How often do the judges get round?—Every three months, but only to headquarters except in special cases. Usually all cases are brought to headquarters.

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[N.B.—*For passages here omitted see paragraph* 144 *of Report.*]

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Mr. Mitchell: On the question of the decentralisation of the working of the courts. You said that a puisne judge in the province would go a long way towards meeting the difficulty and that the Supreme Court judge visits your province, Nyanza, which is 30,000 or 40,000 square miles, once every three months. One has to bear in mind the conditions in these large territories. It would be much the same as if a judge from Rhodesia went once every three months to Nyasaland and there was no other High Court jurisdiction in the interval.—Yes.

As regards revision, would you say that in revising cases from the written records there is possibly a tendency to concentrate purely on the technical or legal side of the case?—Yes, I think so.

Would it be fair to say that under the present arrangements you have lay magistrates exercising very extensive jurisdiction all over the country and they may make mistakes of law more often than others with the result that cases are quashed and the guilty man escapes the punishment that he deserves?—It has happened. It is not frequent. In connection with this revision, it is of great importance that innocent people should not suffer.

If the system also results, owing to the defects in the instruments with which we work, in guilty people escaping punishment, society also suffers?—Yes.

Mr. Wilson: The first part of Mr. Howe's memorandum, with which Mr. Montgomery agrees, deals with native tribunals. Is it your idea, Mr. Montgomery, that lawyers should be allowed to go into the native districts to take up native cases? He mentions in paragraph (i) "that the native is precluded from legal assistance even in the most complicated cases".—I thought that a lawyer should act only in Revision cases.

You are not in favour of the suggestion then?—No, definitely not.

Take the Revision cases, No. 11/32, II Class Magistrates, Eldoret (Mr. E. M. Hyde-Clarke). Having 25 head of cattle on complainant's farm in excess of contractual number.

Sentence: 1 month's Detention Camp and fine 50s., 14 days in default.

Order of S/C.: Quashed.

Remarks: No offence.

Why did the Supreme Court decide there was no offence?—Presumably it would be under the Resident Natives Ordinance. No native can be on a farm without the permission of the owner of the farm and the number of cattle allowed is laid down.

Do you think that this was turned down on a technicality?—It was a question of fact. The judge said there was no evidence.

I want to refer to Revision Case No. 12/32. II Class Magistrate, Thika (Major Sutcliffe). Theft of posho.

Sentence: One month's H.L. and fines 350s., in default 14 days H.L.

Order of S/C.: Quashed.

Remarks: Insufficient evidence. Posho not produce.

Is the fact that posho is not produce insufficient evidence? There had been enough to show that he had stolen posho.—It has been held very definitely that posho is not produce under the Ordinance.

If he had been proved to be a thief, but posho is not produce, is that a technicality?—I should have thought it would be referred for re-trial.

Chairman: He was probably prosecuted under the wrong Ordinance. If he had been prosecuted under a different Ordinance the position might have been different.—May I ask, Sir, whether the last part of my memorandum about amendment of the Penal Code will receive consideration?

We are certainly going to consider very carefully the issues you raise. I don't know whether you want to enlarge upon them. It would necessitate, if the suggestion were put into effect, racial differentiation and discrimination with regard to the law for murder?—It would as we have worded it, but I do not know whether it need.

At the end of the memorandum, page 4:—

> (*b*) That proof that an accused native at the time of an act or omission was acting under the influence or provocation of an established tribal custom, belief or superstition shall not relieve such a native from criminal responsibility, yet on conviction for such act or omission as aforesaid the Court may have regard to such established tribal custom, belief or superstition in mitigation of sentence.
>
> (*c*) A native shall not plead any established tribal custom, belief or superstition other than those of his own tribe.

That is a proposal for rendering certain homicides which are at present murder lesser offences in certain circumstances, and it is only intended, is it not, that that should apply to a native murdering another native? So that you would have to have one law in these circumstances which would differ from the law applicable for a native murdering a non-native. Supposing a native murdered a non-native acting under some tribal custom or provocation. That is possible?—Yes.

Would you charge him with manslaughter?—Yes.

Mr. Mitchell: What you really want to emphasise is that in questions of provocation and circumstances surrounding a crime it should be brought out that the grounds for provocation should be interpreted in terms of the people provoking and provoked. What might be provocation to one man might not be to another?—Yes.

Is it a fact that at the present time the ordinary native in a province like yours would have considerable difficulty in setting the law in motion for the purposes of appeal? Supposing a man had been convicted and he thought unjustly and his case was not automatically revised or brought up, how would the ordinary village native set about setting the law in motion?—He would have the greatest difficulty. He would have to go to the D.C. and ask to have a memorandum of appeal made out.

If he had just been convicted by the D.C. he might be in a difficulty?—Yes. If he was in Kisumu, he would probably go straight away to a lawyer.

Except by engaging legal assistance, which in many cases may not be available, he would have the greatest difficulty in setting the law in motion?—Yes.

Mr. Justice Law: Surely the prison authorities will always help? And the visiting justices would also?—Yes.

The natives know that?—Yes, but the natives from the backwood might not know it.

(*Witness then withdrew.*)

Mr. H. E. WELBY, Provincial Commissioner.

Chairman: You are Provincial Commissioner, Rift Valley Province?—Yes.

You sent us a short memorandum (No. 6) and you enclosed one from Mr. Gillespie. You will be able to help us about his too?—Yes.

In yours, the only point you raise is the question of cross-examination. What ought to be an advantage becomes a disadvantage, because the native is not in a position to make use of cross-examination, while the Crown is?—Yes.

Do you, in your experience, find that a native witness who is telling the truth is confused by cross-examination?—I think he is liable to try to improve his case.

It has been said that the effect of cross-examination on a truthful witness is to make the truth more apparent?—I don't think this applies to natives. I was referring to subordinate courts.

You probably agree that cross-examination in normal circumstances is very useful?—Yes, I was not arguing against it but rather that the native accused is not in a position to cross-examine the opposing witnesses.

You have been present at trials at home?—Yes.

You would notice that even in the case of accused persons there, whether educated or uneducated, they have difficulty in making effective use of cross-examination. How can that be remedied?—Mr. Gillespie suggests a remedy.

He says that before the case is opened by the prosecution the magistrate should be entitled to get from the accused the story of what his defence is going to be and having got that he, the magistrate, would be in a position to put the proper questions on behalf of the accused in cross-examination of the Crown witnesses?—Yes.

Might that not be to the disadvantage of the accused? First of all it means that his defence is anticipated. Whoever is prosecuting knows from the start exactly what it is going to be and he can anticipate that when he comes to deal with his witnesses. There might also be a danger that the accused, having produced his defence, might have convicted himself?—That is so, Sir.

In this preliminary conversation he might quite well have convicted himself and it might be a little difficult, especially for an untrained magistrate, not to convict him unless the prosecution has proved the case?—Yes.

But on the whole do you think it would be more helpful if this procedure was adopted?—I am rather doubtful about it, I see the difficulty.

It would at times tend to relieve the prosecution of the onus of proving their case?—But only in certain cases. I think this question of cross-examination is a difficulty that is becoming less acute as time goes on. One finds that natives are more and more able to understand what is meant by cross-examination, though there is still the same difficulty with the perfectly raw native.

When it comes to a case that is committed to the High Court, the judge can help the accused there because he knows what the position is. In the first instance, before the magistrate, he does not know what to ask the witnesses for the prosecution even if he wishes to help the accused?—Yes. In the old days the Administrative Officer usually conducted an enquiry before the case came on, which was undesirable from many points of view, but it had the advantage that he was in a position to ask questions of the accused to assist him.

Would it meet the case if supposing at the end of the case for the prosecution the magistrate were to have a talk with the accused as to his defence and, having done that, could recall the witnessses and cross examine them on behalf of the accused?—Yes.

The first part of Mr. Gillespie's memorandum deals with adultery and trespass. These are not within our terms of reference. Then Section 233 of the Criminal Procedure Code:—

> "If, after receipt of the authenticated copy of the depositions and statement provided for by the last preceding section and before the trial before the Supreme Court, the Attorney General shall be of opinion that further investigation is required before such trial, it shall be lawful for the Attorney General to direct that the original depositions be remitted to the court which committed the accused person for trial, and such court may thereupon re-open the case and deal with it in all respects as if such person had not been committed for trial as aforesaid; and if the case be one which may suitably be dealt with under the powers possessed by such court, it may, if thought expedient by the court, or it the Attorney General so directs, be so tried and determined accordingly."

The Attorney General has power to return the depositions to the magistrate and says, in effect, "You deal with the case yourself." Do you think there is any objection to this discretion in the Attorney General to decide whether there is any hope of getting a conviction or not on the charge on which the accused has been committed for trial?—Personally I see no objection, Sir.

If he thinks that on the evidence as sent to him he would not get a conviction and that the case could be dealt with on a simpler basis, the Attorney General returns it to the Magistrate?—The procedure was changed with the introduction of the new Penal Code and there was a good deal of misunderstanding. Personally I am only too glad if the Attorney General will give advice.

It is not as though he was doing anything detrimental to the subordinate court. He is only saying, "You try this case. It is within your competence?"—He is in a position to override the opinion of the magistrate.

He cannot file an information unless he is satisfied that it is a proper case for trial by the Supreme Court and that there is a probability of getting a conviction.

Mr. Justice Law: Mr. Gillespie's suggestion with regard to the magistrate explaining the case to the accused is in a sense going back to the old procedure under the Indian Criminal Procedure Code. The evidence was taken first and then the charge was framed. Now it is the other way about?—On the charge, the accused merely pleaded guilty or not guilty.

The magistrate was required to ask him to explain any circumstances which had appeared in the evidence against him?—Yes, but it did not meet the question of cross examination.

But he had a right to recall the witnesses. This is not so in the present Code?—Yes. As a matter of fact on that question of recalling witnesses, in a recent case one of the 2nd Class magistrates in my province had a case commented on as an irregularity because he recalled witnesses. He was asking questions and recalled them in order to ask them questions himself. As far as I know the questions were not particularly for the prosecution or defence.

It does seem to me to be going back to the former procedure.

Mr. Mitchell: On this question of cross examination. Having to do it through an interpreter complicates the business?—Yes, I think it does.

If the magistrate himself does not understand the language in which the question is put, the question may reach the accused in a very different form from that in which it was first put. It may alter the whole nature of the answer?—Yes.

I should like to know, in the case of subordinate courts, are there court houses or court rooms where the trials take place?—Certainly; in the settled areas there is a court room or court house. In the out districts probably the D.C.'s office is used as a court room while he is sitting. There are a good many out courts held, principally in the settled areas and they are often held at the police stations.

You probably remember a good many years ago that the judicial side of the work loomed very largely. The daily hearing of cases was a prominent part of our work. Have you noticed any tendency for that to diminish in importance? Do they try more cases over the table?—I do not think so, rather the reverse. The importance of formality in conducting cases is better realised than it used to be.

It is a fact that a native accused often says something which has a material bearing on his case but

which, before it can be taken notice of by the court, has to be formally proved. For instance a native custom may be alleged and the magistrate may be aware of it, but it has to be proved. In your experience do you think that native accused, through lack of advice or failing to prove things of that sort suffer any prejudice?—Not in the subordinate courts. Where a question of native custom arises the case is nearly always referred to a native tribunal. It is very seldom that in a subordinate court the question of native custom arises. It might where cases are being committed to the Supreme Court. It might arise, for instance, in a case of criminal prosecution for stock theft.

You do not think the native accused is at a disadvantage, as unless the custom is proved it cannot be taken into consideration by the court?—No.

Mr. M. Wilson: On page 2 of the memorandum (No. 12) " Section 196 of Procedure Code: In the case of a native who pleads not guilty and does not show the line of his defence, the magistrate may not put questions to the accused for the purpose of finding out the accused's line of defence—with a view to carefully examining the prosecution witnesses on these points—A case of mine was quashed on the grounds that I had questioned the accused *before the prosecution was opened*, although the fairness of the questions put were not commented on.

Do you know that case?—No, that would probably be at Kiambu.

Chairman: That looks as though the judge thought that questioning the accused in advance was not helping him but prejudicing him.

Mr. Justice Law: Have you found that natives are suspicious of questions asked them by the presiding magistrate? The idea is to help them as much as possible. If you try to take them into your confidence, are they suspicious?—No, rather the reverse. They are suspicious of not being allowed to make their statements as early as they would like to.

There is perfect confidence?—Yes.

Mr. M. Wilson: Is it your experience that natives would rather go to the D.C.'s court than the native tribunal?—No, not generally. There are cases when they would. In the old days when native tribunals were just starting certain individuals went to the D.C. Now they go to native tribunals as a matter of course.

Chairman: Some evidence was given that D.C.'s are apt to " abuse and hush up " natives when they come before them to be tried. Is that your experience?—No, Sir, I do not think so. If a native shows contempt of court or does not behave properly he " gets jumped on."

Generally D.C.'s are patient and anxious that justice should be done and a fair hearing given?—Yes.

(*Witness then withdrew*).

(*The Conference adjourned until* 2.15).

Monday, 3rd April, 1933

The Commission re-asembled at 2.15 p.m. on Monday, 3rd April at the Supreme Court (No. 3) Nairobi.

Mr. A. de V. Wade, O.B.E., *Chief Native Commissioner, Nairobi.*

Witness: I wonder if I might first start, if you will give me an opportunity of referring to something that appeared in the Press which appears to me to be rather damaging and I would like it corrected?—*Chairman*: The Press is here.

Under the question of light sentences. (Witness quotes from report in " East African Standard " of 3rd April). " An administrative officer, acting in the interests of society, would probably give the thief two years, irrespective of the value of the stolen property and probably arguing that the thief had already committed about 25 thefts in respect of which he had not been detected. *The Chairman*: It would be regrettable if an administrative officer were influenced by any such consideration."

Actually I did say " one year " instead of two years. I am quite sure of that. The other point I said as a sort of aside " Of course he might have already committed about 25 offences." It was meant to be an aside and you, Sir, said to me: " It would be regrettable if an administrative officer were influenced by any such consideration." And I said " Oh, yes, certainly " or " Very emphatically " or something of that kind.

Chairman: The first thing you dealt with was alternative sentences to the death penalty and as I understood it you gave us two particular categories of offences where you thought that there ought to be either a discretion in the Judge not to pass the death sentence or a possibility of the offence being in the nature of manslaughter rather than murder, and my note of the two cases is murder where the provocation is real but not sudden and quarrels about cattle or women where there is provocation again which to the native mind is acute.—Actually, Sir, I did include those two cases in one category and the second important category was the Witchcraft one.

May I take for a moment the provocation cases. Would you want to restrict any alteration in the law so that your suggestions would only have effect to the case where the accused is a native and where the victim is a native?—Personally, Sir, I would not like to confine it to the natives. In any case I would merely have it as the general law, my point being that circumstances would count as extenuating circumstances in the case of the wilder kind of natives anyhow which would not be admitted as extenuating in the case of Europeans. For instance, if I myself were charged with murder and pleaded that I thought the murdered man was going to bewitch me.—Leave aside for the moment witchcraft?—Well, if I was accused of murder and pleaded a long drawn out quarrel and that in the end I sort of could not stand it any longer and on the impulse of the moment killed my man, I do not think that should be admitted as extenuating. I am a product of about two thousand years of civilisation and ought to be able to control my impulses. Natives often act on impulse without any intention to kill being very real.

Does not that mean the answer is " yes " that you are confining your proposal to the case where the accused is a native.—I would not in any redraft of the law. My idea was merely that the penalty for murder would be death but that the

Judge should have discretion to take into consideration extenuating circumstances.

In every case?—In every case. I think so. I mean a Judge would put it to a jury something in this way: Did the accused kill the deceased? That would be the first issue. Yes. Are there any extenuating circumstances? No. And the penalty would be death.

If that is your view, he would have to take extenuating circumstaces into account when trying a non-native.—I think he should if they exist.

Then you are not confining your evidence to the problem of natives but to everybody?—I am prompted by a knowledge of the natives.

If you are going to suggest an alteration of the general law of murder as understood to-day in England that is a very big question and is one thing. If you are going to say that natives are not so high a product of civilisation and that different consideration ought to apply in their case, that is another thing. On that, the problem that troubles me is this: Is it in your view practicable to make a racial discrimination?—I think it is practicable although as a matter of fact I dislike racial discriminations. I understand the people in England are not entirely content with the law of murder. I think I read a case in which a Judge was passing sentence of death on a girl who had killed her illegitimate child the first day.—There is an Act of Parliament which deals with that now?—Is it not fairly recent?—In the case I remember the Judge said to the accused "You are not to take the slightest notice of anything I am going to say." He passed the sentence of death and then said "Don't be frightened."

I know there are people who think there ought to be degrees of murder. I do not want the value of your evidence to go off on an issue like that. I think I can see great difficulties with this Commission in attempting to deal with the general law of murder. Supposing we come to the conclusion that as regards the death penalty it is not altogether satisfactory, I want to get your views as to whether it is impracticable to make a racial discrimination.—I do not see any impracticability about it at all. We do have ordinances where there is racial discrimination. There is no reason why they should not have a certain amount of discrimination.

You would have one law of murder when a native kills a native; a different law when a non-native kills a native or when a native kills a non-native or when a non-native kills a non-native?—Would it not be enough to say when the victim and the accused is a native?

All the last would be in one category and the first in the other.—Would it not be in every case where the accused is a native.

You know all about the prerogative in the cases which are considered by the Governor after death sentence is passed and I am sure you will agree with me that they are considered very carefully. Do not you think that there is a sufficient protection in the use of the prerogative? In these countries it is used freely?

(The evidence of the witness on this point was taken in camera.)

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I cannot see how your provision is going to be confined to native versus native?—I would not like to confine it to native versus native; only where the accused is a native.

Don't you think a case like that might raise considerable difficulties?—It might. I do not think there is anything impracticable about it.

Of course you have to meet public opinion—impracticable in that sense.

The next point was the representation and defence of accused persons. You referred to a document and you quoted, I think with approval, a sentence which begins: "But it appears to us that a judge and counsel living in a British settlement under the European colonist conditions of to-day, even though they can no doubt form a better picture of African scenery, are as remote as their brothers in England from any true appreciation of native thought or action." On reconsideration do you really want to adopt that sentence?—I think I prefaced my remarks that I thought this was all put, most of it, in a rather exaggerated way. I would not have put that so strongly myself: "Are as remote as their brothers in England."

Do you not think that a judge who sits day after day for years trying cases dealing with natives must acquire a very real knowledge and outlook of their mentality?—I expect he would after some little time, but we often get judges who are new to the country.

But they must after some years acquire a knowledge. Just tell me this. That paragraph ends up "intellectually lower in comprehension than an intelligent European child of twelve." Do you want to say that the native is lower in comprehension than an intelligent European child of twelve?—I rather think that sentence probably was due to some investigations that were being carried out by some of our doctors here—Dr. Gordon and Dr. Vint—who have been doing a very great deal of experimental work.

This document is not evidence and I am only going to record as evidence any of it which you quote and are prepared to vouch for and therefore I want your view?—I could not support it as an absolute general statement of fact in every case and as for "intellectually lower" I am not perfectly certain what that means. I know doctors have different ideas of what that means themselves. There is I believe some scientific evidence about their brain capacity. I certainly would never have put it as strong as that myself and I should not like it to be thought I agree unreservedly.

May we put it that it is part and parcel of an exaggeration that is to be found throughout?—But I think there is a great sub-stratum of truth.

The sub-stratum of truth is this: You do think that when a native is on trial before the Supreme Court he does feel in a position of great isolation, he does not understand the procedure and is in a very real difficulty.

We have had various suggestions made to us with regard to that. There are at present some means of providing natives with representation.

Mr. Branigan: Lawyers.

Chairman: Do you think that is a satisfactory way of assigning him a lawyer from a panel?—I think it is much better than nothing, but I am not convinced that it could not be improved upon.

There is a difficulty about that, that as a rule the lawyers who have taken the defence are the less experienced.—I am not speaking with certain knowledge but I think I am right in saying that the Bar in Nairobi even the most capable are perfectly ready to give their time. I don't think it is only the junior people. I am quite ready to pay a tribute to the Bar as far as that goes.

Of course that will largely depend upon their being available.

Mr. Branigan: There is a rota, Sir, in which even a busy man will come and take the case.

Chairman: That could be improved upon?—I think it could. There was one aspect of it—I am not perfectly certain whether there is much in this or not—I fancy some are very much better than others as criminal lawyers. A case came to my notice the other day in which the particular advocate who was asked to undertake the defence in a murder case asked to be excused because he said he was not very good at that particular kind of work and that it would be infinitely fairer for another to take it on.

Do you think that a man who is going to take instructions direct from a native needs to have a considerable knowledge of the native outlook and mentality if he is to get the best information and the most help from the native?—Yes.

Have you ever considered the possibility of a Public Defender?—Yes.

Someone suggested that it might be possible to meet the costs of that from the Native Betterment Fund?—It is not a proposal that has come before me yet in a concrete form and Government has not considered it.

If it were possible you would not see any difficulty?—I think it is a thing I would support very strongly myself.

Supposing you were to have a Public Defender to undertake the defence of natives, do you think it would be better done by an administrative officer or a legal officer?—If it were possible to get both. A very good administrative officer might not have the right kind of technical training and not be able to get the best out of his client. On the other hand a very good lawyer might not understand the native mentality, but usually in the administrative service we can get men possibly who have been called to the Bar and with the necessary experience.

If you could combine the functions, of course, it would be an advantage, although I don't know if you could find someone who has been a little more than being called to the Bar—a little experience in trying cases. You do think you would want somebody who has administrative experience?

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[N.B.—*For passages here omitted see paragraph* 146 *of Report.*]

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I gather that you are an advocate of a system by which severe sentences are given?—Well, Sir, I was trying to put the point of view of the administrative officer. As a matter of fact as I understand it there was a difference of opinions about it between the administrative officer and professional magistrates and I was trying to argue that there was at least something to be said for the views of the administrative officers.

You are particularly in favour of the necessity for a "deterrent" sentence?—My point was rather the extent to which it is justifiable to impose a heavier sentence than would otherwise have been given by reason of the prevalence of the particular kind of crime in a district.

And I think you suggested that some of these sentences might be due to that. I do not know if you have seen that list but it looks to me that they are so diffused over the whole country that it is difficult to think there can be a prevalence of crime everywhere at once. But leaving that for the moment, you would agree that the question of a deterrent is only one of the factors to be taken into consideration?—Yes, Sir.

One ought to consider the temptation; and the character of the man; any excuse he may have; and I suppose the question as to whether a heavy sentence is likely to turn him into a confirmed criminal or whether a more lenient course might be more likely to lead to his reformation. You would not think that any Court would be entitled to omit all those sort of considerations and to concentrate merely on the question of crime prevention by passing heavy sentences on criminals. You follow?—Yes, Sir.

I do not want you to think I am implying any criticism of district officers, for whom I have the greatest admiration. Are they not in a difficult position? They are responsible for the peace of their district and a criminal is a real personal nuisance. (*Witness*): Yes. (*Chairman*): They cannot help having a personal interest in his conviction and is it not a very difficult thing for any man, with all those factors in his mind, suddenly to become a judge and to consider only the justice of the case and the abstract theories of punishment. It is a difficult position?—Yes, I think so.

And you think that may re-act a little bit on their attitude?—I think it probably re-acts a great deal in that it tends to make them, perhaps quite unconsciously, overemphasize the deterrent aspect of the punishment.

Do you approve of the system of Native Assessors, generally speaking?—As a system, yes.

Can it be improved?—I believe it could.

By getting better men?—Yes by getting the best men that we could.

Do you think a rota would be a useful expedient?—I think it very likely would if in every district they could get a list of people who are likely to be capable assessors. What usually happens is that a district commissioner will get in assessors from the accused's own location—people who are most likely to know and understand. He says to the headman as a rule "send me three of the best elders you can find." The Chief may not worry very much about it—he may send in three men who are not particularly good. They may be quite stupid. It rather rests with the personnel and how to get hold of the people.

Would not the District Commissioner be able to advise on that?—If he had a list I think he could.

Somebody complained to us that a native very often wanted his case heard before the District Officer, but the District Officer would not hear it and kept on sending him back to the Native Court. Do you know what the position is? Have you ever heard any complaints of that sort?—Yes. I should have thought that was far more applicable to civil cases than criminal cases. The civil case ought to be heard before the native's own Court.

But in a criminal case if a complaint is brought before the subordinate court would he as a rule hear it if the complainant wished it?—I think it would probably depend on the nature of the case.

If he thought justice could not be obtained in their own tribunal owing to the local nature of the case, he would be careful to take it himself?—Oh, yes, or say "Go and have it heard by the tribunal and I will scrutinise it and find out exactly what happens."

There is another point which has been raised. It has been suggested that lawyers ought to be allowed in the District Officers' Courts on appeals from Native Courts. You support that?—No, Sir. It would be a reversal of a policy which we have only recently introduced in the Native Tribunals Ordinance of 1930. Before that Ordinance lawyers could come into any native case and we came to the conclusion that a native did not really benefit by this at all. They only waste their money and time and they were more likely to get justice without a lawyer.

Does that apply to criminal cases?—Hitherto the Native Tribunals have only tried such petty cases that I would say there is no necessity for a lawyer to come at all. But this system is being extended and if they are going to have power to try really serious cases I am not sure it will not require consideration.

What is the utmost jurisdiction of the Native Court?—I do not think anything above six months.

Can you help us on this—has the Supreme Court still got appellate or revisional jurisdiction in relation to criminal cases in regard to Tribunal cases?—That has gone except in stated cases. All the revision is done by the Attorney-General under this Tribunal Ordinance, all returns are sent to him.

Since that Ordinance the Courts have not claimed to use any revisional powers?

Mr. Branigan: In one case they refused.

Chairman: Now that there is a Code of Criminal Law and natives are subject to that Code, do you think that in criminal cases native law and custom comes very much into play at all? I am not now

talking about the value of mentality?—I think very little indeed in criminal cases that come before the subordinate courts anyhow. It would in criminal cases before the Native Tribunals.

You would agree that native law and custom does not play a large part in criminal trials?—Yes.

Mr. Justice Law: I notice in your evidence that you say: "I am told that in Uganda a sentence of imprisonment for murder is legal"?—That was written in 1921.

Well, do I understand from your answers to the Chairman that you would suggest that natives who are convicted for murder should be punished in proper cases differently from other persons convicted of murder?—Yes. Only by reason of circumstances being extenuating in case of natives.

So you agree it would be necessary for us to have a section by amending legislation which would read, perhaps:—

"Any native convicted of murder should be punished with death or imprisonment"

and I do not know whether you would suggest the fine too.—I do not know whether a fine really ought to come in.

Well, then, we will say "death or imprisonment."—If the Ordinance as affecting the whole of Kenya cannot be altered.

That is in your mind so far as natives are concerned and that you should have these two sections so to speak, that the sentence for murder in the case of natives should be death with the alternative of imprisonment of years and with regard to other persons death.—Of course I would much rather if we could simply amend the Ordinance without bringing in racial discrimination. If that is too big a thing and cannot be done then as a second alternative I would like a section merely dealing with natives.

I was not here at the time but the Indian Penal Code was enforced up to 1st July, 1930, and the law then was that there was this alternative, or had it been swept away in the meantime, and this present law is merely a re-enactment of the new law brought in, or is this the amending law—the present Penal Code?—The present Penal Code is the same as the Indian Penal Code except that under the Indian Penal Code the alternative was not imprisonment but transportation for life.

They had difficulty had they not in India in your experience, what you have read, of imposing these alternative sentences?—They only had the alternative of transportation for life which I do not think was ever used. I think this was generally so impracticable that people did not make use of it. Certainly not in this country. There was nowhere to transport them to.

I have a passage from *Ratanlal* in "*The Law of Crimes*" here, and he puts it in this way (quoting from page 696):—

> "'Although the law has provided an alternative punishment, either is not to be passed indifferently at the discretion of a judge; but . . . where the accused has been found guilty of deliberate murder, he must pass sentence of death, and . . . the minor sentence should only be awarded when there is some extenuating circumstance, some excuse which, though the law does not regard it as sufficient to reduce the killing to the offence of culpable homicide not amounting to murder, still is ground for looking leniently on the act.'"

That is your view—that there should be some extenuating circumstances which do not call for the extreme penalty?—Yes. That is exactly what I am getting at.

There is a further passage here which you may agree with—(quoting from same page of same volume):—

> "It is not for the judge to ask himself whether there are reasons for imposing the penalty of death but whether there are reasons for abstaining from doing so."

That would put forward your sentiments?—Absolutely.

I really forget for the moment—witchcraft—your opinion was it should be regarded as a form of self-defence, or that it was one of these extenuating circumstances?—I would prefer to regard it as extenuating circumstances. In practice I try to show it was an act of self-defence.

Although it may have been lasting as between the two persons particularly concerned, over a period of time?—Yes. In the case of when they kill witches it is generally a sort of community decision. What happens—there are a number of deaths, and of course the native says *who* killed him. They cannot get away from the fact that death must be due to human agency.

Well, now, of course, the victim, shall we call him, he has always the right and it would be proper, would it not, for him to go to his particular tribal authority with his suspicions. I suppose it is not done in practice?—It is sometimes and it rather depends—I imagine now among the Kikuyyu, people probably would go to their District Officer and say so-and-so has been bewitching us. But in other tribes they say this is much too serious and there is a chance than no action may be taken, so we have no alternative but to take it ourselves; and they do not let the District Commissioner know about it.

So that is an excuse you have?—Only to the extent of mitigating the offence. I would not say they were not to be punished for it at all, but not to the extent of death. It is very difficult to take it under the Witchcraft Ordinance, but of course you could arrange for him to be moved to another location. It has been done. Administrative action could be taken.

Will not the tribal authorities themselves assist the victim—the Wazee?—Yes, if they are good tribal authorities they will come along to the Commissioner, but others might not. They might say the District Commissioner does not understand witchcraft.

The fact that they have someone to have recourse to, do you not think that that removes the form of provocation which witchcraft may have towards a victim. It really removes any cause or form of provocation?—It would if everybody knew about it and had enough confidence in the District Commissioner. Now take the Wakamba case. What they ought to have done was to have gone to the D.C. But they did not think they would get what they wanted.

Have we not been hammering at this ever since we have been in the country?—Oh, yes.

It is not that they cannot learn or will not learn, but that they prefer to "blot out"?—I suppose it is with some of the older people. It is no good telling them that there is no such thing as witchcraft. They say—we know better.

With regard to the Legal Defender, do you suggest it should be confined to the Supreme Court?—Yes, I think so.

Of course more cases are tried in the subordinate courts than in the Supreme Court.—I was only thinking of capital charges.

I think you have told us that you consider it wholesome to have revision?—I have not said so yet, but I do think so.

When a conviction is quashed the reasons are always given.—Yes.

I suppose it is like all of us when decisions are differed from, it does not please us.—I think it is a little more than that. They know they are fallible and do not mind if these things are pointed out or if there was a re-trial. But when the convicted person gets discharged or acquitted and you can do nothing more about it. I am not quite certain on what principle the revising courts go in deciding that there shall not be a re-trial.

Mr. Mitchell: I suppose it is to a certain extent due to what one might call the difficulties that arise through faulty presentation of the cases, and

that it often happens that the full effect of the provocation or other extenuating circumstances may not be brought to the notice of the court, that is to say, that the law provides for a reduction of a charge of murder to manslaughter in certain circumstances, and whether native is undefended or is only defended by an advocate briefed when the man was in the dock, those circumstances may not be brought before the court?—But also I am thinking of cases where even if every single fact were brought, still the judge at present would have no power to reduce the sentence but has got to bring him in guilty and sentence him to death. Of course he may add a recommendation to mercy.

I suppose you will agree, arising out of witchcraft, we are proceeding from the assumption that there is no such thing. Every native believes that there is—it is a definite fact—and it is not much use going to authority.—Yes.

In the consideration of cases in Executive Council, have Members anything but the record to go on?—No—they have got all the record—the record of the preliminary inquiry before the Magistrate, the record of the case as heard in the Supreme Court or by the Judge on circuit, and then again the record of the Appeal Court, and the Judge's report, and that is from our point of view, one of the most important things, and in that he puts down anything he can think of that would be in mitigation of the offence and explains what the defending counsel said, if there was one, and then generally ends—I have no recommendation to make, or, I recommend mercy.

I think I am right in saying that the Home Secretary has a great deal more than the record of the trial to go on. He gets special reports on enquiries that are made.

Chairman: It is sufficient to say that when you are dealing with a question of the prerogative, you are not only dealing with the legal evidence, you can extend your inquiry to any circumstances?

Mr. Mitchell: As regards Public Defender, in practice the proposal would be difficult and very expensive and if the defence is not technically well qualified it may even operate harmfully to the accused. Would a practical alternative be to attach to the Attorney-General's office a suitable Administrative officer who would help in the scrutiny of depositions and so on and see that all material that might be available was collected? A separate set of notes could be prepared which could be handed to an advocate if one were instructed for the defence at any time prior to the trial, but generally speaking the object would be to see that the Crown Counsel had every possible assistance prior to the trial in elucidating the facts of the case and any relevant matters arising out of the manner of living of the natives or native custom and so on. Such an officer would be rather in the position of Solicitor for the accused?—Yes, I think it probably would help. I think the words in the document which I quoted put the matter plainly:—

> "It is nobody's business to prepare the accused's case for him."

That seems to me to be the one point that really wants remedying. It is the business of the Police to prepare the case for the prosecution, the business of the Magistrate to see there is a *prima facie* case against him, but it does not seem anybody's business to prepare the accused's case either in the inquiry court and very often in the Supreme Court.

So that generally speaking the object would be to see that the Crown Counsel had every possible assistance prior to the trial?—Crown Counsel invariably goes as Prosecuting Counsel. I think that would meet my difficulty a very long way if the Crown Counsel were told that it was his duty to put in points for the accused.

Mr. Branigan: That is the practice already, Sir, that Counsel's instructions are to bring out points for the defence in the course of the trial?—Has it always been so?

Chairman: Obviously he cannot go and interrogate the accused, so he can only put in points which occur to him. He may not be putting points which the accused wishes him to put. So what I suggest is that there should be two departments, one running the prosecution and the other looking after the point of view of the defence, and that department could easily interview the accused.

I think it is a very valuable suggestion.

Mr. Justice Law: There is this difficulty of course: if during the prosecution of the case for the Crown he is also to get from the witnesses points which one would properly say should be brought in favour of the accused, he might find himself in the position of cross-examining the accused in order to establish those points, and it is very difficult to divorce the two positions.

Mr. Mitchell: As regards revision, are the defects alleged to exist in the revision system due to the remoteness of the revising court both from the trial court and from the people in respect of whom it is exercising this jurisdiction?—I should not have thought that that was true myself. I do not think that it would be influenced in any way by that or the judgment affected by that.

Is there no court intermediary between the High Court and the Magistrate's Court? So that if there is anything wrong in a case in the Northern Frontier Province in a second or third class court, it can only be put right by a judge in Nairobi?—Yes.

Does that fact cause revision to be slow in operation?—Not to my knowledge. On the question of remoteness, I have a sort of idea it might be valuable for the revising judge to consult myself, or the D.C., or someone in the administration in cases which there is any doubt, particularly in the question of reduction of sentence. At present he always consult the Attorney-General.

When a sentence of imprisonment has been revised and quashed and the accused has been released having already served his sentence before the revision order is received by the subordinate court, is he sent for and told about it?—He certainly would be if it happened, but I think it is most likely that it would not happen—I mean that the magistrate should get the case back after if he had not finished serving the sentence.

We had it in evidence from the Registrar the day before yesterday that if a native was sentenced to a month on 1st May it would be the 8th June before the record reached the revising judge at all?—I imagine he ought to be sent for and told about it.

You think he would?—I think he must and in some cases they can get compensation. Not very long ago I had a case where a man said he had been unjustly convicted. I sent for the case and I did not like the look of the case at all and sent it to the Attorney-General. He did not like the look of it and eventually we got the conviction squashed and the thing expunged from his record and quite a substantial compensation for him.

He got that by personal application to you?—Yes.

Can you say it is always or generally possible to refund fines when this is ordered in revision, especially in towns?—I think it always is. There are perhaps just one or two cases where the native may have disappeared.

It is a practice to appoint acting judges. Would you say that there is any visible difference between them and substantive judges exercising their revisionary powers?—I do not think I could say so as a general statement. In individual cases I can imagine that an acting judge would be rather like a sort of new broom and perhaps a little more severe

than a judge with more experience. Acting judges I have known myself have been I think severer on administrative officers than experienced judges.

Do you think the system of appointing acting judges adversely affects the proper authority of the High Court and the respect in which it should be held?—I should not have thought so myself. In other parts of Government we are quite used to acting appointments.

I mean from the native point of view?—I do not think so. They themselves know we have acting Provincial Commissioners. I do not think that would make any difference.

It has been stated to the Commission that administrative officers are glad to get rid of Court work and that senior men therefore push it on to their juniors as much as possible. Is that so? If so ought the practice to be prevented, e.g., by instructions from the Chief Justice as to distribution of business?—I do not think it is true at all. It did happen sometimes in the past that a D.C. especially some of the earlier ones before we had quite so much training and examinations, they had not any great opinion of their own capacity as magistrates especially as their cases were liable to be upset and then they would get an A.D.C. who possibly might have been called to the Bar or got a distinction in his law examination and had second class powers, and thought he had better do it. It is just a matter of individual qualifications. The ordinary D.C. would I think take the more important cases himself unless he had got complete confidence in his second in command.

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[N.B.—*For passages here omitted see paragraph 222 of Report.*]

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You said Administrative Officers impose much heavier sentences than Resident Magistrates. Do you suggest that this is because they are not lawyers or rather that as a matter of fact they are better situated to appreciate the relevant value of sentences?—I think really that the reason is probably as I explained just now in talking to the Chairman that the D.C. is concerned probably first of all for the welfare of his people, the protection of society, and that is the aspect of punishment that comes most prominently before him when trying a case. He does not think so very much of abstract theories of retribution or the satisfaction of the vengeance of the State for a crime against itself, but merely, possibly subconsciously, that this sort of thing has got to be stopped, and on the whole that decision does result in heavier sentences by administrative officers, taking them by and large.

If professional magistrates had the same advantages as administrative officers on that side would they not be equally well able to appreciate what is a proper and fit sentence?—Yes. I am not sure that is not a little begging the question because possibly the magistrates' sentences are more fitting than the administrative officers.

If you decentralised the court locally taking this very extensive jurisdiction as in stock theft cases, is there any reason to suppose that fit and proper sentences would not be imposed?—No, I do not think so.

So that one might say that without some knowledge and experience of the manner of life and the mentality of the natives a court lacks an essential element in the assessment of what is a proper sentence?—I think that is true from our point of view. It seems to come back to this problem: are you allowed to take into account the especial prevalence of any particular form of crime and the consequent desirability of imposing an exemplary sentence. Is an exemplary sentence justifiable? As a matter of fact I always thought it was until talking to the Attorney General and he said that the best thought at home in England was coming more and more to the view that exemplary sentences are unsound and that the prevalence of a crime ought not to be taken into account. I may have misunderstood but that is how I understood him. I seem to have heard in England of Magistrates imposing exemplary sentences.

Chairman: Do you think what he said was that exemplary sentences as deterrents are wrong as a general rule. There are two points of view. You may have the sudden outbreak of some particular class of crime like, say, bag-snatching. And as far as I know judges do take that into account as one of the factors. But it is a different proposition if you are going to say that generally speaking you are going to take into account as the primary factor the deterrence of others from committing crime.—I should think it is probable that when I say administrative officers rather tend to give heavier sentences, I doubt if it is so except in thefts. I should think in cases of assault and battery an administrative officer might be inclined to take a more lenient view than a magistrate in Nairobi, but I am sorry to say that most of our native populations are very addicted to theft: some stock theft, and some, particularly the Kikuyu, petty theft. I should think that an ordinary administrative officer for that reason would give heavier sentences for petty theft than a Resident Magistrate would be inclined to.

Mr. Mitchell: But knowledge of the law and knowledge of the circumstances of the people among whom it is being administered are not necessarily mutually exclusive?—I think it is quite an unwarrantable assumption.

In fact a criminal trial consists of two major divisions (1) prior to conviction, and (2) the appropriate sentence after conviction. Is it a fact that in the practice of the Courts there tends to be an excessive concentration on (1) and that (2) gets rather scant attention though from the point of view of society it is in one sense the most important aspect of the trial?—I do not think so. The Magistrate trying the case I think gives a good deal of thought to what is an appropriate sentence and the revising court gives a lot of thought to it. I think that is demonstrated by the fact that they reduce quite a lot of sentences.

Would you consider that with our modern ideas in practice we regard punishment and fines and in some cases whipping as being the forms of punishment permissible but that in relation to a great part of the primitive populations we are dealing with, these forms are terribly ineffective—imprisonment and fines and whipping in certain cases. It seems to me there is a necessary and unavoidable difficulty in this that punishments which we as civilised people approve of are very largely ineffective in dealing with primitive people, in that our ideas are so far in advance of theirs. Whether we have not got to face the fact that being civilised people we have certain handicaps that we cannot get over. That does account for this constant stream of people going into prison for petty thefts?—Yes, it is very true. Native Authorities have said to me and others: If you let us deal with stock theft, we will stop it at once.

That is what I mean, that there is no remedy, but it is as well to remember that there is that difficulty?—Yes.

Do you think it is of importance in High Court cases that they should be tried reasonably near the place where the crime was committed and that there is a good deal of advantage in cases being tried as near as possible?—Yes, I do.

As regards witnesses, is it your experience that as a result of the present arrangement of assizes, witnesses are put to a great deal of trouble and inconvenience and perhaps sometimes hardships—ignorant native witnesses?—I do not think it has been in my own experience. They generally are sent for to come into a station three or four days before the Court arrives. So far arrangements are made for their accommodation and money given

them for food all the days they are away. Any inconvenience would be I am sure quite unintentional.

It is a fact in some countries. We shall probably get evidence to that effect and I wondered if that was the case here?—I would not say but that it could be, but I do not know of any cases.

Mr. Maclellan Wilson: Taking it by and large you think that natives in this country are pretty well looked after?—In what way?

This last question that was put?—Cared for? Yes I think so.

I do not know whether you have been down in the Ukamba country at all?—No.

Since you have been the C.N.C. you have heard a good deal about it?—Yes, and I have travelled around it.

It was in connection with the question of this law of witchcraft—whether the natives would come and tell the D.C. Do you know anything of the trouble? Was it brought to light by the chiefs and the witchdoctors were at the back of the smelling out of the witch and putting the people on to kill her?—I cannot remember that that came out, but I can well believe it was so.

Chairman: It is very definitely the policy of the Government to try to put down the taking by the people into their own hands of the punishment of supposed witches. Do you think that if one was now to alter the law so as to provide for a more lenient treatment of natives who had murdered a supposed witch, that that might be regarded as a weakening on the part of Government in their determination to put the practice down?—I do not think so.

Arising out of imprisonment—when looking at the sentences passed on a native ought one to consider whether imprisonment to a native is the same degree of punishment as it is to a European?—Yes I think that is a perfectly logical consideration.

Is it a great punishment to a native to be put in Prison under modern prison conditions?—I think I can only answer by saying that it varies a great deal with the different circumstances, but generally it is nothing like so severe a penalty as to a European. A native put in prison does not lose any caste at all. A Kikuyu becomes temporarily defiled, but having purified himself by sacrificing a goat he is reinstated in public opinion, so far as I know. Another point he gets fed in prison probably rather better than he does at home; has a place to sleep in that for him is not particularly uncomfortable and has friendly relations with the warders.

So that perhaps it is fair when one is comparing sentences of imprisonment passed on natives and the equivalent sentences passed on Europeans, to remember that in one case it is a much greater punishment?—I do not want to create a wrong impression that they do not mind going to prison. They hate their loss of liberty and they hate having to do certain things at a certain time and they hate not having their drink and women.

(*Witness then withdrew.*)

Tuesday, 4th April, 1933

The Commission re-assembled at 10 a.m. on Tuesday, 4th April, at the Supreme Court (No. 3), Nairobi.

Sir William Morris Carter.

Chairman: Sir Morris. you are kind enough to come here as there are a few points which you feel may be of interest to the Commission.

Witness: My main point in coming here is to advocate that when a native is being tried for murder the judge should have discretion to sentence to death or imprisonment. I have been a judge in this part of the country for twenty years and during seventeen of these years I was in Uganda and we, the courts, had power to pass such sentences. The court had power to pass such sentences on anybody. I remember the point was raised with the judges of this country, but they felt that it was putting too much responsibility on the judge to have to decide on the sentence. I quite see that in the case of Europeans in a small country where the judge very likely knows the accused, that would be too much responsibility and if that were felt, I should advocate that it were only in native cases that this should be done. I can say that in the course of seventeen years I have heard no suggestion against that power in the courts of Uganda. In Tanganyika I was able to get that provision inserted in the law but it did not last long because I went on leave and the law was amended. I have no knowledge whether it was amended owing to any difficulty or merely because the Acting Chief Justice or the Attorney General considered that the English law was the more appropriate.

I think as a general principle it is a mistake to have a fixed punishment for any definite offence and that is recognised practically throughout the law. The court has a discretion in practically all cases. I think there is an instance in this country of a fixed punishment. Is not that so in the case of stock theft? But I think I saw in the paper that the Chief Justice has recommended that the courts should have the ordinary discretion. In murder cases I should not suggest that as far as Europeans are concerned if it is felt that this is too much, and of course it is a time honoured principle of English law that death is the sentence for murder.

But in the case of natives I feel and have always felt that it is the wisest course for the court to have a discretion as to the punishment. I saw in the paper yesterday what Mr. Wade had said with regard to the variety of motives, and I can say that I quite agree with him. I do not go as far as saying that you should have different categories of murder, but simply that the court should have this power. It seems to me that if the punishment of death is admittedly not suitable in all cases of murder committed by natives, that it is a great mistake that the court should be bound to pass a sentence which they know is never going to be carried out. It causes very great delay. In this country the judge passes what sentence he thinks is suitable. The matter then goes up to the Governor in Executive Council and the sentence is there decided upon by people, no one of whom should be as competent to express an opinion as to the sentence as the judge who tried the case. The judge is a man of legal training who spends his time deciding what the punishment for an offence should be. In Executive Council there are no lawyers other than the Attorney General and the Attorney General is, I take it, responsible as head of the prosecution.

Chairman: If I may take the general proposition first, by which I mean that there should be an alteration in the procedure for everybody: because this is a British Colony, the law of England, and I think of all the Dominions and Colonies, is that the penalty for murder is death?—Is that so in India?

I have not included India yet. As to India I am not sure. Under the Indian Penal Code it was death or transportation for life?—It was laid down by law in Uganda, as transportation for life was impossible, that in lieu the court should be able to impose any legal sentence.

You appreciate that it would be a little difficult for this Commission to recommend an alteration in the general law with regard to murder if we are going to deal with the matter generally as to what the offence of murder is or what the punishment is. I understand that you don't want to alter the law at all. You are contending that people should be convicted for murder if they have committed murder as laid down in the English law, but in all cases you think that the judge should be able to sentence to death or imprisonment?—I see the difficulties in a country like this.

You agree that there would be great difficulties?—Yes.

It has been held by the great body of public opinion that when there is a penalty of death it ought to be a fixed penalty so as to relieve the judge of the very difficult and onerous duty of deciding whether he should sentence to death or not. I understand that in this country the offence of rape is punishable by death?

Mr. Branigan: Yes.

Chairman: I think I am right in saying that the death sentence has not yet been imposed?

Mr. Branigan: There was one instance at Kajabe in the case of the rape of a European woman.—Should I be wrong in saying that this is the penalty in South Africa for natives committing rape on European women?

Chairman: Yes.—So that there you have a case in which there is different legislation.

Don't you think that if you have a discretion in the judge in murder cases, many judges would become very reluctant to pass a death sentence if they had an alternative?—No. There might be cranks, of course, who said they were never going to pass death sentences.

As regards the proposal that the judge should use his discretion in the sentence only in the case of natives, do you mean in the case where the murderer is a native or the victim is a native?—In the case where the murderer is a native irrespective of the victim.

Do you think in a country where you have a large white settlement it would be a practicable thing to differentiate between the races in that way?—Yes, Sir, I do.

Can you contemplate the case of an employer or a white man being murdered by a native and the judge having discretion in this matter and feeling any very great embarrassment?—No, I do not think so.

I think if he thought it was a case of brutal murder there would be no question. He would pass a sentence of death.

Certainly. I was thinking of a case of provocation?—You say that you agree with what Mr. Wade said as regards his categories of murder. One of his cases was provocation, long standing, not sudden?—I do not think in practice one would find any very great difficulty.

At present the matter is balanced by virtue of the prerogative?—Yes.

And as you know these matters are considered with very great care by the Governor in Council. The judge does not hesitate to express his view if he thinks there should be commutation. What is your experience?—I do not deny that, but I think it is a waste of time. It seems to me to be a very great mistake to pass a sentence on a native which you know is never going to be carried out. The speedier the justice is, as long as it is justice, the better.

Apart from the waste of time, do you think that the use of the prerogative, as it is used in this country, is an effective check on too brutal punishment?—Yes, but it is a slow check.

You do not feel that despite the use of the prerogative there are a number of natives executed who, having regard to the circumstances of the case, ought not to be?—No, I should not think so.

Do you think the use of the prerogative meets the case?—Yes, as a general rule.

In Uganda the Court had a power—under what code was it?—We had the Indian Penal Code and our local legislation. It was provided that as there was not such a thing as transportation for life, the court could impose any legal sentence. Kenya had not that legislation.

Was it ever used?—Yes, I have used it myself.

In the case of a native?—Yes, I do not think there was any European convicted of murder at that time. If I may say so, I have mentioned this matter since Saturday to five people with whom I have come in contact, both officials and settlers, who have been in the country between 10 and 30 years, and they all take the same view as I do. I think it is a lawyers difficulty rather than a layman's.

Is it to be a general alteration or confined to the native?—Not confined to the native.

Did the people with whom you spoke appreciate that you were not dealing with the question of a native murdering another native but of a native murdering anybody?—I cannot say that. We did not go into detail.

Mr. Justice Law: Your views really are that we should more or less come into line with the Indian Penal Code, sentencing to imprisonment for years instead of to transportation for life?—I would not limit it to imprisonment for life, but there is absolute discretion in the judge.

The practice in India is not uniform?—I could not say.

Looking at the text book one sees that in Bombay judges always sentence to death but in Calcutta they use this discretion?—That may be because there are other circumstances in Calcutta.

To bring it down to a smaller scale and substitute provinces for these different territorities, it might be that in some provinces judges would always pass a sentence of death and in others sentence to imprisonment for life?—It might be so.

You think that would be quite satisfactory?—It is not my past experience that judges do that. During the time I was in Uganda, we had, I think five judges and I never heard of this arising, even though the judges held rather varied opinions generally.

In cases where natives have been sentenced to death, these considerations which you suggest should be left to a judge's discretion, they really are, in point of fact, weighed by the judge in his report and finally by the Governor in Council. It is a very large percentage of natives who are not eventually executed?—Certainly, I think so.

Mr. Mitchell: Is not there an important distinction in the fact that in certain classes of murder cases there is trial by jury and in others there is no jury but assessors and the judge already has discretion as to the sentence where there are assessors?—Yes.

In a jury case you have the ordinary English form of trial. Where there is no jury you immediately depart from the English form of trial in an important particular?—Yes.

The judge has a discretion that he can either convict or not?—Yes, but also he has the discretion whether to convict of murder or manslaughter, or of inflicting grievous bodily harm, etc.

If your proposal were adopted, the discretion that would be made presumably would not be necessarily racial but rather is to whether there was trial by jury or not?—Yes, though it would only be in cases tried with assessors.

Chairman: Although the judge sitting alone can convict of anything he likes, he must abide by the law?—Yes, definitely.

Mr. Mitchell: Supposing that there was no question of any other offence but murder from the evidence, the judge could still say, "I am not satisfied with the evidence"?—Yes.

As regards the prerogative, in your experience was it the case that the judge's recommendation was always accepted?—I had very little to do with cases of that kind. There was no question as a general rule. I imposed what sentence I considered right.

I see?—But I remember one case in Tanganyika in which I sentenced a woman to death for poisoning her husband with arsenic and I recommended that the sentence should not be carried out because, although I was satisfied that she had murdered her husband there was just that vague possibility that she might not have done it. The sentence was not carried out and she was sentenced to imprisonment for life. Can you say whether it often happens that the judges recommendation is not accepted?—I have no experience in this country.

Mr. M. Wilson: I am not quite clear about jury. If a jury in a murder case when a European is the accused decide that he was not guilty of murder, has not the judge got to abide by that decision?

Chairman: That was the point raised by Mr. Mitchell that the European has that safeguard.

Mr. M. Wilson: You suggest that the proposal you have made might be confined to natives?—That is what I intended to imply.

Chairman: Is it your experience that a judge without jury convicts more readily than a judge with jury?—It depends on the jury.

I am leaving out some curious circumstances that might arise. Ordinarily a judge is more easily satisfied with the help of a jury?—Generally speaking.

Where you have a jury there is no need for the judge to have this discretion, but where you have not got a jury the judge ought to have this discretion?—Yes.

The reason you are advancing this suggestion is, I take it, because you feel that natives are sometimes actuated by motives which white men are not actuated by which ought to reduce the offence from murder punishable by death?—Yes.

Mr. Mitchell: Then your point could be met by altering the law as to provocation and tying up that alteration to circumstances which would only be applicable to natives and native mentality?—I do not think it would be as satisfactory as the method I have suggested. There are cases, as Mr. Wade pointed out, with regard to the question of witchcraft when the native really thinks he is acting in self-defence. It seems to me a cruel thing to sentence a man to death when he has killed another in these circumstances. It must be a great shock to the native mind.

Chairman: What that comes to is that this is a circumstance which really ought to reduce the crime to one of manslaughter?—Yes. But perhaps it is advisable to keep the law as it stands. The native commits an offence against our law which is not against native law. You give him a light punishment—that makes them think a bit to start with. As time goes on you gradually make your punishment heavier and heavier.

Until the native has come to understand the European view and to reach the European standard?—Yes.

Mr. Mitchell: As regards interpreters and interpretation in the courts, do you find great difficulty or much inefficiency in interpretation?—At times. Sometimes it is necessary to go through a series of interpreters and you can only hope that you have got what the original man said.

Are you referring to the inefficiency of the court interpreters only or the interpreters one has to have in trying a case?—To both.

In the ordinary way there is a permanent interpreter. Then in some districts you often have to have other interpretation into another language and perhaps another?—Yes.

Would you support that the interpreter, especially the permanent court interpreter, is a very important part of the equipment of a court of this nature?—Certainly.

There is a tendency rather to minimise the post of interpreter. He ought to be a highly paid person?—Certainly. I think it is a most important post and may involve questions of life and death.

Was it a practice in Uganda that when a judge went on circuit he had to make use of whatever interpreter happened to be available?—Yes, I think so.

So he might get a very indifferent interpreter?—Yes, but that might not be the case.

Mr. Justice Law: You used the interpreter of the District Magistrate where you are visiting?—As a rule he is very fair.

Mr. Mitchell: It certainly happens in Tanganyika that a suitable interpreter may not be available. You have a lingua franca covering the whole country and sometimes the Administrative Officers do not use an interpreter at all. So that though there may be a clerk in the station who may be quite good, yet he has had no practice?—Could not the Administrative Officer interpret in these cases?

He would generally have committed the case?—I think it certainly should be the aim of Government to provide the court with an efficient interpreter on every occasion.

So you agree that the best possible interpreting that you can get is an essential part of the equipment of a court of this nature?—Yes.

Mr. M. Wilson: What was your experience in Uganda?—It varied in different cases. It was before Swahili was the official language. But I learnt very little Luganda myself.

You do not remember any instance of an interpreter being convicted for wilful misinterpretation?—No. I don't believe there has been any such case in these territories. It would be rather difficult to bring home.

Chairman: If there were this discretion in the judge, would you see any difficulty in tying it down to allow judges not to sentence to death only in cases where questions of native custom, etc., arise?—I should not see any objection to that. I think it would probably meet the case.

(*Witness then withdrew.*)

MR. P. F. BRANIGAN, *Acting Crown Counsel, Nairobi.*

Chairman: You are here representing the Attorney-General?—Yes.

Is it a part of your work to conduct prosecutions on behalf of the Crown?—A very large part.

Have you any idea how many you have conducted?—Roughly between 120 and 180 Supreme Court Criminal cases.

All over the country?—Yes, at Meru, Nyeri, Eldoret, Nakuru, Kitale, Kisumu and the Coast—Mombasa.

As a result of the experience you have gained in that way, have you any complaints to make as to the procedure and practice of the courts as regards the trial of natives?—They are vague. But

there is the question of atmosphere of the court, which has been mentioned by other witnesses.

It has been put to us that a native in the dock feels himself completely isolated, bewildered by the processes of a foreign law, hampered by the medium of a strange language and of such intelligence that he is not capable of understanding what is going on or adequately making his defence?—I think that is a very far-fetched picture of trials of natives in this country. The trial of natives could be divided into two categories—the detribalised native in towns and municipalities and the raw native from the reserves. The former is at home in the dock. He knows his position and his rights and not infrequently conducts a particularly able cross-examination of the prosecution witnesses. On the other hand, in such places as Nakuru where the trial takes place of Turkana and other tribes such as the Elgeyo and Marakwet from Baringo, they are much less sophisticated than the Kikuyu and tribes round the Coast. They have come, in the first place, anything from 50 to 100 miles to be tried, they are in the court surrounded by Europeans or natives of other tribes, and the only members of their own tribe present are the witnesses who are arraigned against them and three assessors who are elders.

So far as putting up any sort of defence, these people are entirely at a loss?—I think so.

Have you any system of what we will call dock briefs in England for the defence of these people?—Yes. When the trial is held at towns like Eldoret, Kitale, Nakuru and Kisumu a local advocate is invariably engaged for the defence of all natives charged with murder.

When does he first get any instructions in the matter?—I cannot say, but there is no reason why he should not receive a copy of the depositions about the same time as the Attorney-General, because there is a panel of advocates and the District Commissioner or Resident Magistrates at the place in question receives a notification from the Registrar of the Supreme Court telling him the date of the trial and asking him to engage counsel for this prisoner's defence.

A copy could be placed in the hands of that advocate at once?—It could and ought to be.

The depositions could not be handed to the advocate until the Attorney-General has filed his information against the accused, stating whether the crime is murder or manslaughter.—That is so.

Dealing with backward tribes such as you have mentioned, I imagine that an advocate, to understand the accused's defence, would have to understand something about the native outlook and mentality?—Undoubtedly.

Is it your experience that these advocates do that and appreciate the defence which the native is trying to put up?—No, though of course a distinction would be drawn in the case of backward tribes between criminal cases where the offence has been committed in circumstances which involve a large quantity of native life and native atmosphere looms large, and those where it does not. One would distinguish that kind of case from the ordinary sordid crime of murder from jealousy or enragement.

A man in that position wants to get the confidence of the native and to know how to deal with him, and get from the native exactly what his real defence is. He ought to be able to understand and appreciate the motives.—On that question I do not know how far an advocate with a dock brief is successful in his consultations before the trial. In many cases it is obvious from the conduct of the defence that he has not been able to get the confidence of the accused or much valuable information from him. But this is in the case of backward tribes, not Kikuyu for example.

With the advanced tribes these observations do not apply?—I think the Kikuyu, or a native of a similar tribe, is well able to get an advocate and instruct him as to his defence.

As regards backward tribes and the difficulty of understanding the defence, can you think of any means by which the lawyer could be assisted? Could the District Officer help him?—He could, and I should like to mention here that I feel the District Officer could help the native in his defence to a much greater extent than the Administrative Officer referred to by Mr. Mitchell attached to the Attorney-General's Office, because the D.O. is in the district and in the atmosphere and can get at the mentality of that native and the atmosphere in which the crime was committed.

It is possible that the D.O. was the committing magistrate?—There are generally two D.O.s

The suggestion, as you know, has been made that there should be a public defender?—I can foresee a certain amount of danger in appointing a public defender, who is an anthropologist or a student of sociology as so many Administrative Officers are now, without legal training to defend natives. In my experience in the prosecution of natives before the Supreme Court I cannot recall one case in which native law and custom loomed very large in the evidence.

With regard to the knowledge of native life and how it might help in the weighing of evidence, that would be an advantage?—Yes, but I think it would be outweighed by having that native defended by an untrained lawyer who could not be expected to know the points of law to take which might assist his client.

Supposing you could get the happy combination of administrative and legal experience, could you not institute a department of public defenders?—That would be possible.

How many officers would be required?—Two could cope with the work.

But you are confining them to High Court trials?—It would be impossible to have them in the proceedings before subordinate courts and Resident Magistrates, but they should appear in appeal cases.

It has been said that where the defence ought first to be indicated and ascertained is in the subordinate court. Did you hear some suggestions made yesterday as to the procedure before these courts? There was a suggestion that the magistrate might interrogate the accused first, ascertain his defence and then be in a position to help the accused?—That is a two-edged sword. It might militate against the accused because it enables the prosecution to address their efforts towards the weak part of their case and it shows them the salient features of the defence, and they are forearmed. Already there exists in summary trials before the District Commissioners a power to recall witnesses after the accused has made his defence—see Section 145 of the Criminal Procedure Code:—

> "145. Any court may at any stage of any inquiry trial or other proceeding under this Code examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined; and the court shall examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

Mr. Justice Law: You used the word "summary" trials?—I mean the trial before the subordinate courts—not the committal proceedings.

With reference to section 145, that section has been limited in its extent by a decision of the Supreme Court of Kenya, which followed a decision of the court of appeal at home in the case of Rex v. Harris, in which Mr. Justice Avory said that that power must of course be restricted to those matters which arose ex improviso. That restricts the limits of this section rather drastically.

Chairman: The power existing in the English court is inherent not statutory.

Mr. Branigan: Here it is statutory.

Chairman: Do you think it is a useful power to have unlimited?—Yes, in subordinate courts here because an advocate usually does not appear for the accused and I think the District Commissioner who is trying the offence undoubtedly acts as a prisoner's friend and brings out matters which he thinks will help him and if the accused raises a particular point in his evidence upon which the prosecution was silent and which, if true, should be enough to give him the benefit of any doubt. I think it is a very wise thing to recall prosecution witnesses.

Mr. Mitchell: In my experience it frequently happens that a very important witness for the prosecution gives his evidence. When you come to ask the accused what he has got to say, he replies "Oh, but that witness was not there at all," and you find it was so. Native ideas of evidence are not the same as ours.

Chairman: If that power was available and used carefully by the subordinate court, would it substantially take away the disabilities under which natives suffer and assist their defence?—In the subordinate courts, yes.

Mr. M. Wilson: Was it intended that the prosecution witnesses should be excluded from the court when the magistrate was speaking?

Chairman: Mr. Branigan does not favour the suggestion of finding out the evidence for the defence in advance as giving points to the prosecution?—Yes, I dislike anything which forearms the prosecution.

It might relieve the crown of their duty of proving the case?—A native might put up a case through fright which is obviously weak and the prosecution would be aware of that in presenting their case. The magistrate is able to coalesce the knowledge he has of the accused's defence with a weak prosecution and he would be unable to satisfy his own mind that no case has been made out for the prosecution.

If dock briefs are sent in sufficient time and if the barrister selected can obtain the assistance of the District Commissioner in interviewing his client, do you think that would substantially remove the difficulties about trials before the Supreme Court?—I am afraid I do not, because I think the only real weakness in the administration of justice in the Supreme Court in Kenya is the defence of natives.

Then that brings us back to the public defender. Of the various suggestions that have been made, am I right in thinking that you would favour the appointment of two officers of administrative and legal experience who would form a sub-department of some office?—Yes. They could be attached to the C.N.C.'s office and could undertake the defence of natives and also scrutinise all revision and confirmation cases from the point of view of the native.

They ought to have a copy of the returns as well as the Attorney General, and it would be part of their duty to raise any doubtful point?—That would get over the difficulty of revision and that it is a matter of chance whether a revision case comes up before the Supreme Court or not.

Can you judge whether the provision of these two officers would be more expensive than the present system of paying barristers to conduct a defence?—I cannot give you precise evidence but these figures were prepared by the Attorney General:—

	1928.	1929.	Average.
Total No. of capital charges	141	134	137
Nairobi cases	43	30	36
Mombasa cases	18	17	17
Circuit cases	80	87	84
	£	£	£
Total travelling and transport expenses in prosecuting cases outside Nairobi	348	372	360
No. of days away on circuit	117	147	132

The cost to Government of a Crown Counsel on the normal scale of £720 to £920 per annum over a period of 10 years would be:—

	£	
Total salary for 10 years	8,460	
Add 4 return passages and family allowances ...	800	
	9,260	
or		926 per annum.
Add cost of prosecuting cases	360	
a total of	1,286	per annum.

For that expenditure all Supreme Court criminal cases could be adequately defended, non-capital as well as capital cases, for the travelling,, etc., figure represents the cost of prosecuting all assize cases.

If local advocates were engaged we get the following figures, for capital cases only:—

	£	s.	d.
Nairobi and Mombasa cases 53 at Shs. 90s. each	238	10	0
Circuit cases at say Shs. 120s. per day away from Nairobi 132 days at Shs. 120s. ...	792	0	0
Add the same travelling and and transport as Crown Counsel would receive	360	0	0
	1,390	10	0

One public defender, therefore could be obtained at a total cost of £1,286, inclusive of passages and family allowances, while if local advocates are engaged for the defence of native prisoners at the rate of 90s. for each dock brief in Nairobi and 120s. on circuit cases the cost is approximately £1,390 10s. 0d. At present local advocates are only engaged for the defence in murder cases, and that is only in the centres where they are available, not at Meru and Nyeri.

So that you could get one public defender for less money than is spent on the very inadequate system at the present time. If you want two public defenders it would mean another £1,286?—Yes. I think the suggestion has been made that the cost of two public defenders for native cases should be borne by the Native Betterment Fund (Moyne Report).

I think on the question of the type of person to hold the position of public defender, more weight and stress should be put on the legal qualifications and his skill as a criminal lawyer than on his knowledge of native custom. For if a lawyer with experience in criminal matters is appointed and a suitable man is found it would not be difficult for him to acquire, especially if he is attached to the C.N.C.'s office, a certain knowledge of native mentality and the circumstances of their lives.

The language qualification would be essential?—Yes.

How many languages are there in Kenya?—About twenty. It would be impossible for him to acquire a knowledge of all of them.

About interpretation. From your experience in prosecuting, do you find interpretation is well done on the whole or not?—Considering all the circumstances and the difficulties under which the courts

work at the present moment in trials I think the interpretation is as good as could be expected, but it might be better.

Trials before all courts are conducted in English?—Not in the subordinate courts where the D.C. has a sufficient command of Swahili—that is on the assumption that the people before him are Swahili.

The interpreter may interpret into Swahili?—Yes, and where the Magistrate understands Swahili there would be no further interpretation into English.

Do you know of any subordinate courts where the enquiry is conducted in the tribal language?—No.

In Supreme Court cases are tribal languages ever translated straight into English?—Yes. Mr. Ishmael (Court Interpreter, Nairobi), who is a Kikuyu, translates straight from Kikuyu into English, where the accused person is a member of the Kikuyu tribe. When the Supreme Court goes on circuit to places like Kisumu, a local interpreter interprets from Lua, the tribal language, into Swahili, which in turn is translated into English by the Supreme Court interpreter.

What is your experience with regard to interpretation?—Interpretation is a great handicap, especially in cross examination of witnesses. I think it is very slow and in fact very dangerous to use intensive cross examination where two interpreters are required, and it has been known to lead to mistakes.

Then you agree with me that it would be a dangerous thing for any court to try to conduct a trial in Swahili or in any other language unless the magistrate has a very intimate knoweldge of that language?—Yes, I agree with that.

Mr. Mitchell: Have you experienced any cases of poor interpretation which have led to mistakes?—I have known of two cases where a District Officer, who happened to have a very good knowledge indeed of Swahili and who was sitting beside me while I was prosecuting in a trial on circuit, mentioned to me, while listening to the interpretation, that one word was not properly translated. I mentioned the matter to the judge and on investigation it was found that the interpreter had in fact used a word quite different from that used by the witness. That, I feel, must often happen, but I do not think it is a serious matter because the context would always show the judge where a blatant misinterpretation had occurred.

Chairman: As regards assessors. Do you find on the whole that the assessors show themselves intelligent and understand their duties?—Their advice to the trial judge at the end of the case is helpful in only a minority of cases. When they do give advice that they think the man is guilty they give their reasons for this opinion which are usually totally opposed to those which any trial judge would hold.

They take into consideration all sorts of things which a trial judge could not?—Yes, frequently based on their personal knowledge outside the courts which, of course, is far greater than that of anyone in the courts.

That means that they knew the facts already?—Yes, it is impossible to find people who have heard no rumours about the case. It does happen in some cases, especially at the Kisumu sessions, that there are three assessors whom we have at each assize and they are very helpful to the trial judge, giving cogent reasons for finding the accused guilty or not guilty—but that is the exception.

As regards revision and confirmation cases, is the Attorney General's Department consulted both in confirmation and revision cases before any action is taken by the Supreme Court judge?—Yes.

May we take it that all these convictions which we see quashed or the sentence reduced are quashed or reduced with the concurrence of the Attorney General?—Yes, though it may happen that the Attorney General dissents from the views of the revising judge and the case is set down for hearing before two judges of the Supreme Court. The Crown Counsel then appears on behalf of the Attorney General and if his arguments fail to convince the judges the sentence is altered without the Attorney General's concurrence.

The question of delay. First of all can you tell me what is the longest time a man, after committal, can be kept waiting for trial?—That would depend on the district from which the person was committed. In the case of a crime committed in Nairobi or the surrounding districts such as Kiambu and Thika, approximately five or six weeks would be the maximum time, because the criminal sessions are held every month in Nairobi. If the crime was committed in the Rift Valley Province or the Nyanza Province or in Trans-Nzoia, those are districts whose headquarters are Eldoret, Nakuru and Kisumu where the judges go on circuit and the maximum would be three and a half months, sessions being held at these centres every three months. At Nyeri and Meru on what is called the Mountain circuit there is a possibility of something over four months as a maximum. There may be a few cases from Moyali and Wajir in the Northern Frontier Province where there might be a greater delay owing to the difficulty in getting the accused and witnesses down to Nyeri for trial on account of the state of the roads at certain times of the year. In such cases the Provincial Commissioner may be given extended jurisdiction and try Supreme Court cases. But that has happened very infrequently—once in the last two years.

What would be the average delay?—Leaving out Nairobi, where there are criminal sessions every month, roughly seven or eight weeks (three months being the average maximum delay).

Am I right in thinking that a convicted person has only got a right of appeal on a question of law?—Strictly speaking he can appeal on questions of law and mixed law and fact only without the leave of the Court of Appeal or trial judge. But in appeals where the appellant is not professionally represented the court invariably allows appeals on questions of fact as well.

Having been tried and put in his appeal, between conviction and the hearing of the appeal in the Court of Appeal of Eastern Africa there may be a maximum delay of what?—Something over six months.

That is on the supposition that he is going to a mixed East African court?—Yes. As a matter of fact I would restrict the maximum to cases where the appellant is represented by an advocate. The case of an unrepresented native would be taken at the next sitting of the court of appeal whether it sat at Kampala or Dar-es-Salaam.

That is not very satisfactory.—A native who goes to the length of engaging an advocate to defend him in his appeal—such advocate will not go to Dar-es-Salaam unless he is properly remunerated, and that means he will apply for his client's appeal to be set down for the next session of the court of appeal at Nairobi.

Don't you think it a little difficult to defend delays of this nature?—I think it is the most unsatisfactory aspect of the administration of justice in the Supreme Court.

Am I right in thinking that all judges are judges of the court of appeal?—Yes.

In Kenya, how many judges are there?—A Chief Justice and three puisne judges.

So there are always four judges?—One judge may be on leave, but there would be an acting judge.

So that you could always obtain sufficient judges in Kenya to constitute a court of criminal appeal?—Yes.

Therefore can you explain why the court of appeal should restrict the hearing of appeals in Kenya to the quarterly sittings of the mixed Court of Appeal of Eastern Africa?—No. This is an aspect of the administration of justice I cannot understand and

especially in view of Rule 4 of the Eastern African Court of Appeal Rules, 1925, as follows:—

"4.—(2) Special sessions may be held at any time when considered desirable by the President, subject to such directions as to notice as the President may determine."

So long as you have got a court of appeal which does not contain the trial judge there is nothing to be gained in criminal cases by having a mixed court?—I can see no advantage in waiting for a mixed court.

If courts of criminal appeal were to be established regularly you could reduce these delays to a matter of weeks?—Yes, and there would be this further advantage. In appeals from Kenya to the Court of Appeal for Eastern Africa which are heard at Kampala or Dar-es-Salaam, the Crown is represented by a Crown Counsel from one of these territories and he works on a copy of the proceedings, whereas if the appeal is heard in Kenya the Crown Counsel who prosecuted at the Supreme Court would be able to undertake the prosecution of the appeal.

Mr. Justice Law.—With regard to these dock briefs, a copy of the depositions in the first instance is received by the Attorney General?—Yes.

After the Attorney General decides to lay an information, he sends that where?—To the Registrar.

And what happens to the copies of the depositions?—In the first instance the depositions are sent to the Registrar from the committing magistrate with a copy to the Attorney General. A copy of the depositions together with the information is sent by the Registrar to the accused when the trial is being held on circuit, and he also sends a copy of the depositions to the District Magistrate for the use of the advocate if one is available for the defence.

Do you know whether the depositions are handed over straight away?—I do not know. I should think so.

So it might happen that a defending advocate was merely notified just before the trial?—That is possible, though I think the district Registrar would feel it his duty to put the depositions in the hands of the advocate as soon as possible.

Do you know from experience or observation whether advocates in these circumstances take instructions from the accused?—In some cases, but it is not the invariable rule. I think in most cases they consult the accused, but there are cases where they go on the depositions alone.

Of course the value of the advocate's services is diminished in that case?—Yes.

You speak of two public defenders. You mean, I assume, that there should always be two professional men with this administrative and legal experience in the country at the same time?—I do not think it would necessitate that because, as regards leave movements, if one public defender was alone in the Colony for six months he could have seconded to him an officer from the Administration with legal qualifications who could, I think, fairly well take the place of the other public defender on leave.

So you agree that they would be like Crown Counsel except that they would be attached to the C.N.C.'s Department?—Yes, except that, of course, Crown Counsel do not make a study of native mentality.

Of course they would be called Defending Counsel?—I think the Attorney General's view is that it is possible to work this scheme with one public defender, but I fail to see how he can attend criminal sessions held at various parts of the country simultaneously.

Does every case that is tried throughout the length and breadth of the Colony and Protectorate come before the High Court some time by way of confirmation or revision, or is it only cases of a certain type where the punishment, perhaps, is too severe?—Under Section 11 of the C.P.C., in confirmation cases where the sentence passed by the subordinate courts exceeds six months imprisonment or twelve strokes or a fine exceeding £50 the record of the case must be first transmitted to and confirmed by the Supreme Court. With regard to subordinate court cases which do not come under section 11, only those cases which are called for by the Supreme Court judge as a result of his scrutiny of the monthly returns are revised, and if the case should be one in which a reading of the records discloses an irregularity, that case would be called up.

So in the first instance the oringinal record is not sent up, but merely the report?—The judge goes through the monthly returns and then he calls for the record.

The public defenders you suggest should have copies of the returns and in the same way they would go through the revisions lists?—That would be a very important part of the functions of the public defender to examine the monthly returns of subordinate court cases and especially confirmation cases. They should be entitled to a copy of the record in the same way as High Court judges are entitled to them. There might of course be cases where the judge might consider the sentence desirable while the public defender thought it excessive.

Do you think, with regard to interpreters, that a sort of small sub-department of interpreters could be formed to train selected men?—You mean for the Supreme Court?

For all purposes—principally the Supreme Court?—I think it would be a very good thing; it is essential to have highly trained interpreters. As a matter of fact, of course, the Swahili interpreters attached to the Supreme Court are now, through long practice and experience, very capable. But the interpreters of tribal laguages into Swahili who are on the local District Commissioner's staff and who are called in aid at criminal sessions on circuit are, in many cases, rather inferior.

Chairman: Is there any such thing as a substantive appointment of interpreter—for instance Ishmael at the Court here?—His work is mostly interpreting, but he does other things at the Supreme Court Offices. But I think the suggestion that there should be a special staff of interpreters fairly highly paid is very good.

Mr. Justice Law: Because it is of paramount importance that the interpretation should be faithful?—Yes. One cannot hope for perfection, but with a staff of efficient interpreters things would be better.

Chairman: Such a staff would devote their whole life to becoming efficient and studying the language.

Mr. Justice Law: Are there regular criminal sessions in Nairobi?—Yes, once a month.

Mr. Mitchell: As regards the fines in stock theft cases, clearly one may assume that an individual native cannot pay a fine of 5,000s. or 10,000s. or whatever it may be himself, so that these fines are in reality collective punishments?—Yes. There is a Collective Punishments Ordinance.

But in order that that law may be put into force the Governor has to be satisfied on the evidence not only that an offence has been committed but that circumstances make it just to punish the community?—Yes.

Under the Stock and Produce Ordinance no such enquiry is required?—Under this ordinance where a heavy sentence is imposed on the culprit the warrant issued for that fine may be executed within the local limits of the jurisdiction of the court imposing it and it may be imposed on the culprit's family, sub-tribe or tribe. Whenever a warrant shall have been issued under this ordinance and there is not sufficient moveable property belonging to the accused to satisfy such a fine, the warrant may be executed against the moveable property of any member or members of the offender's family or any member or members of the sub-tribe or tribe to whch the accused belongs.

Chairman: So that when the resources of the family are exhausted you then apply to the sub-tribe or tribe.

Mr. Mitchell: The point is that there are two collective punishments:—

(1) the Governor must be satisfied that certain conditions have arisen, for instance one of them being that the community is culpable, and

(2) it must be established that the family, sub-tribe or tribe is culpable with the accused, in which case the warrant must be backed and endorsed by the P.C.

Chairman: So that before you attach the property of the family you must first completely exhaust the available property of the accused—take away every penny he possesses?—Yes.

Mr. Mitchell: Under some ordinances there is a presumption of guilt in certain offences?—Only one—Section 4 of Ordinance No. X of 1928. Stock and Produce Theft:—

"4. If any stock is found in the possession or on the premises of any person in a proclaimed district in circumstances which may reasonably lead to the belief that such stock has been stolen, such person shall be deemed to have stolen the same and shall, unless he proves affirmatively (the onus being on him) that the possession was lawful, be liable to the penalties prescribed by section 3 of the Principal Ordinance."

Certain areas have been proclaimed areas for the purposes of this section and if in these areas a man is found in possession of stock under circumstances which may reasonably lead to the belief that the stock is stolen, he is charged with being in possession of the stolen stock and the onus is on him to prove that his posession is of lawful origin. But nowhere in that ordinance is it laid down what are the circumstances which may lead to a reasonable belief that the stock was stolen.

In this respect I have here the record of a case in which the accused person was convicted of this offence before the 2nd Class Magistrate's court at Kericho. The case came before the Supreme Court and the conviction was quashed on the ground that the accused had discharged the onus.

Talking of assessors, do you think there is a tendency to over-emphasize that they must have a knowledge of native custom, etc., in choosing assessors?—For the purpose of giving assistance to the court you might get better assessors if you got two or three intelligent Africans who were not old men and who had not perhaps as great a knowledge of native custom from the same district.

The D.C. seems to over-emphasize the necessity for a knowledge of native custom in selecting assessors?—Yes.

Chairman: I think directions on that might be given to D.C.s.

Mr. Mitchell: On the question of delays in trials before the Supreme Court, is any difficulty caused by the court having to move on from one session to another without completing the cases?—I know of no instances where the Supreme Court went away without finishing the criminal calendar unless it was some mistake on the part of the committing magistrate in not sending all the witnesses.

Is there any difficulty as regards the typing of the copies of the depositions? In country areas the clerical staff is probably small and unskilful?—I know of no difficulties in Kenya in that respect. The staff of the Supreme Court would type the depositions if they could not be done otherwise.

In practice the criminal jurisdiction in the Supreme Court in native cases is confined to murder, manslaughter and rape?—Yes, and sometimes the more serious cases of causing grievous bodily harm are committed for trial.

Even on that limitation there is a certain amount of delay?—In the Supreme Court in the case of its criminal work the average delay is roughly two to three months, and in districts which are very remote the maximum is about four months.

If the criminal jurisdiction of the Supreme Court were extended to other native cases which are now tried by the subordinate courts, would the present staff be able to cope with the work?—It is difficult for me to say, but as far as the Attorney-General's Department is concerned they could undertake the prosecution on circuit and in the criminal sessions here of any jurisdiction extending to other native cases of a serious nature involving imprisonment of 5 or 6 years.

As regards the defence of the accused. The only practicable safeguard for the illiterate accused is a trained advocate?—I agree.

The appearance of public defenders unless they were as fully qualified in every respect as the prosecutor and other people in the court might not be very effective?—I can see in certain cases that they would be detrimental to the accused. If he was an indifferent advocate it would be better to leave the accused to the mercy of the judge.

As regards this idea of a public defender or defenders, you do not think that some appointment such as we have discussed but for the purpose of preparing material for the defence would be preferable?—I think there are practical difficulties in the way. The Administrative Officer who would scrutinise these cases committed for trial with a view to preparing the grounds for the defence to be undertaken by someone else in court would get into communications with the various committing magistrates all over the country and receive from them certain information and cause certain enquiries to be made, and he could only be actuated in the enquiries that he would cause to be made by the depositions which, in many cases, would not disclose any material for him to work on. If he is operating from the Attorney-General's Office his work would be done in correspondence with the local D.C. at the place in which the crime has been committed. He would have to communicate with committing magistrates all over the country.

If he is a public defender undertaking the evidence in court, he would have to go on circuit with the judge and meet the accused and his witnesses that he is going to defend?—If he is going to act as an adviser preparing the ground work of the defence he presumably is not going round on circuit, his work is chamber work and consequently he could only find out and pursue certain aspects of the evidence by correspondence with the local D.C.

But he might appear in the court on circuit?—Such assistance would be limited presumably to assistance of a nature dealing with native custom and mentality.

The only man who can look after the accused is the judge, so that additional help is required to bring out the special considerations which might otherwise escape the notice of the judge. Some such arrangement as we have been discussing might be possible. Can you think of any other solution?—The only alternative is a public defender.

Chairman: I think the witness thinks a public defender as he suggested would be effective?—Yes, if he were the right type of man.

Mr. Mitchell: As regards the examination of witness and the difficulty of interpretation, would you agree that it is very much more difficult with the native witness, working through an interpreter, to get out of him what he has to say by the process of question and answer. The better method is to say, "What do you know about this"?—Yes, my own practice has been to ask the witness at the beginning to tell what he knows about the case and when one approaches the crucial point in the evidence to begin asking questions. By this method one receives a certain amount of irrelevant evidence but I think it is the only way of dealing with native witnesses.

In subordinate courts the police conduct the case by quick questions and answers?—I have no knowledge of what the practice is in the subordinate courts.

As regards the witness, who looks after them?—They come down from their district either in the company of the local headman or in some cases the

Assistant District Commissioner comes down with him. The local headman looks after them, and they have rations, and accommodation is found for them in the local native location.

Do you, as Crown Counsel, see the prosecution witnesses?—I see the evidence in the depositions. I have never found it necessary to interview a native witness. Their evidence is fully reported in the depositions.

Mr. M. Wilson: You have mentioned that you are in favour of these public defenders, and in discussing it mention was made by a witness of the advisability of allowing a magistrate to cross-examine for the defence. Might it not prejudice his mind in favour of the accused if he feels that the accused is undefended?—Every King's Bench judge at home is in the same position where a prisoner is undefended.

You consider a public defender the solution?—The defender is the ideal but I do not know whether it is practicable or not.

(Witness then withdrew.)

Warukia. Headman at Kiambu.

Witness was brought by Mr. McKeane, D.C., Kiambu.

Witness was examined, in Swahili, by Mr. Mitchell.

Witness was asked whether he wished to make a statement or be asked questions. He replied that he wished to make a statement.

He felt it important that arrangements should be made so that people should follow and abide by the customs of their forefathers. Judges who decide cases should follow native customary law—i.e. the members of the native tribunals should follow native customary law—and their powers should increased so that they could deal with more important cases than they do at present. All cases arising in the Kikuyu reserve should be remitted to the native tribunals for trial. In capital charges and stock theft, land and marriage cases, if they arise in the native reserve, ought to be tried in the native tribunals. He also felt that cases in connection with poll tax, if they are criminal cases, should be in the hands of the elders. Any questions as to whether people, widows or old people, should be exempted from poll tax ought also to be left to the native tribunals to deal with.

Witness stated that at the present time there are no natives qualified as lawyers and that therefore they thought Government should endeavour to secure an intelligent European to represent natives in their cases—High Court cases in the Colony. He should be a salaried servant of Government.

He considered that where native reserves and European plantations are intermingled and there are cases of trepass of native cattle over European property, the fines should not be large, but if an offence is proved against a native for trespass of his stock the fine should be small because large fines created bitterness between natives and Europeans and they have got to live together in the same country. If there is bitterness caused by excessive punishments it will create ill feeling. At the present time many natives complain about the severity of the fines.

Witness stated that conditions are now excellent in the native areas and that the natives are progressing, their cases are well dealt with and they do not wish lawyers to be permitted to interfere in matters affecting their customary law because there is a possibility of a lawyer knowing nothing about Kikuyu customary law. He may know about what happens in the towns but cannot be expected to understand the conditions in native reserves. If it is a matter of great importance the P.C. and D.C. with the assistance of the elders are well able to find out all about it and understand it and, if necessary, to go and visit the particular places to see things for themselves, but a lawyer has not these advantages and therefore should not be allowed to intervene. If, similarly, in native marriage cases, difficulties arise between the natives it is not possible for a European lawyer to understand the circumstances or to know what it is all about. Generally speaking the natives, if their cases are left to them, do not require legal assistance, but in cases where it is required, a special officer of Government should be appointed.

In reply to a question by Mr. Justice Law, witness stated that he thought natives ought to be allowed to run their own affairs both criminal and civil, Only if they were given jurisdiction in capital charges and murder cases, being serious matters, should they have supervision by the Supreme Court.

Witness stated that there are two grades of native courts—a lower, and a higher to which there should be appeal and appeal from that to the D.C. and from the D.C. to the P.C. In their opinion that is sufficient because if the intervention of outside courts is permitted there is liable to be miscarriage of justice owing to the parties being on different levels of wealth—one being able to afford a lawyer and the other not. They look forward to the time when, through education, there shall be native lawyers and even judges who will be educated people and who, in addition to their education, will know native customary law. In the meantime they preferred to await that eventuality.

In reply to a question by Mr. McLellan Wilson witness stated that he thought these courts should have to revert to the old customs of punishment. Mr. M. Wilson then said, "I believe one of the old customs was that certain individuals who were noted bad individuals were picked out by the tribe and put to death communally. Do you want that?" Witness replied, "In the old days there were people such as witches who were seized upon and put to death by their family, clan or the people among whom they lived. Now I think they should be sent to the native court. When asked what the native court would do to them, witness stated that in 1921 there was a case of a witch and his children who were sent before the elders in the native tribunal and subsequently to the D.C. As a result they were deported to another district and warned to stop their evil practices. The treatment was successful, they have abondoned their evil ways and returned to their reserve. Other cases could be imprisoned and would then give up their bad habits. If the native tribunals had their powers of imprisonment extended sufficiently they could give adequate sentences and punish people in that way.

Mr. M. Wilson: You have a court, but who is going to carry out the mandates of the court. Police?—We have trained police and prisons now.

Mr. Mitchell: Evidence was given the other day about the system of kipandis and the arrest of people for not carrying them. What have you to say about this?—I disagree entirely with the evidence. In the old days Kikiyu, Nandi, Meru, etc., all lived in their own countries. Now conditions have changed and all the tribes live together. In this collections of people, if a serious crime is committed, how is it possible to trace them

if there is no system of registration? In the war a number of people lost their lives, and they had often given wrong names. As a result of their dying their family lost their property. Had there been a system such as that in force at present it would have assisted the family to recover the property.

We are not concerned with the laws of property.

Witness stated that he recognised that as regards registration there are people who would not agree with him. There are abuses in regard to the arrest of people for not carrying their kipandis and he considered that the restriction and fines in that direction should be relaxed and that the kipandi should be treated like the passport of a European—a man should not be expected to carry it in his own country. Otherwise he thought the kipandi system excellent.

Witness said he wished to emphasize what he first said about the powers of native courts, D.C.s and P.C., as this is of the greatest importance to the progress of his country.

(*Witness then withdrew.*)

Wednesday, 5th April, 1933

The Commission re-assembled at 10 a.m. on Wednesday, 5th April, at the Supreme Court (No. 3) Nairobi.

His Honour Sir Jacob Barth, Chief Justice, Kenya.

Chairman: Sir Jacob, you have read the evidence I think and were good enough to say that you would come here to give us the benefit of your views?—Yes.

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[N.B.—*For passages here omitted see paragraph* 154 *of Report.*]

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As regards revision, the court only gets the name of the accused, the crime for which he was convicted and the sentence passed. They get no notes of the evidence?—No.

Unless there is something on the face of the record which looks suspicious or unless somebody draws the attention of the High Court to irregularities, they might pass unnoticed?—That is quite possible.

Do you think there is any way of strengthening that position? Would it be too much of a labour for a copy of the evidence to be sent with the return?—It would entail an enormous amount of work for the administrative officer if he has to copy out all the evidence and for this court which has to read it.

It has been suggested to us that the question of the defence of natives in any court, but particularly in the High Court because the issues are more serious, is important. An undefended native, especially of a backward tribe, is very lost and in a difficult position, the language and procedure are strange to him and he has no adequate means of making a defence. Is that an unfair picture of the case?—I think, of course, that probably a native from an outlying tribe may feel a bit strange, but I think that natives as a whole are not so unsophisticated from that point of view as many people believe. Among the backward tribes there is a tendency to be honest, admit having done the crime and give reasons.

There is a system of dock briefs?—Yes. In nearly every case of murder dock briefs are given out.

Perhaps it is not entirely satisfactory if a lawyer takes a case up at the last moment. He might have difficulty in getting the confidence of and facts from the accused. It has been suggested that there should be a public defender who should defend natives in the High Court and would also scrutinise the revision lists, seeing the files if necessary, and bring to the attention of the High Court any cases which he thought ought to be brought up.—Any machinery which would improve the defence of natives charged with crime would be welcome.

Someone suggested that it would be helpful to have an African legal adviser attached to the Supreme Court. Do you think that is a helpful suggestion?—I cannot see how that could improve matters. You have to deal with facts and law. An adviser could not help one way or the other.

As regards assessors. Do you find that on the whole they are helpful?—Yes, on the whole.

Do you think the quality of the assessor might be improved?—I have no complaint to make of the quality of the assessor as a rule.

You do not find that they are overawed by the court and anxious to please the judge?—Not at all. They are independent in their views.

Are they apt to give their opinion on considerations which you cannot take account of sometimes?—Yes, occasionally. There is only one thing I have recently written to magistrates about. D.C.s frecently send in assessors who already know too much about the case and have formed their own opinion as to the guilt of the accused. That is undesirable and I have pointed it out.

I have no other specific points to speak about. Is there anything in the evidence that occurs to you?—There has been a suggestion, I see, that there should be alternative punishments for murder. I do not think that is sound. I think there should be only one punishment. If you can sentence to death or imprisonment you have entirely different categories of punishment. Also there would be the question of whether the term of imprisonment should be a fixed one. Under the Indian Penal Code you could sentence a man to death or transportation for life. Of course that was varied here to imprisonment.

Have you used that power here?—Yes, but not very often. I think it is far better left to the executives to decide taking into consideration all the circumstances of the case.

You think it would be undesirable that the judge should have the function of taking into consideration these things which are at present dealt with by the executive?—Yes, I think so.

Mr. Justice Law: Do the original records come up in confirmation cases?—In confirmation cases the original record is sent in straight away, but not in revision cases; judges who read the monthly returns send for such cases.

With regard to revision cases in Uganda we have the original record sent in straight away like confirmation cases, also in all cases where a sentence of three months or over is imposed by Administrative Officers in their first six months of service and sentences imposed under certain special ordinances. Do you think that this is a better system?—It is only better because more cases are seen by judges.

Whereas simply a scrutiny of the return makes it possible that a case which should be revised might be omitted?—Very possibly. Of course in the past