one has occasionally issued orders for all cases under a specific ordinance to be sent in for scrutiny. At the present time all cases of whipping are sent in.

In cases where less than 12 strokes are to be inflicted it is carried out immediately?—Yes.

Have you any views on that subject, that perhaps it ought to be suspended until the case has been reviewed?—It would cause more damage than if the sentence were inflicted?

Chairman: There is the anticipation of course.

Mr. Justice Law: Still if a man is to get 10 strokes and gets them it is bad luck that he was not awarded 12, in which case, if it was a bad sentence, he might not get them at all?—Most whippings are given to juveniles, to keep them out of the prisons more than anything else.

Connected with this, I think there is also the question of provocation to be considered. Do you think that the standard that is applied to the ordinary man should be applied to the native of Africa?—I do not see why not.

In view of particular circumstances, witchcraft for instance?—If you regard witchcraft as provocation you are going to run yourself into considerable difficulty. It was because of the general native custom in regard to witchcraft that the Witchcraft Ordinance was passed which gives the native a chance of prosecuting people who practise these alleged supernatural powers.

Generally speaking, you are satisfied with the quality of assessors? You think that no useful purpose would be served in this respect by having, say, a panel of assessors in each district?—It might be useful.

Men who act regularly as assessors would have their minds trained in this particular function?—I know in one or two places one sees the same people, and they are very satisfactory.

Mr. Mitchell: As regards confirmation and revision and the very extensive jurisdiction of the D.O.'s and magistrates in this country, I suppose you would agree that it would be preferable for that jurisdiction to be exercised by judges?—I quite agree.

A good many of the difficulties which arise in the more serious cases would disappear if the original trial was before a professional court?—Yes, but on the whole I think that political officers, D.O.'s and A.D.O.'s, do their work extraordinarily well. If, however, you have a professional court the necessity for revision and confirmation would disappear.

As regards the alternative sentences for murder, at present, you state, the decision is left to the executive. Has the executive only the material on which the trial judge gave his decision?—They have the record to go on and the report of the judge.

Chairman: They may have more than that?—Yes. On Executive Council are people who represent the interests of the natives and know their habits and customs.

Mr. Mitchell: From your experience do the executive invariably accept a judge's recommendation?—No, not invariably. In two cases of my own I made no recommendation and the sentence was reduced from death to imprisonment.

There have been cases, too, in which the judge has made recommendations and the executive have not seen fit to follow them, but that may be for political reasons or otherwise not within the cognisance of the trial judge.

Chairman: In considering whether the law was to take its course the executive might consider the prevalence of the crime?—There seem to be two main principles guiding the executive—humanitarian and political.

Mr. M. Wilson: As regards this question of fines for theft of stock being ten times the value of the stock stolen, has this been helpful in the reduction of stock theft?—I do not think so myself. I have suggested that it should be amended and that the compulsory fine of ten times the value should be abolished. It may come to an enormous amount of money which the culprit cannot possibly find and in a great many cases it would be a hardship to inflict it on his family, sub-tribe or tribe.

In that case I suppose there have been a number of cases in which the fine has not been collected?—I have no returns about this, but so far as I know there are a large number of cases.

Chairman: We have been a little struck by the delay which may occur, especially in a murder case, if the man is going to appeal to the East African Court of Appeal. This is serious?—It may be. It is never more than three months, or it should not be.

The court of appeal sits every three months and it could sit at any time?—Yes.

In Kenya you have a Chief Justice and three judges, so that you could always form here an independent court?—Yes, at any time.

Mr. Mitchell: Then it might be a good thing to take criminal appeals at a local appeal court sitting at frequent intervals. I think it might be a good thing from the point of view of avoiding delay?—That would be more possible in appeals from other territories. The judge who tries the case cannot be a member of the court of appeal, so in Kenya murder trials would probably have to await the regular sitting.

Chairman: But you have three judges here?—One is stationed at Mombasa.

It might be better than leaving the case three months. It struck me as a long time. By the time the accused has been committeed and the appeal heard, the time mounts up.—It would be quite possible to bring the judge to Nairobi from Mombasa at any time, though it would be expensive.

Other territories have not got the facility for holding special courts since they have only two or three judges. Supposing you formed your special court here, would you have any objection to taking criminal appeals from Uganda, for instance, in that court so as to help them out of a difficulty?—None at all.

As regards interpretation. Do you find that this is satisfactorily done?—On the whole it is in the Supreme Court.

Would a system appeal to you by which you had a cadre of permanent interpreters, receiving salaries, and devoting their time to interpretation and studying the necessary languages—Kikuyu for example?—Occasionally one has to get in a policeman, for example, to translate from some native dialect into Swahili.

If interpreters devoted all their time to it they might get much greater skill?—Yes, but we are tied up through want of money in this country.

There is one thing I would like to add. As regards revision cases, very often people who are given sentences which are not appealable, i.e., whose sentences are not over a month, etc., apply for revision.

If they apply for revision, do you send for the file?—Yes, it is treated in practically the same way as an appeal.

Mr. M. Wilson: Do they apply to the D.C.?—No, straight to the Supreme Court.

(*Witness then withdrew.*)

Thursday, 13th April, 1933

The Commission assembled at 10 a.m. on Thursday, 13th April, at the Resident Magistrate's Court, Eldoret.

ARCHDEACON OWEN.

Chairman: Is this memorandum (No. 7) you have given us your own or is it on behalf of the Kenya Missionary Council?—These are the views of the Council, but there was no opportunity to refer it to the Council. I have sent copies to the Secretary and other members and have had no comments.

In the foreword you draw attention to the Native Tribunals Ordinance, 1930. Of course we are not concerned with native courts, but we are concerned with the practice and procedure of the subordinate courts and the Supreme Court. Am I to understand from your foreword that you would like the Supreme Court to have power to hear appeals from native courts?—Yes. The Kenya Missionary Council tried to get that through at the time the bill was under consideration.

Do you think that as a whole natives would desire that?—In certain cases, land questions, etc., and criminal cases.

Do you think there is a substantial demand for this among Africans?—I cannot say that I have heard that expressed.

Your first point is interpreters. Let us take the subordinate courts. The trials there are conducted always in English?—In the courts where I have been the cases were sometimes conducted in English and sometimes in Swahili. If you have an interpreter who does not know English but only the language of the district and Swahili the magistrate must use the language that the interpreter knows so the case is conducted in Swahili.

In the subordinate courts even if the case is not conducted in Swahili most magistrates know sufficient Swahili to check an interpretation in Swahili?—I would hardly like to say so. For instance newly appointed Resident Magistrates must conduct cases where they cannot check the interpreter.

Of course Swahili is not the only problem. How many languages are there in Kenya?—I should say there are about half-a-dozen main groups of languages but many more dialects that might need interpretation.

In the Supreme Court cases are always conducted in English with the aid of interpreters? Sometimes there must be a double interpretation because interpreters generally cannot interpret from languages other than Swahili straight into English?—Yes, there are very few interpreters who can translate from any other language than Swahili straight into English.

Your view of interpretation is that it is not very good?—Yes, in certain courts.

Where have you had experience?—At Kisumu, Nairobi and in Uganda.

Is it better in the Supreme Court as a whole than in the outlying courts?—I have never gone to the Supreme Court but I know the class of interpreter employed in it and I should say that the higher the court the higher the qualifications of the interpreter.

Do you think that it would be a good thing if we were able to have a corps of interpreters who would be permanently employed and would devote their whole time to studying languages and interpreting in the courts?—Yes, that is distinctly my view.

Have you ever seen poor interpretation cause a real and substantial misunderstanding?—Yes.

And it has amounted to a miscarriage of justice?—The miscarriage of justice did not take place because I begged to be allowed to correct the misinterpretation. In my opinion if I had not intervened a miscarriage of justice would have occurred.

The context generally would make it clear that there had been a misunderstanding, sooner or later?—I think possibly that occasions must arise when the magistrate would come to this conclusion.

In your memorandum you say, " Special attention should be directed to those interpreters who act not only in the Courts but also in the administrative work in the reserves ".—The interpreter who accompanies the District Officer in the reserves interprets the orders of the D.O. to the baraza and acts as go-between generally. That is quite outside court work.

So that there must be a number of cases where the D.O. cannot talk the local vernacular.—The exception is the other way about. I am speaking of Kenya now.

You think that some attention should be paid to these interpreters also?—Yes, I should like to see clear cut interpreters confined to court work only.

Under the suggestion that I put to you just now that there should be a special corps of interpreters, that might well happen?—Yes.

The next point is the Native Tribunals Ordinance, 1930. As you point out, under that there is power for the transfer of certain cases to the subordinate court. Of course there is always a right of appeal from a native tribunal to a subordinate court?—Yes.

You think lawyers ought to be admitted before the subordinate court in a case which is transferred from a native court or on appeal to a subordinate court?—Yes.

Do you make that suggestion from your knowledge of the desires of the natives themselves?—Absolutely.

You think that they would welcome the assistance of a lawyer in cases before the subordinate courts?—Yes.

You think that without that assistance they find difficulty in making their defence?—Yes.

You do not know why they are not allowed?—At the time the bill came up we sent a deputation from the Missionary Council to the Colonial Secretary on the matter and we were given various reasons, one being that certain types of lawyers who concerned themselves with these native cases were not always good types and would employ touts.

That might well apply to civil work and land cases?—Yes, but not criminal cases. It was also argued that the lawyers' fees would be high for natives and this would lead to further litigation.

In some places it has been arranged that fees payable to lawyers for this type of work should only be paid on taxation, and thus the risk of overcharging would be prevented. Would that meet the difficulty?—Yes, I think it would. Another point that was brought up was that under the administration of our system of law it might be possible for a native who was really guilty to escape through some technical irregularity that the lawyer could bring to light.

I am puzzled about this suggestion of technicalities. One has got to conduct a case according to rules, and if a rule is not followed it is not always a technicality.

Do you think the chiefs would resent the intrusion of lawyers in these cases?—Certain of them would. They are really only headmen who are functioning under the Native Tribunals Ordinance.

There is no hereditary system?—Yes. But headmen are not appointed with regard to the existence

of that tradition probably by mistake besause the District Officers are not aware of its existence.

Are there no chiefs here who succeeded according to hereditary principles?—I think there is hardly a headman who holds his office at the present day according to native tradition and custom.

Do you think that the appearance of lawyers on appeals would be subversive to the authority of the chief?—No. There would be nothing more subversive than a sense of injustice. It causes friction in the tribe and might for a short time upset the headman but it would result in better administration in the long run.

There is no question in this country of the D.O. feeling embarrassed by the appearance of lawyers because I understand they do appear in the subordinate courts?—Yes. There is a desire to confine procedure to summary justice, but this may equally result in summary injustice.

You urge that "criminal cases under the Native Authority Ordinance should not be heard by any District Officer where such cases arise out of an alleged breach of an order issued by such Administrative Officer." Administrative Officers can issue orders under the Native Authority Ordinance and if these orders are not obeyed, that is a criminal offence?—Yes.

Administrative Officers holding subordinate courts are in a difficult position?—Very.

They have to act as prosecutor and judge and that is not easy?—It must be a very difficult function at times.

On the whole, having regard to the difficulties, they do as well as anyone could?—Yes.

You mention the Asembo case?—In that case a petition was made to the Governor and he appointed a Commission of Enquiry to find out the facts. I presume it has reported because all the fines have been returned to the accused.

Mr. Branigan: The report has not been made public.

Chairman: Can you tell us shortly the facts of the case?—It was a case in which a D.C. gave an order prohibiting gatherings of natives in a certain location unless they had first applied for and obtained the permission of the headman or chief. It was alleged that a gathering took place in one of the village churches for which I am responsible and that this gathering constituted a breach of the order issued by the headman on the instructions of the D.C. Fifteen men were convicted in all of having taken part in this so-called illegal gathering. The case went first of all from the native tribunal to the D.C. who revised the case, and from the D.C. to the P.C. who confirmed the convictions. The D.C., I may say, while he confirmed the convictions, reduced the fines.

We were convinced that there was a grave miscarriage of justice and perjury and there was no other court to which the case could be taken since the Native Tribunals Ordinance did not allow of it. So there was a petition to His Excellency asking for intervention under any powers the High Court might have. A Commission of Enquiry was appointed, sat at Kisumu, took the evidence, and the accused were told to go to Kisumu and their fines would be returned to them. One witness who was accused of perjury was dismissed from the minor post he held under the chief.

You have assumed that that miscarriage was due to the system? Any court may be deceived if the witnesses perjure themselves?—In my opinion the D.C. could not possibly have remained unprejudiced in the circumstances of the case. The nature of the evidence that was produced before the Commission of Enquiry was such that had he not been prejudiced he could have got the same evidence when he revised the case.

Mr. Mitchell: Was the prohibited meeting about something in which he was interested in his executive capacity?—It was. The meeting was alleged to have been held to protest against the appointment of an official headman—a so-called chief. The D.C. had held a baraza of the elders of the location to get nominees for the appointment. When he found that the elders were not prepared to vote for a certain nominee, he dismissed the elders and on his recommendation the individual that the elders would not vote for was appointed. The whole community felt most strongly that they had been treated unfairly, and it was alleged that this meeting in the village church was a meeting to hinder the process of administration by protesting against the appointment of the unpopular man.

(At this point the Chairman asked the Press not to publish the details of this case.)

Chairman: All this points to the fact that an Administrative Officer, as magistrate, should not try cases arising out of his orders as executive. How can one avoid that?—In this instance, the D.C. issued an order. The order in his opinion, was disobeyed. He acted as prosecutor before a subordinate officer in prosecuting those men.

That was an attempt to avoid any suggestion of prejudice?—I say that for a senior officer to act as prosecutor before a subordinate officer is entirely wrong.

You think the attempt was a failure, but there are not enough Resident Magistrates to take all these cases?—I think the administration of justice would benefit if there were more trained men.

It would not at the moment appear to be practicable for D.O.s. to avoid dealing with cases of this kind, themselves?—No. but I consider that even as things are to-day offences based on disobedience of D.O.'s. orders should be tried by Resident Magistrates. The objection on the ground of prejudice, to trial by D.O.'s is really acute in that type of case.

I see.

The next point you deal with is the Masters and Servants Ordinance. That is outside our terms of reference.

You say you have no experience of police methods?—I should like to revise that. Only one thing has come under my own personal observation. A few years ago I was run in on the criminal charge of not having signed on or off a native's kipandi. I was confronted with a statement by the police and the witness who had made the statement was in the witness box. The statement was read over to the witness. With the greatest astonishment he said, "But that is not my statement at all." The officer conducting the case threw down his file on the table and metaphorically, threw up the sponge. I begged him to go on with the case, which he did.

The witness was the native whose kipandi was not signed?—Yes.

Mr. Branigan: A native often goes back on a statement.

Chairman: But is this meant to be a criticism of the police.—Yes. The interpretation may have been deficient.

It comes to this that the witness had made some statement to the police and when he came into the box he went back on his statement.—The genuine astonishment of the witness convinced me that there was a blunder somewhere.

You think that the police had misunderstood what witness had meant?—Yes. It was inefficient interpretation in dealing with a language which the police officials did not understand.

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[N.B.—*For passages here omitted see paragraph* 228 *of Report.*]

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Do you think they press a case unduly?—At times they may. I can quite conceive that there are occasions—but I know of no facts.

The functions of the police are to detect persons who have committed crimes and to obtain sufficient evidence if they can to convict them. Provided that they do not use third degree or other improper methods, they are entitled to press the matter strongly?—Yes, Sir.

Who prosecutes in the subordinate courts, is it the Police?

Mr. Branigan: Yes.

No, Sir. I have been in subordinate courts where there is no police officers. At Kisumu for instance there is no such officer prosecuting. The magistrate acts as prosecuting officer, defence and everything else.

An Indian sub-inspector frequently prosecutes there.—My experience is mainly in the native reserves.

Chairman: You have not seen a police officer pressing a case unduly and being unfair?—No.

Mr. Justice Law: With regard to this matter of the D.C. revising the case which arose from the alleged breach of an order issued by the native authority on his instructions, of course the position is very difficult?—It is, Sir.

Mr. Justice Law: And there are not enough magistrates to go round?—Not at the present time.

Do you think in the case you mention that the D.C.'s opinion was in any way influenced by the fact that he originally issued these particular instructions?—Most definitely.

You told us that he himself did not try the case for the breach of his instructions. It was tried before the native tribunal?—Yes.

And do you suggest that when it came to him to revise those proceedings that he was influenced by his knowledge and not by what appeared on the record?—Yes, most definitely. There was no record of the evidence. That is one of the tremendous difficulties of an African trying to get an appeal.

Your criticism then is of the system?—Certainly.

When a case from a native tribunal goes for revision or on appeal would not that court file the record of evidence?—No. There is no record of evidence.

Then there is nothing to revise except to see that the sentence passed is in accordance with the powers of the native tribunal.—Yes.

In the case you mention, it was by reason that some fresh light was thrown on the case that these fines were refunded?—No, Sir, not entirely. Part of the complaint was that the magistrate would not hear any of the evidence which the accused wished to bring forward. The evidence was there.

Now these criticisms of incidents that you have observed with regard to askaris, did you yourself take any steps to see if they could be remedied in any way?—I wrote in one case (Mohoroni I think) to the police at Kisumu, but in the other cases, in one the train was on the move and in the other I told the guard that I should report him but I did not. One gets most unpopular and rather chary of reporting everything one sees.

Your view is that in all (criminal) cases that come before a District Officer however they come before him, whether by appeal or revision or originally, the accused should be entitled to be defended by an advocate if he desires it?—Yes, and in certain cases I think it ought to be an obligation on the courts to provide defence.

You think that an advocate in all cases would be of assistance?—I think it would undoubtedly be of assistance in bringing to light points of law.

You mentioned technicalities. You think that a man might be able to get off on a technicality?—Supposing a District Officer issues an order outside the scope of the native ordinance, the lawyer would bring this to light.

There is the safeguard of the appeal to the Provincial Commissioner?—But in the case I spoke of this was of no avail. First of all he is an administrative officer and has to keep his district in order. It is only secondly that he is a magistrate. It is very difficult to balance these two functions.

Then you think these two functions should be absolutely divorced?—Yes. That point was made by the Aboriginal Protection Society in its evidence before the Select Committee. I am not alone in thinking that there is a case to be made out for the separation of the functions.

Mr. Mitchell: It has been said to the Commission by native witnesses that the police are disposed to arrest an African in cases where they have discretion whether to arrest him or not merely because he is an African when his name and address might have been taken instead?—Yes, that is so. It is the accumulation of what we call little things that rile the African.

As far as you know, if natives wish to appeal or have a grievance, have they difficulty in setting the machinery of the law in motion?—Yes.

Lawyers practising in this country usually require their fees. Would you say that the poor man experiences any practical difficulty if he cannot produce fees?—Yes, there is difficulty. But there is another difficulty more fundamental. Certain native authorities regard it as an act of insubordination for a native under their authority to attempt to employ a lawyer, and a man may be made the butt of the ill-will of the native authority. I should like to emphasize that.

Arising out of what you said about magistrates and the separation of the functions, obviously it would be expensive and difficult to replace all administrative officers exercising judicial functions by professional magistrates; but if it were possible by an adjustment of duties to arrange in the larger districts that one of the D.O.s should do court work and nothing else, would that meet your case?—Provided you took him out of the Administration and placed him in the Judicial Department.

Mr. M. Wilson: You do not know of any headmen who are actually hereditary chiefs?—I cannot recall one.

Do you refer to the whole country?—No, to the Nyanza Province.

On what sort of lines are these people elected, education?—Sometimes the reverse. There is an enormous amount of intrigue when once there is a vacancy to be filled. At once the location divides into camps. Occasionally there will be a candidate commanding the support of the whole of the people, but even he does not go through the old tribal ceremonies.

Chairman: The question of headmen, of course, has been dealt with arising out of the objection by headmen alleged to exist to the appearance of lawyers at appeals from native tribunals?—These headmen who are appointed can exercise a tremendous amount of influence in the courts on a judgment. They have only got to say "My feeling is so-and-so" and it is very difficult for the elders subordinate to him to give a contrary verdict, even though the evidence is to the contrary. In my opinion some of these appeals are not worth the time spent on them.

Mr. M. Wilson: Do D.C.s make headmen men who they get on fairly well with?—Yes, I should say that is so. But a D.C. is not very long in one location. He may in the course of his tour of service in that district only have the appointment of one or two men.

Chairman: There is one thing more I wish to ask. Have you any comments or criticisms to make on the practice or procedure before the Supreme Court?—No, Sir.

There is one thing I omitted from my memorandum. As regards summonses: I consider the summonses that are used at present are of little help to the native to understand the nature of the charge which is going to be brought against him. References to sections and ordinances leave him with no understanding of what he is up against. I suggest that the summons should contain the gist of the offence and should be in English and Swahili.

(*Witness then withdrew.*)

Mr. F. N. HOYT, Society of Friends.

Witness stated that he wished to support the Archdeacon in what he had said about interpreters being incapable and corrupt.

Mr. J. H. SYMONS: Lessos Farmers' Association.

Chairman: You are Chairman of the Lessos Farmers' Association?—Yes, Sir.

And is this memorandum (No. 8) on behalf of your Association?—Yes, Sir.

You complain of the inadequate sentences passed and the increase of crime which is taking place. Speaking of inadequate sentences, are you referring to the subordinate courts, or the High Court or to all of them?—To the subordinate courts.

Then you include the courts of the D.C.'s and R.M.'s?—That is right, Sir.

Do you find that there is any difference in principle between the amount of sentences as a rule passed by the courts of the D.C.'s and those of the R.M.'s?—As a matter of fact I personally have only known cases that have been taken by the Resident Magistrate.

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[N.B.—*For passages here omitted see paragraph* 171 *of Report.*]

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Don't you think that an indiscriminately heavy sentence of imprisonment might have the same effect at any rate on people who are not confirmed criminals. Don't you think that you have got to consider not only the question of deterring others but the effect it is likely to have upon the convicted man?—Yes, Sir.

Don't you think that a man who is a first offender not a hardened criminal may possibly be made worse by a heavy sentence in the early stages of his career?—Personally I disagree.

Don't you think that to some extent the prevention of crime is a question of education?—Possibly.

When it was a capital offence in England to steal anything of the value of a shilling crime was very much more prevalent than it is to-day?—The rate of crime here is steadily increasing, not decreasing.

Do you say it is steadily increasing because sentences are too light?—If sentences were heavier it would decrease.

Have you studied the lists of any records of cases and sentences or are you speaking of matters which have come to your attention?—To the latter. But I only heard that you were coming here last Saturday night and I have had no time to get together the details I should have liked. I am only concerned with what concerns us as farmers.

I am concerned with whether crime has increased in this country notwithstanding the fact that sentences are very heavy?—Personally I should like to see the fine cut out and imprisonment increased.

You have no particular cases that you can bring to our attention?—We had a boy, a squatter, on the farm and he was caught branding cattle, with a homemade brand, with the letters "AM" (immune against rinderpest) which only the Veterinary Officer is allowed to use. This boy was not only branding his own cattle but other people's and charging them for doing it. He was charged and found guilty and given three months imprisonment with a fine of Shs. 150s. When he came out of prison he came back to the farm, from which he had been dismissed, and while he was waiting to go we received a letter from the Administration saying that this boy was owed Shs. 150s. We took this up with the P.C. and he said that this money had to be handed back to the boy. Before he received it back he was bragging about the farm—how lightly he had got off and how he would try again. When he got his money back there was no holding him.

He got off on a technicality?—Apparently it was a question, according to the law, of a fine *or* imprisonment, not both. Instead of giving him a longer time of imprisonment they merely remitted the fine. It was a bad thing for him and it reacted on the other boys.

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[N.B.—*For passages here omitted see paragraph* 150 *of Report.*]

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That is revision. Would you say the same thing on questions of appeal? That a court of appeal instead of quashing a conviction should order a retrial?—I have never considered the question of appeals.

It is the same principle?—I do not know what the procedure of appeal is and have had no experience of it.

I can give you one more instance in regard to stock theft; I was not present myself, but my manager was. Very recently two Lumbwa came 150 miles from their reserve to a farm in this district. They stole cattle and took them back to their reserve. By smart work on the part of the police they were caught. The principal delinquent admitted that the crime was premeditated to the magistrate. He admitted three previous convictions, The other boy had had no previous convictions and admitted his guilt too. Sentences were passed of five and four years. I understand that on revision in Nairobi that was reduced to two years each. I think you will agree that this was a serious case of stock theft. I think that if the magistrate is a sufficiently capable man to hold such a position he ought to be given power to inflict sentences that he himself thinks right and that they should not be subject continually to revision from Nairobi without a complete retrial. If the man is incapable, remove him.

Some people say that the man who deals with the case should not be the man who has the full discretion as to punishment, and that these cases are better decided by an impartial body acting judicially without all the troubles of the neighbourhood in their minds. Punishments ought not to take the form of revenge?—No.

Do you think that the system of imprisonment is good as a deterrent so far as natives are concerned, or only if the sentence is sufficiently long?—I think only long sentences are of any use.

If a man is given five years instead of three that would make all the difference between his wishing to commit the offence again or not?—Yes.

Mr. Justice Law: You do not agree with fines in the question of stock theft?—No.

When they come out of prison their one object is to replace what has been taken from them?—Yes.

So it would make no difference from your point of view whether it were a fine or a confiscation of stock?—No.

Mr. Mitchell: You say that revision has a bad effect?—Yes.

And if it could be arranged that such cases could be taken by a court exempt from revision, that would meet your case?—Yes.

So far as you are concerned, your difficulty would be removed if there was a High Court judge or other person exercising equally full powers in the district?—Yes.

Mr. M. Wilson: You think that prison is a deterrent?—Yes.

We have some evidence to the effect that prison is a poor deterrent, as a native, compared with a European has so little to lose. If he is in for a number of years he may come out a hardened criminal?—I do not agree.

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[N.B.—*For passages here omitted see paragraph* 174 *of Report.*]

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(*Witness then withdrew.*)

Mr. W. E. Barker, *Farmer.*

Witness stated that he was a farmer representing the Southern Uasin Gishu Farmers' Association, and was also a member of the Eldoret District Council.

He stated that he supported Mr. Symons in what he had said. He had noticed a tremendous increase in crime in the country during January and February of this year and he considered that this increase was attributable to the inadequacy of the sentences imposed, such inadequacy resulting sometimes from revision. He believed in corporal punishment and gaol for stock theft. He stressed particularly the danger of upsetting sentences on revision owing to the effect on the native mind.

(*Witness then withdrew.*)

Mr. Symons asked if he might make a further point.

Witness: I would like to suggest that if you cannot see your way to recommending that magistrates decisions should always stand, that it should be a definite ruling that before the sentence is pronounced it should be subject to revision before the High Court, with the proviso that the High Court should return that sentence to the magistrate within as short a time as possible.

Chairman: The magistrate in that case would have to remand the man for sentence. If he is remanded he must know that he is convicted, so this would not get over the difficulty of the conviction being quashed?—No, but it would get over the difficulty of the sentence being revised.

Would it be practicable to bring a man up again just to hear his sentence?—In this district it would be all right. I do not think he would ever be detained more than a day's walk away.

(*Witness then withdrew.*)

Friday, 14th April, 1933

The Commission re-assembled at the court of the Resident Magistrate, Eldoret, at 11 a.m.

Mr. Oswald Bentley, Kitale.

Chairman: Mr. Bentley, your memorandum (No. 9) sets out the headings on which you wish to give evidence. Have you a larger memorandum prepared, or would you like to enlarge upon the headings?—I would like to answer any questions on the headings.

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[N.B.—*For passages here omitted see paragraph 240 of Report.*]

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Will you give us your observations on all the headings? No. 2—Magistrate's Enquiry.—With regard to the Magistrate's enquiry, the point which strikes me is that although the accused native is being prosecuted before the magistrate, he is not being defended.

Yes.—And as I have already said, the police seem to be in a very powerful position and their power, to my mind, seems to be added to before the magistrate in that in eliciting statements before the magistrate I believe the method used is questions and answers. If you don't mind my speaking frankly, I think in practice it may turn out that a native going to give evidence before a magistrate knows the sort of answers that are expected and it is therefore easy for the police to conduct the prosecution on their own lines with that system in vogue of the native witness answering questions as distinct from the native witness making an unbroken statement.

Yes.—May I be allowed to supplement what I mean by referring for one moment to the Wagishu case? It is perfectly true that in that case before the magistrate the police should have brought certain evidence for the defence, and I suggest they would have done so if they had not been intent on a conviction. What I am getting at is that it seems to me that the magistrate is necessarily to a great extent in the hands of the police in that he assumes the police have produced all the evidence available whereas, perhaps, they have not done so. And may I stress this further point. The native in Africa never seems to me to understand how he should help himself in calling evidence on his own behalf.

Yes.—As I have said, as he obviously feels himself in a hostile atmosphere it is more difficult for him than ever to understand that he is being told how he could help himself. I do suggest that he feels that the police officer for that particular occasion is his enemy and therefore he finds it more difficult to believe that he is being asked to produce evidence to help himself.

Does that conclude No. 2?—Yes, Sir.

No. 3, with regard to trial by the High Court. Would you like to add anything to that or is it as full as you would like to put it?—Yes, Sir. I think so.

Let us turn back to the first heading. Do you agree with me about the functions of the police. They exist for the purpose of detecting crime and of bringing offenders to justice?—Yes, Sir.

So long as they use legitimate methods, would you agree with me that they are entitled to pursue their investigations vigorously?—Yes, I agree.

And supposing in the course of these investigations, after taking a series of statements and hearing all sorts of facts, rejecting some and accepting others, they come to the conclusion that they have found the guilty man, would you agree with me that they are then entitled and bound to obtain all the evidence they can in order to convict him?—Yes, Sir, I agree with that.

At the same time you say that they ought to produce any other facts or statements in their possession which, perhaps, do not assist their case but which may be regarded as relevant?—And may assist the accused.

I agree with you.—Yes, Sir. I agree with that.

Having obtained all the evidence they can and having put that before the magistrate together with any other facts which are in their possession, is it not the duty of the magistrate then to see whether they have discharged their obligation to establish their case.—Yes.

And when you say that the police should pay as much attention to defending as to prosecuting accused natives, are you not putting them in quite

an impossible position?—My idea is that if he has a magisterial instinct in him, the police officer, he will naturally think of the native's defence.

But we are assuming this, that he has investigated the matter thoroughly and has come to the conclusion that he has found the guilty man. You do not suggest that having done that and having obtained evidence, that he is to break down his own evidence? You do not mean more than if there are any other relevant facts in his possession he ought to place them before the court?—Yes. And if there are any further witnesses he should mention those witnesses to the court. That I do consider his duty.

You say the one idea of the police should not merely be to obtain a conviction, irrespective of whether they believe in the guilt of the accused or not?—Yes.

Again it is the same point—you think they should place all the facts in their knowledge before the court which may be relevant?—I am thinking all the time from the native's point of view. You are looking at it from the point of view of the police officer and that it is difficult for him to do what I have suggested.

I am trying to look at it from the point of view of securing justice in the event either of conviction or acquittal. You do not wish to suggest that the police suppress material facts in order to get a conviction?—No, I do not.

" Police officers conducting an enquiry should be thoroughly competent in Swahili and should have some understanding of a native's mentality "—but surely that is always the case?—No, not always. You may get a new police officer attached to a district acting for his chief who may be sick and he is left to do this work. It does happen surely?

He would not get very far, would he, without a knowledge of Swahili?—I don't think he would get any distance at all Sir.

Have you any particular case or instance where something has gone wrong because the police did not know Swahili?—Actually I have, Sir, though when I put that remark down I was not thinking of concrete cases. I remember a police officer coming to my house about a case of mine. The boy he came to see was frightened out of his life. The police officer said something to the boy and the boy, not understanding, gave some sort of an answer. Later when the boy came up for trial the police officer accused him of lying.

You say that the police investigation goes right through the magisterial enquiry. Do you mean by that that the magistrate is overawed by the views of the police?—I don't think he is overawed. I think that he is, quite naturally, influenced.

Influenced by what? He ought to be influenced by the evidence, but what else would he be influenced by?—I think he is very much in the hands of the police officer Sir.

But what the police officer does is to produce certain witnesses who give evidence. Now the magistrate listens to that. What traces of the police investigation are there except the evidence which is a result of it?—I do suggest, Sir, that the police officer is convinced that he has got a guilty native in the magistrate's court and it goes a long way towards making the magistrate feel the same thing.

Do you mean this, that if the magistrate sees or thinks that the police officer investigating the case has a personal view on that case he, the magistrate, would be influenced by the personal view of the prosecuting policeman?—I don't mean that.

I am trying to see what it is that you think influences the magistrate apart from the evidence to which he listens?—If I myself was in the position of a magistrate and the police officer comes in with his case and I know the police officer, I have every trust in him and he obviously, to me, is convinced that he has a prima facie case in the court, it is bound to influence me. I do not mean personally.

But you think the magistrate would be influenced because the policeman prosecuting believes in his case?—Yes.

You were a magistrate in the Sudan. Did anything of that sort influence you?—We are only human beings whether we are magistrates or not, and I am hardly ashamed to say that I think it must influence one.

Perhaps we may leave it at this, that it would be very improper if it did.

Then you state that a police officer, finding himself beaten, will naturally refer the matter to his askari, the idea being that the askari would not be too particular in his methods of obtaining evidence. I do not quite understand the word " naturally ". It would be unnatural, would it not, for a police officer to refer a matter to an askari with the object of getting evidence by improper methods?—Yes, Sir.

It would be an improper thing to do?—Yes, Sir, if you add those words to the end of the sentence.

Are you saying that this is a regular practice of the police?—I am suggesting that the police officer refers the matter to an askari with the idea of getting what assistance he can from his senior native askari?

There is no suggestion, therefore, that in referring this matter to the askari he is condoning irregular methods?—No, Sir. I meant nothing of that kind at all. But I do feel that a junior police officer might not realise what could happen.

He should be careful about it?—I do not quite understand when you say that police officers in a settled area should make a point of consulting the employer of the accused native. They would naturally consult him if they could get any assistance in the case. Is there anything beyond that?—It might be a help and there would be more chance of the truth being arrived at. As the boy's employer, he must probably be in a position to be of help.

Now as regards Magistrate's enquiry. Are you including under this trials before the subordinate courts or is this confined to the preliminary enquiry for the High Court trial?—The High Court trial Sir.

" This should not merely confirm, as in the Wagishu-Nandi case, the police presentation of the case ". But of course if the magistrate is satisfied with the presentation of the case and believes it to be proved, it should confirm it?—Yes, Sir.

And defence. You feel strongly that natives should be defended?—I do suggest it as an additional safeguard. I am sure it is a most desirable thing.

But you would not regard it as a practical proposition in all the subordinate courts and magistrates' courts?—No, Sir. I feel that the magistrate himself should do that instinctively.

You mean he should note and place due importance upon any points which tell in the accused's favour?—Yes, Sir. When the actual trial comes on the accused native is defended by an advocate—he is in fact called in for the purposes of the trial. But before he is called in, during the magisterial enquiry he has no one of this kind, and it may be that a statement has been taken from him by the police or magistrate, and surely it is rather handicapping his advocate later on at the trial.

First of all, statements to the police are not admissible in the evidence in this country?—Yes, Sir.

And before making a statement to a magistrate he is warned that it will be used in the evidence?—Yes.

You mean he may make a statement then that may tell against him later?—Yes, Sir. That is in my mind—that is to say, if advocates are employed in native cases.

I understand that when a case comes to the High Court there is generally what is called a dock brief?—Yes.

I follow the point which you are making, because, of course, a statement taken in the preliminary enquiry can be given in evidence at the trial.

What you say is that the accused up to that moment has no legal advice and may say something which his advocate will advise him he had better not have said.—I hope I make myself clear. All the time I am giving evidence I am thinking of an entirely different system in Africa—that at present in force in the Sudan, which I shall always feel is the fairest you can arrive at.

You probably got near to this different system in the last observation in your memorandum on magistrates' enquiries—" (*d*) Why should not the magistrate conduct what is now called the police enquiry in conjunction with the police ". As I understand it, that is the Sudan system.—The Sudan system is different in that the police officer was *ipso facto* a magistrate.

Do you think it is of assistance to an accused person that the magistrate who is going to try him should have been present at the police enquiry and should have heard all sorts of things that are not evidence, and be primed not only with the evidence, but with every sort of suggestion and hearsay from the commencement of the enquiry?—I think that would be wrong.

But is not that the suggestion in (*d*)?—But naturally I do not mean that the magistrate should first of all take part in the investigation. I am thinking again of the Sudan system where the police officer is also a third class magistrate. As a police officer he first of all conducted the investigation.

Yes, he investigated the crime and heard every sort of suggestion and theory from beginning to end, as the police do now. They follow up every sort of clue that may lead nowhere. They eliminate all that is irrelevant and at last may obtain evidence that is admissible before a court. Under your system all these things which may not be proved would be in the magistrate's mind. I cannot see that that is going to help the accused native.—You don't think that if you were a native and the man conducting the investigation was a magistrate as well as a police officer you would feel happier?

I would rather be tried by someone who is a judge and not a policeman.—Quite, Sir.

There is one other point I wish to mention. I do feel that it is very important indeed that in the trial before the magistrate the witness should make a statement.

Yes, instead of questions and answers, the witness ought to be allowed to make his own statement.—I think you get a fairer result.

I understand, at any rate when Crown Counsel are employed, that this is the method they adopt.—I understood that the method employed here was question and answer.

We have had evidence from the Crown Counsel that he follows the system of statements.

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[N.B.—*For passages here omitted see paragraph* 159 *of Report.*]

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Are you now referring to the examination of witnesses? Do you mean that the High Court judge has not sufficient knowledge of native mentality and so on to appreciate the evidence which the witnesses are giving?—Certainly.

It is not only when natives are accused that there is native evidence. Your proposition would lead to this that every time a European is being tried and you have native evidence you would adjourn the court to this trinity who understand the evidence.—I am thinking of this from the point of view of the natives. It seems to me that for them there is a different atmosphere in the court. With a European, everything is naturally being conducted in English.

That is a different point.—It helps.

But don't you think that judges who spend many years of their life in trying these cases must gain a very fair appreciation of the native and his mentality?—Yes, Sir, but I don't think they ever can have the knowledge of native mentality that a D.O. can have. I feel quite convinced of that. In amplification of that point, the High Court judge, following the tradition in England, realises that the case is in the hands of the advocate for the prosecution and the advocate for the defence and feels that the case is in safe hands from both points of view. If he is a D.O. and has none of these safeguards, he is dealing directly with the accused and I think the position is fairer.

A judge surely would not fail to take any point that has to be taken on behalf of the accused merely because the defending advocate was incompetent and had not taken it? You don't think that the judge washes his hands of the accused if someone is there to defend him.—No Sir, but the judge is not so vigilant as he otherwise might be.

Do you think, Sir, that the ordinary High Court judge has a good knowledge of Swahili?

All cases in the High Court are conducted in English?—I think so, Sir.

Of course it is not every native who speaks Swahili.—Quite, Sir.

When you suggest that cases should all be conducted without interpretation, what you mean is that this should be so where the accused and all the witnesses speak Swahili.—Yes, Sir. But I do feel that even though the natives concerned in a case have no knowledge of Swahili at all and the judge has a knowledge of Swahili, it is much easier for him to deal with the natives concerned even if he does not speak their own dialect.

You mean it might save a double interpretation?—It might save that, Sir, but probably if the judge knows a certain amount of Swahili he will be able to appreciate the position better.

Have you heard interpretation in the courts from time to time?—Yes, Sir.

Do you think it is well or badly done?—On the whole I think it is well done, but when you have a court in this country—and I am thinking of a particular court in which I figured—there may be no one in the court at all who could tell whether the interpreter was interpreting fairly. I think it is a source of danger—not wittingly on the part of the interpreter. In the case I am thinking of the way in which the question was put made all the difference. It was put wrongly.

Of course in a country where there are about twenty-six languages there must always be some difficulty in interpretation. But you probably agree with me that anything which may be done towards perfecting interpretation and to get a good class of interpreter would be useful.—Yes. Before we leave this, may I give a concrete example of what I mean showing that the interpreter was acting according to his lights perfectly fairly. The advocate for the prosecution turned to the interpreter and said he wished the witness to be asked who was at the tembo party. The interpreter turned to the boy and said in Swahili, " Who drunk tembo with you that night?" The boy said " So-and-so and so-and-so." The interpreter then turned to the advocate and said, " He said so-and-so and so-and-so." In the judge's minutes the answer to that question goes down that so-and-so and so-and-so were at the tembo party. That may give an entirely false impression.

I am sure no one would contest your view as to the importance of interpretation. It necessarily adds to the difficulties. But there are other dangers in trying to conduct a trial in a language which is not yours.—The High Court judge is bound to depend on an interpreter. If he was a senior Administrative Officer he would not have to depend on interpretation.

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[N.B.—*For passages here omitted see paragraph* 240 *of Report.*]

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Mr. Chairman, speaking frankly all I am insinuating is that the police or any other officer of Government are human beings and it may be for one reason or another that a statement which should have been taken has not been taken, and chapter and verse for that, Mr. MacGregor, is the incident of where that Sudanese headman of mine, a most intelligent boy, had a statement which he could have made on behalf of those four Wagishu and for some reason it was not in the police files.

Mr. MacGregor: It was never taken?—It was taken but not recorded. He was questioned by the police officer, went about with him and helped him a lot. That is a case where the system was not carried out. Every statement should be reduced into writing and appear in the enquiry file.

I gather that your objection to the taking of evidence by question and answer is that the witnesses know the sort of answer they are expected to give?—Yes, that is my point.

Do you suggest that police officers in court put leading questions?—I suggest that with this method it is very easy unwittingly to put a leading question.

If a witness is so well schooled as that, is it not possible that he also knows the sort of statement he is expected to make and that you have the same evil?—Yes, but the danger will not be nearly so great.

Why?—If a native is put up to make a statement and he is going to lie, he will find it much more difficult. If he is lying in an unbroken statement in nine cases out of ten he will break down.

I see that in dealing with High Court trials you suggest that the employment of lawyers either for the prosecution or defence should be abolished. Am I to take it that this is to apply to all courts?—I think so, yes. I am thinking of the native. The prosecutor is there and there is no one on the other side. My idea was that it would be better not to have an advocate at all.

Your idea is neither or both?—Yes, Sir.

If you have neither, does not that put you back to the magistrate having to read through a mass of paper first and to hear all the rumours, irrelevancies, etc.?—No, Sir. The magistrate who has that file in front of him has not had anything to do with the case at all.

But he has to read through that file in advance, or do you mean he is not to read through the case beforehand?—It is put before him to help him.

Mr. Justice Law: The police file would contain a mass of irrelevant matter?—Yes, Sir.

Do you suggest that the magistrate should apprise himself of the contents of that file of the full extent of the investigation?—No, Sir. There is in this country a police diary. The police make a rough diary as distinct from a precis of the statements they obtain.

Yes; it would record every movement of the police in connection with the case. Apart from being a great waste of time, would it not fill the magistrate's mind with all sorts of facts that had no direct bearing on the case?—All the irrelevant matter would be separated from the facts relevant to the case, leaving merely a precis of evidence of the different witnessss.

What will be put before the magistrate will be what he is intended to know?—I assume that everything is fair.

The police should put before the magistrate, then, any evidence in favour of the accused?—Yes, Sir.

Then as regards the "hostile atmosphere." You are referring to the police investigation?—Yes. Mr. Chairman. By this expression "hostile atmosphere," I do not mean to imply that I have ever had anything against the police. I mean really "hostile environment."

But don't you think that these natives are used to shauris all their lives in a petty way—being accused and brought before their own people?—Yes, but there is all the difference in the world, sitting under a tree with your own people to being dealt with by a police officer.

You were speaking of the European police?—Yes. They have their difficulties. Assuming that a European police officer speaks Swahili perfectly, it is no use to him in a great number of cases because he may be dealing with people who do not speak Swahili. So inevitably he must refer to askaris and he is in their hands?—Yes.

So there is no alternative in a matter like that?—I was not thinking of a police officer beaten by a particular case but by an obstinate witness. He might feel that the witness in question was full of information. The askari is a man you can rely on—he has been in the police some years. You say, "This witness refuses to speak. Will you see what you can get out of him." All I mean is that there is a danger. The police ought to try to find out what happens.

With regard to witnesses giving their story in their own words, don't you think that that tends to waste not only a lot of time but also that you get an incoherent story very often. Don't they mix up their ideas?—In my experience, no. I think they want helping occasionally, but in my experience witnesses usually give their statements very fairly. But I do feel strongly that there is all the difference in the world between the method of giving evidence in the form of a statement and as answers to questions. As I said before, we are dealing with human nature. The police are intent on a conviction—if that word is not too strong—and it is human nature to get the answers that you want; it is much more easy to get them if the evidence is taken in the form of question and answer.

Is it not enough to have a magistrate there to safeguard against leading questions?—No. In the Wagishu trial there was a long statement from an imbecile woman obtained by question and answer. If she had been left to make her own statement they would have got nothing out of her. The result of the procedure they adopted was that they got on the wrong tack.

In regard to the suggestion of a police officer influencing a magistrate, I assume you mean unconscious influence?—Yes.

Do you consider a professional magistrate would be less liable to be influenced?—I cannot say.

Mr. Mitchell: Is it your opinion that the native's possible inability to call evidence on his own behalf, for instance a lack of appreciation of the fact that he is being charged with a crime other than the one he committed prejudices his case?—Yes. He has no idea of asking sensible questions with the idea of helping himself.

I expect you consider that the danger is greater with questions and answers if they are through interpreters?—There is danger there, though interpreters do their work well.

Mr. M. Wilson: As regards 2 (*d*), the magistrate conducting the police enquiry in conjunction with the police, would the investigating magistrate also try the case?—That would depend on the gravity of the case. I have been advocating this idea having in view another magistrate trying the case.

As regards 3 (*a*), more safeguards are necessary than is at present the case for accused natives. "These may be summarised as follows: A senior P.C. who is *ipso facto* a first class magistrate should preside over these courts. That he should have two administrative officers sitting with him on the Bench . . ." Would you regard the court you propose as an arbitration court?—I did not regard it as such. I merely suggested three administrative officers as providing three people with special and diverse experience. In that particular case of mine the judge quoted in his summing-up the so-called motive for this crime where these four Wagishu are said to have murdered a Nandi. The motive given by the first witness for the prosecution in answer to a question by the police was that they had murdered him because about two years before some Nandi had stolen some of my cattle. The judge ought to have written off that as nonsense. What I suggest

is that an Administrative Officer hearing this so-called motive in court would have been at pains to make a few enquiries instead of merely writing it down and accepting it. Directly a motive goes down in the judge's minutes it is accepted as a motive for the crime. To my mind these matters have to be taken from the standpoint of common sense.

Chairman: There are two points of view. Are you on the whole less likely to get injustice if you follow traditional customs and rules made over a number of years, or should you deal with these trials in a less formal manner?—It occurs to me as strange that in this country where there is a settler element and we apply our rules to the native, that in one protectorate you have a system which is considered to be a very good system whereas across the boundary into Kenya there is this entirely different system.

But you cannot compare the conditions in the Sudan with those in Kenya?—I see no difference.

The Sudan even to-day, and I suppose much more so in your day, is very primitive and lightly administered?—I have never met a more primitive tribe than the Wagishu.

The Wagishu are only one small tribe in this country. You are not suggesting that that is the general standard. The detribalised native is a man of some shrewdness?—As regards natives on a farm, I think you can compare them.

(*Witness then withdrew.*)

Saturday, 15th April, 1933

The Commission re-assembled at the Court of the Resident Magistrate, Eldoret, at 10 a.m.

Mr. R. C. A. Cavendish, Commissioner of Police, Nairobi.

Chairman: You are the Commissioner of Police?—Yes, Sir.

I have not much to ask you because I am glad to say there has been very little criticism of the police; but there are one or two matters we should like to have your views upon.

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[*N.B.—For passages here omitted see paragraphs* 231 *and* 241 *of Report.*]

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And that such records should be put at the disposal of the counsel for the defence. Would that be a practicable proposition? I do not know what this record contains, the evidence?—It contains all the dates of the different incidents in connection with the investigation to the effect that a certain officer went out at a certain time, examined the scene of the crime, saw a certain witness, etc., and also notes on the course of the preliminary enquiry or the trial.

Do you see any difficulty in placing these records at the disposal of the defence?—I would not like that, Sir, it does not seem to be consistent with police practice. As far as I know, it is not done anywhere.

I understand that if the defence apply to the Attorney General's Office, he supplies them with anything which is relevant unless, for obvious reasons it is unproduceable on the ground, for instance, of privilege?—Ordinarily, I would have no objection to giving any particular evidence to the defence, but I do not think the whole file should be available.

I think that deals with the difficulty.

I see in the Police Procedure, Sequence (9), Sec. 139 C.P.C.: "During investigations all statements of witnesses taken down in writing. Witnesses are requested to sign such statements though this is not compellable. Should any witness who can give any material information refuse to give a statement, a witness summons is obtained from a magistrate requiring the attendance of such witness before a court when his statement is recorded on oath."

All I want to point out there is that apparently statements of all witnesses are taken down in writing and witnesses are requested to sign such statements, so that you get a record of the whole of the evidence, relevant or irrelevant?—Well, Sir, the statement is not necessarily taken. The police make an enquiry and the statement is given verbally originally. If it is found that this evidence is of no use to the police case, the statement would not be recorded in writing.

That is not what the instruction says—but I will leave that for the moment.

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[N.B.—*For passages here omitted see paragraph* 223 *of Report.*]

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Another complaint was in regard to the arrest of natives for the non-payment of hut and poll tax. I am not clear if that would come under the Colony police at all or would be dealt with by the tribal police?—I am afraid I cannot help you as I have no practical experience—I have never been an executive police officer in this Colony. Mr. Peacock can give you evidence on this.

In point of fact I do not think that we have any dealings with these things unless they are definitely referred to us.

I understand there is no power of arrest in the police for the non-payment of hut and poll tax without a warrant. The allegation has been made that nevertheless it has been done?—I can give you no information about it.

As regards language qualifications, the allegation has been made that the police do not know enough Swahili to conduct cases in that language. Are there examinations?—Yes, Sir. They are all required to pass examinations in Swahili before they are promoted from 2nd grade assistant inspector to 1st grade assistant inspector.

Thank you.

Just one other thing, do you know anything about what was called the Kericho case where it was alleged that the policeman threw pepper into the eyes of one of the witnesses?—No, Sir. I read the evidence of the witness who made that statement and I certainly know nothing about it.

You have no personal knowledge of it?—No. I rather gather that it was a tribal police case.

Mr. Justice Law: You say that a sub-inspector may arrest a man without a kipandi. He can ask him, and if he has not got it, he may be arrested?—If he has some satisfactory explanation he would be released. Why at one time the police were so keen on the kipandi business was that frequently the person without one was an undesirable character and might be associated with recently committed crimes.

As regards the examination of various people before an enquiry, anybody who gave you any line in the investigation would be recorded in writing and put into the case file?—Yes.

Mr. Mitchell: On the language question for the investigation of a serious crime is there any regular arrangements as regards interpreters for the police officers?—No, I imagine that it is done by a police constable. But perhaps you would like to put that question to Mr. Peacock. We certainly have no regular interpreters.

Referring to what Mr. Law asked you, when a sub-inspector questions a man for his kipandi and the man has not got one and there are going to be proceedings against him for not having it, if he is a well known person he is not necessarily arrested and put in the police cells for the night. He could presumably be allowed to go home and receive a summons the next morning?—I hope so, Sir, but I am not in a position to answer this.

It was said in Nairobi that in addition to cases when they had not got their kipandis, natives were also arrested and had to spend the night in cells if they had committed any minor offences?—No, Sir, that is quite wrong. The police are as anxious as anyone else to keep the lockups free of unnecessary prisoners. It makes extra work for them, supervising, etc. The reason a native is more likely to be kept in a cell than a European is because a native is much more difficult to recover.

Do police officers have plenty of opportunity to get about the country, know the people, the way they live, etc.?—I think they get ample opportunity of doing that, Sir. Any investigation is always conducted by a European police officer and if it is a serious crime it is conducted by the senior officer in the unit. So that any crime in a native community, provided it is not in a native reserve unless the police have been invited to go into the native reserve, takes them among the people and they get to know their customs, etc.

In Kenya there are two police forces, the regular police and the tribal police?—Yes, the regular police under the Commissioner of Police, and the tribal police under the Chief Native Commissioner.

When in the middle of a native reserve a murder is committed, who takes charge of the investigation?—Normally the Administrative Officer of the area. We should not interfere unless he invited our assistance.

You cannot tell us whether they keep full and detailed records?—No, I know they don't.

So that as far as natives are concerned, the greater part of this police material we have been hearing about would not be available anyhow?—No, of course not, Sir. It is possible that if the whole proceedings are carried out in the reserve that the colony police would not be concerned at all.

If a man, say, is murdered in the middle of the Nandi reserve, at what stage would your officers take charge of the proceedings?—Not at all unless they were asked to.

The murder is committed, the case goes to the Attorney-General and then to the Supreme Court?—Yes. I imagine that the only record would be a native deposition.

The bulk of the natives of the country live in native reserves?—Yes, Sir.

So that the police officers with which they come into contact mainly are tribal police, not the regular police?—Yes, Sir, very largely, though now and again we do go into the native reserves.

Mr. M. Wilson: Sequence 12, Police Procedure, Orders 19-31:

"On no account whatsoever will any complainants or witnesses in a police case, investigation or enquiry, be allowed to sleep, live, or be given shelter in police quarters or lines. Should complainants or witnesses be unable for any reason to return immediately to their homes or residences, they should be taken to the District Officer or Magistrate to be supplied by him with food and shelter as may be necessary and available. Police are forbidden to provide shelter or lodging or to remain in any way in charge of complainants or witnesses."

That is carried out?—The order still stands, though there must be mistakes of course.

As far as possible witnesses have to be questioned on the scene of the crime instead of being taken to the police station?—Certainly, Sir. Those are the general directions.

Chairman: In this country statements made to the police by the accused are not admissible in evidence?—No, Sir.

Is that a satisfactory state of affairs?—I do not think so, Sir. It has often puzzled me as to why this should be so.

First of all, do you think it would be safe to allow confessions to be made to native police?—I do, Sir, when the usual caution has been administered.

Of course the provision is due to the fear that there might be extortion by the police under threats and so on. Don't you think, so far as native police are concerned, that it is a salutory rule?—I don't think there is any greater risk in this country than there is in any other country.

As regards European police, would you feel satisfied that if confessions to them were admissible that the privilege would not be abused?—Generally speaking, yes, Sir.

Would you be prepared to extend the principle to the tribal police?—No, Sir, not from what I know of them.

Of course one knows that statements by the accused in other countries very often form a large part of the case for the prosecution. Have you felt embarrassed by the absence of any power to use such statements in particular cases?—I cannot say, Sir. I do not have very close dealings with things of that kind. Perhaps Mr. Peacock could give you information on the subject.

(*Witness then withdrew.*)

Mr. S. F. DECK, Provincial Commissioner.

Chairman: You are the Provincial Commissioner, Nzoia?—Yes.

We have from you a memorandum (No. 10) in which you make seven suggestions. Would you like to enlarge upon these before we ask you questions, or shall we take the points as we go along?—I would prefer to discuss the suggestions in order.

No. 1. "That a specially selected Administrative Officer should be appointed to act as Counsel for the defence in all cases in which a native is to be tried by the Supreme Court. This officer should be attached to the staff of the Chief Native Commissioner."

You may have seen in the press reports of the evidence of this commission some suggestions for the defence of natives before the Supreme Court. Don't you think that if you are going to have an officer who will adequately present the case for the defence he ought to be a lawyer or at any rate someone with a real and substantial knowledge of law and the practice of the law?—It would be advisable.

I was wondering whether, if you could have somebody like that possibly with some administrative experience as well and if he was attached to the Chief Native Commissioner, the administrative side of his duties would not be practised in consultation with the C.N.C. and whether he could not get from him the advice and assistance which would give him sufficient guidance on that side of his work. I am a little bit puzzled about this Administrative Officer.

He would not see the points which might be taken and would not be able adequately to present a defence without considerable legal training?—Yes, Sir, I think it would certainly be advisable to get a man for the purpose who has legal training, but at the same time I think that an experienced Administrative Officer who has considerable knowledge of court and legal procedure generally would very rapidly acquire the necessary power to present a good case for the defence.

Perhaps we may agree upon this, that a legal training is necessary and also sufficient knowledge of native mentality and outlook successfully to conduct these defences, get the confidence of the accused, etc.?—One of the main functions of the Administrative Officer who acts as defender of natives would be to obtain the proper witnesses for the natives' defence. Witnesses who really know something about the case are sometimes not called.

And more. He would be in a position to check the evidence which was produced at the preliminary enquiry?—Quite.

It may be that there would be evidence of measurements, plans and so on. However honest a witness may be it is possible to make mistakes and some one in this position would be able to verify the details though it is really a solicitor's work, and it might be that this would be even more useful than the actual appearance in court?—Yes.

No. II. "That in cases triable by the Supreme Court a native should not be called upon to plead guilty or not guilty before evidence for the prosecution has been led"?—In making that suggestion I had in mind that a native is very often flustered when he appears in court. He is asked a question by the judge and the question is interpreted by the court interpreter, and he may plead guilty or not guilty quite contrary to his own interests in the case. If he has heard the evidence for the prosecution he is in a better position to deal with his defence. I am dealing with the position when he has no legal adviser.

All the evidence for the prosecution he has already heard at the preliminary enquiry and if there is any new evidence he has to have notice of it?—Yes. I think it only occurs in the case of an exceedingly raw and unsophisticated native.

I imagine a judge is very reluctant to accept a plea of guilty in these serious cases and certainly not unless he is sure the accused understands what he is talking about?—If the judge takes sufficient trouble. I am sure judges explain as much as possible the nature of the case, but there is the possibility of a raw native not seeing what he means to say.

Generally in the High Court, the judge would be trying for murder and rape, and I think he would be very reluctant to take a plea of guilty?—I do not wish to press the point.

No. III. "That two or three Administrative Officers with special knowledge of the tribal customs of the accused should sit with the assessors to advise the judge in cases of murder and manslaughter. I consider this would be preferable to putting Administrative Officers on the bench as judges."

Is it your experience that tribal law and custom plays any substantial part in trials before the Supreme Court at all? We have now a code and this code supersedes native law and custom. If they are at variance, and I wonder if native law and custom really come into the trial?—Of course the accused is very often influenced by native law and custom in committing an act, but the real reason I put that in was that I think in Supreme Court cases the native case very often suffers from defective interpretation and I think that, not necessarily a Provincial Commissioner, but a senior Administrative Officer with experience of the tribe to which the native belongs and very possibly with a knowledge of his language could point things out to the judge which would otherwise escape his attention. In some cases there is doubtful interpretation.

Yes?—And the exact significance of evidence given by the witnesses must, through defective interpretation, lose a great deal by the time it gets to the judge. I think every possible step should be taken to secure good interpretation.

You don't think the Administrative Officer would like to act as interpreter as well?—Of course it requires a very considerable knowledge of the language. The Administrative Officer may be able to check defective interpretation without being able to interpret himself. The danger would be in that case that the A.O. might quite possibly misinterpret on certain points. Also it would probably be very slow.

It has been suggested to us that it might be of advantage if there was a corps of interpreters who were permanently employed and engaged upon no other work, and that by this means a higher standard might be reached. Do you think that is a good suggestion?—Yes, I think is is a very sound suggestion.

No. IV. "That European Police should be allowed to give evidence, as they do in England, of statements made to them by the accused after due warning."

You want to confine that to the European police officer?—Yes.

Would you think it a safe power to give to native police?—No, I should not be inclined to give that power to native policemen.

Have you found in many cases that there has been some difficulty or embarrassment by reason of the rule that these admissions are not admitted?—Yes, I can think of certain cases. I remember one very definitely where the only direct evidence against a native on a charge of seriously wounding another native was the admission that he had made to the police officer who arrested him. I believe it was perfectly voluntary but it could not be accepted. I think this sort of thing occurs fairly often.

From what you have seen of the police and their practice, you think it would be a safe power to give to Europeans?—I should be perfectly prepared to see it given to European police.

No. V. "That cases should not be revised by the Supreme Court except on appeal".

Is that put forward in the interests of the native?—I am afraid I did not develop that suggested alteration quite fully enough. I had in mind a Provincial Court limiting all revision in native criminal cases to the provincial court, and that from that court appeals should lie. I do not agree altogether that appeals should lie to the Supreme Court.

You are now assuming a different system from the present one?—Yes.

At present a D.O. exercises judicial powers by reason of his officer and by selection?—Yes.

And you probably agree that his administrative duties are difficult and exacting and that they are his first love?—Yes.

Do you find that as a whole D.O.'s are not very fond of the judicial side of their work?—I think they are quite prepared, willing and anxious to see that justice is done and to perform all the necessary judicial work with that end in view. The difficulty lies in the procedure under which they have to work, especially with regard to revision.

Then it comes to this that the administration of justice in accordance with the rules and practice of the law, etc., is a technical job and it may be that they do not feel the same confidence in doing work which is not their real work?—I think the average A.O. considers the judicial side of his work

as probably the most important. When the administration in countries of this type was begun it was his most important function to settle disputes between natives.

Now they are so sophisticated that these things have to be done in accordance with law and order and there cannot be any doubt that he is in a difficult position if he has to do this work up to the standard and technique of a judge?—Yes.

Do you think, generally speaking, D.Os. would be glad to be relieved of that work, or the more important cases, if satisfactory arrangements could be made?—Speaking from my own point of view and of the officers under me at the moment, I think they are very keen to retain it. If you remove this, I think they would lose a very great deal of prestige.

You do not think the native understands the distinctions between the executive and the judiciary?—No, I do not think so, though there is a class of educated native which is beginning to realise it.

There must be a certain loss of prestige when a case is revised?—I do not quite agree as regards prestige. I think damage is done as regards the maintenance of law and order when sentences are quashed. But as far as prestige goes, practically every native realises there is an appeal and that if his conviction does not appear to be sound to the revising court he will be released. I do not think that thereby the A.O. loses much prestige.

Supposing the D.O. lost jurisdiction in some of the more important offences, do not you think his prestige would maintain his authority intact?—I think the tendency would be for the general status of the A.O. to diminish and suffer in the eyes of the native if the more important jurisdiction were removed from him.

Does it suffer when the Supreme Court goes round on circuit?—The Supreme Court only tries natives on charges of homocide and rape and that has been the recognised practice for some considerable time. I think, generally speaking, the greater the judicial powers of the A.O., the greater his prestige.

No. VI. "That cases of rape where both parties are natives should be heard by magistrates of the 1st or 2nd class." I would like to modify that suggestion that cases of rape should be triable by the Provincial court—if there is a provincial court.

You are rather inclined to favour the Provincial court?—I am, yes.

But how is that going to fit in with D.Os. losing their prestige if they lose their criminal jurisdiction?—But these cases are already triable by the Supreme Court.

No. VII. "That where it is suspected that the death of any person has been caused by foul play, the police record of the investigation should contain *all* relevant evidence as to the cause of death . . . ."

I do not know whether you were here this morning when I put that to Mr. Cavendish?—I did not hear it.

The procedure which is laid down for the police contains this.

He told us that all relevant statements which bore upon the case were taken down. So that deals with this point.

No. VII continues, "and that such record should be put at the disposal of counsel for the defence".

I understand that the defence can, if they apply to the Attorney-General, get any relevant information they require?—Then that meets the case.

Mr. Macgregor: As regards Nos. IV and V, you say that European police officers should be treated differently from others in that confessions made to them should be admissible. Have you considered whether there is not a risk if that change were made that the native askari would terrorise a witness to such an extent that he would then go before a European police officer predisposed to make a confession which otherwise he would not have made?—There is a danger of that of course.

Do not you think it is a real danger?—It is a danger but I do not think it outweighs the advantages to be gained by making such statements admissible after the usual caution has been administered.

Let us take the position as it is in England to-day. Any constable to whom a confession is made can include that confession as evidence and he is liable to be cross-examined as to the circumstances in which that confession was made. So that the accused has that safeguard. Is it not possible that we might have, with this change in the law, the position where the European police officer could say, "The accused came before me, I gave him the usual warning and he made this confession, it was voluntary, etc."? But he would not be in a position to say whether the accused had been previously terrorised by the askari. Would not the accused be in a position to lose to that extent?—Yes he would in those circumstances. It is impossible to obtain perfection in these matters, it is simply a matter of weighing the pros and cons. I am definitely of opinion that the advantages to be gained are greater than the possible disadvantages of terrorism. An experienced policeman ought to be able to spot that sort of thing.

At present if a confession is made to a police officer, he can get that confession made admissible by taking the accused to a magistrate and leaving him with the magistrate. If you are not going to extend the power to prove confessions to all members of the police force, is not the power in Section 26 of the Evidence Act sufficient?—At present a man is brought before a magistrate to make a confession and he cannot be made to say anything.

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[N.B.—*For passages here omitted see paragraph* 147 *of Report.*]

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As regards No. VI, that would entail abolishing the death sentence for rape?—I wish to modify that and substitute the suggested Provincial Court for 1st class magistrates.

They would have power to pass the capital sentence?—Yes.

Mr. Justice Law: With regard to No. II, I quite appreciate what you have now said, that you do not desire to press it, but has any case come to your knowledge where the native has pleaded guilty where he has not understood the charge against him?—No, I cannot recollect any specific case.

Then you made the suggestion as a caution?—Yes.

I would go further than the Attorney-General with regard to the fourth suggestion, with regard to these confessions to European police, that they may be prompted by native police exercising terrorism?—Yes.

There is the further danger that there may be not only terrorism but some inducement or promise?—Yes.

And you would agree that in practically 100 per cent. of these confessions that are brought to the European police officer they would start through the askari?—To get over that difficulty I would suggest that the confession should only be admissible when it is made in the first instance to the police officer when there has been no possibility of any communication between the native askari and the person making the confession.

Surely it is the askari who has the first contact with the prisoner?—Not always. Very often the European police officer is in a position to get these confessions first hand. I should be inclined to restrict it to that in order to avoid this risk.

Otherwise you would regard it as a live danger?—Yes.

With regard to your 5th suggestion, have any cases come to your notice which have been revised by the Supreme Court for reasons of their not appreciating, as you put it, the case as it was

appreciated by the convicting magistrate?—Yes, I have made no list, but my recollection is that revision cases are frequently quashed. For example, if questions are put to the accused on oath by the trying magistrate. It is very often in the interests of the accused and for that reason the magistrate does occasionally put questions to explain to the accused points in the evidence occurring against him, and I do not think cases should be quashed on grounds like that.

Sentences have been quashed because the magistrate has put questions to the accused to explain the evidence against him?—Yes. It seems to me that there ought to be some method by which the trying magistrate can justify himself in cases like that. It may be that with the best of intentions the magistrate's questions have taken the form of cross-examination of the accused and that this is a form of questioning to which the revising judge might take objection. Magistrates are now more careful than they were, especially in the way in which they make their records.

What is your impression of assessors? You have seen them in the courts; are they useful?—They serve a useful purpose as far as their opinion on matters of native law and custom is concerned. As regards their opinion on the guilt or innocence of the accused, I do not think it is worth very much. They are influenced by considerations which do not apply in the system of law under which the accused is being tried and unless they have personal knowledge of the case I do not think their opinion is of much value.

Do you think that the position would be improved if there were a panel of assessors approved by the D.C.? It might ensure men of a better type being selected who would acquire experience in these cases?—I do not know that it would. I think the D.C. can be relied upon as a general rule to send in the most suitable people.

In practice do they select assessors personally or do they leave it to someone else?—From my experience, I think they do it personally.

Mr. Mitchell: As regards No. 1., this is a mixed province?—Yes.

I suppose there are many non-natives who are extremely poor and not well-educated people?—Yes.

Do you think there are sufficiently good reasons for the state providing a public defender for natives as opposed to any poor and ignorant person when the funds for this would have to be found from the public revenue?—I do not think that there are many non-natives of a sufficient degree of ignorance and of such extremely low intelligence that they would be prejudiced to the same extent as natives. The native stands in the greatest need in my opinion, though the poor and uneducated non-native certainly also stands in need.

And of course he is much less frequently in the dock on the charge of homicide—the numbers being so much fewer?—Yes.

In making that suggestion you would not want to stress particularly that the accused should necessarily be a native, he might be an Indian, Somali or Arab?—I should be inclined to limit it to natives in the first instance.

You think that public opinion would be agreeable to that?—I think so.

Mr. M. Wilson: You have been Provincial Commissioner of this Province for some time?—About six months.

We have in our file of memoranda certain cases of revision and also confirmation.

In regard to memorandum No. 5, Revision Cases, No. 22 of 1931:

II Class Magistrate, Kapsabet (Capt. Hislop or Mr. E. M. Hyde-Clark).

Charge: Evading payment of Hut Tax since 1926.

Sentence: Fined Shs. 96s. or 2 months Detention Camp.

Order of S.C.: Quashed.

Remarks: An order to pay such tax not an order within Sec. 8 (1) of Cap. 129 (Native Authority Ord.).

What was the D.O. to do in such a case?—He must let it go.

Mr. MacGregor: Imprisonment can only happen where it is provided for by statute?—Yes.

Mr. M. Wilson: Is that a technical irregularity Mr. Deck?—If the man cannot pay his tax, he goes into the detention camp. The fine, I should say, was illegal. The whole prosecution was misconceived.

Then Confirmation Case No. 62 of 1930.

Court: Kapsabet.

Charge: Stock theft (2 accused).

Sentence: Three years R.I. and fine 400s. or 9 months each.

Order of S.C.: Reduced to (1) 18 months R.I., (2) 2 years R.I.

Remarks: Excessive sentences.

Do you think it is wise to have natives put into prison for long years for stock theft?—No, I do not think it has the effect many people believe. I am against long sentences. We must devise some other method of punishment.

Would you be free to say what you think a good method of deterrent punishment?—I think there should be some form of preventive detention. In a district like Nandi there are a certain number of boys who do practically no work. They are rich enough to dispense with having to earn so that their time hangs heavy on their hands and they steal. One way of dealing with this is to find them work or put them under some sort of supervision. It is a matter really of strengthening the hands of the chief by administrative action or by some special law for the purpose. Compulsory labour in the reserves was a very good thing and did a great deal to stop it, but it hardly exists to-day.

You think that could be brought in again?—It would be exceedingly difficult.

Mr. Mitchell: About the Provincial Court, when advocating this, did you mean that you particularly want that special kind of court mentioned in the memorandum or that you want Supreme Court jurisdiction decentralised to be present in more places. Supposing in place of this particular proposal it was suggested that a puisne judge should be stationed at Kisumu, would that meet your case?—Yes, but I think he ought to sit with the Provinicial Commissioner in cases where natives are being tried and native law and custom are involved.

Mr. Justice Law: How would it be known that questions of native law and custom would arise. Sometimes these things emerge at the end of a case. Would the P.C. be there the whole time?—He would peruse the file of the committing magistrate.

You suggest that he would be there all the time?—Yes.

Chairman: Is he to be a full member of the court or adviser to the judge?—I dont think that would matter very much. His main function would be advisory. The legal aspect of the case must naturally lie with the judge.

Do you think it would be useful if he had the right to be there and to assist the judge with advice on matters within his competence?—Yes.

In regard to the provinicial court I do not agree with the restriction of appeal. I consider the accused should have a right of appeal from the Provincial Court to the Supreme Court.

And that might well take the place of the East African Court of Appeal?—Yes.

(*Witness then withdrew.*)

Mr. F. Peacock, Superintendent of Police, Eldoret.

Chairman: You are Superintendent of Police, Eldoret?—Yes, in the Uasin-Gishu District.

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?—From my own experience, 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.

Did you hear our discussion as to what statements were actually recorded in the police enquiry file? Can you tell us what the practice is?—All statements pertaining to the case, enlightening the case in any way whether the accused did or did not do a thing, are recorded.

After the investigation you sort out the relevant from the irrelevant?—Yes and eliminate the irrelevant.

Everything is in the file and recorded?—If a person made a statement to me to the effect that he was present at the crime, I should want another witness to corroborate it.

Does the court have the file?—The file is in the court and can be called for by the magistrate or the judge, Sir.

Have you any views about the admissibility of confessions?—Yes. I consider that any admission made to a police officer should be admissible.

I mean admissions made after due warning according to the law of England. If that was the law here would it be advantageous?—Yes.

You don't think there would be any danger of getting statements induced by threats?—No.

Would you confine it to statements made to European police officers?—No, Sir.

You think you could trust your askari?—There is always a check. Everything an askari says has to be recorded by a police officer.

The askari could come and say, "After due warning the accused made the following statement, etc." You don't think there would be any danger?—No, Sir.

Mr. Mitchell: It was stated to us in Nairobi that if a native has committed a petty offence other than being without his kipandi, in the case of a non-native it would mean taking his name and address and sending a summons, but because he is a native he is arrested and produced before the court next morning. Is that true?—I should say no, Sir.

He would be taken to the police station and released on bail immediately?—If you know a person well enought there is no object in imprisonment.

About the non-payment of taxes, how do you dispose of summonses?—We have to put them through our books and endorse each summons through a constable. If we receive a notification that the fine has not been collected a distress warrant is passed through a constable which is endorsed over to a constable who is sent to have it executed.

Mr. M. Wilson: Police are stationed in the reserve?—Yes.

Is there a tribal police system in the reserve?—Yes.

Besides your police?—Yes. There are police in the reserve under me for discipline and attached to the D.C. for duty.

Chairman: I was asking you about an askari warning an accused before taking a confession. What is the Swahili word for "warn"?—The word often used is "kutiisha," but that really means to threaten.

There ought to be a proper formula.

(*Witness then withdrew.*)

Mr. D. Edwards, Resident Magistrate, Eldoret.

Chairman: You are the Resident Magistrate, Eldoret?—Yes, Sir.

* * * *

[N.B.—*For passages here omitted see paragraph* 101 *of Report.*]

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What is the great bulk of cases that you try here, petty cases?—I have jurisdiction in all cases as regards natives. At the moment the greatest number of cases are stock thefts, but I get serious burglaries.

Is a lot of your time taken up with petty work, motorcar cases, etc?—Yes, but it does not take up much time. I have a lot of civil work. With regard to criminal work, I find no difficulty in getting over the petty cases.

You are a professional magistrate and I want to see whether the qualifications you possess are properly used or whether it is a waste of your time and ability.—I consider that an injustice done in a petty case through, perhaps, a careless trial may have a very bad effect on a native. So I have no objection to doing the petty work and I do not think my time is wasted.

I was thinking of re-distribution of the work. Wasted is the wrong word. If you have to have work done by a lay magistrate, it might be better that he should do the small work and that the more serious work should be done by the trained magistrate.

Have you available a copy of the monthly returns of your cases?—I will get the registers.

(These were examined.)

There is just one point. The clerical staff are able to do all the court work in one office—my office. If there were two courts functioning, it might be necessary to have duplicate sets of registers, office staff, etc.

Do you travel out to other places to take criminal work too?—Yes, Sir.

How far?—I go to three places outside—the greatest distance is 25 miles.

Is your jurisdiction over all that geographical area or do you go to relieve other courts?—There are police stations where I go, and the reason I go is to save bringing the witnesses in here. If I did not go the case would have to come here and the expenses would be greater.

Mr. MacGregor: In your last province at Nakuru, you used to go to Thompson's Falls?—Yes, and that was to take the serious work. The D.C. used to go one month and I the other.

(*Witness then withdrew.*)

Friday, 21st April, 1933

The Commission assembled at 9.30 a.m. on the 21st April, 1933, at the Law Courts, Kampala, Uganda.

Chairman: Mr. Griffin, the Commission have received a number of memoranda from the Law Officers' Department and from other local sources, as for instance from the Uganda Law Society and from legal practitioners, but up to the present we have not received any memoranda from the Administration or from any Provincial Commissioners or District Commissioners. We have no power to compel the attendance of witnesses, but we are naturally very anxious that we should hear both sides of the questions under reference, and it seems to us that it would be most unfortunate if, while we are here, we do not have the advantage of hearing the views of the Administration.

It has also occurred to us that the Native Government might have had some observations to address to us.

Lastly I think it should be noted that the enquiry embraces police procedure.

Perhaps you would be good enough to bring these remarks to the attention of the authorities.

Secretary: Certainly, Sir.

Witness: Mr. C. Mansel Reece, Crown Counsel, Uganda.

Memorandum (No. 11).

Chairman: Mr. Reece, you are Crown Counsel?—Yes, Sir.

I want to start off if I can by getting a picture of the existing courts and their jurisdiction. First of all, there is the High Court?—Yes.

That was established by the Order-in-Council, 1902?—Yes, Sir, and amended by other Orders-in-Council.

And also receives jurisdiction from the Criminal Codes?—Yes, Sir, that is so. That jurisdiction is confirmed by the Criminal Procedure Code.

Now you say that as a result of all that the High Court has criminal jurisdiction over all non-natives?—Yes.

And jurisdiction over natives subject to the agreements to which you have referred in the second paragraph of your memorandum:—

> *Buganda Province.*—Uganda Agreement, 1900. Uganda Agreement (Judicial), 1905. Courts Ordinance (1919) and Proclamations thereunder. Criminal Procedure Ordinance (1919) and Proclamations thereunder.
>
> *Western Province.*—Ankole Agreement, 1901. Toro Agreement, 1900. Toro Agreement (Judicial), 1912. Courts Ordinance (1919). Criminal Procedure Ordinance (1919) and Proclamations thereunder.
>
> *Northern Province.*—Unyoro Native Courts Ordinance, 1905. Courts Ordinance, 1919. Criminal Procedure Ordinance (1919).
>
> *Eastern Province.*—Courts Ordinance, 1919. Criminal Procedure Ordinance (1919) and Proclamations thereunder.—Yes.

After the High Court come the subordinate courts. Are the subordinate courts here all of one class?—There are three classes.

Can you tell me the jurisdiction of each?—I am afraid I cannot. It is all in the Procedure Code.

Criminal Procedure Code, Section 7:—

> "Subordinate courts of the first, second and third class may, when the accused is a non-native, pass the following sentences, namely:—
>
> *Subordinate Courts of the first class.*—Imprisonment for a term not exceeding two years. Fine not exceeding £300. Corporal punishment.
>
> *Subordinate Courts of the second class.*—Imprisonment for a term not exceeding six months. Fine not exceeding £75. Corporal punishment.
>
> *Subordinate Courts of the third class.*—Imprisonment for a term not exceeding one month. Fine not exceeding £15."

That is as regards non-natives.

Now as regards natives, Criminal Procedure Code, 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 35, 36 and 37 of the Penal Code, 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 authorised by the Penal Code or any other law. Provided always that in the exercise of such jurisdiction no sentence exceeding two years' imprisonment or fine exceeding two thousand shillings shall be imposed unless the court sits with assessors. The provisions hereinafter contained with respect to assessors in trials before the High Court shall, so far as reasonably possible, apply to assessors in trials before a subordinate court when held with the aid of assessors.
>
> (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."

Section 10 provides for the class of offences which the subordinate courts may try in sub-section (1). Sub-section (2) provides a restriction on sentences of courts of the 1st and 2nd class in that for sentences of more than two years it is necessary to sit with assessors.

What is the class of offence which these courts can try?—They can try any offence under the Penal Code or any other law except the offences of murder, manslaughter and rape, also treason and the concealment of treason (see Sections 35, 36 and 37 of the Penal Code).

That is the class of offence they can try. Now as regards sentences?—They can give any sentence authorised by the Penal Code or any other law.

Can you tell me who holds the various classes of subordinate court?—The subordinate courts of the first class consist in the first category of the magistrates of the Judicial Department, then you have the Administrative Officers who are appointed to that class by the Governor under notice.

Can Administrative Officers of any rank hold a subordinate court of the first class?—At the moment I cannot recollect any limitation of the powers of the Governor to appoint Administrative Officers to be first class magistrates.

Can you tell me in fact what rank of Administrative Officer holds these powers?— A D.C. holds first class powers. The P.C. holds first class powers, but he never or very seldom sits, and below the rank of D.C. the powers would be second or third class. In practice all D.C.s are first class magistrates.

As regards both these jurisdictions, what is the provision in regard to confirmation?—It is laid down in the Criminal Procedure Code, Section 11:

> "(1) 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 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 High Court.
>
> (2) The High Court may exercise the same powers in confirmation as are conferred upon it in revision by Part X of this Code."

That is native—now non-native?—I don't think there is anything laid down, Sir, but I know it is a practice that the High Court apply confirmation to the cases of non-natives.

In the case of a non-native you said sentences of two years could be imposed. It would be very odd if there was no confirmation for non-native cases while it exists for native cases. Perhaps you could clear that up sometime and let us know?—Yes, Sir.

In confirmation cases is not the court which tries the case sent a full record of the details of the charge and a record of the evidence?—Yes.

As regards powers of revision, the High Court receive a monthly return of all cases tried in subordinate courts with the sentences. In these cases they don't get anything in the nature of evidence?—In practice it is laid down that the High Court should have this return and they can then call for the record of any case with a view to revising it. In the first instance they only receive the return.

Mr. Justice Law: The whole record is sent and we get a return as well. Records of cases where sentences of over three months are imposed are sent in automatically.

Chairman: Of course the High Court can deal with those cases of revision?—Yes.

Before exercising these powers, do they communicate with the Attorney-General's Department?—No, Sir. They might bring the case to our notice for any particular reason and do bring it where appearance is being made on behalf of the person aggrieved.

Would they hear the accused in person?—Probably. If it were a case in which the Crown might be interested, they would get the accused to be represented and then inform the Crown.

You mention the establishment of District Courts. By that you mean what are called Special District Courts?—Yes.

Special District Courts are dealt with under Sections 14 and 15 of the C.P.C.:—

> "14. The Governor in Council may, by order, direct that any area in the Protectorate shall be a special district for the purposes of this Code.
>
> "15. The Governor may, by appointment in the Gazette, confer upon any officer holding a subordinate court of the first or second class within such special district, power to try natives for offences under sections 35, 36 and 37 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 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 High Court."

That means that these courts have the jurisdiction of the High Court?—Yes, complete jurisdiction insofar as they are empowered to try cases originally reserved to the High Court. Otherwise they have not the same jurisdiction as the High Court.

So that any sentence over six months needs confirmation?—Yes.

You say in your memorandum that all districts in Uganda are special districts with the exception of Buganda Province and Busoga?—Yes.

How many districts are there?—Eighteen, of which thirteen are special districts having High Court jurisdiction.

Does the High Court not go there at all?—Sometimes. For instance the High Court goes to the Eastern Province on circuit and when there it sometimes goes into the special districts. For example, next month it is going to the Teso District, which is really a special district, and when there will try cases exercising concurrent jurisdiction.

You observe, in paragraph 9 of your memorandum, that in 1932 the subordinate courts tried more High Court cases than the High Court. The High Court tried 66 cases and the Subordinate Courts 93. Does that strike you as satisfactory?—No, Sir.

Of course I may be wrong, but it occurred to me that this was a provision for special circumstances?—Yes, emergency.

And it seems to have become rather the practice than the exception?—Yes, Sir, it has in Uganda.

Do you know what the reason for that is? Is it because the High Court is not sufficiently staffed to enable it to visit these places?—That is one very substantial reason, Sir.

Do you know of any other reason?—Expense.

These special courts are presided over by the D.C.?—Yes.

Apart from the occasions when the High Court goes into these Special Districts, what circuit jurisdiction is there?—There is a circuit held three times a year in the Eastern Province, at Jinja, Mbale and sometimes Soroti.

How many judges are there?—One Chief Justice and one puisne judge.

And is it a fact that appeals from subordinate courts have to be heard by two judges, so that when a judge goes away on circuit no appeals can be heard?—Yes.

You have some professional magistrates?—Yes, four.

Where do they sit?—At the present moment two sit in Kampala and one of these takes work at Entebbe, another is stationed at Jinja and a fourth should be stationed at Mbale. At the moment I think a magistrate is on leave and there is an Administrative Officer doing the work.

Do these magistrates do all the court work, including the petty work and in these places relieve the D.Cs. of all court work?—Yes.

Has it ever occurred to anybody that if you must have courts with High Court jurisdiction it might be advisable to post the professional magistrates there and let the D.Cs. hold subordinate courts where there is not this extended jurisdiction?—That seems clear to me. But I think the idea with regard to the four magistrates is to keep them in the four townships.

They do civil work, and the civil work in the townships would be more extensive?—Yes, I think that was one of the considerations which confined them to the townships.

Is the remoteness of these districts from Kampala a difficulty?—Yes.

Take the Northern Province, for instance. This is not very accessible from Kampala, but I assume the communications are good. If there were a district judge stationed up there, could he get round and take the work at present done by Special District Courts?—Yes.

You cannot tell me off-hand the amount of cases tried in the various provinces?—No, I am afraid I cannot. I would like to say that about five years

ago the High Court used to go right round the country, and it went to the Eastern Province four times a year.

How many judges had they then?—The same number.

I suppose the High Court work has increased? If you look at the statistics, you would find this?—Yes, that is so.

Are you suggesting that with the present staff they should tour the whole country on circuit at sufficiently frequent intervals?—Not with their present staff, Sir.

Do you think that one more judge would be sufficient?—I think that one more judge is absolutely essential.

With one more judge would it be possible to eliminate the Special District Courts?—It would be possible to curtail them a great deal.

In paragraph 13 of your memorandum you refer to Article 20 of the Uganda Order-in-Council, 1902, which provides:—

> "In all cases, civil and criminal, to which natives are parties, every Court:—
>
> (*a*) shall 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, or any regulation or rule made under any Order in Council or Ordinance and
>
> (*b*) shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and *without undue delay*".

As regards the first of these provisions, the statement that you shall be "guided by native law so far as it is applicable . . . ." Now that you have got a Criminal Procedure Code, am I right in thinking that native law comes into criminal work very little?—Yes, because in my experience there are very few cases in which native law and custom are involved.

Native law and custom now cannot override the Criminal Code?—They would be considered in the interpretation of the Code as it affected the individual.

The court would be guided by native law so far as it is applicable and not inconsistent with any ordinance. Therefore the Criminal Code holds the field?—Yes, Sir.

Is it your experience in this case that native customary law comes into the picture or not?—Not in a vital matter. The actions of witnesses, etc., are explained by the influence of native law and customs, but I know practically of no cases in which native law would turn the scale.

By the "actions of witnesses", of course, one really implies native mentality. By native custom I mean the substantive native law and the necessity for treating a native in accordance with that law. Of course the actions of witnesses and their outlook and the likelihood of the accused doing a particular act are matters of mentality?—Yes.

This phrase "without undue regard to technicalities of procedure", do you agree that it is in the Order-in-Council for the protection and assistance of the native?—Yes, I assume it is.

You would not regard these words as empowering the court to refuse to natives these technicalities which are open to non-natives?—No.

To put the matter quite shortly, it is not a charter of liberty for illegalities in the subordinate courts?—No.

Paragraph 24 of your memorandum—Delays in Trials. First of all the High Court. Can you give me any idea of the average time which a person who is eventually tried by the High Court would have to wait for trial. What is the longest time?—In regard to that I have a case here. It was committed for trial on the 13th September last year and finally disposed of on the 2nd March of this year. That is six months from committal, plus three weeks from the date of arrest. He was eventually tried in Kampala.

How was that time occupied?—It was because the judges were far too busy and the particular counsel who was defending the accused asked for at least one if not two adjournments. I remember the case was down for trial in December and counsel for the accused asked for an adjournment to January, and then the court of appeal sat and took one of our judges away.

Talking about the drain on the staff, I understand that the next court of criminal appeal is sitting on the 22nd May at Mombasa?—Yes.

So that the Chief Justice presumably will have to go there and the Acting Judge, Mr. Gray, will be away on circuit. There will, therefore, be no judge here at all?—Yes, Sir.

Is that six months an extreme case?—It is a case that is on the long side even for Uganda. I have another case here which is in course of trial at the moment. That was committed on the 15th December and I hope to finish it on Monday.

What has happened to that case?—There has been lately a grave congestion of work caused by the factors which I have already mentioned—the attendance of one of the judges on the court of appeal in December, that delayed matters, and then there was a circuit in January to the Eastern Province and the remaining judge could not give his attention to any other criminal work then of course. I am partly responsible, chiefly due to the fact that I have had so many cases since the beginning of the year.

You are the only Crown Counsel?—Yes.

And the only person who prosecutes in the High Court?—Yes, Sir.

Am I to take it that roughly speaking a prisoner committed for trial would hardly expect to be tried under three or four months?—In the High Court in Kampala I should say that that is possibly rather too much. I think about three months. One must remember, of course, that Buganda, for instance, is a large province and witnesses take time to collect.

As regards the places to which the High Court goes on circuit, it goes three times a year?—Yes, Sir.

All places served by the High Court would get a circuit three times a year?—No, Sir. The Eastern Province is the only circuit area, and there, if a case misses a circuit, the delay may be four months.

How many places in the Eastern Province are visited on this circuit?—They go to two places Jinja and Mbale, three times a year.

So that the maximum delay for trial there would be four months?—Yes.

Mr. Justice Law: Possibly the High Court might hold a special session at Jinja?—Yes, and we have had special circuits into the special districts.

Chairman: That is as regards trials. Now as regards appeals. From the High Court there is an appeal to the East African Court of Appeal which sits four times a year?—Yes.

So that an appeal there might easily involve another three months delay?—Yes. A man who misses the December court of appeal, has in addition his month appeal period, and might experience delay of three or four months before the case was finally disposed of in May.

So that the case you were dealing with just now has been waiting about four months altogether. If the accused were to appeal he would miss the Mombasa court and it would bring him on to September—nine months?—Yes.

Mr. Mitchell: During four of which he might, perhaps, be under sentence of death?—Yes.

Chairman: How long is the delay in the special district courts?—It would be about two months on a average. But I don't want to commit myself on that. I have known delays there of more than two months