those systems and the directions in which the alleged failure is most pronounced, and concludes by making certain recommendations designed to cure those defects.

2. At the outset I dissent from the conception of the theory of the Kenya system in the Report. In paragraph 16 it is stated: "Generally speaking the British conception of a system for the administration of justice in criminal matters would involve a sufficient number of Judges . . . who would try all serious crime. Magistrates would be concerned only with the trial of less serious crimes and with the holding of preliminary enquiries . . . and their powers of punishment would be comparatively small . . ." and in paragraph 17 it is stated: "In theory a system of this kind has been set up in the three territories . . .".

3. A system of this kind, however, has not been set up in Kenya either in theory or in practice in so far as the administration of justice to natives is concerned.

The provisions of Section 10 of the Criminal Procedure Code, which is quoted in paragraph 21 of the Commission's Report, clearly shows that the intention of the Kenya system is not that the powers of punishment conferred upon magistrates in their jurisdiction over natives should be "comparatively small," but that they should be so extensive as to embrace "any sentence authorised by the Penal Code or any other law" for "any offence under the Penal Code or any other law other than offences under Sections 36, 37, or 38 of the Penal Code (treason and analogous offences) murder, manslaughter, rape or attempts to commit . . .".

The Code at present in force, which was enacted in 1930, embraces substantially the provisions conferring powers on magistrates embodied in the Courts Ordinance of 1907.

4. It is clear, therefore, that the policy of the Kenya Government to entrust to magistrates comprehensive powers in dealing with offences committed by natives has been deliberate and consistent, and that no attempt has been made to introduce a system resembling in all respects what is described as the "British conception" in paragraph 16 of the Commission's Report.

5. A reason for this differentiation between the British and the Kenya systems is to be found in the Article of the Order in Council common to all three Dependencies quoted in paragraph 47 of the Commission's Report:—

> "In all cases, civil and criminal, to which natives are parties every court shall (*a*) be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance, and shall (*b*) decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

6. It is true, as the Commission has shown in paragraph 48 of its Report, that (*a*) has been made a dead letter because the Penal Code is the criminal law of each Territory, "so that native law and custom, as has been frankly admitted by most witnesses, seldom has to be considered as a matter of

substantive law in a criminal trial " except in so far as the existence of a native custom may be considered in mitigation of the offence; (*b*) however remains operative and is of great importance. " Substantial justice " and prompt justice are the aims of the system and the Article clearly contemplates that substantial justice can be achieved without " undue regard to technicalities of procedure." The responsibility for administering justice to natives has therefore been entrusted to those who know most about natives, that is to say, their own Administrative Officers. It is a mistake to suppose that " substantial justice " means in the minds of Administrative Officers " rough and ready justice "—still less " rough and ready injustice," or " a charter of liberty to allow any breach of regularity "; the suggestion in paragraph 156 of the Report.

It should be unnecessary to point out that, even if Administrative Officers wished to administer " rough and ready justice " regardless of " the technicalities of the law and legal procedure " the present system effectively prevents their doing any such thing. Every judgment of an Administrative Officer is liable to be reviewed by the Supreme Court, and all heavy sentences must be confirmed by the Supreme Court. If the Administrative Officer whose judgment has come under review has failed to appreciate the requirements of legal proof and has attempted to mete out " rough and ready " justice, his judgment will be altered and, as likely as not, he will be severely reprimanded by the judge who reviews his judgment.

7. Under the British system in a trial for a serious offence there is not only a judge but there is a jury also. The determination of the law is the function of the judge, the determination of questions of fact is the function of the jury. A jury of natives in this country is under existing conditions an impossibility, and assessors, though helpful, " obviously have their limitations," vide paragraph 132 of the Report.

The judge or magistrate therefore trying a " native " case has to decide for himself both questions of fact and points of law. To arrive at the facts in a native case is not always easy. Natives as witnesses are notoriously unreliable. They are commonly unable to distinguish between what they may have seen and what they may have been told, they will spoil a good case by fictitious embroidery, they will feel that it is their duty to do their best for their friend or their worst for their enemy rather than to reveal damaging facts. They are not in the least impressed by any form of oath that can be administered in court, and on occasions they will assume the identity of some other member of the family—e.g., a Kikuyu will quite honestly say: " I had 27 sheep stolen " when he really means that his grandfather had one sheep stolen and he is now claiming for that sheep and its putative progeny. Moreover, criminal law is a conception foreign to the native mind. A native cannot understand an offence against the State, he is concerned only with the righting of a private wrong. Under such conditions as these it may well be that the man best qualified to determine the facts in a native criminal case is not necessarily the expert in law but one who, from having lived and worked among natives, has some understanding of their customs and mentality and is therefore in a better position to estimate the value of evidence than the Judicial Officer, whose contact with the natives of the Colony is both remote and transitory. One instance alone may suffice in support of this contention. A native of Kisii was charged with theft from a Luo. The evidence against him was complete and flawless but the accused protested that he was innocent. The magistrate (an Assistant District Commissioner), knowing that whenever a Kisii stole from a Luo he was so proud of the fact that he would always admit it, refused to convict for no other reason than the accused's protest, and adjourned the case for further investigation. It transpired that there had been a quarrel and that the complainant and all the witnesses had concocted an ingenious and perfect conspiracy. But for the magistrate's local knowledge an innocent man would undoubtedly have been convicted.

Such instances can, of course, be multiplied indefinitely. It may be argued that in the instance given the fact of the quarrel should have been produced in evidence. Admittedly, but the essential factor is that it was not produced.

8. The second desideratum indicated in the Article of the Order in Council is "prompt justice." A system under which a District Officer can administer justice in his office, outside his tent, or under a tree, must make for more expedition than any system of judge's circuits.

9. The Kenya system is not a haphazard one or one adopted merely for reasons of economy, but is one deliberately established because it is believed to be suited to local conditions and is more likely to achieve substantial and prompt justice for the natives in whose interests it is devised than would be the British system.

10. In paragraph 18 of its Report the Commission says:—

> "It is no exaggeration to say that the machinery for the administration of justice as apparently set up by law in these territories does not work and as at present constituted cannot work." In fact, the machinery, whether good or bad, does work and in the opinion of many works well.

The Commission, however, disagrees and in paragraph 19 "states concisely" the respects in which the system has failed. They are:—

> (i) the conferring of excessive jurisdiction on magistrates of the subordinate courts;
>
> (ii) the excessive use of the power of investing magistrates with the jurisdiction of the High Courts;
>
> (iii) the fact that the High Courts of the territories are understaffed with the result that circuits are held at too infrequent intervals and at only a few of the larger centres of population;
>
> (iv) in the case of Tanganyika the centralization of the High Court at Dar es Salaam.

With (iv) this Government is not concerned.

(ii) can hardly be said to apply to Kenya for the power referred to is exercised only in the cases of the Turkana and Northern Frontier Provinces and the Commission, in paragraph 60, recommends no immediate alteration.

11. There remain for consideration (i) and (iii) and in this connexion reference is invited to the following passage from paragraph 18 of the Report:—

> "No machinery, however perfect it may be in itself, can perform its primary function of meting out justice to the people unless it takes justice to the people and administers it with despatch, with independence, with certainty and with skill. It may have to be admitted that financial considerations do not permit of a complete reform immediately, but no possible effort should be spared to make the machine work satisfactorily, so that prolonged delays in trials and undue hardship to witnesses and parties may be avoided.
>
> "If magistrates of the subordinate courts had less extensive powers over natives there would not be the same occasion for the constant interference by the Judges on Confirmation and Revision, and the Judges themselves would not be confined to the trial of a small part only of serious crime.
>
> "At present the system in its working is so remote and impersonal as to be little understood and appreciated among the 12 million natives over whom it is supposed to function."

Certain of the above strictures, expressed and implied, have no application to Kenya. The Kenya system is neither remote nor impersonal. It cannot be said to impose unduly severe hardships on parties or witnesses

for in paragraph 27 of the Report it is stated: " In Kenya there is no unreasonable delay up to the determination of a case by the Supreme Court," and the remainder of the system, that part which is administered by Resident Magistrates and District Officers (whatever other defects it may have) is certainly calculated, as explained in paragraph 8 of this memorandum, to achieve expedition. The gravamen of the charge against Kenya, therefore, is that in this Colony magistrates of the subordinate courts have too much scope and the Judges of the High Court have too little, and that as a consequence justice suffers from a lack of independence, certainty or skill.

12. It may be admitted that Administrative Officers are not commonly so skilful in the conduct of judicial proceedings as are those who have made the practice of the law their profession, but in Kenya any lack of skill there may be is remedied to some extent at least by the system of revision by the High Court. Under this system, which involves the constant supervision by Supreme Court Judges of the magisterial activities of Administrative Officers, the latter do perforce in the course of time acquire no little skill in the discharge of their magisterial duties. This system of revision results in the " constant interference of the Judges " and it is presumably to this that the Commission is referring in its emphasis on the desirability of certainty, the argument being that there can be no certainty where sentences are so frequently reversed or altered. On page 17 of the Judicial Department Report for 1932 it is stated that a total of 46,051 convictions was recorded in subordinate courts during 1932. On page 3 idem it is stated that 181 cases were before the Supreme Court on revision. In 103 of these cases retrials were ordered or the judgments were varied, while in 76 the sentences were reversed and two were pending at the end of the year. It is understood that these 181 cases involved 182 convictions. That is to say, of a total of 46,051 convictions recorded in subordinate courts 182 (or ·395 per cent.) were " interfered with " on revision. On page 4 of the same Report is a table showing the number of cases tried in subordinate courts in which the sentences imposed required confirmation by the Supreme Court under Section 11 of the Criminal Procedure Code. Of the 1,093 convictions recorded in subordinate courts 899 (or 82.25 per cent.) were confirmed without alteration.

These percentages do not appear to indicate so great a degree of " uncertainty " as to constitute a very serious abuse. In any case the remedy proposed, that all serious crime should be tried by the Supreme Court must involve the evils which have been found to result from the operation of that principle in Tanganyika Territory, the evils of intolerable delay.

13. In paragraph 45 it is urged that the administrative duties of a District Officer are such as to make it difficult for him to be a good magistrate in that " it cannot always be easy for him to assume a judicial role and to proceed calmly and dispassionately to apportion responsibility and to arrive at a proper sentence." It is even suggested that the severity of sentences passed in cases of stock theft has in some instances been due to the fact that " stock theft in several districts has assumed the proportions of a major political issue." This passage indicates a fundamental misconception. To establish the contention that District Officers are not impartial and that on occasions they are actuated by political motives the Commission quotes in paragraph 46 of the Report a return of confirmation cases in which sentences passed by Administrative Officers sitting as Magistrates are so severe as to be in their opinion unjustifiable. In each of the cases quoted, the conviction recorded by the Magistrate was confirmed by the Supreme Court. Therefore, the issue is narrowed to the question whether the Magistrates were able " to proceed calmly and dispassionately . . . to arrive at a proper sentence." The argument used

by the Commission appears to be this: in the cases quoted the District Officers concerned imposed severe sentences and those sentences were drastically reduced by the Supreme Court. Therefore, not only were the sentences unjustifiable, but the Magistrates who tried the cases were not impartial and were probably actuated by political motives. The fallacy of this argument may be most strikingly demonstrated by applying it without variation to a series of cases in England in which the sentences imposed by judges and other qualified judicial officers were subsequently reduced by the Court of Criminal Appeal. These illustrations are taken from cases cited by the Attorney-General in Confirmation Case No. 108/1933:—

| *Offence.* | *Sentence of Trial Judge.* | *Sentence in Court of Criminal Appeal.* |
|---|---|---|
| Larceny ... ... | 5 years' penal servitude. | 12 months' imprisonment with hard labour. |
| Obtaining goods by false pretences. | 5 years' penal servitude and 3 years' police supervision. | 15 months' imprisonment with hard labour. |
| Obtaining goods by false pretences. | 21 months' imprisonment. | 12 months' imprisonment. |
| Obtaining goods by false pretences. | 5 years' penal servitude. | 9 months' imprisonment. |
| Obtaining goods by false pretences. | 3 years' penal servitude. | 12 months' imprisonment. |
| Larceny ... ... | 3 years' imprisonment. | 12 months' imprisonment. |
| Larceny in a dwelling house. | 5 years' penal servitude. | 3 years' penal servitude. |
| Obtaining goods by false pretences. | 3 years' penal servitude. | 12 months' imprisonment with hard labour. |
| Office breaking and larceny. | 5 years' penal servitude. | 18 months' imprisonment. |
| Larceny ... ... | 3 years' penal servitude. | 12 months' imprisonment. |
| Larceny ... ... | 5 years' penal servitude. | 12 months' imprisonment. |
| Garage breaking ... | 4 years' penal servitude. | 18 months' imprisonment. |
| House breaking ... | 12 months' imprisonment. | 6 months' imprisonment. |
| Larceny ... ... | 3 years' penal servitude. | 21 months' hard labour. |

Application of the reasoning in paragraphs 45 and 46 of the Report to the sentences imposed in the Court of first instance in the foregoing trials leads to the absurd conclusion that the trial judges were unable to " proceed calmly and dispassionately to apportion responsibility and arrive at a proper sentence " and that they were probably actuated by political motives.

In passing severe sentences District Officers are influenced not by political motives but by the knowledge that (*a*) conditions are such as to demand that a sentence shall be not only retributive or reformative but also deterrent; and (*b*) that for the sentence to be effectively deterrent it must be severe. In other words, District Officers in passing sentences take

into consideration the prevalence of the type of crime that they are trying and are apt to believe that a sentence of a month's detention is useless as a deterrent for burglary in Nairobi or stock theft in Kisii. 771

It is necessary to stress the fact that stock theft is regarded by many native tribes not as something wrong but rather as an honourable and traditional means of acquiring wealth. In such circumstances, the only practical method of preventing extensive outbreaks of stock theft is by the infliction of severe deterrent punishment on offenders who are caught and convicted. Failure to check such outbreaks is fraught with the gravest dangers and it is the knowledge of this fact, and not political motives, which actuates Administrative Officers in inflicting severe deterrent punishments on this class of offenders.

From their close association with the native tribes concerned, Administrative Officers are, in the nature of things, more likely to appreciate that unless an outbreak of inter-tribal stock theft is promptly and firmly dealt with the result is likely to be a serious outbreak of lawlessness, and possibly bloodshed, than is a Supreme Court Judge, whose knowledge of local or even of African conditions may be very imperfect. In such circumstances, Administrative Officers conceive it as being nothing less than their duty to impose severe deterrent sentences notwithstanding their knowledge that the severity of such sentences will possibly be considerably reduced by the Supreme Court through lack of appreciation of the circumstances in which the severe punishments were quite properly imposed.

14. It may be that in their desire to protect the law-abiding from the depredations of the lawless, District Officers have on occasions erred on the side of severity.

It is equally arguable that on other occasions they may have erred on the side of leniency. Errors in this direction would naturally be less liable to detection and criticism and have therefore escaped the Commission's condemnation.

15. The Commission proposes to remedy the evils of the existing system by reducing the jurisdiction of magistrates in Kenya to the limits which obtain in Tanganyika, that is to say, their powers of punishment are to be limited to sentences not exceeding two years in the case of first class magistrates, one year in the case of second class magistrates, and three months in the case of third class magistrates. It is curious that the remedy for the alleged defects of Kenya should be the adoption of the system which appears to be productive of so many evils in Tanganyika. Possible effects of this recommendation would be that two years would become the maximum sentence for almost every non-capital offence and that Provincial Commissioners would do little else but try cases.

It is true that the Commission, realising the delays that must inevitably occur under this system, proposes a palliative in the shape of one additional Judge. It is recorded, however, in paragraph 57 of the Report, that the Commission regard it as most important that trials by the High Court should be held in the district in which the crime was committed and the witnesses reside:—

> "The High Court should be so constituted that it can hold assizes at frequent intervals not only at provincial headquarters but at district headquarters also."

There are in Kenya 28 district headquarters exclusive of those in Turkana and the Northern Frontier Province. If the one additional Judge were continuously on circuit throughout the year it would still be inevitable that the accused and witnesses at many district headquarters would wait many months for his arrival. In short, greater delays would occur.

16. In 1932 the following numbers of convictions were recorded in the Supreme Court and subordinate courts respectively for the undermentioned classes of crime:—

| | *Supreme Court.* | *Subordinate Courts.* |
|---|---|---|
| Offences against the person ... ... ... | 192 | 1,049 |
| Theft of stock or produce ... ... ... | 1 | 1,441 |
| Other offences against property (including cruelty to animals) ... ... ... ... | 5 | 3,344 |
| | 198 | 5,834 |

Among the offences dealt with by subordinate courts were many which merited punishment in excess of one year's imprisonment and many punishment in excess of two. Had the Commission's recommendations been in force during that year, therefore, many cases would have had to await a visit from a Provincial Commissioner (or some other first class magistrate) and many others could have been dealt with only by a Supreme Court Judge. In the former category of cases delays may be considerable; in the latter the delays will be so serious as to create the very conditions which in Tanganyika have earned the Commission's severe condemnation.

A comparison between the procedure in a typical stock theft case under the existing system with that which will prevail under the proposed system may serve to illustrate this contention.

A party of Kisii crosses the Masai boundary, steals 10 head of cattle, and returns to Kisii with the loot. The offenders are arrested in Kisii and sent to Narok, the headquarters of the district from which the cattle were stolen. Under the existing system one of two courses will be adopted. Either the witnesses will be called to Narok and the case will be disposed of there by a District Officer with second class powers or, if a District Officer is due to tour the area in which the theft was committed, the accused will be taken there under escort and the case will be disposed of on the spot. In the latter event the witnesses would have to make one return journey of from one to 50 miles, whereas if the case were tried at Narok they would have to make one return journey of from 100 to 150 miles. If the accused were convicted and were sentenced to a considerable term of imprisonment, say three years (which, in view of the possible inter-tribal hostilities and bloodshed which are the natural results of stock theft, might not be an excessive punishment) the case file would be sent to the Supreme Court for confirmation. If the conviction were upheld the sentence would be either confirmed or varied. In either event the witnesses would not be required again and the case would be disposed of expeditiously and finally. If the District Officer had erred either in procedure or in severity of sentence his error would be rectified in a comparatively short space of time by the High Court, and no substantial hardship or injustice would have been done, nor would any undue delay have occurred.

Under the system advocated by the Commission the procedure would be the same, with the essential difference that instead of disposing of the case the District Officer would merely conduct a preliminary enquiry. He would then commit the accused persons to be tried by the Supreme Court, and provided the Attorney-General agreed that the case merited punishment in excess of two years' imprisonment, a date would be fixed for hearing the case at Narok. The witnesses would either have to be detained at Narok pending the arrival of the Judge on circuit, or, if the date of his arrival were too remote, would return to their homes in Kisii and would later have to make a second return journey of 100 to 150 miles.

17. It does not appear that the evidence recorded in the Commission's Report is of such a nature as to justify the conclusions arrived at or to warrant the radical reorganisation proposed, the inevitable result of which will be to create the very conditions which the Commission has so unreservedly condemned.

*The Commission's Specific Recommendations Relative to Kenya.*

*(Paragraph 252 of the Report.)*

(i)-(ii).—Are dealt with above.

(iii).—Were it not for the expense involved I should welcome the appointment of an additional Judge in order that District Headquarters might be more frequently visited, not only for the purpose of holding sessions for the trial of capital charges or other charges not triable by magistrates, but also for the purpose of revision of magistrates' cases. Such revision on the spot and discussion of cases with the magistrates who tried them is helpful and instructive and tends to obviate misunderstandings and possibly protracted correspondence.

(iv)-(v).—Do not concern Kenya.

(vi).—I prefer the existing system.

(vii).—I agree, but the financial situation precludes additional staff being provided.

(viii)-(ix).—In this connexion the Chief Justice writes:—

> "I do not think undue delay often occurs owing to the necessity for two Judges to sit on a criminal appeal. In cases where the appellant is in custody every effort is made to avoid delay. In my opinion it is more satisfactory to have a Court composed of at least two Judges in dealing with such appeals than to leave the matter to one Judge. Usually criminal appeals are heard at Nairobi and it is seldom that two Judges are not available for the purpose.
>
> "A further point is that the confirmation of a sentence subject to confirmation does not debar the convict from appealing. It would be unsatisfactory for one Judge sitting on appeal to overrule the decision of a Judge of equal jurisdiction sitting in confirmation.
>
> "The only gain, if this recommendation be accepted, would be to make it possible for criminal appeals to be heard on circuit, but usually a hearing on circuit would cause more delay than a hearing at Nairobi where the appeal record would be prepared. The chief gain to be derived from a hearing on circuit would be in the possibility of the appellant attending the hearing of his appeal without great expense to himself or the Crown."

I agree with the Chief Justice and prefer the existing system.

(x).—Though there is much to be said for the principle I fear that the expense involved in bringing appellants to Headquarters for the hearing of appeals—many of which are groundless—would be prohibitive.

Though the Chief Justice agrees that this recommendation is unexceptionable, he adds:—

> "But the question arises as to the expense incurred in bringing appellants in custody to the Court sitting in appeal. Is it to be borne by the appellant or the Crown? If by the latter, it may involve a very considerable sum of money."

(xii).—I disagree. The Chief Justice writes:—

> "I regret to differ from this recommendation. If extra Judges are appointed to the Supreme Court I am of opinion that they should receive the remuneration accorded to their brother Puisnes. It is difficult to support any differentiation of salary among people who do exactly the same work and have exactly the same responsibilities."

(xiii).—I agree, if practicable.

(xiv).—Does not concern Kenya.

(xv).—I agree.

(xvi).—I disagree. The Police are too greatly interested in securing a conviction to be safely entrusted with the duty of recording confessions to be used against the accused. I am deeply impressed by the quotation from Cave J. in para. 93 of the Commission's Report. The Chief Justice writes:—

> "I agree with Mr. Justice Law's observations in this recommendation and would maintain the existing rules of evidence relating to confessions to be found in the applied Indian Evidence Act . . . ." "Although many European police officers might conscientiously investigate the reasons which induced the accused person to confess it is too much to expect of human nature that every European police officer would enquire too deeply into such reasons. I must say that I generally feel suspicious about admissible confessions made to magistrates and regard confessions generally as evidence of a weakness in the case for the prosecution. It may be that I am too suspicious."

(xvii) to (xxiii).—I agree. The Chief Justice states, with reference to recommendation (xvii):—

> "I have no objection to this provided that the power to transfer is confined to Resident Magistrates who may be expected to decide the matter on principle and not in accordance with what might be administrative convenience at the moment."

(xxiv).—I disagree emphatically. The power to call additional witnesses under the former Code often provided the only way of arriving at the truth and was often the accused's surest safeguard (vide the case cited in paragraph 7 above). It should be remembered that in the majority of cases heard by subordinate courts there is no regular "prosecution" and no properly presented "defence." If the object of a criminal trial is to arrive at the truth the magistrate trying the case should have power to summon such witnesses as in his opinion are most likely to produce the necessary evidence.

(xxv).—I agree that this would be valuable.

(xxvi) to (xxviii).—I agree.

(xxix).—Does not concern Kenya.

(xxx) to (xxxiv).—I agree. In connexion with recommendation (xxx) a suggestion has been made that before a Judge revises or alters a sentence he should be encouraged to send a questionnaire to the trying magistrate on any points on which he may be in doubt and particularly upon those on which the experience and knowledge of the magistrate would be valuable.

(xxxv).—I agree. The Chief Justice states:—

> "The proposed section to be adopted from Nigeria is in my opinion advisable, but I think it should be in addition to and not in substitution for the present provision of the Penal Code dealing with compensation which is applicable to any offence."

(xxxvi).—This procedure is adopted in rare cases. Normally it is not necessary in Kenya and it is used to convince remote tribesmen that the sentence has been carried out.

(xxxvii).—I agree. It should be noted that in Kenya juveniles are now dealt with under the Juvenile Offenders Ordinance, 1933. The Chief Justice is of the opinion that the suggestion should be tried.

(xxxviii) to (xl).—I agree. This proposal originated in this Colony in 1930. In the opinion of the Chief Justice "the Courts would welcome adequate representation of a poor prisoner's defence and his case on appeal whether to the Supreme Court or the Court of Appeal. The suggested Public Defender would also be useful in representing the convict in confirmation and revision cases where enhancement of the sentence was contemplated . . . ."

(xli).—I regret that the Commission were unable to agree to an alternative sentence to the death penalty for murder. The case in which 60 Akamba were condemned to death for the murder of a woman believed to be a witch, a case which excited questions in the House of Commons, aroused much publicity in the local and English Press and prompted the Chief Justice to take the unusual step of suggesting that the Governor-in-Council should exercise his prerogative of mercy before the appeal had been heard, was so tragic a farce as to demonstrate the desirability of allowing to Judges some discretion in passing sentence.

(xlii).—I agree under present conditions. I hope, however, that education and progress will gradually result in the elimination of claims for blood money. The Chief Justice states:—

> "I am doubtful of the advisability of this suggestion. "Blood money" was the utmost that could be exacted under native law which did not recognize offences against the State. Offences were in the nature of private wrongs and as such the perpetrator was liable to compensate the person injured or his family. If the State punishes a wrongdoer whether by death or otherwise the sufferer should be left to his civil remedy in those cases in which a civil claim can properly be brought. It is in my opinion opposed to the principles of justice to punish an offender twice for the same offence, i.e., in the case of murder or manslaughter by death or imprisonment and also by the infliction of blood money.

(xliii).—I agree.

(xliv) and (xlv).—Do not concern Kenya.

(xlvi).—I agree, when circumstances permit, in so far as "simple prohibitions" are concerned (vide paragraph 250 of the Report).—

(xlvii).—I agree

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## II.

*Despatch from the Governor of Uganda to the Secretary of State for the Colonies.*

Government House, Uganda.

18th November, 1933.

Sir,

In accordance with instructions received through the medium of the Secretary to the Governors' Conference I have the honour to submit herewith my comments on the Report of the Commission of Inquiry into the Administration of Justice in Kenya, Uganda and the Tanganyika Territory in Criminal Matters.

2. I should like to express my gratitude to you for your decision that my comments should be published at the same time as the Report. It is scarcely necessary for me to say that the comments and criticisms contained in this despatch refer to the suggestions made in the Report only in so far as they relate to the Protectorate of Uganda.

3. In order to avoid the repeated use of circumlocutory phrases I shall, in the body of this despatch, make frequent use of the terms " professional courts " and " professional justice " and " non-professional courts " and " non-professional justice ". I shall use these phrases, except where otherwise indicated, in the sense in which they are employed by the Commission itself, that is to say the term " professional " will be applied only to those courts which are normally staffed by permanent members of the Judicial Services.

4. Since I shall consider it my duty to criticise freely the findings of the Commission and to differ from them in respect of some of their more important recommendations I should like at the outset to express my appreciation of the exceedingly thorough manner in which they conducted their investigations and of the value of a number of their suggestions.

5. It may appear from a number of my criticisms that I consider the Commission as a whole to have entered upon their investigations with a bias in favour of the professional courts. I hasten to admit that ten years' service in India has probably left me with a bias in favour of a magistracy with administrative experience. I venture, however, to call attention to the fact that I served for two and a half years as Registrar of an Indian High Court, and that I may therefore claim to have some experience of aspects of this exceedingly difficult question which do not ordinarily come within the purview of the administrative officer.

6. In the eighteenth paragraph of their report the Commission make the following statement :—

> " It is no exaggeration to say that the machinery for the administration of justice as apparently set up by law in these territories does not work, and, as at present constituted, cannot work."

This is, as the Commission themselves admit, a very grave statement. They contend that it is fully supported by the evidence they heard. I have not had the advantage of studying the whole of that evidence, but the statement does not appear to me to be adequately supported by such of the evidence as is referred to in the report itself nor by the ascertainable facts.

7. With the Commission's contention that no machinery, however perfect it may be in itself, can perform its primary function of meting out justice to the people unless it takes justice to the people and administers it with despatch, with independence, with certainty and with skill, I am in full agreement, but I consider that the reasons for which the Commission have alleged that the judicial machinery in Uganda fails in these respects merits the closest examination and the result of such examination shows, in my opinion, that several of these reasons are mere assumptions which are not supported by the actual facts.

From a perusal of paragraph 18 of the Report it would appear that the Commission consider that the existing system suffers from four main defects.—

(*a*) It involves prolonged delays in trial and consequent undue hardship to witnesses and parties.

(*b*) The existing extensive powers which magistrates of subordinate courts exercise over natives give an occasion for constant interference by the Judges on confirmation and revision.

(*c*) The existing system confines the Judges themselves to the trial of a small part only of serious crime.

(*d*) In its working it is so remote and impersonal as to be little understood and appreciated among the twelve million natives over whom it is supposed to function.

In the next paragraph of their report they re-state the respects in which the system has failed (in Uganda) as follows :—

(i) The conferring of excessive jurisdiction on magistrates of the subordinate courts.

(ii) The excessive use of the power of investing magistrates with the jurisdiction of the High Court.

(iii) The fact that the High Court is understaffed with the result that circuits are held at too infrequent intervals and then only at a few of the larger centres of population.

I propose to deal in detail with the four reasons as first stated. As regards the second three I would merely remark that they all depend upon assumptions. Firstly, the assumption that the normal jurisdiction of the subordinate courts is excessive; secondly, the assumption that the power of investing magistrates with the jurisdiction of the High Court has been used to excess, and thirdly, the assumption that the holding of High Court circuits at more frequent intervals and at more of the larger centres of population would be beneficial. I shall deal with these assumptions (which have not all, in my opinion, been properly established) incidentally in the course of my detailed examination of the first set of four reasons on account of which the Commission consider the present machinery to have failed.

8. The first defect of which the Commission complain is prolonged delays in trial and consequent undue hardship to witnesses and parties. There are short sentences in paragraphs 38, 74 and 78 of the Report which refer specifically to delays in trial by the High Court, but from a perusal of the Report as a whole I am inclined to think that any person of ordinary intelligence would come to the conclusion that there is very serious delay in all classes of criminal cases and that the situation, in this regard, in Uganda is particularly bad. I am myself left in some doubt as to whether the Commission were themselves under the impression that there is serious delay in cases tried by magistrates in Uganda under Part VI of the Criminal Procedure Code. I have made careful

enquiries and I am fully satisfied that in Uganda at any rate, in cases which are actually tried by magistrates, except when exercising extended jurisdiction in special districts, there is no unusual or avoidable delay and no consequent excessive hardship on parties or witnesses. It is therefore in only approximately 3 per cent. of the criminal cases tried in Uganda that the question of delay arises. I admit that in cases where there is a preliminary enquiry by a magistrate and a subsequent trial either by a Special District Court or by the High Court, there is very often exceedingly serious delay. Everything possible should be done to remedy this state of affairs and I will deal with certain suggestions in this regard in a later paragraph of this despatch. The point which I am immediately concerned in establishing is that there is no avoidable delay and in fact little, if any, more delay than would be found in any highly civilized country, in cases tried by magistrates, and that therefore as far as the magisterial courts, both professional and non-professional, are concerned, the criticism that the existing machinery does not administer justice with despatch does not apply. The suggestion that the powers of magistrates in Uganda should be restricted would have the effect of increasing considerably the percentage of cases in which delay occurs and would therefore, in this respect, tend rather to increase than to diminish the evils of which the Commission complains.

9. The second contention of the Commission is that the extensive powers exercised by magistrates of the subordinate courts over natives involve constant interference by the Judges on confirmation and revision. One would have expected a statement like this, which seriously impugns the efficiency of the subordinate courts, to be supported by a considerable volume of evidence. The only support which I can find in the Report is the list in paragraph 46 of twelve cases of theft of stock in Kenya in which the sentence inflicted by a magistrate was reduced by the High Court. The adequacy or inadequacy of a sentence in any particular cases must obviously be a matter of opinion; it is in fact a matter on which the opinions of the most experienced judges differ widely *inter se*. I am not therefore prepared to admit that in all cases in which a sentence has been reduced by a High Court the sentence of the original court was in fact excessive. In any case a list of twelve cases in which the sentence of the magisterial court was reduced appears to me a somewhat slender thread upon which to hang a serious indictment of the efficiency of magisterial courts throughout the three territories, and I have considered it necessary to obtain figures which were not before the Commission, or at any rate were not mentioned in their Report, in order to enable me to judge for myself whether magistrates in Uganda are in fact as frequently at fault as the contention of the Commission with which I am now dealing would imply. In 1932, 6,018 cases were disposed of by magisterial courts; 101 of these cases

were dealt with by the High Court in revision and in 19 cases the order of the magistrates' court was varied on appeal to the High Court. Of the cases dealt with in revision those which were returned for retrial or for the taking of further evidence, those in which no order was made but the attention of the magistrate was called to certain irregularities in procedure, and a few cases in which the High Court order amounted practically to a confirmation of the sentence of the magistrate, may be eliminated; there remain 77 cases under revision and 19 cases under appeal in which the order of magistrate's court was finally varied by the High Court. In only 33 of these or approximately one-half per cent. of the total number of cases tried by magistrates was the conviction of the magistrate quashed. In the remaining 63 cases the sentence of the lower court was varied, being reduced in the majority of cases but enhanced in one or two. The plain facts therefore are that in approximately one per cent. of the cases tried by magistrates did the High Court differ from the magistrate's opinion as to the sentence which it was desirable to impose; in one-half per cent. of these cases did the High Court acquit a person who had been convicted by a magistrate. I have not examined the orders of the High Court in appeal but I have seen all their orders passed in revision and in only one case does the High Court order clearly indicate that in their opinion the convicted person was innocent. In this case his innocence was established by evidence in a subsequent case and the attention of the High Court was drawn to the circumstance by the magistrate himself. In the large majority of cases the conviction was set aside because in the opinion of the High Court it was not adequately supported by the evidence. It is a cardinal principle of British justice, and one with which I should be the last person in the world to disagree, that it is better that a hundred guilty men should be acquitted than one innocent man should be convicted, and, while I have not the slightest doubt that in all these cases the High Court was perfectly right in quashing the conviction, it must be borne in mind that an order quashing a conviction implies not a probability but only a possibility that the convicted person was in fact innocent. I make this point, not with the idea of suggesting that orders quashing convictions are unnecessarily frequent but merely in order to remove an impression which the report might possibly create that " constant interference by the Judges " has the result of restoring to liberty a considerable number of innocent persons. Arguments from mere statistics are often fallacious, and the Chief Justice has rightly pointed out to me that the nature of the mistakes made by magistrates is at least as important as their number. I propose to deal with this question later. In the meantime the figures which I have quoted appear to me to indicate that the magisterial courts in Uganda, both professional and non-professional, have attained a high standard of efficiency, and to

rebut completely the statement of the Commission that the powers of magistrates are so extensive as to involve the " constant interference " of Judges. The Chief Justice informs me that a very considerable number of cases in which no revisional order is actually passed nevertheless need very careful scrutiny by the High Court, and had the Commission substituted the word " vigilance " for the word " interference " I should have been disposed to agree with them.

10. The third contention of the Commissioners is that the existing system confines the Judges themselves to a trial of a small part only of serious crime. The Commission elaborates this theme in paragraph 55, where they state that the function of the High Court, in so far as its exclusive criminal jurisdiction is concerned, ought to extend to the trial of all cases of which a sentence in excess of two years' imprisonment is proper. It is quite obvious that however successful our efforts may be to remedy the delays which must occur when a case is tried by the High Court, the trial of any case by the High Court instead of by a magistrate must inevitably involve quite considerable additional delay and I do not consider that any step involving additional delay should be taken unless it is proved that such a step is necessary in order to ensure that justice is duly and properly administered. Original criminal jurisdiction should not therefore be transferred from magistrates to the High Court unless it has been established that the magisterial courts are, in the classes of cases in which it is proposed to take away their jurisdiction, incapable of rightly and properly administering justice.

11. In stating that the trial of any case by the High Court instead of by a magistrate must inevitably involve quite considerable additional delay, I have, of course, assumed that the present practice, whereunder a trial by a High Court is preceded by a preliminary enquiry, will continue. This practice, which finds a place in both English and Indian procedure, appears to me to be necessary in Uganda for three reasons. In the first place, if a magistrate's jurisdiction is limited, not to certain classes of cases but to a maximum penalty, there must obviously be cases in which he cannot decide, until he has heard the whole of the prosecution evidence and possibly some, at any rate, of that for the defence, whether to complete the case himself or to commit it to the High Court. Secondly, it is not desirable, as the Commission themselves point out, that much of the time of the High Court Judges should be taken up in investigation of cases which may prove to have no substance in them. In the third place it is desirable that an ignorant and unsophisticated accused person who is to be tried by the High Court (inevitably in some degree, to him, a more remote and formidable body than a court presided over by an administrative officer) should be given that assistance in the preparation of his defence which can frequently be afforded by a magistrate with what I may comprehensively term " local

knowledge ". I wish it to be understood that I am not in any sense impugning either the desire or the capacity of the High Court to assist ignorant and unintelligent persons in defending themselves. I am fully aware not only that Judges regard this as one of their first duties, but that the experience and personal qualities without which they would not have attained their high position render them eminently capable of carrying it out. Nevertheless, cases have occurred and will continue to occur in which a small piece of local knowledge, so much a commonplace to the accused that he would never think of mentioning it, may not be within the cognizance of of the advocate for the defence, if there is one, or of even the most experienced and able High Court Judge and yet may be of vital importance to the defence. Such a point should be within the cognizance of a magistrate with local experience who would consider it in all its bearings during the preliminary enquiry and thus ensure that it should be given due weight during the trial proper. The Commission themselves have, I think, recognized this possibility in the suggestion mentioned in paragraph 124 of the Report, a suggestion which I fully endorse. I have also frequently found, during the course of my own experience as a magistrate, that the real line of defence which an ignorant accused person ought, in his own interest, to take does not appear until quite a late stage in the defence, and is then only revealed as it were, incidentally, with the result that additional evidence has to be called for the defence and witnesses for the prosecution have to be re-examined. What I may term a re-shuffling of the whole case has to take place and it is obviously desirable that the re-shuffling should be done in a magisterial court in order that the case, as it comes before the High Court, may be as complete on both sides, as possible. I do not imply that either of these contingencies will arise in the majority of cases. But they occur with sufficient frequency to add weight to the other considerations which, in my opinion and that of the Commission, make it essential that there should be a preliminary enquiry in all cases tried by the High Court.

12. The Commission have enunciated the principle that all cases of serious crime (in the sense of crime meriting a heavier punishment than two years' imprisonment) should be actually tried by the High Court. They have adduced no argument in support of this principle, but have talked of bringing High Court Justice to the people as if it were the only form of justice worth considering. From the point of view of securing reasonable expedition in criminal trials (the lack of which in some cases is clearly the main defect of the present system) I consider it a much sounder principle that all criminal cases should be tried by the lowest class of court that is capable of dealing with them adequately; provided always that the High Court has complete power of supervision, and adequate opportunities for exercising those powers. I believe, and the figures which I have quoted in a preceding

paragraph support me in that belief, that Uganda magistrates, supervised to the extent to which they are at present supervised by the High Court, are capable of dealing adequately with the cases which come within their present ordinary jurisdiction, and that therefore no case has been made out to justify the considerable increase in delay and public inconvenience which must follow the general curtailment of their powers as recommended by the Commission. I consider, however, that the present powers of second class magistrates are too high, and that they should not have power to pass a sentence of more than two years imprisonment at the most, and I also consider that only first class magistrates should have power to commit cases for trial by the High Court.

13. At this stage I would refer briefly to the argument which the Commission state at the end of paragraph 44 of their Report has been advanced against a diminution of the judicial powers of administrative officers. I refer to the argument that such a diminution would impair the prestige of a District Officer. I find it difficult to believe that any administrative officer can ever seriously have put forward such an argument. It is, I consider, quite ridiculous to suggest that the prestige of an administrative officer depends on his power to punish. If it does, then the sooner it ceases so to depend, the better. I am perfectly certain that all District Officers in Uganda would gladly surrender any amount of their judicial functions and I entirely agree with the remarks contained in paragraph 53 of the Report. I am not surprised that, as stated in paragraph 54, the administrative officers of Tanganyika think that the limited jurisdiction placed on them as magistrates of subordinate courts is sufficient for maintaining law and order and I am practically certain that all Administrative Officers in Uganda would agree with them. From the purely administrative point of view I would welcome a decrease in the judicial duties of administrative officers. From the point of view of the administration of justice I consider such a decrease highly undesirable. I would point out that there are many passages in the Report which go to show that complaints of delay are far greater in Tanganyika than in Kenya or Uganda. I am aware that in Tanganyika distances are great and communications bad, but it is impossible not to connect the more frequent complaints of delay received from Tanganyika with the limited jurisdiction which is conferred upon magistrates in that territory.

14. The Commission's fourth contention is that the existing system is so remote and impersonal as to be little understood and appreciated among the natives over whom it is supposed to function. I venture to suggest that as far as the magisterial courts are concerned, justice in Uganda is neither remote nor impersonal and that it is as well understood and appreciated by the native as is possible considering the state of civilization and education at which they have arrived. I suggest on the other

hand that a High Court in any country, however civilized, must always seem remote and impersonal except to professional lawyers and to those whom, for want of a better term, I may call professional litigants. I fully agree that a native haled before a "remote and impersonal court" is likely to be bewildered and embarrassed and severely handicapped in defending himself. A court presided over by an administrative officer with whose office and functions practically every native is to some extent familiar cannot fairly be described as remote and impersonal. To remove a large number of cases from the cognizance of such a court, to put them before another court which can fairly be so described and then to try and render that other court less remote and impersonal seems a tortuous procedure for which I can see no necessity. Frankly, neither I nor the Chief Justice are able fully to appreciate the force of the argument of the Commission. If it merely supports their contention that more frequent and extended circuits of the High Court are desirable we agree with it. If, however, it is a criticism aimed at the whole system of justice as laid down in the existing penal and procedure codes, then it raises exceedingly wide issues with which the Commission themselves have not dealt and which, subject to the observations contained in the next paragraph of this despatch, neither the Chief Justice nor I wish to discuss at this juncture.

15. I have endeavoured to prove in the preceding paragraphs of this despatch that in stating "the machinery for the administration of justice as apparently set up by law in these territories does not work, and as at present constituted, cannot work" the Commission have seriously exaggerated the faults of the existing system of justice in Uganda. I have, I hope, made it clear that there is no reason whatever to suppose that the existing system leads to any actual failures of justice and that although there is unquestionably very serious delay in a number of criminal cases such delay does not occur in more than approximately 3 per cent. of the total number of criminal trials. You will no doubt have observed that my disagreement with the statement that the existing system of justice is little understood and appreciated among the natives is not unqualified. We have, rightly or wrongly, imposed upon natives of Uganda an alien system of justice. Our object in doing so was presumably, in the main, to inculcate more satisfactory ideas of right and wrong; to teach the native that crime is, in the main, to be regarded as an offence against society and not as an offence against the individual; and gradually to teach him to appreciate that European methods of administering justice are both more effective and more equitable than the rough and ready method to which he was accustomed before our arrival in the country. I do not at the moment propose to discuss whether we have gone too far or too fast in imposing upon the native an alien system of justice but it is

clear, I think, that a full and complete understanding and appreciation of such a system cannot be expected to be attained in the short space of a quarter of a century. The process of acclimatizing the native to more advanced ideas of right and wrong and teaching him fully to appreciate the merits of a system which must at the outset appear to him almost totally incomprehensible, must inevitably be a slow one. It must depend, not entirely upon a lengthy experience of the system itself, but also upon the spread of education and upon an increase in material prosperity which will be accompanied by a rise in his general standard of living.

16. I will now turn to the question of jurisdiction in cases of really serious crime. I refer to the classes of crime detailed in Section 10 (1) of the Criminal Procedure Code of 1930. As the Commission have pointed out, these cases are tried in Uganda either by the High Court or by magistrates of the Administrative Service sitting as Special District Courts. In paragraph 61 of their Report the Commission record their opinion that the Government of Uganda has made an improper use of the provision for the declaration of Special Districts. I cannot subscribe to the use of the term "improper". Apart from other considerations the fact that there are only two Judges of the Uganda High Court has, in my opinion, made it impossible to give to that Court more extensive original jurisdiction in the cases of serious crime. The Commission recommend that an additional Judge of the High Court be appointed for Uganda and they state that this increase in the judiciary will enable the High Court to hold assizes in all important centres in the Protectorate with the exception of Karamoja and possibly the West Nile District which should continue to be regarded as Special Districts. I am not yet fully convinced that the suggested increase would in fact enable the High Court to deal with reasonable expedition with serious crime in all but two of the districts of the Protectorate. I agree that in a country where there are no Judges (as opposed to magistrates) subordinate to the High Court it is theoretically desirable that all cases of really serious crime (as described above) should be tried by the High Court, but this general statement is, in my opinion, subject to the condition that the personnel of the High Court should be large enough to enable it to deal with these cases with little, if any, more delay than would occur if they were dealt with by a Court permanently stationed in the district in which they arise. I am apprehensive that this condition might not be fully met by the addition of one Judge only to the Uganda High Court, while the addition of two Judges would almost certainly mean that the High Court as a whole had not sufficient work to do. The additional expense involved by the creation of a second puisne judgeship would be considerable, including as it would, not only the pay of the judge himself but that of his staff and probably that of an additional crown counsel and considerable extra travelling expenses. I am not in principle,

opposed to the suggestion of the Commission that an extra puisne judge should be appointed and the number of special districts reduced. I feel, however, that the scheme needs the most careful and detailed examination. I do not wish further to delay the submission to you of my general comments on the Commission's Report. I will, however, proceed to examine this particular scheme closely, in consultation with the Chief Justice, and hope to formulate my final recommendations before the Report of the Commission is discussed, as I presume it will be discussed, by the Governors' Conference.

17. In paragraph 65 of their Report the Commission have recommended that a more extended use might be made of the services of professional resident magistrates. They state that they have it in evidence that much of the time of these magistrates is taken up in trying minor statutory offences. They suggest that this is a waste of time of a professional magistrate but they make no suggestion as to by whom such offences should be tried. In India, a great deal of valuable work in the trying of such offences is done by boards of honorary magistrates. In Uganda the class of person who have both the leisure and the intelligence to do the work of an honorary magistrate is entirely non-existent and I presume therefore that the Commission had it in the back of their minds that such cases might be tried by junior administrative officers. I venture to point out that the junior administrative staff already perform at least as much routine office work as is compatible with the necessity for allowing them time to devote to the study of languages, and for ensuring that they obtain as much experience as possible under the tuition of a senior officer of the duties which they will ultimately be called upon to perform themselves. I would therefore strongly deprecate any addition to the duties which are laid upon cadets and junior administrative officers. Further, with due respect to the Commission, I feel that the time of the professional administrator is as valuable as that of a professional magistrate, and I can see no justification whatever for imposing upon the former duties which the Commission consider would be a waste of time in the case of the latter. These minor statutory offences are precisely the class of cases in which local knowledge, which is the special qualification of the administrative officer, is of the least value and I am strongly of the opinion that such minor statutory offences should in all cases where possible be tried by a permanent member of the judicial service. The jurisdiction of resident magistrates in Uganda is, in fact, not limited territorially and use is already made of them (in so far as is possible) to relieve non-professional magistrates whose cause list is becoming unduly heavy, or for the trial of specially complicated cases where an administrative officer has asked for their assistance.

18. I come now to the very vexed and difficult question of the respective merits of the professional and non-professional courts.

The Commission suggest in paragraph 45 of their Report that it is not always easy for administrative officers to assume a judicial role and to proceed calmly and dispassionately to apportion responsibility and to arrive at a proper sentence. I do not think I am going too far when I say that this sentence must be interpreted as implying that administrative officers do in fact, in a certain number of cases, allow themselves to be influenced, both in deciding upon the guilt or innocence of the accused and in arriving at a proper sentence, by extra-judicial considerations. I am willing to admit that cases do arise in which a non-professional magistrate's opinion as to the guilt or innocence of an accused person is swayed by considerations which have not actually come within his judicial cognizance, although I believe that in the majority of such cases such evidence could have been brought within his judicial cognizance by a proper leading of the evidence, but I am not prepared to admit that there is any real danger of administrative officers allowing their opinion as to the guilt or innocence of an accused person to be swayed by political or administrative considerations. As regards the question of arriving at a proper sentence, it is quite clear that the Commission and I differ widely in our opinion as to the consideration which can properly be taken into account. I will deal with this point later. The point which I am concerned in establishing at the moment is that the implication contained in several passages of the Report that administrative officers generally find it difficult to adopt, and frequently do not adopt, a judicial frame of mind when administering criminal justice is a wholly unmerited reflection on a service which has, in the countries which it administers, a high reputation for integrity and impartiality. There are of course exceptions. Non-professional and professional magistrates alike display on occasions lack of balance and judgment, but I cannot subscribe to the opinion at which the Commission have hinted in more than one passage of their Report, that administrative officers are, in general, so liable to be swayed by extra-judicial considerations that it is advisable to restrict their judicial powers as much as possible. In paragraph 44 the Commission have mentioned the argument that an administrative officer's unfamiliarity with the " technicalities of law and legal procedure " is more than compensated for by the knowledge of native law and customs of the tribes among whom he is working and of their language, mentality, outlook on life and environment, and they have stated in the succeeding paragraph that this argument is, in their opinion, fundamentally unsound. I am not enamoured with the form in which the Commission have stated an argument which is, in my opinion, very substantial. Native background and atmosphere of native life must always be overwhelmingly important in deciding such questions as motive, extenuation, credibility of evidence, severity of sentence, etc., and above all for the proper preparation of a native's

defence. I should prefer to argue, not as the Commission have stated the argument, that an administrative officer's unfamiliarity with legal technicalities is more than compensated for by his local knowledge, but rather that local knowledge is an absolute essential at certain stages of the trial of native criminals in other than urban areas and that the possession of this knowledge to the fullest possible extent counterbalances overwhelmingly the risk that an improper use may be made either of such knowledge or of the magistrate's position as the officer responsible for the maintenance of law and order. I have already indicated that I cannot agree with the Commission's implied opinion as to the gravity of that risk, and in any case I believe that steps can and should be taken to render it even more negligible than it is. The Commission have themselves stated that for many years to come the great bulk of magisterial work must be performed by administrative officers. I do not think that I malign them when I say that they suggest that such officers are but imperfect instruments of justice and should be replaced gradually by professional magistrates. I agree that as the country develops and the population grows and (an inevitable corollary, I fear, of development) the more sophisticated forms of crime become more frequent, an addition to the number of professional magistrates will become necessary. But I fully believe that the cheapest, most effective, most convenient, and most acceptable basic machinery for the administration of justice in extra urban areas will always be the unprofessional magistrate, and that our object should be not to replace that piece of machinery but to render it more effective. I do not believe that I am exaggerating when I say that the unprofessional magistracy in India is as efficient, even from the technical point of view, as any other magistracy in the world. For this there are two main reasons. In the first place the junior administrative officer in India spends (or at any rate used to spend fifteen years or so ago, and I have no reason to believe that conditions have altered greatly in this regard) several hours over magisterial work every day, and consequently becomes thoroughly familiar with the not very complicated technicalities of the Criminal Procedure Code. In the second place he is taught to consider his judicial duties as in every way as important and as integral a part of his work as his administrative duties. The non-professional magistrate in Uganda is fortunate in having a much lighter burden of judicial work, but this good fortune has, I fear, the effect of sometimes causing him to regard such work as an interference with, rather than as a part of his normal duties. It is the duty of the Government to indicate to him quite clearly that the contrary is the case. I freely admit that the importance of rigidly observing correct legal procedure is not fully realized by all non-professional magistrates. The Chief Justice, in discussing the whole question with me, has drawn my attention to individual instances of neglect

of the most elementary principles of justice of which I should have taken serious notice had they been officially reported to me at the time when they occurred. Further, a detailed examination of the statistics mentioned in the ninth paragraph of this despatch shows that the decisions of non-professional magistrates are more often varied by the High Court than those of professional magistrates, a fact which is only partially accounted for by the larger number of petty offences tried by the latter. I fully believe that more adequate steps could be taken than are taken at the present moment to induce non-professional magistrates to realize the importance of a thorough acquaintance with the niceties of legal procedure and to take greater pains to acquire it. In this connexion it is obvious that there must be the closest co-operation possible between the High Court and the Government. An excellent system has recently been brought into force in Uganda under which the Chief Justice submits a report on the judicial work of a cadet before he is confirmed and of administrative officers before they pass the efficiency bars at £600 and £720. I personally should always attach the greatest weight to such reports and should take them into full consideration not only in deciding whether an officer should be confirmed or should pass his efficiency bar but also in considering the district to which he should be posted. I believe, however, that even more than this should be done to acquaint the Government with the Chief Justice's opinion of the judicial capacity of adminstrative officers. At the present moment the Government is not informed as a matter of routine of any adverse comments made by the High Court upon the judicial work of a non-professional magistrate. This should be done. I do not necessarily mean, of course, that all revisional orders of the High Court should be communicated to the Government, but I consider it of the greatest importance that if ever a High Court Judge finds reason to comment unfavourably upon the diligence or thoroughness of a non-professional magistrate or upon any undue or persistent disregard of the technicalities of legal procedure such comments should invariably be communicated to the Government, which in its turn should take serious notice of them. There is at present, I believe, a tendency for Judges of the High Court to communicate such comments in the first instance to the officer concerned and not to report them to the Government unless they are driven to by repeated instances. I am not detracting from the authority of the High Court when I say that an administrative officer takes more notice of an adverse comment when it comes from the Governor than when it comes from the Chief Justice. It is inevitable that should be the case. Not only does the administrative officer look upon the Governor (who alone has disciplinary authority over him) and not upon the Chief Justice as the person to whom he is responsible, but it is unfortunately the case in some Colonies, though I hope not in Uganda, that there is a certain tendency

to friction between the Judicial and Executive Authorities, and administrative officers may sometimes feel that strictures passed upon them by the Chief Justice would not necessarily receive the full support of the Governor. It is very necessary that this impression should be removed and that the administrative officer should realize that in so far as his judicial functions are concerned the sole considerations of the Governor as well as of the Chief Justice is that these functions should be exercised properly and in accordance with agreed principles. He should also realize that in the eyes of the Governor his judicial work is of equal importance with his administrative work and that failure in respect of the former may well lead to stoppage of promotion or to other disciplinary measure. In order that this object may be attained it is not only necessary that the Government should be acquainted more fully than heretofore with the High Court's opinion of Administrative Officers, but that it should take more effective action than it does at present to bring home to the officer concerned the stern necessity of remedying any defects which he may exhibit in his judicial capacity. Such action for example as a reduction of a first class magistrate's powers to second class (with the consequence that he could not be placed in charge of a district) would probably have considerable effect in inducing an officer, who persists in paying too light a regard to proper procedure, to mend his ways. I believe that with close co-operation between the High Court and the Government it would be possible considerably to improve the standard of the judicial work of administrative officers in its purely legal aspect, and I propose, when the report of the Commission has been published, to issue, after consultation with the Chief Justice, a circular on this subject to all non-professional magistrates.

19. I now turn to another question upon which I am compelled to join issue with the Commission. I refer to the question of the considerations by which a court should be guided in determining the sentence which it should pass upon a guilty person. The Commission appear to consider that the fact that an administrative officer is concerned with maintaining law and order in his district is, when it comes to a question of passing sentence, if not a positive disadvantage, at any rate a source of danger. Surely one of the main objects of the punishment of criminals is the protection of society and the maintenance of law and order. I am far from asserting that this is the sole object of punishment or the sole criterion by which the severity of a sentence should be assessed. There are other considerations such as that the accused person must be given a reasonable chance of reformation, and that the punishment must not be so severe as to rouse widespread sympathy for the accused and deprive the law of the support of public opinion. This latter qualification must, however, be further qualified by the necessity in some cases of

educating public opinion to regard as serious, crimes which it has hitherto regarded as venial. Admitting that, subject to the qualification above mentioned and to several others which are obvious the main object of punishment is the protection of society and the maintenance of law and order, surely no one can be better qualified to judge what sentence is adequate in this respect than the officer who is intimately acquainted with the society in which the offence was committed and whose main duty is the preservation of law and order in that society. I say without hesitation that an administrative officer acting as a magistrate is in many respects better qualified than a superior court to judge as to the adequacy or otherwise of a sentence. I do not for a moment propose that the powers of the superior courts to reduce sentences passed by administrative officers should be in any way interfered with. As I have already stated, it is a principle of British justice that it is better that a hundred guilty men should be acquitted than one innocent man convicted. It is a corollary of that principle that it is better that a hundred guilty persons should be inadequately punished than that one guilty person should be punished with undue severity. Magistrates, both professional and non-professional do occasionally in all countries pass extravagant sentences, and I have no doubt that it is quite essential that a superior court should have the power of reducing such sentences. I maintain, however, that local knowledge is, and must always be, of the greatest importance and assistance in enabling a court to decide.

20. I will now deal with the question of the delays which unquestionably occur to a most undesirable degree in serious cases which are the subject both of a preliminary enquiry and of a subsequent trial, that is to say in cases dealt with either by the High Court or by a Special District Court. As far as cases tried by the High Court are concerned the position is very much the same under the Criminal Procedure Code of 1930 as it was under that of 1919 and apart from certain minor recommendations which the Commission have made in this regard I cannot find any further remedy for the existing state of affairs except one which I fear you will consider somewhat drastic, but which I strongly recommend for serious consideration. There is no doubt that in all cases tried by the High Court in which there is an appeal, considerable delay is caused by the fact that the appeal lies to the Court of Appeal for East Africa. Much time could be saved if an an appeal from the decision of a single judge of a High Court sitting in original criminal jurisdiction could be heard by a two-judge bench of the same High Court, making each High Court the final Court of Criminal Appeal in its own territory. This suggestion would of course be impracticable unless an additional judge were appointed to the Uganda High Court. The procedure which I suggest is, I believe, not without precedent

in the case of the Indian High Courts, and I can see no objection to it other than the purely technical objection that there is in existence a Court of Appeal superior in its jurisdiction to the individual High Courts and that in theory all final appeals in capital cases should go to this court. I do not believe that the interests of accused persons would be in any way prejudiced by the adoption of my suggestion, while considerable delay would be saved, and I therefore recommend that the East African Court of Appeal should cease to exercise any criminal jurisdiction. The suggestion commends itself to the Chief Justice, but he is not certain that it would be possible so to arrange the work of the High Court as to ensure that much delay is really saved. If, therefore, you are prepared to accept the suggestion in principle, further examination will be necessary before it can be decided that it should be adopted in practice. As regards trials by Special District Courts, the situation has been materially altered for the worse by the introduction of the Criminal Procedure Code of 1930 and the substitution of the English for the Indian system. I venture to point out that there was no demand in East Africa for this substitution, the prospect of which was in fact thoroughly disliked by the very large majority of local opinion both expert and non-expert. The three Governments concerned and their law officers were, of course, closely consulted as to the details of the new code, but they were never invited to express their opinion as to the advisability of substituting English for Indian methods nor were they informed for what reason the change had been decided upon. The almost unanimous opinion of local experts was that the existing system was working entirely satisfactorily. Under the old code murder cases and other cases of serious crime as defined in Section 10 (1) of the existing code were tried by District Officers without a preliminary enquiry and the appeal from such trials was heard by the local High Court. I have been unable to discover any indication whatsoever that this system was unsatisfactory in its results and there is no question that it operated with a minimum of delay. Under the new code, a case which is heard by a Special District Court is first of all enquired into by another magistrate. The proceedings are then sent to the Attorney-General for him to lay an information, a procedure which must in many cases involve a delay of at least a month. The case is then heard by the Special District Court and an appeal lies, not to a local High Court but to the Court of Appeal for East Africa. It is obvious that the additional delay caused by the alteration in procedure may even amount to several months, and it is a fact that the average native of the districts in which Special District Courts operate is totally unable to appreciate or understand this procedure and, however carefully the position may be explained to him by the officer presiding over the Court of Inquiry, he remains under the impression that he is twice being tried for the same offence. I can see no advantage whatever in the new procedure and I have no hesitation in recommending that Special District Courts should try cases without preliminary

enquiry and without the necessity for an information being laid by the Attorney-General, and that an appeal should lie from a Special District Court to a two-judge bench of the Uganda High Court. It will be observed that in making these recommendations I differ totally from the recommendation of the Commission which is that all appeals from Special District Courts and not only appeals in murder cases should lie to the East African Court of Appeal. I cannot see anything whatever to recommend this proposal. To add to the delay in certain classes of appeals for the sake of purely theoretical consistency seems to me to be in direct opposition to the principle laid down in Article 20 of the Uganda Order in Council, 1902, to the effect that all cases to which natives are parties should be decided without undue regard to technicalities of procedure and without undue delay. No one will, I imagine, attempt to urge that the Uganda High Court is incapable of properly dealing with such appeals and to transfer them to another court merely for the sake of technical consistency appears to me to be entirely unjustifiable. I hesitate to make any alternative recommendation for fear that the fact that I do so may detract from the weight which you attach to my substantive recommendation. I cannot urge that recommendation too strongly, and I sincerely hope that you will find yourself able to approve it. Should you not do so, however, I recommend that cases should be committed direct by a Court of Inquiry to a Special District Court without the need for the laying of an information by the Attorney-General. Since the new procedure was adopted 422 cases have been committed for trial to Special District Courts or to the High Court; in only 15 of these has the Attorney-General entered a *nolle prosequi*. This percentage of cases in which the Attorney-General has refused to lay an information does not appear to me to justify a procedure which adds to the delay in cases which come before the Special District Courts.

21. In paragraph 157 of their Report the Commission indicate their opinion that the existing powers of confirmation and revision should be maintained. Under the old procedure only death sentences by magistrates were confirmed by the High Court and I am not fully convinced that the very wide extension of the confirmation procedure which was introduced by the new code is altogether necessary. As, however, it does not appear to add to the delay in the disposal of the cases I do not advocate any change. I fully agree with the Commission that the existing powers of revision are essential and wisely and temperately used and should remain part of the system of administering justice. In this connexion I strongly support the suggestion that appeals which come before the High Court should be heard by a single judge except in the case of appeals from murder cases tried by a Special District Court.

22. The Commission have referred in their Report to Article 20 of the Uganda Order in Council of 1902. They have pointed out that so far as that article directs that the courts will be guided by native law in so far as it is applicable and is not repugnant to

justice and morality or inconsistent with any Order in Council or Ordinance, the article is practically inoperative. They have animadverted upon the misinterpretation which is, they say, sometimes placed upon that part of the Article which directs that all cases shall be decided according to substantial justice without undue regard to technicalities of procedure and without undue delay. I fully agree that this provision should not, in the words of the judgment in the Kenya Confirmation Case No. 97 of 1933 " . . . be misconstrued into an authority for administering justice to the native in the rough and ready style of which some affect to think highly but which is generally but the sign of lack of experience or of sympathy and patience and not infrequently results in what is in reality rough and ready injustice ". There is, I think, a possibility that non-professional magistrates do, on occasions, think that this Article absolves them from the observance of technicalities of the full significance of which their legal experience has been insufficient to make them aware. It is important that magistrates should realize that legal technicalities which often appear to them a mere formality are in fact the result of the accumulated experience of centuries and that while in ninety-nine cases out of a hundred their non-observance may lead to no ill results, in the hundredth their observance may be of the greatest importance. While, however, I agree that this Article of the Order in Council must be most carefully interpreted and is capable of serious misconstruction I cannot believe that the article is altogether without meaning. Its intention obviously is that a foreign system of justice should not be imposed in its entirety upon persons who are still in a comparatively primitive state of development but that care should be taken to ensure that any system of justice imposed upon them should have regard to native law where such law is not repugnant to justice and morality and should not involve undue delay owing to the necessity for observing technicalities which, however suited they may be to the country of origin of the system are unnecessary in the country of its adoption. I venture to suggest that in many respects, particularly those to which I have referred in dealing with trials by Special District Courts, the replacing of Indian by English procedure was in direct opposition to the spirit of Article 20 of the Order in Council. I venture to quote a passage from an article on " Colonial Administration as a Science " which appeared in the October number of the Journal of the African Society. The writer says :—

> " The school of thought which held that everything European was *ipso facto* good and had only to be offered to the native to be accepted by him with automatically beneficial results has now given way to more discriminating views."

I believe that statement to be true in the field of administration ; I do not feel so satisfied where the field of justice is concerned. There appears to me to be a distinct danger that questions such as those which were considered by the Commission may be viewed too much from a purely technical point of view, and that there may

be an undue insistence upon the necessity of imposing upon the native, with the minimum of adjustment, systems of justice which have proved successful in more civilized countries but which are not suitable in their entirety to the less developed parts of the world.

23. I append as a schedule to this despatch my comments on the summary of recommendations which appear as paragraph 252 of the Report. I have not repeated in this schedule any comments which have already been made in the body of this despatch but have added, in brief, comments on those recommendations which have not been dealt with herein.

24. The preceding paragraphs of this despatch have been seen by the Chief Justice, and I have discussed the Report and the views set forth in this despatch with him. Mr. Abrahams is unable to support my view that the jurisdiction of magistrates in Uganda should not be restricted as suggested by the Commission. He considers that the danger of injustice being done by untrained magistrates is sufficient to warrant the proposed reduction of their powers. I have the greatest respect for the Chief Justice's opinion, but he has not convinced me, and I maintain to the full the opinions expressed in paragraphs 9-13 of this despatch. In this connexion Mr. Abrahams has pointed out to me that many members of the administrative service in Uganda do not acquire sufficient experience of magisterial work. This is unquestionably so, as the total volume of magisterial work done by District Commissioners and Assistant District Officers is comparatively small. I venture to point out that the Commission's proposal would still further reduce it. I consider that more effective steps can and should be taken to ensure that junior administrative officers obtain sufficient experience as magistrates. The Chief Justice, in this connexion, supported the implied suggestion of the Commission that administrative officers should relieve resident magistrates of some of their minor cases. He has also pointed out, in connexion with the use in this despatch of the expression " urban areas ", the difficulty of dividing the country scientifically into " urban " and " non-urban " areas. I agree that a hard and fast division would be difficult, if not impossible; nor do I consider it necessary.

With the remainder of this despatch Mr. Abrahams is in general agreement, and he authorizes me to express his specific agreement with the suggestions contained in paragraph 20, subject to the condition that it would be practicable, which he doubts, to make satisfactory arrangements for a two-judge bench of the High Court to hear appeals from a decision of a single judge.

I have, &c.,

B. H. BOURDILLON,
Governor.

SUMMARY OF RECOMMENDATIONS.

(*Paragraph 252 of Report.*)

(i).—See paragraphs 9-13 of despatch.

(ii).—See paragraphs 9-13 of despatch.

(iii).—Does not apply to Uganda.

(iv).—See paragraph 16 of despatch.

(v).—Does not apply to Uganda.

(vi).—Does not apply to Uganda.

(vii).—See paragraph 17 of despatch.

(viii).—I agree that this should be the general practice in cases where it does not involve delay in hearing of appeals.

(ix).—I fully agree.

(x).—I agree when appeals are heard on circuit.

(xi).—I agree, subject to confirmation not being unduly delayed.

(xii).—I do not agree, so long as additional judges are members of the High Court. The case would of course be different if a class of court corresponding to those of District and Sessions Judges in India were constituted.

(xiii).—See paragraph 20 of despatch.

(xiv).—Does not apply to Uganda.

(xv).—I agree.

(xvi).—I agree.

(xvii).—After considering the objections raised by the Chief Justice to this proposal I do not consider that the law should be altered.

(xviii).—I agree, and believe this to be the practice in Uganda. The Chief Justice has not noticed any shortcomings in this respect.

(xix).—I agree.

(xx).—I agree.

(xxi).—I agree.

(xxii).—The Chief Justice writes:—

> "This goes too far. It depends so much on the witness and what he is called to say as to whether he should be 'given his head' or be carefully interrogated. It is all very well to advise that a witness should be permitted to tell his own story in his own way but sometimes he has no story and is called to testify to facts which appear to him to have no significance whatever or again he may have a lengthy narrative to tell and will omit a matter of vital importance to the side which calls him merely because he is unaware of its relation to the matter in issue. Obviously the less a witness is interrupted the better, but many years experience as counsel, magistrate and judge with witnesses of diverse races and sects and of considerably varying intelligence have satisfied me that there is no golden rule of examination and that it is dangerous to try and create one."

I fully agree with him.

(xxiii).—I agree.

(xxiv).—I disagree. The suggested power cannot possibly harm an innocent accused and may be of material assistance to him.

(xxv).—I agree.

(xxvi).—I agree.

(xxvii).—I agree and propose to appoint a committee to consider the best method of educating and recruiting interpreters, and of encouraging a high standard of excellence. I would point out that efficient interpreters from local dialects into Luganda or Swahili (with one of which languages all unprofessional magistrates should be familiar) are already available.

(xxviii).—I agree.

(xxix).—I agree in principle.

(xxx).—See paragraph 21 of despatch.

(xxxi).—I agree.

(xxxii).—I agree.

(xxxiii).—I can see no objection to a fairly wide use of whipping instead of imprisonment in certain districts, particularly among the Nilotic tribes, where no social or moral stigma attaches, but whipping is looked upon as a " manly " form of punishment.

(xxxiv).—I agree.

(xxxv).—I agree.

(xxxvi).—I do not consider this necessary.

(xxxvii).—I agree, if it is practical, which I rather doubt.

(xxxviii).—It is impossible to resist, in theory, any proposal which would, if effectively put into practice, result in every poor prisoner being defended by a really skilled advocate. But I fear that the ideal set up by the Commission is quite impossible of realisation. The majority of persons accused in criminal cases in Uganda are " poor " and to provide for the skilled defence of every one of them, in magisterial courts as well as the High Court, would involve the creation of quite a large and expensive department. All the courts in Uganda are fully accustomed to safeguarding the interests of the accused, and I believe that they do so more effectively than any but a really skilled advocate could. The Poor Prisoners (Defence for Murder) Ordinance, 1932, provides for legal assistance being given, at the public expense, to poor persons accused of murder, and I doubt if it is possible to go further at present. It might, however, be possible to arrange for a public defender in High Court cases, where the accused has to meet a more skilled prosecution than in the magisterial courts.

(xxxix).—I agree, if and when a public defender is provided.

(xl).—As above, except that consultation with the Public Defender on confirmation and revision cases should be at the option of the High Court.

(xli).—I agree.

(xlii).—I agree, provided that the claim is consonant with native law or custom.

(xliii).—I fully agree with the Chief Justice's comments which are as follows:—

> " The English standards of reason and self control are far too stringent for these territories. In the Gold Coast Criminal Code the provocation must be such as to ' deprive a person being of ordinary character and being in the circumstances in which the accused person was, of the power of self control.' It appears to me, however, that in order to get rid of the effect of English precedents of what is sufficient to deprive an ordinary person of self control it will be necessary to insert proper qualificatory words in the appropriate section of the law in view of certain decisions of the East African Court of Appeal."

(xliv).—See paragraph 20 of despatch.

(xlv).—I agree as regards appeals, but not as regards confirmation and revision, where the leave of the High Court should be necessary.

(xlvi).—Such publication would be quite useless in Uganda.

## III.

*Letter from the Chief Secretary to the Government of the Tanganyika Territory to the Secretary to the Conference of East African Governors.*

Dar es Salaam,

24th October, 1933.

SIR,

I am directed to refer to the Report of the Commission of Inquiry into the Administration of Justice in East Africa, and to transmit herewith the comments of the Chief Justice on each of the recommendations of the Commission.

2. This Government regards the Report as a work of great value and authority; and it considers that subject to the observations in the following paragraphs of this letter all matters on which the Commission has submitted recommendations should now be regarded as *res judicatae*.

3. *Recommendation (V).*—This Government accepts the Commission's recommendation that the High Court of Tanganyika should be increased by two Judges; and provision has been made in the 1934 budget for their appointment with effect from the 1st of July, 1934. But it has been decided, on the advice of the Chief Justice, that while one of the additional Judges should be stationed at Mwanza the other should be posted to headquarters for the reasons given by Sir Joseph Sheridan.

4. *Recommendation (VI).*—For the reasons given by the Chief Justice, it would appear that there are good reasons for retaining the present system of committing to the High Court cases from districts which have to be tried in extended jurisdiction.

5. *Recommendation (XII).*—This Government agrees with the Commission's view that it is not necessary that the two additional Judges should receive the emoluments now paid to the High Court Judges; and on financial and other grounds it considers that a salary of £1,200 a year should suffice for the 3rd and 4th Puisne Judges. Provision has been made in the draft Estimates for 1934 accordingly.

6. *Recommendation (XVI).*—It will be observed that the Chief Justice, both Puisne Judges concurring, considers that the law in Tanganyika, which provides that " no confession made to a police officer shall be proved as against a person accused of any offence " should remain unaltered.

7. *Recommendation (XXIX).*—This Government entirely concurs in the Commission's view that the employment of really expert

stenographers in the Tanganyika High Court would be advantageous but must for financial reasons gratefully accept the Chief Justice's view that the expense should not be incurred at the present time, but that the matter should be borne in mind.

8. *Recommendation* (*XXXVIII*).—This Government accepts the Commission's view that the defence of poor prisoners should be undertaken by a Public Defender; but for financial reasons it may not be possible to give effect to the proposal for some time to come.

9. I am advised that the following recommendations, if accepted, will necessitate legislation in Tanganyika :—

Para. 65.—Extension of Resident Magistrate's jurisdiction.

Para. 96.—Admissibility in evidence of confessions to European police officers.

Para. 98.—Venue of cases in subordinate courts.

Para. 130.—Admissibility in evidence of depositions in certain cases.

Para. 184.—Award of compensation in criminal cases.

Para. 189.—Penal labour for juvenile offenders.

Para. 249.—Appearance of counsel on appeal from Native Courts to Administrative Officers.

Para. 251.—Delegation by officer in charge of police of duty to make personal investigation into cases of sudden death.

I have, &c.,

D. J. JARDINE,

Chief Secretary to the Government.

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*Enclosure.*

MEMORANDUM BY SIR JOSEPH SHERIDAN SETTING OUT THE RECOMMENDATIONS OF THE COMMISSION AND HIS COMMENTS THEREON.

I.

Refers to Kenya and Uganda.

II.

*Recommendation.*—Magistrates should be empowered to try all non-capital charges which can be adequately dealt with within the limits of their powers, all more serious cases being committed to the High Court.

*Comment.*—I agree.

III.

Refers to Kenya.

IV.

Refers to Uganda.

*Recommendation.*—The strength of the High Court of Tanganyika should be increased by two Judges, one to be stationed at Mwanza and the other at Tanga or the Northern Province.

*Comment.*—I observe that the Commissioners recommend that one of the two new Judges should be stationed in Tanga or in the Northern Province (paragraph 63 of the Report), but I am inclined to think that it was not their intention to rule out the discretion of the Chief Justice as to where the Judge should reside. I may say that if it be proved to my satisfaction to make for the better administration of justice I am prepared to station a Judge either at Tanga or in the Northern Province later, but at the present time I hold the very definite view, and I so informed the Commissioners, that he should be stationed at Dar es Salaam. Some of my reasons for this were stated before the Commission.

For Your Excellency's information the objections to posting the second Judge away from Dar es Salaam, are these:—

I do not believe in decentralization so far as the High Court is concerned unless there are cogent reasons for it. I was prepared to agree that a case for posting a Judge in the Lake Province had been made out, but not so in the case of Tanga and the Northern Province. It is recognised that a High Court with some of its members resident away from headquarters is not as strong as when all the Judges reside at headquarters, and if the circuits can be held as expeditiously and effectually by sending out Judges from Dar es Salaam, as I am satisfied they can, in the case of Tanga and the Northern Province, there is no need for any decentralization in so far as that part of the Territory is concerned. Secondly it is better that circuits should be taken by different Judges and particularly that the Chief Justice should at times go out on circuit, other considerations being equal. Thirdly I am not satisfied that a Resident Judge would have sufficient work to occupy him. Fourthly by retaining the Judge at Dar es Salaam the expense of providing a subordinate staff for a Resident Judge becomes obviated. I may say that a Resident Judge if stationed in the Northern Province would also require a library, not an inexpensive item. Fifthly a Resident Judge would be unable to function successfully, unless he had posted within his jurisdiction a Crown Counsel. Undoubtedly the staff of the Attorney-General's department will require to be strengthened by at least one extra Crown Counsel, and, in my opinion, it would be more advantageous and less expensive for him to have this officer at headquarters. Sixthly with a view to having sessions of the Court of Appeal held locally for the purpose of dealing with criminal appeals, it is desirable that the new Judge should be stationed at Dar es Salaam so that the least difficulty may be experienced in assembling a Court.

With regard to the posting of a Judge at Mwanza, I have shown in Schedule A what additions to the Judicial vote are necessary. It will of course be necessary to have a suitable house for the Judge at Mwanza, where I propose to fix his headquarters. In addition the present Court house will require to be enlarged so as to include Judge's Chambers, a small room in which to accommodate the Court library, and a second room for the clerical staff.

*Recommendation.*—The Lindi Province and the South of the Western Province should remain under extended jurisdiction.

*Comment.*—An occasional visit by the High Court to this area may be possible. It has been proved to be necessary on one occasion in the past, and District Officers have personally informed me of their desire that the High Court should visit this area. I propose to review the position in regard to this area when the new Judges are appointed, but I agree that for some time to come this area will have to remain under extended juris-

diction for the most part. Few sessions cases come from the Lindi Province and the South of the Western Province, the number of cases in the exercise of extended jurisdiction for 1932 being 15, and for 1933, to date, 9.

VI.

*Recommendation.*—Cases from Districts which the High Court will not be able to visit should be committed for trial under extended jurisdiction.

*Comment.*—This recommendation is contained in paragraph 64 of the Report in which it is stated: "We have already referred to the unnecessary delays involved in the system of committing all cases for trial in the High Court. We recommend that cases from those districts which the High Court under our recommendations will not be able to visit should be tried in extended jurisdiction without reference to the High Court." As I find that the present system of committing such cases to the High Court in the first instance causes no delay in practice and has distinct advantages I consider no change is necessary. Let me explain. Immediately a case say from Lindi is committed for trial to the High Court, the committing Magistrate transmits the records to the High Court and the Attorney-General under the provisions of S. 224 Criminal Procedure Code. This statutory provision is necessary so that the Attorney-General may consider the record and file an information, unless he decides to enter a *nolle prosequi* (S. 80 Cr. P.C.), direct further investigation (S. 225 Cr. P.C.), or return the depositions (S. 227 Cr. P.C.). Not until an information is filed is any action taken by the High Court, but immediately an information is filed the record is placed before a Judge of the High Court who endorses on the record a direction that the case be heard in the exercise of extended jurisdiction by a particular Provincial Commissioner or District Officer who is authorised to exercise powers in extended jurisdiction under the Extended Jurisdiction Order, 1930. Inasmuch as the records must be forwarded to the Attorney-General for the purpose specified and the act of endorsing the High Court direction is a matter of a moment, there is nothing to be gained by any change. On the contrary the present system enables the High Court to become possessed of particulars of the case at the earliest opportunity, and makes it possible for the Judge to direct that the case shall be heard before an officer who is regarded by the High Court as efficient. It is not every person who is fitted to exercise extended jurisdiction and every Judge is able to tell from the records kept in the High Court whether or not a particular individual should be directed to try the case.

VII.

*Recommendation.*—More use might be made of Resident Magistrates for the trial of serious cases.

*Comment.*—With this recommendation I am in full agreement and I would suggest that instead of a Resident Magistrate's jurisdiction being limited to within the district in which his Court is situated he should be invested with provincial jurisdiction. This would need a slight amendment of the Courts Ordinance, the limits of jurisdiction being described: "The Court of a Resident Magistrate . . . within the limits of the Province in which it is situated or within such area as the Governor may, with the concurrence of the Chief Justice, appoint." Take for instance the case of the Resident Magistrate at Tanga. The amendment I have suggested would enable him to relieve District Officers for their administrative duties by his holding Courts at regular intervals at district headquarters outside Tanga township. Amendments would also be necessary to the First Schedule to the Criminal Procedure Code conferring upon Magistrates jurisdiction in non-capital cases which is at the present time reserved to the High Court. I refer to paragraph 55 of the Report in which the Commissioners say:

"The solution which we propose is to make it possible for the High Court to discharge properly the functions which it is its duty to perform. These functions in so far as its exclusive criminal jurisdiction is concerned ought to extend to the trial of all cases in which a sentence in excess of two years' imprisonment is proper. We therefore recommend that the jurisdiction of Magistrates in Kenya and Uganda be reduced to the limits which obtain in Tanganyika Territory. We further recommend that Magistrates in all three territories be empowered to try any non-capital charge which can, in the opinion of the trying Magistrate, be adequately dealt with within the limits of his powers. All more serious cases will be committed to the High Court after preliminary enquiry."

VIII.

*Recommendation.*—Appeals from Subordinate Courts should be heard by Judges of the High Court on Circuit.

*Comment.*—This practice has been in force ever since my coming to Tanganyika on the Tanga Line Circuit. When an appeal is lodged the accused or his advocate (where he has an advocate) is asked whether he wishes to have the appeal heard locally or at Dar es Salaam. The Crown is also consulted. The practice is now in force on the Central Line Circuit, Mr. Justice Hearne having heard appeals locally on the last circuit.

IX.

This recommendation affects Kenya and Uganda and commends the provisions for the hearing of appeals by a single Judge which obtains in Tanganyika.

X.

*Recommendation.*—Appellants, whether in custody or not, should have the opportunity of appearing at the hearing of their appeals.

*Comment.*—This will be arranged as far as possible. At the present time and with the present staff of Judges, it is not always possible, for, rather than detain an appellant an unnecessarily long time in custody awaiting a Circuit, his appeal is heard at Dar es Salaam to which place he would not, as a rule, have the means to travel. Again I would say that the hearing of an appeal be it on circuit or at Dar es Salaam presupposes a Crown Counsel being available.

XI.

*Recommendation.*—The exercise on circuit of the power of confirmation and revision may prove convenient.

*Comment.*—I agree the power has actually been exercised on circuit, but here again the Crown must be represented.

XII.

*Recommendation.*—It is not necessary that additional Judges should receive the emoluments now paid to High Court Judges.

*Comment.*—As Chief Justice I think it right to point out that as the new Judges will have exactly the same powers as the present High Court Judges they should be paid at the same rate. Differentiation in the pay of High Court Judges of the same bench in East Africa was abolished about the year 1920 and I think it would be a retrograde step to return to it. I stated before the Commission that my opinion was that a High Court Judge should receive not less than a Provincial Commissioner and that as there is but £50 difference between the pay of a High Court Judge and a Provincial Commissioner the new Judges should receive £1,400. However erroneous it may be, there is no doubt that the public judge the prestige of an office by the emoluments paid to the holder. Finally, a lesser salary than that enjoyed by the present Judges is not calculated to attract the best type of man. At the present time Tanganyika is well served in its

puisne judges and it would be regrettable if the standard were to suffer by reason of the emoluments to be paid to the new Judges. Naturally as Chief Justice I am most anxious to retain the present standard.

XIII.

*Recommendation.*—For the hearing of criminal appeals the Court of Appeal for Eastern Africa should be convened locally every month.

*Comment.*—This is a matter under the direction of the President of the Court of Appeal and Sir Jacob Barth has already put the recommendation into practice. When the new Judges are appointed it will be possible to have Criminal Sessions of the Court of Appeal held locally when local appeals and appeals from the other territories as directed by the President can be heard.

XIV.

*Recommendation.*—In Tanganyika a system of police investigation at or near the scene of the crime should be introduced as soon as possible.

*Comment.*—This is a matter more for the Attorney-General. It is, if I may say so, a very sound recommendation.

XV.

*Recommendation.*—The officer in charge of a police station should have power to issue a search warrant when application cannot conveniently be made to a magistrate.

*Comment.*—A strong case has been made out for this recommendation.

XVI.

*Recommendation.*—Confessions to European Police Constables in Kenya and to commissioned police officers in Tanganyika should be admissible and Uganda should consider restricting admissibility so as to conform to Kenya and Tanganyika.

*Comment.*—This is a question on which there was a divergence of opinion. My own opinion is that the law in Tanganyika which is embodied in S. 25 of the Indian Evidence Act should remain unaltered. That Section provides that "No confession made to a Police Officer shall be proved as against a person accused of any offence." It will be seen from my evidence and that of Chief Justice Abrahams at paragraph 95 of the Report that we both view with favour S. 25 of the Evidence Act. I may say that both Mr. Justice McDougall and Mr. Justice Hearne share our view. It will be observed in paragraph 96 of the Report that the Commissioners merely say "we incline to the view" in making their recommendation. In a country like Tanganyika where, I believe, as many as 100 different dialects are spoken, it must happen in the majority of instances that a confession made to a European commissioned officer would have its origin in a statement made to a native policeman or at least that a native policeman or interpreter connected with police work would have to act as a medium between the accused and the commissioned officer in interpreting the statement. From every point of view, I would regard any alteration of the law as undesirable.

XVII.

*Recommendation.*—Power of transfer of cases might be delegated to Subordinate Courts of the first class.

*Comment.*—At paragraph 98 of the Report Mr. Hall, the Acting District Officer of Maswa, gave one concrete case where he said it would have been more convenient to try the case in a district other than that in which the crime was committed for the reasons that the stolen property, a cow, had been found in that district and the accused wished to call witnesses from that district to establish an alibi. I have no objection to an amendment of the law to meet the difficulty mentioned by Mr. Hall and obviate the

necessity of referring to the High Court. I would suggest an amendment of the Criminal Procedure Code making alternative provision for the trial of an offence in the local area in which the offender is apprehended or the proceeds of an offence discovered. The new section would, I think, be appropriate after Section 72 of the Code.

XVIII.

*Recommendation.*—Summonses and warrants should contain sufficient detail to make the charge clear to accused persons.

*Comment.*—I agree.

XIX.

*Recommendation.*—At the close of the case for the prosecution a Magistrate should remind the accused what the charge against him is.

*Comment.*—I agree.

XX.

*Recommendation.*—On the discharge from an asylum of a person found unfit to plead, the case should be reported to the Attorney-General for directions.

*Comment.*—I agree.

XXI.

*Recommendation.*—Bail should be granted unless there is strong reason for refusing it.

*Comment.*—I agree. This matter was thoroughly dealt with in the Report on the question of Imprisonment and a High Court Circular issued to Magistrates on 4th November, 1932, advising them of the recommendation of the Commissioners that " The question whether an accused person can be admitted to bail should be constantly in the mind of every Magistrate and Police Officer."

XXII.

*Recommendation.*—Native witnesses should be allowed to give evidence in their own way, without interruption.

*Comment.*—I agree. Counsel with experience of native witnesses always follow this practice.

XXIII.

*Recommendation.*—If accused wishes to make a statement when invited to cross-examine a witness, he should not be prevented but his statement should not be recorded. The Magistrate should however, put on behalf of the accused any question that may arise from his statement.

*Comment.*—I agree; it is the practice followed by experienced Magistrates.

XXIV.

*Recommendation.*—Magistrates should not be given a general power to call additional witnesses.

*Comment.*—The present powers in the Code for calling witnesses do not require to be enlarged.

XXV.

*Recommendation.*—The form of caution to an accused person at a preliminary enquiry might be expanded.

*Comment.*—I agree.

XXVI.

*Recommendation.*—The deposition of a witness in a lower court should be admissible in the High Court when the delay and expense involved in calling him would be excessive, but subject to the same limitations as in the case of evidence taken on commission.

*Comment.*—I agree that this should be so. At the present time the provisions of the Criminal Procedure Code on the point may be said to be in conflict with Section 33 of the Indian Evidence Act and it is in the interests of justice that they should be reconciled, for until that is done the provisions of the Criminal Procedure Code prevail, it being a later enactment and dealing with the particular subject of procedure.

XXVII.

*Recommendation.*—Measures should be adopted to provide an efficient corps of interpreters.

*Comment.*—I agree. At the present time the discovery of efficient interpreters is a real difficulty.

XXVIII.

*Recommendation.*—It should not be a statutory obligation for a list of assessors to be kept, but District Officers should keep a list of suitable men.

*Comment.*—I agree. The necessity for keeping such a list in the case of natives was got rid of by an amendment of Section 239 of the Cr. P. C. and assessors in native cases are drawn from a list supplied by the District Officer.

XXIX.

*Recommendation.*—Expert stenographers might be employed in the High Courts of Uganda and Tanganyika as in Kenya.

*Comment.*—This is a matter which I suggest might be borne in mind, but at the present time I do not like to ask that the expense shall be incurred. Stenographers in Kenya are paid £400 by £20 to £600 and I believe are provided with quarters and passages.

XXX.

*Recommendation.*—Confirmation and revision are necessary and should continue.

*Comment.*—I agree.

XXXI.

*Recommendation.*—The punishments sanctioned by enlightened systems of Jurisprudence are the most suitable punishments.

*Comment.*—I agree.

XXXII.

*Recommendation*—Fines should be of an amount within the means of the offender to pay.

*Comment.*—I agree. The necessity for this has already been emphasized in Tanganyika and Magistrates were circularized on the subject in 1932.

XXXIII.

*Recommendation.*—The use of corporal punishment for adults, whether generally or for natives only, should not be extended.

*Comment.*—I agree.

XXXIV.

*Recommendation.*—In minor cases compensation is a suitable form of punishment and should be more largely used.

*Comment.*—I agree.

XXXV.

*Recommendation.*—The Governments should adopt a section similar to the "reconciliation" section of the Nigerian Supreme Court Ordinance.

*Comment.*—I agree.

XXXVI.

*Recommendation.*—In order that the fact that the death sentence is carried out should be known, representatives of the community to which the condenmned man belongs should be allowed to see him before and after execution.

*Comment.*—I agree.

XXXVII.

*Recommendation.*—A system of extra-mural work should be adopted for juveniles and first offenders.

*Comment.*—I agree.

XXXVIII.

*Recommendation.*—The defence of poor prisoners should be undertaken by a public defender, who should possess adequate professional qualifications, and, if possible, some administrative experience.

*Comment.*—I agree, but as the Commissioners point out, it may not be possible to give effect to the proposal for some time to come. Meantime I would say that native murder cases are defended by Counsel where possible.

XXXIX.

*Recommendation.*—A public defender might undertake the conduct of appeals to the Court of Appeal.

*Comment.*—I agree.

XL.

*Recommendation.*—He might also appear for the appellant in the High Court and be consulted on confirmation and revision cases.

*Comment.*—I agree.

XLI.

*Recommendation.*—There should be no alternative sentence for murder.

*Comment.*—I agree.

XLII.

*Recommendation.*—If the death sentence is not carried out a civil claim for "blood money" might be entertained by the native Courts.

*Comment.*—I have no objection.

XLIII.

*Recommendation.*—The definition of "provocation" should remain unaltered, but upon the trial of a native the conception of an "ordinary person" should be that of the community to which the accused belongs.

*Comment.*—The question as to what an "ordinary person" is in a murder case where the defence is grave and sudden provocation must, I consider, be left to judicial interpretation. In the majority of cases it may be perfectly correct for a Judge to sum up an ordinary person as a person typified by the assessors. My view is that while in the majority of cases where one native is tried for the murder of another the mentality of the assessors may afford a correct basis for arriving at the meaning of an ordinary person, there may be cases, rare no doubt, where the assessors, and indeed the community to which the accused belongs, hold the view for instance, that a belief in witchcraft constitutes grave and sudden provocation. In such a case I would disregard their view and so might be said to be disregarding the view of the community.

XLIV and XLV.

Refer to Uganda.

XLVI.

*Recommendation.*—Such enactments as local Government rules and regulations should be published in Swahili.

*Comment.*—I agree.

XLVII.

*Recommendation.*—The officer in charge of a police station should be empowered to send another officer to inquire into a sudden death if unable to go himself.

*Comment.*—I agree.

J. A. SHERIDAN,
Chief Justice.

1st September, 1933.

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## IV.

*Despatch from the Governor of the Tanganyika Territory to the Secretary of State for the Colonies.*

Dar es Salaam,

28th February, 1934.

SIR,

I have the honour to offer, with your permission, certain comments upon the Report of the Commission of Enquiry into the Administration of Justice in Kenya, Uganda and the Tanganyika Territory in Criminal Matters, dated May, 1933.

In doing so I do not feel impelled to enlarge upon my ignorance of local conditions. My remarks are of a general nature and if they can be regarded as carrying any weight at all, it can only be on account of a long administrative experience in another part of " native " Africa where similar problems have arisen.

2. I am not sure whether the Commission's terms of reference were intended to preclude, as *chose jugée*, any questioning of the foundations upon which the legal system in East Africa is built and to restrict discussion to methods of its application. If so, perhaps some apology is due from me for stressing the wider issue. My excuse must be the conviction that, but for the element of limitation of which the Commission appears to have been conscious, greater prominence might have been given to certain factors which seem to be of vital importance to the fulfilment of what I assume to have been one of the main objects of the Enquiry, namely, the provision of prompt and effective justice to the native inhabitants.

3. If British legal procedure in general is accepted as the ideal for adoption in Africa, it is certainly difficult to come to conclusions other than those embodied in the Report, and I am not

competent to question the soundness of the Commission's consequential recommendations. May I, however, with all due diffidence, and without raising the question of the exclusive sacrosanctity of British concepts of right and wrong (paragraph 162 refers), voice my doubts as to the pre-eminent suitability of British legal procedure in the conditions which prevail now, or can prevail within the foreseeable future, among the native tribes of Africa.

4. It may be that the special conditions obtaining in Europeanized areas, and even perhaps in areas which are not predominantly native, are such as to require an exclusively British system, and it is no doubt arguable that in such conditions a separate judiciary, operated by officers who have no other relations than those of judges with those who appear before them, has certain advantages; but it certainly does not seem to me that, where these conditions do not apply, the substitution of more complicated alien methods for the old-established and simpler ways which satisfy the African's sense of equity is called for unless it is first established that the African's sense of equity is so deficient as to condone the practice of injustice, and unless there are ample guarantees that the new system can be operated with efficiency and despatch and conduces to the happiness of the people.

5. At home the great edifice of legal procedure, built up in the course of generations of complex civilization, is familiar and ineluctable. To the African, whose simpler life and outlook require no more than speedy justice for the complainant and for the accused, commonsense, impartiality and understanding, in those who try their cases are the only real requisites, and the rest is incomprehensibly superfluous and frequently onerous. He is a believer in essentials: he wants the offender punished and the aggrieved party compensated as quickly and as fairly as possible—and he is prepared to make due allowance for the possibility of occasional error. He would realize that the record of the case should be a fair and comprehensive presentation, in view of the possibility of appeal, but he could not easily regard this secondary requirement as ranking equally in importance with the primary need for a reasonably rapid decision of the original dispute. His ideas regarding the non-admissibility of hearsay evidence would, on grounds of commonsense, be the same as our own, but—to take examples—there would be to him a strong element of the ludicrous in the existence of fixed rules as to the admissibility, " as part of the record or depositions," of " interjections by the accused " (paragraph 119): he could never understand the suggestion made by the Chairman of the Commission in paragraph 49 that if " important and relevant questions of native mentality and custom " are not on the record, " you ought not to expect the High Court either to know them or to use them even if they did know them " : nor could he ever see why it should be laid down

that " an accused person can avoid cross-examination by electing to make an unsworn statement " (paragraph 111).

6. In paragraph 148 the Commission state that a High Court Judge, in exercising the power of confirmation and revision, " is at a disadvantage in that he probably knows nothing of the district in which the crime was committed or the mentality of the natives and he has not seen and heard the witnesses." Is there any escape from the conclusion that, in that case, it is desirable to avoid reference to him? Surely a knowledge of native mentality is a *sine qua non* at every stage in the proceedings for one whose duty it is to administer justice among natives; and yet it can only be acquired by continual personal contact with natives. Knowledge of the locality in which the events under consideration occurred is also a valuable aid, and the advantage of having personally seen and heard the witnesses is unquestionable. Combine the three factors and they must incontestably outweigh the professional judge's greater acquaintance with the codes.

7. The Commission record their view that " the machinery for the administration of justice as apparently set up by law in these territories does not work, and, as at present constituted, cannot work " (paragraph 18), and that " every chief who appeared before us in Tanganyika had the same complaint to make; all spoke with feeling and distress of the hardships which their people had to endure in the interests of justice " (paragraph 41). A Provincial Commissioner of long experience without apparent contradiction testifies of the existing state of affairs in respect of the summoning of witnesses : " It means starvation for them. Last year we had the Boma yard full of them and every one of them knew that the locusts were eating their crops " (paragraph 42).

8. These quotations, as the Commission naturally allow, disclose a very deplorable state of affairs. " *Ut olim flagitiis sic nunc legibus laboramus* " would appear to be no unfair comment. But a perusal of the Report of the Commission must, I suggest, lend colour to the view that the fault derives from the system itself, apart from any question of the method of its administration : and yet it was the administration and not the system which was *sub judice*.

9. In paragraphs 44 and 45 the Commission express their opinion concerning certain alternative remedies proposed by witnesses who appeared before them.

They state " A number of witnesses have suggested that if delays are to be minimised and hardships obviated by holding a trial at or near the place at which the crime was committed, the only remedy is the extension of the system of special districts or extended jurisdiction so as to enable the Administrative Officer on the spot to try all cases that arise in his District " (paragraph 44).

They reject this remedy, however, on the ground that the arguments adduced in favour of it are, in their opinion, fundamentally unsound (paragraph 45).

Many a good case has been lost by the inadequacy of the arguments cited in its support. It cannot, for instance, be true that natives " *only* understand and appreciate justice when it is meted out to them by officers whom they know and respect " (paragraph 44) : they understand and appreciate prompt justice whenever it is apparent and from whatever source. An " unfamiliarity with the ' technicalities of law and legal procedure ' " on the part of the Administrative Officer, and a tendency to give " rough and ready " justice (paragraph 44) seems to be postulated on somewhat insufficient grounds; and I do not personally share the view " that a District Officer owes much of his prestige to his exercise of judicial functions and his power to punish, and that a diminution of those powers will adversely affect his standing with the natives " (paragraph 44).

10. It is, to my mind, not so much a matter of a (hypothetical) unfamiliarity with legal procedure being " more than compensated for by his (the Administrative Officer's) knowledge of native law and custom . . . language, mentality, outlook on life and environment " (paragraph 44), but of that knowledge being an essential pre-requisite.

11. In this connexion there is a further point as to which I find myself in disagreement with the Commission, if I have understood them aright. They hold that Administrative Officers as a class are apt, on account of their previous knowledge of the facts, to find it difficult " to assume a judicial role and to proceed calmly and dispassionately to apportion responsibility and arrive at a proper sentence " (paragraph 45), and it is implied (cf. paragraphs 50 and 51)—though I see no grounds for it—that they are apt to be " swayed by political and other non-juridical considerations " to the extent of departing from a strictly judicial frame of mind.

I am acquainted as yet with very few of the Administrative Officers of this territory, but with many elsewhere in Africa who are recruited in a similar way from the same sources. I have also had considerable personal experience myself as an Administrative Officer; and I cannot regard the implication made as tenable. When an Administrative Officer acting as a magistrate is placed in the position of being himself the prosecutor, the counsel for the defence, the jury and the judge—he being also responsible for the order and welfare of his district and generally regarded as in *loco parentis* to all and sundry—he is, in my experience, apt to be particularly conscientious in the holding of the scales of justice evenly, and in seeing that the rights of the accused, the complainant and the public are properly and severally safeguarded. If exceptions to this general rule occur, it is hard to believe they can be so numerous or serious as to warrant a preference for a professional magistracy which labours under the grave disability of not being in touch at all with native life.

12. I note that the Commission concede that " even if effect is given to all our recommendations, it will still be necessary for the system of extended jurisdiction or special district courts to continue in parts of these territories " (paragraph 58), and they recommend that " magistrates in all three territories be empowered to try any non-capital charge which can, in the opinion of the trying magistrate, be adequately dealt with within the limits of his powers " (paragraph 55). So much to the good, but it appears open to serious doubt whether these recommendations go far enough. Why, for instance, in a native area, need the functions of the High Court " extend to the trial of all cases in which a sentence in excess of two years' imprisonment is proper " (paragraph 55)? Ignorant though I am of local conditions. I assume, as the Commission does, a high standard of conscientiousness and at least average capacity in the provincial staff, and, to meet the very grave and admitted evils of delay and unpopularity attaching to the administration of the law in the provinces of this territory I should have expected to see a recommendation that the powers of the provincial officers should be considerably increased.

13. Secondly, unless it is established that the present powers of the native courts are exercised in an unsatisfactory manner, it would seem advisable at the same time, to increase their powers of imprisonment: these, I observe, cannot at present exceed six months in the case of the courts which have the highest powers of all. No doubt some amendment of the provisions relating to appeal would be required as a corollary, since at present an appeal from a native court lies to the District Officer; but it would seem practicable, if the powers of such courts were extended, to make provision for a direct right of appeal to the Provincial Commissioner in certain cases.

Thirdly, the provision whereby every conviction by a subordinate court, where the sentence exceeds imprisonment for one month or a fine of five pounds, involves a right of appeal to the High Court (paragraph 69) seems difficult to defend in the light of the opinion quoted in paragraph 6 above, in the absence of any evidence to show that the subordinate courts are incompetent, and in view of the delays and uncertainties that must inevitably result from exercise of the right in question.

14. If a fundamental change of the legal structure is now out of the question, and if more and more professional judges are, and will be, in consequence required for its administration, I would at least urge in the interests of the native population that such measures of alleviation as are still possible may be taken in the direction of simplification and decentralisation by the method of entrusting more powers with fewer formalities to the local administrative authorities in the out-districts, and, if it is necessary, by increasing the training of the Administrative Officer in the art of clear thinking and the knowledge of the criminal law.

I anticipate with a confidence born of my own experience, and increased by a perusal of the report which is the subject of this despatch, that the result would be the achievement of a far greater measure of contentment at a far smaller ultimate cost. 311

I have, etc.,

HAROLD MACMICHAEL,
Governor.

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## V.

*Despatch from the Secretary of State for the Colonies to the Governors of* (1) *Kenya*, (2) *Uganda, and* (3) *the Tanganyika Territory.*

Downing Street.
10th April, 1934.

SIR,

I have the honour to refer to previous correspondence on the subject of the Report of the Commission of Enquiry into the Administration of Justice in Kenya, Uganda and the Tanganyika Territory in Criminal Matters.

2. As you are aware, I discussed this Report during the course of my recent visit to East Africa and I have now been able to consider [*to* 1 *and* 2 : a despatch dated the 28th of February* from Sir Harold MacMichael] [*to* 3 : your despatch of the 28th of February*] and to give further consideration to [*to* 1 *and* 3 : Sir Bernard Bourdillon's despatch of the 18th of November, 1933,†] [*to* 2 : your despatch of the 18th of November, 1933,†] to Mr. Moore's despatch of the 9th of November,‡ to Mr. Jardine's letter of the 24th of October, 1933,§ addressed to the Secretary to the Conference of East African Governors, and to the memoranda enclosed with those documents. As a result I have now directed that the Report of the Commission shall be published together with the documents enumerated above. I have decided, moreover, that effect should be given to those recommendations of the Commission in which all three Governments concur, but that those recommendations with which one or more of the Governments is unable to agree should be referred to the Governors' Conference, at its forthcoming meeting, in the hope that, after further discussion at the Conference, the Governors may be able to arrive at agreed conclusions thereon.

3. I have therefore caused a letter‖ (of which a copy is enclosed) to be addressed to the Secretary to the Conference requesting him to place this matter on the agenda of the Session opening on the 2nd of May.

I have, &c.,

P. CUNLIFFE-LISTER.

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* No. IV. † No. II. ‡ No. I. § No. III. ‖ No. VI.

## VI.

*Letter from the Colonial Office to the Secretary to the Conference of East African Governors.*

Downing Street.

10th April, 1934.

SIR,

I am directed by Secretary Sir Philip Cunliffe-Lister to address you on the subject of the Report of the Commission of Enquiry into the Administration of Justice in Kenya, Uganda and the Tanganyika Territory in Criminal Matters.

2. As you are aware the Secretary of State discussed this Report during the course of his recent visit to East Africa, and he has now been able to consider Sir Harold MacMichael's despatch of the 28th of February* and to give further consideration to Sir Bernard Bourdillon's despatch of the 18th of November, 1933,† to Mr. Moore's despatch of the 9th of November, 1933,‡ to Mr. Jardine's letter of the 24th of October, 1933,§ addressed to yourself and to the memoranda enclosed with those documents. As a result he has now directed that the Report of the Commission shall be published together with the documents enumerated above. He has decided, moreover, that effect should be given to those recommendations of the Commission in which all three Governments concur, but that those recommendations with which one or more of the Governments is unable to agree should be referred to the Conference of East African Governors, and he desires that when the three Governments concerned have been able once more to consider these recommendations at the Conference, a report should be submitted embodying, if possible, the agreed conclusions reached as a result of these further deliberations.

3. I am to request therefore that you will place this matter on the agenda for the session of the Conference which opens on 2nd May, in order that the Secretary of State's wishes may be carried out and a Report may be submitted as indicated above.

4. A copy of a despatch‖ which has been addressed to the Governors of Kenya, Uganda and the Tanganyika Territory is transmitted herewith for your information.

I am, &c.

J. E. W. FLOOD.

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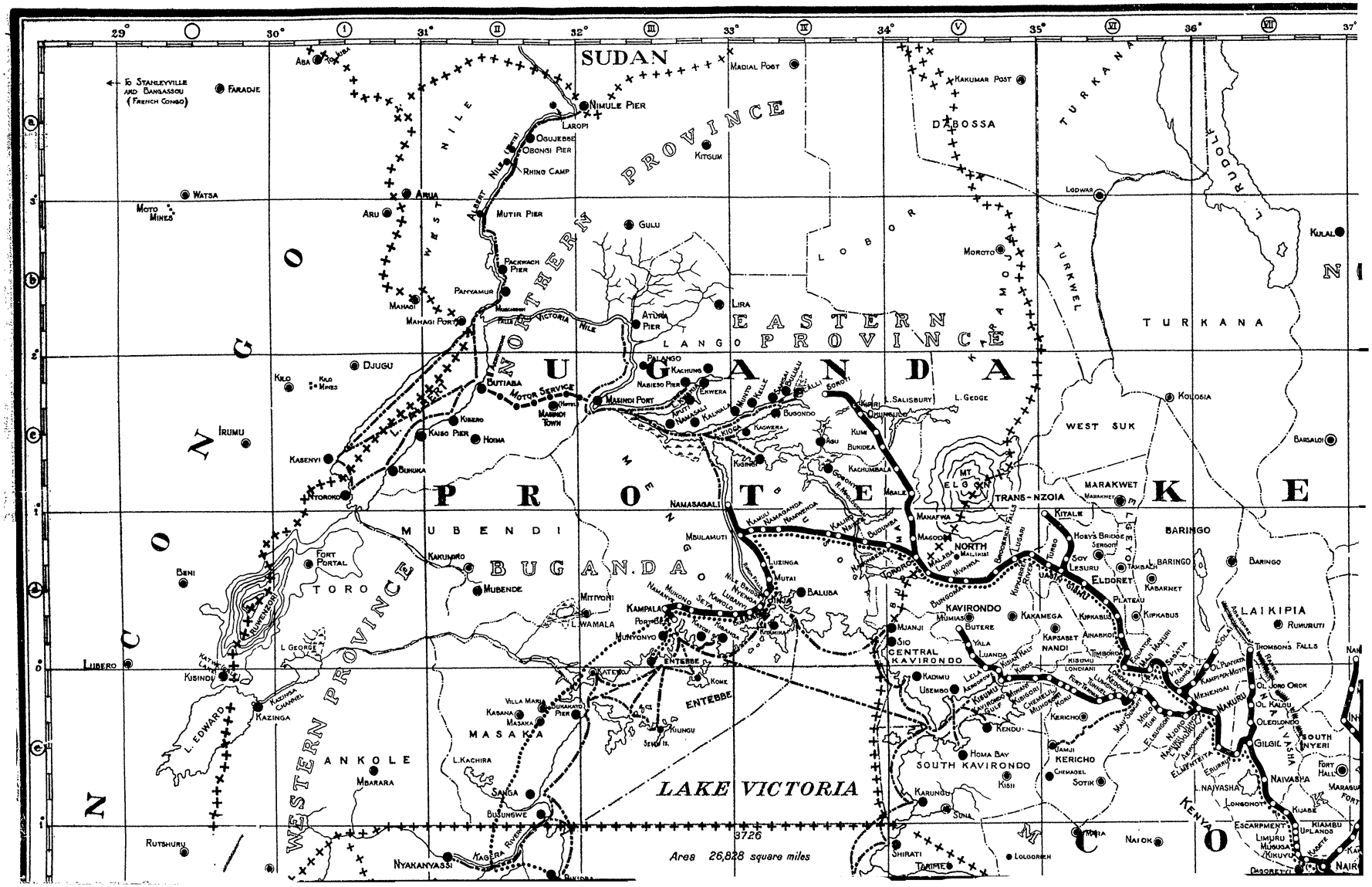
* No. IV. † No. II. ‡ No. I. § No. III. ‖ No. V.

(21158—2) Wt. 1263—3105 1635 7/34 P. St. G. 3

# MAP OF EAST



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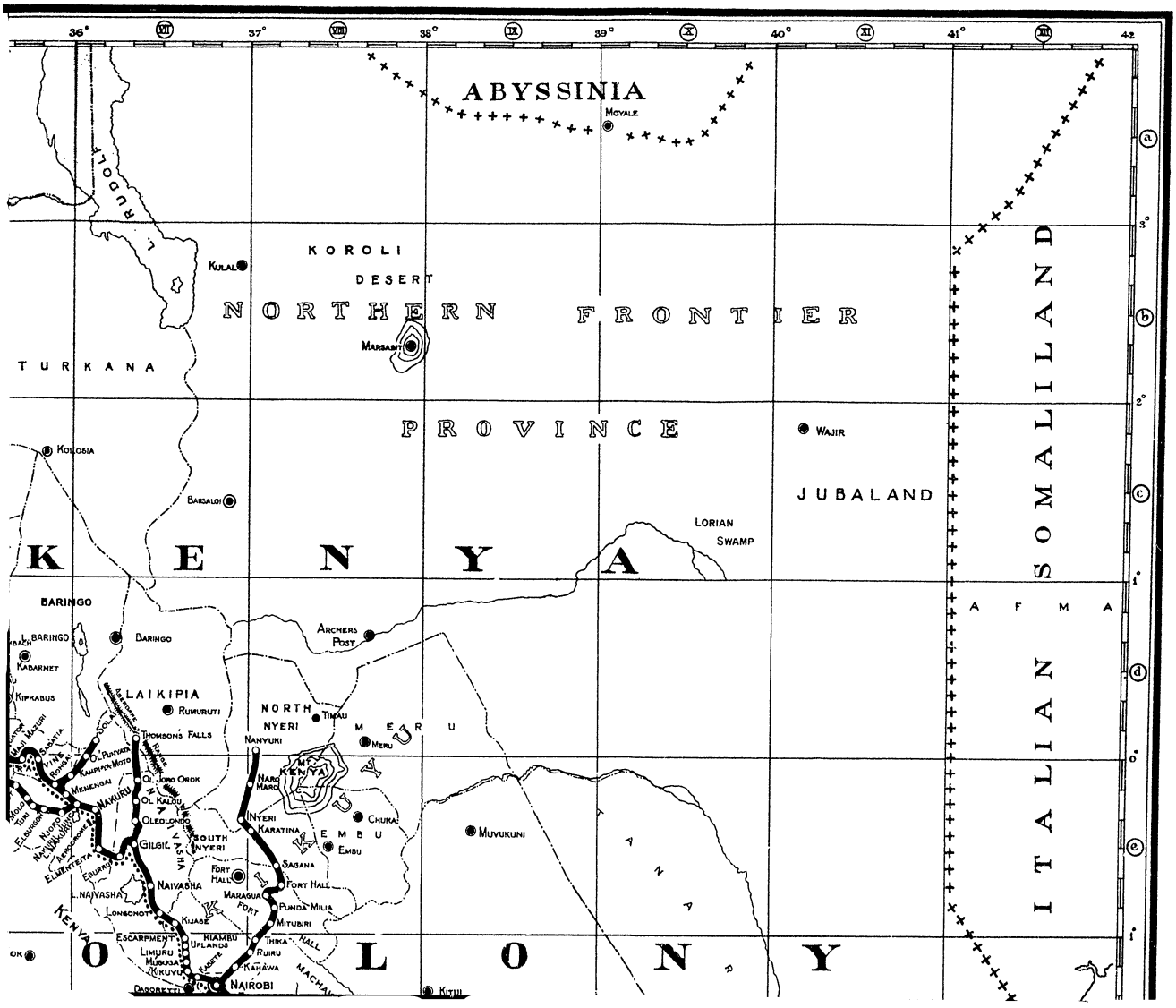

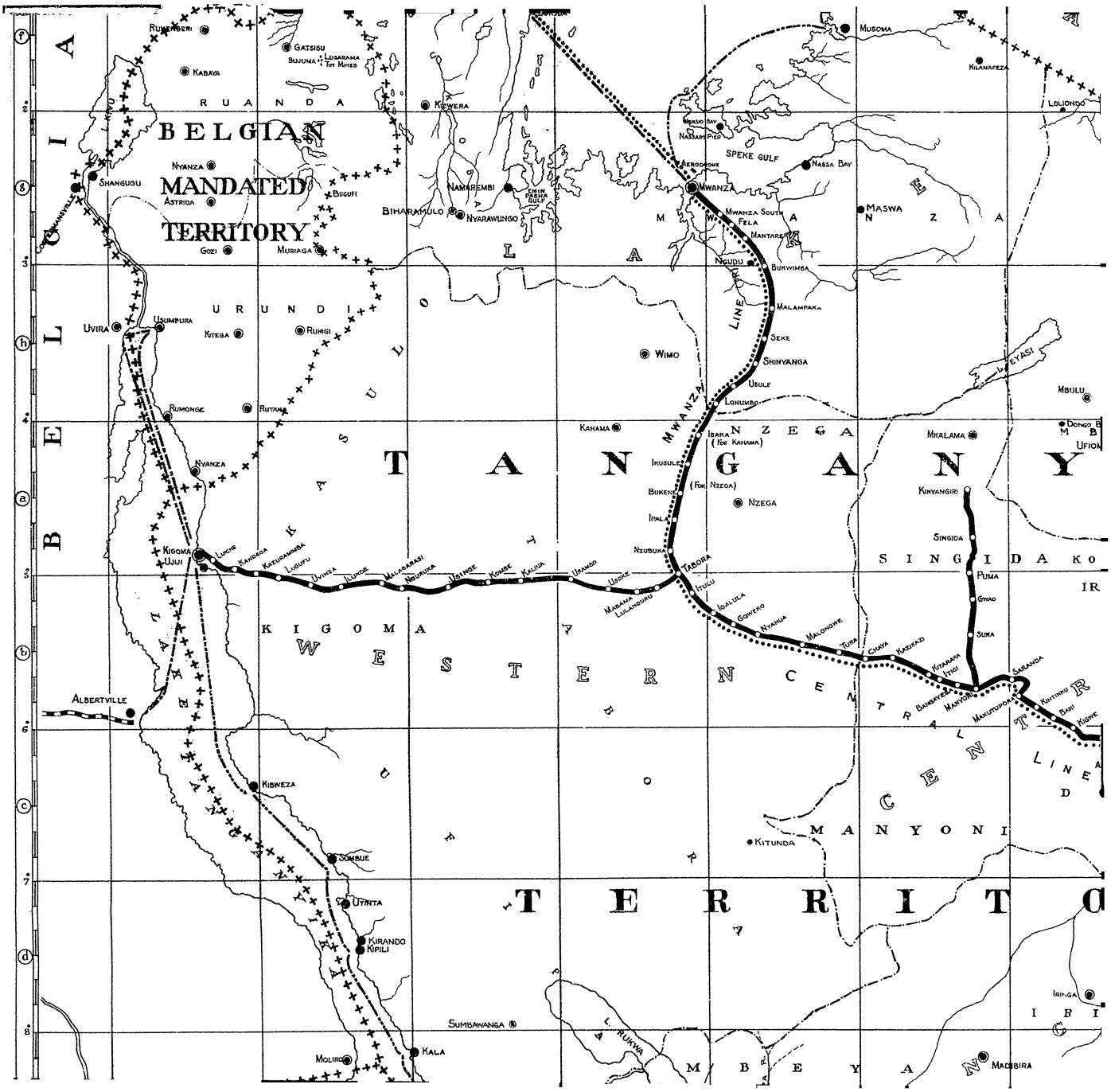

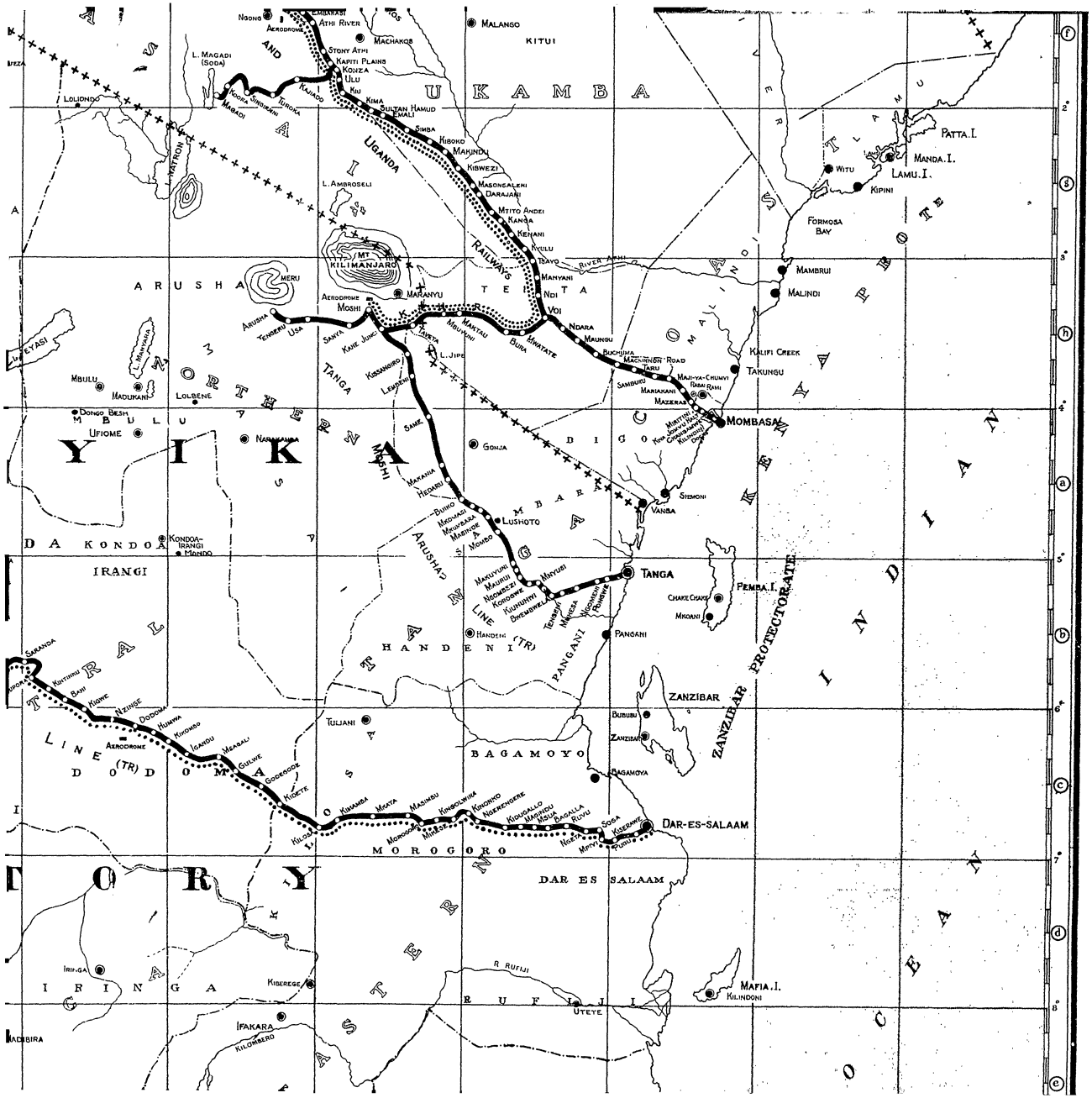

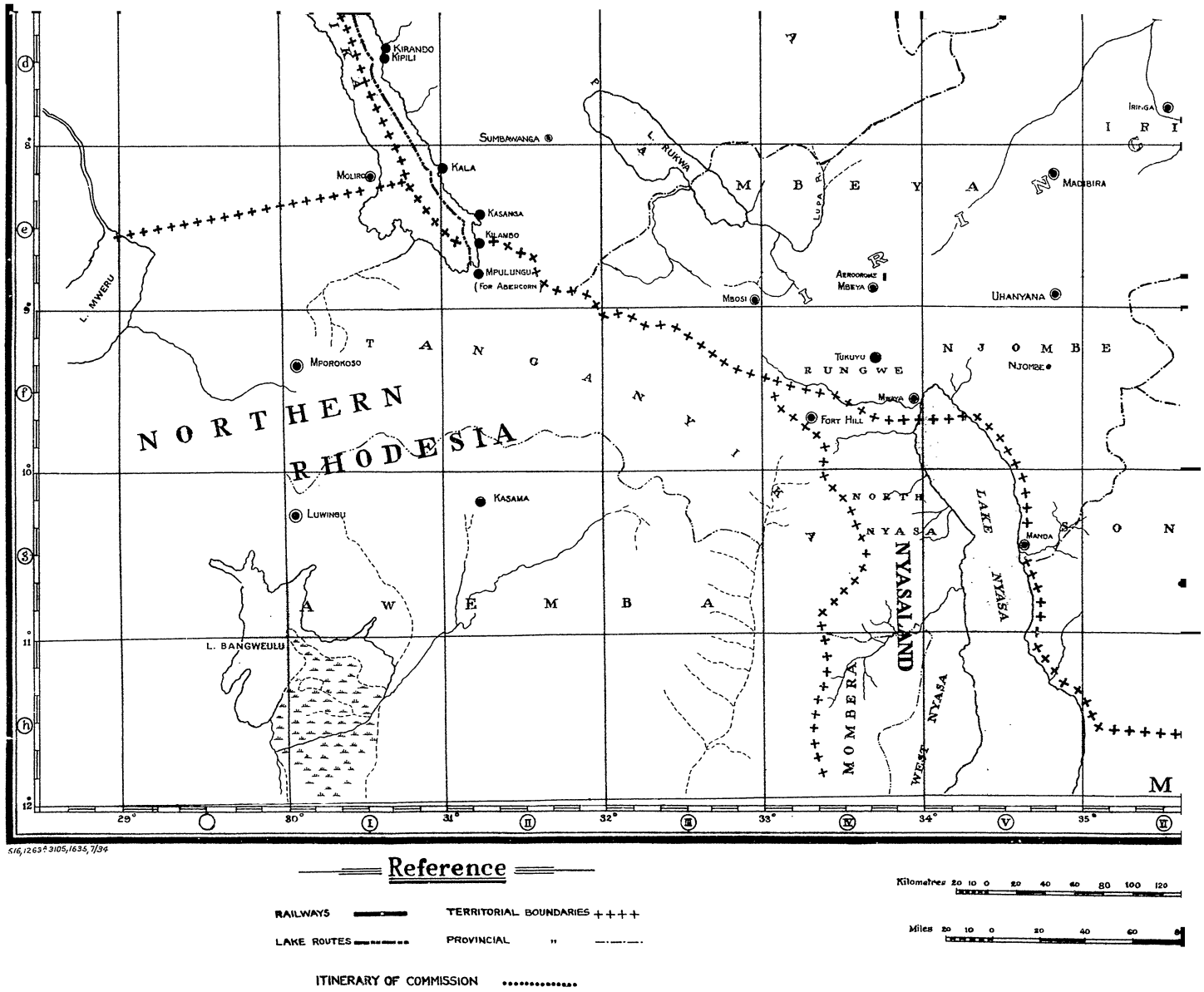


S.16,1263 & 3105,1635, 7/34

## Reference

RAILWAYS

TERRITORIAL BOUNDARIES

LAKE ROUTES

PROVINCIAL "

ITINERARY OF COMMISSION

Kilometres 20 10 0 20 40 60 80 100 120

Miles 20 10 0 20 40 60