THE APPLICATION OF THE CRIMINAL LAW TO THE ABORIGINES OF THE NORTHERN TERRITORY OF AUSTRALIA.*

(The following article is by the late Mr. Justice Martin Chemnitz Kriewaldt, who from 1951 until his sudden death in July 1960 was Judge of the Supreme Court of the Northern Territory. For many years before that he had been a practitioner at the South Australian Bar, and an Independent Lecturer at the Law School of the University of Adelaide. He took a scholarly and scientific as well as a practitioner's interest in the working of the legal system and his death was a great loss to the Australian law schools as well as to the practising profession.

Shortly before his death, Judge Kriewaldt had been in communication with me with a view to taking a period of leave from the Bench and spending it as a Visiting Fellow at the Australian National University, in order to revise and complete the following paper which he himself regarded as "notes" on the subject—a mere preliminary draft. I have edited his work so as to produce a continuous narrative, omitting mainly passages which adumbrated further field inquiry.

It is certain that his Honour would have done much more work on the subject if he had been spared. For example, he wanted to investigate more closely what anthropologists and specialists in aboriginal languages had to say concerning the possibility of explaining to tribal aborigines the abstract concepts and procedural devices of a sophisticated legal system. My impression was that his Honour had developed from experience a view that the aborigines as a whole, or at any rate a considerable number of "pure-blooded" aborigines, had a slightly different mental make-up from the white man or the mixed blood, and that this created inherent and inescapable difficulties in applying our legal concepts to their affairs, even after they had had considerable contacts with white society. These were the sort of assumptions which he wished to re-examine in the light of anthropological investigations.

In view of the length of the paper, it is here printed without notes or criticisms but it is hoped to print criticisms and further material on the substantive subject in the next number of this journal. —GEOFFREY SAWER†).

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1. Northern Territory statistics.

Before any intelligent discussion of the need for reform of the criminal law in its application to aborigines can take place, it is essential to ascertain how, in fact, the criminal law is applied to the aborigines in the Northern Territory. To that end I collected such statistics as the Northern Territory Court records disclose of charges against aborigines. I propose to give some details of criminal trials for serious crimes which were heard in the Supreme Court during the years 1944 to 1957. I shall also refer to charges heard in the Police Courts in the Northern Territory and give some statistics of such offences, but first there are some general observations to be made.

As the law stands at present, there are, speaking generally, no offences a white man can commit for which an aborigine cannot be tried if he commits these offences. There are a few crimes created by legislation, which, either by specific enactment or necessary implication, can be committed only by a person who is not an aborigine. An example is the unauthorised entry on a reserve for aborigines now called "Reserves for Wards". There are some offences only an aborigine can commit because the legislation creating the offence does not apply to white persons, e.g., being a ward drinking alcoholic liquor, or being a ward leaving a reserve to which he has been removed. In some cases it is difficult to decide whether a statutory prohibition applies to an aborigine: e.g., sec. 53A of the Aboriginals Ordinance, while that Ordinance was in force, provided: "Any person who procures any female aboriginal to have carnal connexion shall be guilty of an offence." This section was probably not intended to apply to a male aborigine.

In practice the offences for which aborigines are brought before the Courts do not present any great variety. The cases brought before the Supreme Court are mainly crimes of violence. There are, in addition, a few cases of offences against property, and a few of escape from lawful custody. The great majority of the cases brought against aborigines in the inferior Courts in the Northern Territory relate to or are connected with the consumption of liquor.

A. *Serious crimes tried in the Supreme Court.*

I had prepared a schedule of all the cases for the years 1944 to 1957 (both inclusive) heard in the Supreme Court of the Northern Territory in which the accused was an aborigine.

It may be that some of the accused persons mentioned in the schedule were partly white, but when I was aware of this I excluded

those persons, except one of them, Peppin (tried in Alice Springs on 21st January 1952) who was, I know, a half-caste. I included that case because the accused lived like an aborigine. The schedule shows whether the trial took place in Darwin or in Alice Springs. Owing to the state of the Supreme Court records I do not vouch for the entire accuracy of the schedule. It would be very difficult, perhaps impossible, to construct a similar schedule for any earlier period.

During the years 1944 to 1956 the number of aborigines in the Northern Territory was approximately 14,000 (perhaps a few more) of whom approximately one third (perhaps a few more) came within the geographical limits of the Alice Springs Supreme Court district. That district roughly extends from the South Australian border up to Newcastle Waters. Until about 1948 local conditions in the Northern Territory were such that some cases that would normally have been heard in Darwin were heard in Alice Springs, but since that date the place of trial provides a rough guide whether the crime was committed in the northern or the southern half of the Territory. There has been a gradual increase in the number of aborigines in the Northern Territory of recent years and the number of aborigines completely out of touch with white civilization is constantly decreasing.

Only the "murder" charges were tried by a jury; all other charges (including manslaughter) were heard by the Judge alone. In a murder charge, the jury is entitled, if the facts warrant, to bring in a verdict of "manslaughter". Mr. Justice Wells heard all the cases in the list up to the end of the year 1950; I presided at all trials since the beginning of the year 1951. From this material I have prepared the following analyses.

(1) Murder and other offences.

Wells J.

YEAR	MURDER	OTHER OFFENCES	TOTAL
1944	2	3	5
1945	3	5	8
1946	8	10	18
1947	2	7	9
1948	3	5	8
1949	5	3	8
1950	1	1	2
	— 24	— 34	— 58

Kriewaldt J.

YEAR	MURDER	OTHER OFFENCES	TOTAL
1951	7	3	10
1952	2	5	7
1953	5	3	8
1954	1	6	7
1955	5	2	7
1956	3	9	12
	— 23	— 28	— 51
Totals	47	62	109

(2) Main types of offence.

Homicide

Murder	47	
Manslaughter	11	
		— 58
Violence to the Person		
Sexual offences, e.g., rape, etc.	4	
Other assaults	18	
		— 22
Offences against Property		
Housebreaking, theft, etc.	15	
Stealing or killing animals	4	
		— 19
Escape from Custody		10
		109

(3) Result of trial in murder charges.

(Note: Jury decides on question of guilt.)

Wells J.

YEAR	NO. OF CASES	VERDICT OF MURDER	VERDICT OF MAN-SLAUGHTER	NOLLE PROS.	ACQUITTED
1944	2	—	—	—	2
1945	3	1	—	—	2
1946	8	1	2	1	4
1947	2	—	—	—	2
1948	3	—	2	—	1
1949	5	1	—	—	4
1950	1	—	—	—	1
	24	3	4	1	16

Kriewaldt J.

YEAR	NO. OF CASES	VERDICT OF MURDER	VERDICT OF MAN-SLAUGHTER	NOLLE PROS.	DISAGREED	INSANE	ACQUITTED
1951 ...	7	1	2	—	1	—	3
1952 ...	2	—	1	—	—	—	1
1953 ...	5	1	1	—	—	1	2
1954 ...	1	1	—	—	—	—	—
1955 ...	5	1	1	1	—	—	2
1956 ...	3	—	3	—	—	—	—
	23	4	8	1	1	1	8

Out of 47 trials for murder there were 24 complete acquittals. Of the 19 verdicts of guilty, only 7 verdicts were "guilty of murder" while 12 were "guilty of manslaughter". The other four cases in the list resulted in 2 entries of a *nolle prosequi,* 1 disagreement, and 1 verdict of not guilty on the ground of insanity. During my years as Judge there were some further cases where a *nolle prosequi* was entered, but because this was done before the accused was put into the dock and asked to plead, those cases do not appear in the Court records. The percentage of verdicts of murder as between cases heard by Wells J. and cases heard by me remained constant, but after I assumed office the percentage of acquittals decreased while the percentage of verdicts of manslaughter increased. The change was due, I think, (a) to a difference in point of view between Wells J. and myself as to the extent to which the Judge should indicate to the jury the view he holds as to the proper verdict; (b) the inclusion of civil servants amongst those qualified to serve as jurors, thus decreasing the percentage of old residents on juries; and (c) a fairly liberal view taken by me of the circumstances which entitle a jury to return a verdict of manslaughter on the ground of provocation.

(4) Sentences imposed after verdict of guilty in charges of murder.

Wells J.

Sentences for *murder*—10 years (1); 1 year (2).
Sentences for *manslaughter*—10 years (2); 5 years (3).
Total—8 sentences.

Kriewaldt J.

Sentences for *murder*—12 years (1); 5 years (1); 2 years (1); 18 months (1).

Sentences for *manslaughter*—5 years (1); 3 years (1); 18 months (1); 12 months (2); 9 months (1); 3 months (1); 6 weeks (1).

Total—12 sentences.

Regarding the sentences I imposed for murder, in the case where I imposed the long sentence of 12 years the victim was an old man, half-white, half-Cingalese, who was speared to obtain possession of his meagre stock of tobacco and rations; the sentence of 5 years was for the killing of the husband of a woman whom the accused desired to have for wife. In the two cases where Wells J. imposed sentences of 10 years for manslaughter, the files suggest that verdicts of murder should have been returned.

(5) Result of trials in charges other than for murder.

(Note: Trial is held before Judge without a jury.)

Wells J.

YEAR	NO. OF CASES	CONVICTED	ACQUITTED	RESULT NOT KNOWN
1944	3	1	1	1
1945	5	4	1	—
1946	10	9	1	—
1947	7	5	2	—
1948	5	4	1	—
1949	3	2	1	—
1950	1	1	—	—
	— 34	— 26	— 7	— 1

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1951	3	3	—	
1952	5	4	1	
1953	3	3	—	
1954	6	5	1	
1955	2	2	—	
1956	9	9	—	
	— 28	— 26	— 2	
Totals	62	52	9	1

Of the 34 cases heard by Wells J., 11 pleaded guilty—hence he acquitted 7 out of 23. Of the 28 cases before me, 18 pleaded guilty, and so I acquitted 2 out of 10. In two or three cases Wells J. acquitted the accused because a charge of manslaughter had been preferred instead of a charge of murder. I would not myself have regarded this as a sufficient ground on which to base an acquittal. The above analysis warrants the inference that since 1944 few aborigines accused of serious crime have been acquitted where there was no jury.

I did not seek to obtain comparative statistics of serious crime by aborigines elsewhere. I did happen to know that in South Australia (where the full-blood aborigine is still to be found in substantial numbers) only three aborigines were tried in the Supreme Court for serious crimes during the years 1952 to 1956, both inclusive. All three cases were charges of housebreaking and larceny.

I had reason to believe that there were several cases of suspected murder where the suspected offender escaped prosecution because the deadly wound was inflicted in the Northern Territory but the death occurred in South Australia. In another case the murder was committed in the Northern Territory, but when the accused was apprehended, hundreds of miles away on a mission settlement in Western Australia, it was thought best not to incur the expense of returning him to Alice Springs for trial.

In all the cases of violence tried in the Supreme Court during 1951 to 1956 where the accused was an aborigine, the victim was, with two exceptions, either an aborigine, or a half-caste living after the manner of an aborigine. The first exception was the case of *R. v. Anderson* (tried at Alice Springs on 11th May 1954), where the charge was one of attempted rape on a white woman. The second exception was *R. v. Nelson* (tried in Darwin on 27th March 1956), where the accused was charged with the murder of a white man. The jury brought in a verdict of manslaughter, which in my opinion was a proper verdict. So far as my researches into the records of the Supreme Court throw any light on the subject, there have been, during the last forty years or more at least, very few cases of crimes of violence by aborigines on whites. Cases of offences by whites on aborigines are extremely infrequent.

The general conclusion I draw from my experience and from my examination of the records of the Supreme Court is that one may expect in the future to encounter a substantial number of serious crimes committed by aborigines against aborigines. I predict an in-

crease rather than a decrease, not because more serious crimes will be committed by aborigines, but because the number of undetected crimes will decrease as the effects of the policy of assimilation make themselves felt. Some of the older inhabitants of the Northern Territory fear that there will be an increase of crimes by aborigines against whites. I do not share their fears—unless the present strict prohibition against aborigines drinking liquor is relaxed. I think that the case of offences by whites against aborigines will continue to be rare.

B. *Minor offences tried in the Police Courts.*

The number of charges against aborigines heard in the Police Courts is greater than one would expect, having regard to the number of aborigines in the Northern Territory and the fact that many live in areas where the nearest police officer is hundreds of miles away. I caused the records for the Darwin Police Court for the year 1956 to be examined, likewise the records for the Alice Springs Police Court for the years 1951 to 1956, and the records of the Katherine Police Court for the years 1954 to 1956.[1]

The figures thus extracted give the following results:

Darwin:

Total cases heard in Police Court in 1956	1,423
Cases in which an aborigine was the defendant	212
The cases against aborigines may be classified—	
Drinking liquor	158
Drinking methylated spirits	38
Sundry	16
	212

One aborigine (Parap) appeared on five occasions during 1956 charged with drinking liquor. Another, Charlie, appeared six times for drinking liquor and twice for drinking methylated spirits, but the name is so common that it may be that the charges relate to several persons. A cursory inspection of the records of the Darwin Police Court suggests that 1956 may be regarded as a typical year. The learned Stipendiary Magistrate who usually presided over the Darwin

[1] The somewhat arbitrary difference in periods was due to the bulk of the relevant material. The lists are available to research workers at the Australian National University.

Police Court in my time has said that roughly 95% of aborigines charged in the Police Court plead guilty. The Clerk of the Police Court, who had some years of experience in Alice Springs, concurred in that opinion and informed me that in his opinion over 80% of all fines imposed on aborigines were paid. This rather suggests that the opinion held by many, that aborigines regard imprisonment as a holiday, is not correct. On several occasions aborigines who worked for me, when convicted of drinking liquor, applied to me for an advance on wages to pay the fine, and other residents of Darwin have had similar experiences.

Alice Springs:

YEAR	TOTAL CASES	CASES AGAINST ABORIGINES	LIQUOR OFFENCES
1951	571	94	48
1952	443	100	58
1953	315	57	44
1954	428	119	97
1955	573	160	107
1956	773 approx.	85	75

Many names appear year after year. Many charges of drinking liquor are accompanied by charges of fighting in a public place, assault, disorderly behaviour, indecent language, etc.

Katherine:

YEAR	TOTAL CASES	CASES AGAINST ABORIGINES	LIQUOR OFFENCES
1954	151	41	37
1955	103	35	20
1956	—	31	24

The general conclusion I draw from these figures for Darwin, Alice Springs, and Katherine is that offences connected with the consumption of liquor by aborigines will continue to require the attention of the authorities in the future. If the number of aborigines living in the vicinity of the larger towns increases, the number of offences is almost certain to increase.

There are other police courts in the Northern Territory but the number of charges in those courts is very small. For example, the Tennant Creek Police Court in three years (out of a total of nearly 500 cases) heard only two charges against aborigines, but then there are no aborigines living near Tennant Creek. In the outback areas it is difficult to constitute a Police Court (two justices of the peace or

a magistrate are required) and hence offences in those districts, if any arise, are either overlooked or the offender is brought to Darwin, Alice Springs, or Katherine. Since liquor is not readily obtainable except in the larger settlements, the minor crimes by aborigines not living in or near these settlements are few in number.

2. Protection of aborigines through the Criminal Law.

The basic principle underlying the criminal law is that an individual is subjected to the criminal law in return for the protection afforded by that same law. Popular discussion of the topic of the aborigine and the criminal law is confined to the aspect of subjection, but, in my opinion, the right of the aborigine to the protection of the law is of equal importance. The chief problem which in the past arose from the right of an aborigine to the protection of the criminal law concerned his protection against white offenders. That problem has, in the main, been solved, but the other problem still remains, the protection of an aborigine against crimes by other aborigines and this will, I fear, remain difficult of solution, especially during the years of partial assimilation.

Today it can safely be said that, by and large, aborigines enjoy the protection of the law to the fullest extent in their dealings with whites. It is in the field of a crime committed by one aborigine against another that the present position leaves much to be desired.

Three types of cases can arise and each demands separate consideration:

(1) The case where the offender is a white person and the victim is an aborigine;
(2) The case where the offender is an aborigine but the victim is white; and
(3) The case where the offence is committed by an aborigine and the victim is also an aborigine.

A. *White accused and aboriginal victim.*

So far as white offenders are concerned, a distinction must be drawn between cases tried before a Judge sitting with a jury and cases tried before the Judge alone, in other words between murder cases and other charges.

It is no doubt true that in the past juries have perversely refused to convict whites accused of crimes against aborigines, but today I think the aborigine enjoys complete protection against whites even where a jury is asked to decide the issue of guilt. So far as the Northern

Territory is concerned, there has been since 1946 no case of a white person accused of the murder of an aborigine. I have in my reading run across only a very few cases heard after 1910 and before 1946 where white men were tried before a jury for the murder of an aborigine. The few cases which came to my notice all resulted in acquittals. The files relating to the older cases are not now available. Of the more recent decisions one verdict of acquittal was regarded by officers of the Department of Native Affairs as a miscarriage of justice. My perusal of the relevant file inclined me to agree with that opinion. In another case, on perusing the file, I formed the opinion that on the evidence a verdict of acquittal was proper but I doubt whether the evidence was as complete as it might have been.

I presided over many murder trials in the Northern Territory where both accused and victim were white; in some of these cases juries acquitted where I would have convicted. The same has been true where the accused and his victim were both aborigines. Allowance should be made for the high percentage of acquittals by Northern Territory juries in all murder cases before the conclusion is reached that a white person accused of the murder of an aborigine will be acquitted by reason of the colour of his skin.

On the whole there need be no fear today that a jury would perversely acquit a white accused of the murder of an aborigine, merely because the accused was white.

Trial by jury, except for murder cases, was abolished in the Northern Territory in 1921. So far as I could ascertain there were since 1942 only two cases of white persons being charged in the Supreme Court with offences of violence against aborigines not resulting in death. Both cases were tried by the Judge alone. One case resulted in an acquittal, the other in a conviction.

I had no doubt that in the two cases since 1942 of violence by whites on aborigines heard by the Judge alone, the colour of the accused had no influence on the verdict. As it happens, I was the Judge who convicted several white persons of a serious assault on aborigines. If my decision had been to acquit the accused, I should with equanimity have ignored any suggestion that I was influenced by the racial characteristics of the accused.

I was satisfied that in the Northern Territory a white person who commits a crime against an aborigine will be prosecuted exactly as if the victim had been white. It may be that some offences of whites on aborigines do not come to the notice of the authorities;

but, if information is received, investigation is inevitable and if the evidence is available, prosecution follows as of course. That there have been, in recent years, so few prosecutions of whites in the Northern Territory for offences against aborigines is due, I believe, to the absence of such offences and not to any failure to investigate or prosecute. Under present conditions I doubt whether any serious crime by a white against an aborigine would fail to come to the notice of the authorities. Indeed the investigation into such allegations would probably be conducted with greater thoroughness than similar investigations into offences by whites against whites.

B. *Aboriginal accused and white victim.*

During my years as Judge there was only one case of the murder of a white person by an aborigine. That was *R. v. Nelson,* tried in Darwin on 27th March 1956, in which the jury properly returned a verdict of manslaughter. Charges against aborigines of the murder of whites have, since 1910, been extremely rare. The last case before *R. v. Nelson* of which I can find any record is the well known case of *R. v. Tuckiar,* heard in Darwin in 1934. In my opinion there would today be no bias against an aborigine accused of the murder of a white man.

The absence of bias on the part of juries against aborigines is illustrated by two cases of half-castes charged with murder of white persons. The two cases are *R. v. Maroney*[2] and *R. v. Lucy O'Connell,* both heard in Darwin. In both cases the accused was half-caste, but in each case the victim was white. In each case there was an acquittal. In each case the evidence was sufficient to have entitled the jury to convict of either murder or manslaughter.

I heard only one case of violence short of homicide by an aborigine against a white person: *R. v. Bobby Anderson* (tried at Alice Springs on 11th May 1954). I could not trace any case heard by Wells J. after 1942 of an aborigine accused of violence against a white.

I was satisfied that in the present state of public opinion an aborigine who commits a crime against a white person will not be prejudiced by his colour.

C. *Aboriginal accused and aboriginal victim.*

This is the common case that comes before the courts. My experience led me to believe that in many cases a more thorough

[2] This name was written in script and the spelling is speculative.—G.S.

investigation into the circumstances of the incident which resulted in a charge being laid against the accused would have revealed that the accused should not have been regarded as the only offender. In many cases he was not only an offender but also a person offended against, and as such entitled to have the criminal law set in motion against the persons who offended against him. One of the purposes of the criminal law is to restrain the instinct to resort to violence when a wrong has been suffered. This restraint is accepted in civilized communities partly from fear of punishment but partly also because there are other means of punishing the offender than resort to force. Today, if an aborigine resorts to force, if he takes the law into his own hands, he is punished, but it is rare that criminal proceedings are taken against the person whose actions caused the accused to act as he did. Failure to prosecute the other aborigine, if his acts amount to a criminal offence, is a denial to the accused aborigine of his right to be protected by the criminal law.

Two examples will illustrate the point. In May 1957, at Alice Springs, an aborigine was charged before me with assault. He had thrown a boomerang at another aborigine who stepped aside and thus avoided injury. The boomerang hit a young boy who suffered a broken arm. The accused pleaded guilty to a charge of assault occasioning bodily harm. The story behind the assault was that the aborigine at whom the boomerang was thrown had paid attentions to an aboriginal woman to whom he could not be married without breach of tribal custom. He had been warned to desist. On his failure to do so, the accused, a near relative of the woman, threw a boomerang to give point to the previous warning. I was able to do substantial justice by releasing the accused on his own bond: one of the very few cases where I have used this type of sentence. There are not many aborigines who would understand what was meant by a release on conditions.

The moral of the story is that no proceedings were taken against the intended victim. I find it difficult in this case to suggest what criminal proceedings could have been taken. Nevertheless, if an aborigine is to restrain himself from violence for fear of punishment by our law, it is essential that the person who provokes him to violence should, in proper cases, be made subject to the law. In this particular case there should probably have been, soon after the trouble about the woman commenced, an order prohibiting the trouble-maker from remaining on the reserve. A breach of that order could have led to prosecution in the Police Court.

The other case I heard in Darwin in June 1957. A man had been promised a girl as his wife, but when she was old enough to be married her parents broke their promise and gave her to a younger brother of the man to whom the promise had been made. Acting under a sense of grievance the disappointed aborigine threatened to assault his younger brother. In the fight that ensued the accused wounded his elder brother. Again there was a plea of guilty to a charge of assault occasioning actual bodily harm. Because the wound was inflicted with a spear I imposed a short term of imprisonment. In coming to that decision I acted on the advice of an experienced officer of the Welfare Department. The moral of this story is that no proceedings were taken against the elder brother, although he was clearly guilty of an assault.

The failure to extend the full protection of the criminal law to aborigines arises partly from the fact that there are cases where the act of which an aborigine can properly complain does not readily fit into the categories of crime adopted by our legal system, and partly from the fact that at present the criminal law is set in motion by persons insufficiently acquainted with its ramifications.

The problem of extending the full protection of the criminal law falls, I think, to be solved by the Welfare Department through an intelligent application of the criminal law. The officers of the Welfare Department should not confine their activities to defending aborigines accused of crime, but should in proper cases initiate prosecutions, and in some cases even take preventive action. The importance of the proper selection of the authority charged to decide whether proceedings should be taken, and against whom, will appear later. I think this aspect of the problem is more the concern of anthropologists than of lawyers. The function of the law in this regard ends once it is decided that aborigines are entitled to the full protection that the criminal law affords.

The only solution that occurs to me, to cover cases not readily classified as breaches of the ordinary law, is to make more frequent use of the powers of banishment conferred on the Director of Welfare by the Welfare Ordinance; but a note of warning should, perhaps, be sounded. It may be that if this power is to be used to give effective protection to aborigines against offences not covered by the ordinary criminal law, or against apprehended offences, the power of banishment should be subject to review by the courts. It is clear, from the decision of the High Court in *Waters v. Commonwealth*,[3] that the

3 (1951) 82 Commonwealth L.R. 188.

Supreme Court already has the power to prevent an arbitrary exercise of the power of banishment by the Director of Welfare. My suggestion is rather along the line that every order in the nature of banishment should be reported to and examined by some independent authority. Merely to give a "ward" a formal right of appeal against a banishment order would be illusory; when the time arrives that an aborigine understands that he may appeal from "Welfare" to the courts, that aborigine has also reached the stage where he should no longer be subject to the Ordinance.

3. Subjection of the aborigine to the Criminal Law.

In the present section of these notes I intend to discuss the question of the right of the white community to subject the aborigine to the ordinary criminal law in force in the Northern Territory. Many who agree that the aborigine is entitled to the protection of the law contend that the aborigine nevertheless should not be subject to the same law.

I can think of no valid reasons which would support the view that the white community in the Northern Territory has no moral right to subject aborigines to the criminal law and accordingly no right to punish an aborigine for an offence against the prevailing law. I assume, of course, that the white community extends the protection of the law to aborigines as well as subjecting them to the sanctions of the law. In my opinion, all members of any given community are entitled to the benefits conferred by law, in return for which they become subject to the law and accept the restrictions laid down by the law. At the same time I see no reason why, in proper cases, exceptions should not be made in the general application of laws, and in particular, I see no reason why certain classes in a community should not be tried for offences in a manner different from that employed for the majority. Further, it seems obvious to me that if the aborigines in the Northern Territory are to be assimilated, in the sense that they shall become a permanent, integrated, and useful section of the community, it is essential that they be punished for crimes they commit. The extent to which the aborigines of the Northern Territory have been in contact with white civilisation has now reached the stage where nearly all of them know that some actions they are tempted to perform will result in punishment being inflicted. The concept that they are entitled to the protection of the law is comparatively new to them; it has, I think, been brought into the thinking background of most of them so far as the white section of the community is concerned, but is still entirely foreign to their way of thinking so far as

other aborigines are concerned. The task of making the aboriginal members of the community realise that the criminal law suffices to extend to an aggrieved person some measure of protection against other aborigines also, so that retaliation may safely be abandoned, is one of the major problems of the policy of assimilation.

There are some who hold that it is always wrong to bring before the ordinary criminal tribunals aborigines who have offended against the ordinary penal laws. Those who so contend usually assume that every crime with which an aborigine is charged arises from acts done by him either in accordance with or under the compulsion of tribal customs. On that assumption they regard the accused as always morally justified in his actions. As will appear later, my experience disproves the underlying assumption.

There is a substantial body of opinion in the Northern Territory, especially in the Alice Springs district, to the effect that whites should not concern themselves at all with crimes committed by one aborigine on another, whether those crimes have any connection with tribal laws or customs or not. "It is no concern of ours what they do to each other" is how it is put. It was my custom, in Alice Springs especially, to impress on juries that they would be false to their oath if they acted on that view. For example in *R. v. Willie,* tried at Alice Springs on 12th May 1955, I said in my summing up to the jury:

> "Some of you may think that it is an imposition that you should have been brought here and kept here all day to try an aboriginal native of Australia for an offence such as this.
>
> "I have heard a lot of discussion in the Northern Territory in the little over four years that I have had the honour of being the Judge of the Northern Territory, regarding the trial of aboriginal natives for offences they are alleged to have committed. There are some people who have been unkind enough to say that this tribunal, consisting of a judge and jury, is utterly unsuited to try natives for alleged offences. Some people say there should be an entirely different type of tribunal . . . .
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> "There are some people who say natives should not be tried in surroundings such as this but that the trial should be held at the scene of the alleged crime . . . . There are some people who think it is not right to apply the ordinary criminal law to the trial of natives; they think that we should apply special laws to native cases. There are some people who quite honestly think

that the white man should not interest himself in matters at all which concern natives only . . . .

"Gentlemen, I have merely mentioned these matters to emphasise what I must tell you at the very beginning of my summing-up, and that is that you and I together form this Supreme Court today; I am bound by the law which is in force in the Northern Territory, and you are equally bound by that law. You took an oath this morning to make true deliverance between the accused and our Sovereign Lady the Queen and that means your verdict must be according to law. I feel certain that, no matter what your private opinion may be, in your capacity as jurymen you will accept what I tell you, that the law requires you to judge this case as if the accused were a white person. If the deceased and the accused had been white, and the true verdict was one of "Guilty" it will be your duty to bring in a verdict of "Guilty"; but if the true verdict under such circumstances was one of "Not Guilty", it will be your duty to bring in a verdict of "Not Guilty." You are not to be influenced by any views that you may hold regarding the wisdom of trying natives at all, or by your views as to the methods and the rules according to which they are tried."

Whether this emphatic lecture to the jury had any effect, I do not know, but it is a fact that the jury brought in a verdict of guilty. In another case arising out of the same incident and heard during the same sittings, *R. v. Activity and Peter,* where I did not make any similar remarks, the jury brought in a verdict of "Not Guilty". The two charges arose out of the same incident and the evidence was substantially similar.

The Australian courts have consistently held that the whole of the law at any given time applies to aborigines and whites alike, except to the extent that the legislature had seen fit to make differences or to allow exceptions. In *R. v. Jack Congo Murrell,*[4] an aborigine was charged with the murder of another aborigine. His counsel demurred to the indictment. The argument in support of the demurrer was as follows:—

"This country was not originally desert, or peopled from the mother country, having had a population far more numerous than those that have since arrived from the mother country.

[4] (1836) 1 Legge (New South Wales) 72.

Neither can it be called a conquered country, as Great Britain was never at war with the natives, nor a ceded country either; it, in fact, comes within neither of these, but was a country having a population which had manners and customs of their own, and we have come to reside among them; therefore in point of strictness and analogy to our law, we are bound to obey their laws, not they to obey ours. The reason why subjects of Great Britain are bound by the laws of their own country is, that they are protected by them; the natives are not protected by those laws, they are not admitted as witnesses in Courts of Justice, they cannot claim any civil rights, they cannot obtain recovery of, or compensation for, those lands which have been torn from them, and which they have probably held for centuries. They are not therefore bound by laws which afford them no protection."

Five reasons were given by the Court for overruling the demurrer, but only the first and fifth are of interest. Burton J. for the Court (Forbes C.J., Dowling and Burton JJ.) said:

". . . . although it might be granted that on the first taking possession of the Colony, the aborigines were entitled to be recognised as free and independent, yet they were not in such a position with regard to strength as to be considered free and independent tribes. They have no sovereignty . . . If the offence had been committed on a white, he would be answerable, was acknowledged on all hands, but the Court could see no distinction between that case and where the offence had been committed upon one of his own tribe. Serious causes might arise if these people were allowed to murder one another with impunity, our laws would be no sanctuary to them. For these reasons the Court had jurisdiction in the case."

As late as 1860 attempts were made in Victoria to induce the Supreme Court to hold that the ordinary criminal law did not apply to aborigines. In *R. v. Peter*,[5] the accused (a half-caste said to have "a local residence apart from the white inhabitants of the colony") was convicted of murder. The judgment of the Full Court of Victoria as reported is short and reads: "The Court did not call on the Solicitor-General for any reply; but held that the Queen's writ runs throughout this colony, and that the British Law is binding on all peoples within it, and that the conviction was good." In *R. v. Jemmy*,[6] the accused

[5] Reported in *Argus* newspaper of 28th June 1860.
[6] Reported in *Argus* of 6th September 1860.

had been found guilty of manslaughter (incidentally this is the case called *R. v. Jeremy* by Professor Elkin in 17 *Oceania* 173, at 203). The deceased was his "lubra". The point reserved for the decision of the Court was "whether in the absence of evidence that either of these natives had become civilised or had changed their habits or modes of life so as to be supposed voluntarily to have subjected themselves to British law, the prisoner was liable to the jurisdiction of the Court." The argument put for the accused was as follows:—

> "*Mr. Adamson.*—This case is distinguished from that of *Reg. v. Peter,* decided in this Court last term, inasmuch as here both the slayer and the deceased were natives. It must be conceded that if the sovereign *de facto* should impose laws upon a territory held by conquest or occupation, those laws would be binding, and would supersede the laws previously in force. But it is competent for such a sovereign to sanction the pre-existing laws, and to confine them in their operation to the race which before was subject to them. And this may be done tacitly. Such was the case of Ireland with regard to the Brehon law. Then there are the American cases and authorities, having reference to the native Indians. He cited *Worcester v. The State of Georgia,* 6 Peters U.S. Rep. 515; *The Cherokee Nation v. The State of Georgia,* 5 Peters, 1; 3 Kent's Commentaries, 460, to show that in cases of dependence or qualified subjection, the subject or dependent race may retain their immunity from the jurisdiction of the courts of the dominant race. Was that so in this case? The onus lay upon the Crown to have shown that it was not so. But the case negatived the offer of any evidence on this point."

The Court did not call upon the Crown to reply to the argument for the accused. The judgments were as follows:—

> "*The Chief Justice*:—This case must be held to be governed by *Reg. v. Peter.* It makes no difference whether the victim were an Englishwoman or a native. The jurisdiction of the court is supreme, in fact, throughout the colony, and with regard to all persons in it. It is not intended to decide that in no case might there be a concession to a subject race of immunity from the laws of the conquerors living among them.
>
> "*Sir Edmond Barry J.*:—This is virtually a plea to the jurisdiction. It is not suggested what other jurisdiction could be named, so as to 'give a better writ'.
>
> The conviction was affirmed."

The length to which the general principle that the whole criminal law applies to aborigines was taken appears from the report of *R. v. Neddy Monkey.*[7] Four aborigines were charged with the murder of another aborigine. A female aborigine was called as a witness for the prosecution. She claimed to be the "lubra" of one of the prisoners and said: "I have been married to him more than a year." Had she been a white woman she could not have been compelled to give evidence against her husband. The trial Judge reserved for the opinion of the Full Court the question "whether Sally was not to be deemed the wife of the prisoner 'Neddy Monkey' and whether her evidence was properly admissible as against him." The Court held the evidence to be admissible against all the prisoners. Barry J. said:—

> "The Court cannot take judicial notice of the religious ceremonies and rites of these people, and cannot, without evidence of their marriage ceremonies, assume the fact of marriage. The word "lubra", also, is not to be understood by the Court without explanation or evidence. To assume because this person described herself as a "lubra", and as married, that she was the prisoner's wife within the meaning of the Act, is assuming too much, without evidence of the meaning of the word "lubra", or of the facts constituting marriage according to the rites and ceremonies of these people. Every witness is presumed to be testible until the contrary is shown; and it is not by the use of unexplained terms, or the assertion of vague rites and ceremonies, that the general rules of evidence are to be broken down."

Similar decisions on the admissibility of evidence by female aborigines married according to tribal custom were given in the Supreme Court of the Northern Territory by Mallam J. between 1928 and 1932, and, I think, also by his predecessors. But the discussion between Wells J. and counsel in the *Tuckiar* case (1934) suggests that following the decisions of Mallam J. a direction had been given (probably at ministerial level) that a woman married according to aboriginal customs to an aborigine accused of a crime should not be called as a witness.

I regarded it as settled law that, except to the extent that legislation has made some alteration, the whole of the criminal law, both substantive and procedural, and the whole of the law of evidence, applied equally to whites and aborigines. There is, however, one position that frequently arises if this view is adopted which has caused

[7] (1861) 1 Wyatt & Webb (Victoria) 40.

me much concern. I refer to the extent to which an aborigine on trial for a serious crime understands the nature of the proceedings at his trial.

4. Comprehension by aboriginal accused of the proceedings of a trial.

If the accused cannot understand the nature of the proceedings of a trial he cannot be tried, and if he cannot be tried, he cannot be punished. A person unable to plead for lack of comprehension of the proceedings at the trial is regarded in law as insane and in accordance with the usual practice confined so long as the authorities think fit. Lack of understanding usually arises from mental deficiency, but the rule is not limited in that way. Whether the inability to understand the proceedings arises from mental defect, or from some other cause, such as lack of education, the result is the same: *R. v. Dyson.*[8]

In *R. v. Lee Kun*[9] Lord Reading C.J. said:—

> "No trial for felony can be had except in the presence of the accused, unless he creates a disturbance preventing a continuance of the trial: see Stephen's Digest of Criminal Procedure, p.194, and *Reg. v. Berry,*[10] per Wills J. Even in a charge of misdemeanour there must be very exceptional circumstances to justify proceeding with the trial in the absence of the accused. The reason why the accused should be present at the trial is that he may hear the case made against him and have the opportunity, having heard it, of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings. The prisoner may be unable, through insanity or deafness or dumbness, or the combination of both conditions, to understand the proceedings or to hear them, either directly or by reading a record of them, or to answer them either by speech or writing. In these cases a jury is sworn to ascertain whether the prisoner is "fit to plead", which is interpreted in *Rex v. Pritchard,*[11] as meaning whether he is "of sufficient intellect to comprehend the course of proceeding on the trial so as to make a proper defence . . . . If you think that there is no certain method of communicating the details of the trial to the prisoner, so that

8 Referred to in R. v. Pritchard, (1836) 7 C. & P. 303 at 304, 173 E.R. 135. as having been heard before Parke J. at the York Spring Assizes in 1831.
9 [1916] 1 K.B. 337, at 341-342.
10 (1897) 104 L.T. Jnl. 110.
11 (1836) 7 C. & P. 303, 173 E.R. 135.

he can clearly understand them, and be able properly to make his defence to the charge, you ought to find that he is not of sane mind." If the accused is found not fit to plead, he is not tried, but is detained during His Majesty's pleasure.

"The authorities dealing with the matter are all discussed in the recent case of *Rex v. Governor of Stafford Prison.*[12] If the accused is fit to plead it may yet be that no communication can be made in the ordinary way; it may be that he is deaf and can only be approached by writing or signs, or dumb, and can only make his views known by writing or signs, or a foreigner who cannot speak English and requires the assistance of an interpreter to understand the proceedings and make answer to them. In such cases the judge must see that proper means are taken to communicate to the accused the case made against him and to enable him to make his answer to it."

So far as I have been able to ascertain, the point has never been taken in the Northern Territory that an accused aborigine did not have sufficient education or intelligence or background of civilisation to understand the proceedings. So far as my experience goes, if the point had been taken, the correct decision in many instances would have been that the accused did not understand, and could not have been made to understand, what was going on.

The limitations of "pidgin" English used in most cases are such that it is quite impossible to transmute into that jargon the archaic words of a formal indictment. It is also quite out of the question, I think, to translate an indictment into an aboriginal language. It is not difficult to convey to an aborigine either in his own language or in "pidgin" that the person in the dock is accused of the death of another aborigine, or of inflicting a wound on another aborigine, or of killing a beast, or of taking something, or of leaving the precincts of a certain place, but to convey the concept of murder, or of unlawful wounding, or of unlawfully killing cattle, or of theft, or of escape from legal custody is, I think, impossible. Neither "pidgin" nor any aboriginal language suffices to convey the meaning of "malice aforethought" or of "unlawfully" or of "fraudulently without a claim of right" or of "lawful custody".

I do not intend to convey that the average aborigine on trial has no knowledge at all of what is going on at the trial. I think that in

12 [1909] 2 K.B. 81.

nearly every case of murder, for example, he appreciates that the people in the court room are for some reason or other interested in "that trouble that come up along that dead feller." I think he knows that the witnesses are telling somebody (probably the interrogating counsel) about "that trouble". I think he believes that at the end of the proceedings he will be returned to the gaol to stay there some further period. I am, however, certain that no aborigine who has appeared before me has understood the respective functions of judge, jury, or witnesses, or has appreciated that the proceedings were directed to ascertain whether the evidence sufficed to establish beyond reasonable doubt that he was guilty of the crime alleged against him. There is one possible exception. I think that, perhaps, in the case of *R. v. Nelson* (heard in Darwin on 27th May 1956) the accused understood sufficient of the proceedings to have been fit to plead. Another recent case at Alice Springs could, perhaps, also be regarded as an exception.

The plain fact is that in the Northern Territory the trial of an aborigine in most cases proceeds, and so far as I could gather, has always proceeded, as if the accused were not present. If he were physically absent no one would notice this fact. The accused, so far as I could judge, in most cases takes no interest in the proceedings. He certainly does not understand that portion of the evidence which is of the greatest importance in most cases, namely, the account a police constable gives of the confession made by the accused. No attempt is made to translate any of the evidence to him. If a jury is present the accused certainly does not understand the summing up nor could it be explained to him. If there is no jury, the accused in most cases has no comprehension of the addresses made by counsel to the Judge sitting as the fact-finding tribunal. If the rule requiring substantial comprehension of the proceedings were applied in the Northern Territory, many aborigines could simply not be tried.

I can see no possible way by which this difficulty can be overcome. It matters not what changes may be made in the composition of the tribunal before which aborigines are tried, or what alterations are effected in the rules of procedure regulating trials, or what alterations are made in the law of evidence, the fundamental fact that most accused aborigines do not understand the proceedings will not be affected for many years to come. There is no solution. If the criminal law is to be applied at all to aborigines, it must simply be accepted that, for some years yet, many aborigines will not understand, even to a limited extent, the method whereby it is decided whether they be guilty or not.

And yet the present system is not, for this reason, unjust in its operation. It is the part played by the Welfare Department which prevents the present system of trial being unjust. In every case of serious crime counsel is briefed for the accused aborigine. Counsel always has available the assistance of an experienced officer of the Welfare Department, who will invariably have interviewed the accused and the witnesses. If there is any real defence, counsel and the Welfare Department are well able to bring that defence to the attention of the Court. The proceedings in the Supreme Court are not really a trial, but resemble rather an inquiry before a tribunal which, although it follows the procedure of a court of law, really decides only whether a prior decision made by the Welfare Department that the aborigine is guilty is correct in law.

If the ordinary rule requiring comprehension of the nature of the proceedings were consistently applied, the result would be that the white community would have to overlook entirely many crimes committed by aborigines. If the law were to adopt that attitude, there would be a reversion, I think, where the victim is white, to a policy of reprisals, and that would be worse than to continue with the present system. Where the victim is another aborigine, the white community, taken as a whole, would probably not be greatly concerned if there were no trial. Only the more discerning would see that failure to punish crimes is a serious reflection upon our capacity to assimilate the aboriginal part of our community and inconsistent with the duty we owe to the aborigines.

One would expect a similar position to arise in Western Australia where the full-blood aborigine is to be found in greater numbers than in the Northern Territory. I was informed by the Minister for Justice of that State that his officers "cannot recall any occasion when an interpreter was required for aboriginal witnesses or to interpret the English evidence for an aboriginal accused." I suspect that in that State also the authorities often fail to launch prosecutions against aborigines for offences against other aborigines.

This section is to be read as having reference only to trials in the Supreme Court of the Northern Territory. So far as aborigines charged in the police court with minor offences are concerned, there is no similar problem. Those aborigines are nearly always of the sophisticated class and nearly all of them plead guilty. I have no personal experience of those cases, but discussions with those who are in position to know have led me to the belief that aborigines charged with minor

offences understand that their presence in court is due to the commission of an offence and that the penalty they will suffer is determined by the court. I had some doubts, however, whether all the aborigines brought before a police court were aware of their right to plead not guilty and to insist upon proof of guilt by admissible evidence.

5. Knowledge of breach of white law and influence of tribal law.

I referred earlier to an assumption which underlies much of the current criticism: That an aborigine accused of a serious crime always acts in accordance with and frequently under the compulsion of tribal law and custom. The material I have cited from cases other than those tried by myself provides no indication of the extent to which the acts charged as crimes were committed by comparatively uncivilised aborigines, nor does it show the extent to which the accused may have acted in accordance with tribal laws or customs. But the evidence produced at the various trials before me usually provided some material for an assessment of the extent to which the accused had been in contact with white civilisation and in many cases also indicated whether the accused was acting in accordance with tribal laws or customs. Where an accused was convicted I had in addition the evidence of officials of the Welfare Department and of other informed persons, usually missionaries, on these points. My general conclusions are as follows:—

A. *Serious Crimes tried in the Supreme Court.*

(1) A substantial proportion of the crimes I tried were committed by aborigines who have had little contact with white civilisation. The majority of aborigines I tried have had a good deal of such contact but lived a mainly "aboriginal" life. The class of aborigines who have substantially adopted white habits of life provided few of the accused who appeared before me.

(2) In a few cases only was the crime due to causes which could be referred to tribal laws or customs. A few of the cases which could be so classified were for violence permitted by aboriginal custom, but in nearly all these cases the degree of permitted violence was exceeded.

(3) The great majority of the cases of violence I tried arose from anger, or lust, or desire for revenge. In nearly every case the actions of the accused were regarded as wrong by the aborigines most nearly concerned. This is shown by the number of cases

where tribal punishment was inflicted on the accused or would have been inflicted if he had not fled or the authorities had not intervened.

(4) Knowledge that the act in question would lead to punishment by the white community existed in nearly every case.

Some elaboration of these conclusions may be of help, especially because the views I have expressed in the preceding paragraphs run counter to all that I have read.

I tried only one case where in my opinion the accused aborigine was not aware that his action was contrary to white law and would entail punishment. I can call to mind no case where the accused aborigine was aware that he was doing wrong according to white man's law but nevertheless acted as he did for fear of tribal punishment if he failed to act. In a substantial proportion of the cases I have tried the accused acted in accordance with the customs of his tribe, but would have realised that his actions would lead to punishment, if he had stopped to think about this aspect.

I think I should emphasise that not one case came before me where the aborigines forming the community to which the accused belonged were not aware that the act which brought the accused to trial was against white law. At the present time there can be only very few aborigines who do not know, in a general way at least, that to kill or injure another native is likely to lead to arrest by the police and punishment by the "big boss Judge." The sanctity of the person and property of white persons the aborigines learned from the many punitive expeditions in years gone by; the sanctity of the life of fellow aborigines they have now learned from the arrest and trial of numerous offenders. In those areas where the aborigines have no knowledge at all that violence will result in punishment, the probability is that crimes of violence do not come to the notice of the authorities.

The trials following on the murder of an aborigine at Murray Downs are of special interest in this respect. That murder resulted in charges against *Willie, Activity,* and *Peter* which were heard at Alice Springs in May 1955. Two other aborigines were also charged with murder, but after a jury had acquitted *Activity* and *Peter* the Crown Prosecutor entered a *nolle prosequi* against these two aborigines. The murder was, I had no doubt, the result of a belief that the deceased had been the cause of the death of another aborigine. Elaborate care was taken to hide the body of the murdered victim and to confuse the tracks of the party of aborigines who were responsible for the

death. This indicated that the aborigines concerned in that killing knew that their actions might expose them to punishment at the hands of the white community. There was, of course, also fear of tribal retribution, but I am satisfied that fear of the police was the major factor.

A similar murder occurred near Tea Tree at about the same time. The *post mortem* examination excluded the possibility of natural death. That the identity of the person responsible for the killing is known to the aborigines in the district is believed by the police and officers of the Welfare Department to be the case, but fear of retaliation, or a desire to shield the guilty party, has so far prevented the local aborigines from disclosing his identity.

The Areyonga murder (*R. v. Charlie* and *R. v. Captain* and *Tiger*) tried at Alice Springs in 1953 provided the only incident in my experience in which tribal beliefs or tribal laws beyond question had a substantial effect. In my opinion it was a difficult decision to make whether there should be a prosecution of the aborigine *Charlie* in that case. At the time I had some doubt as to the wisdom of the prosecution of that aborigine because of the extremely limited extent to which he had been in contact with whites, but I realised that failure to prosecute would be misunderstood by the aborigines at Areyonga. I had no doubt that the prosecution of *Captain* and *Tiger* was proper. In the Murray Downs cases (*R. v. Willie* and *R. v. Activity* and *Peter*) there can be no doubt that the prosecution of most members of the party responsible for the murder was essential. The aborigines in that area are well aware of the fact that punishment will follow on the murder of an aborigine. I think that many aborigines in that area still believe in the power attributed to some aborigines to will the death of another aborigine, but I am certain that all the aborigines in that area also know that they are not allowed to murder the supposed killer.

I did not make summaries of the evidence in trials for offences other than murder, and accordingly those who read these notes will have to trust to the accuracy of my assessment. The charges of manslaughter, in my time, have all been cases where provocation existed or where the intent to kill or inflict a serious injury was negatived by the facts. I can call to mind no case of this class where any tribal aspect of importance fell for consideration, except the cases where death was caused as the result of the infliction of punishment permitted by tribal custom. For example, an aborigine had stolen another aborigine's wife. The husband recaptured his wife without much

difficulty. He demanded the exercise of his right to inflict punishment on the offender who consented without demur. The appropriate number of blows on the head with a heavy stick was duly given. Contrary to expectation, the victim suffered a cerebral concussion from which he died. Theoretically the accused was probably guilty of murder, but the decision of the Crown to lay a charge of manslaughter had my approval.

The offences against property were all against property owned by whites. No tribal factors entered into any of these cases. In the cases of escape from lawful custody it may well be that an aborigine has a greater desire to return to his own country and a lesser degree of knowledge that escaping is an offence than a white prisoner.

B. *Minor Crimes tried in the Police Courts.*

A perusal of the schedule of cases of minor crimes shows that the majority of these offences arose from or were connected with the consumption of liquor. I did not notice a case in the records of any Police Court where an offence was alleged where there was even the remotest possibility that the accused did not know he was acting contrary to white law, except of course the cases where the accused was before the Police Court merely for the purpose of being committed for trial. Those cases I have discussed under the heading of serious crimes. In the cases heard in the Police Court, where there was a victim of the offence, he was usually another aborigine, or part-aborigine, with the exception of the cases where the police suffer assaults in the course of effecting an arrest.

C. *General Conclusions.*

The only case which seems to require serious discussion is that of the aborigine whose contact with white civilization has been small and who acts in conformity with tribal custom. It is a rare case, as I have shown, but when it arises many factors must be considered before a proper decision can be made whether a prosecution should be launched. There have been from time to time suggestions that no prosecutions should be commenced against any aborigine for any serious crime without the prior approval of the Welfare Department. At one time there was a ministerial direction "that no action is to be taken with regard to offences committed by one aborigine against another aborigine until the facts have been placed before the Chief Protector of Aborigines and his authority procured for such action." A later direction confined this to "relatively uncivilised natives . . . who are not under any form of permanent European control." At

this stage I shall only repeat that the difference between serious and minor crimes is of importance, that the degree to which the accused aborigine has become civilised has also much relevance, and that the extent to which the aborigines of the community of which he forms part have been in contact with white civilisation is probably the most important factor of all.

6. Investigations into alleged crimes by aborigines.

I heard little discussion or criticism of the present methods of investigating allegations that offences have been committed or of the preliminary steps prescribed by law to bring an offender to trial. Despite this apparent universal approval, I held the opinion that the present system was neither good nor well applied, and that substantial reforms were long overdue.

Before any formal steps are taken to bring an offender to trial, inquiries have been made which are of great importance. In many cases these earlier steps do more to make aborigines aware of the existence of the criminal law than the later formal steps and the eventual trial. Of these preliminary matters the one that is most common is the police inquiry.

When a crime is reported to the police, inquiries are conducted by a police officer. In some cases the officer has the assistance of an interpreter and also of "police trackers." In some cases, but rarely so, the police officer may be assisted by an officer of the Welfare Department. If the crime was committed at a mission station or on a cattle station there has probably been an earlier unofficial inquiry by the missionary or the people living on the cattle station. In those unofficial inquiries the local aborigines have probably assisted. When the police officer arrives at the scene of the crime the identity of the criminal is usually common knowledge already.

Most police inquiries are conducted by a police officer who has had little experience of aborigines. Where the police officer is new to the service (and that for many years could have been said of most of the local police force) the possibility that the story he obtains is only a garbled version of the truth is extremely likely. The more contact I had with the aborigines, the more convinced I was that the paucity of the average aborigine's vocabulary presents a real difficulty in communication between whites and aborigines. Assuming that this barrier does not exist in any given case, the difficulty of being able to distinguish between truth and falsity when an aborigine is telling the story is nevertheless formidable, and in my opinion, insurmount-

able by a police officer in the earlier years of his service. There are some police officers who have had much experience with aborigines but usually such officers receive promotion and their new duties prevent their employment in the investigation of crimes committed by aborigines. Those members of the police force who do not become sergeants but remain in the lower ranks are usually assigned to the "out-back" stations where they have unrivalled opportunities of learning to understand the aboriginal way of life. The members of the police force who have had service at the outlying stations, if assigned to investigate an alleged offence, are probably better qualified to ascertain the truth than anybody else. Unfortunately, it was my experience that the majority of serious crimes have been investigated in the first instance by fairly junior members of the police force.

In some cases there is, simultaneously with the police inquiry, also an investigation by the Welfare Department; sometimes the police officer and the patrol officer work in conjunction. Usually, however, the Welfare Department makes its inquiries only after the police have apprehended the offender. The shortage of patrol officers has probably been the reason why this course has up to date been generally adopted. After an aborigine has been convicted, the reports of officers of the Welfare Department have usually been made available to me. These reports often contain much interesting material which was not disclosed by the evidence given at the trial. Nearly all the officers of the Welfare Department have had some period of training for their work and many have had years of experience with aborigines. Several of them must be ranked with the experienced police officers as most likely to get at the truth.

A competent inquiry into the facts of an alleged crime, and an inquiry into the motives actuating the alleged crime, are perhaps the most important steps of all in the application of criminal sanctions to aborigines. It is only after full inquiry that a wise decision can be made whether action extending beyond the prosecution of the offender for the obvious crime should be taken. To ensure that the inquiry is both competent and complete it should be conducted only by police officers with substantial experience of aborigines. I suggest that as soon as the strength of the Police Force permits, all police investigations be conducted by two officers, one of whom should be an experienced member of the Force and the other a junior member attached for instruction.

I can see no theoretical objection to the police being assisted in their inquiries by officers of the Welfare Department. The idea that

the officials of that Department have it as their duty to "protect" the aborigine, is not, it seems to me, sufficient reason to abstain from giving assistance to the police in their efforts to discover the identity of the criminal or the collection of evidence to establish his guilt. The duty to "protect" is owed not only to the offender but also to the victim of the offence, and frequently can only be obeyed if active assistance is given to the conduct of police investigations.

The "negative and static in emphasis" policy condemned by Professor Elkin[13] in 1937 has given way in the Northern Territory to a policy of assimilation whereby it is hoped to make the aborigine a useful member of the community. As part of that process it is essential that he be taught that the criminal law will inflict punishment on him for such crimes as murder, assault and theft. It is equally essential that he be taught that the law will protect him and thus remove the temptation to take the law into his own hands. I see no objection if the officers of the Welfare Department, to further the policy of assimilation, give assistance to the police in their investigation of crime. In my opinion their participation in such investigations would probably have the effect that not only would the true facts be eventually presented in Court but that adequate information as to the motives underlying the crime would also be presented.

If, however, it is necessary as a matter of policy to keep the inquiries of the police separate from those made by officers of the Welfare Department, there should be an investigation by the Welfare Department in every case. Although the main emphasis in that inquiry should be placed on the discovery of the extent to which the accused acted in accordance with tribal custom, a full inquiry into the facts of the alleged offence should also be made. In that regard special emphasis should be paid to the possibility of punitive action against any aborigine who may be regarded as having contributed to the crime in question by some unsocial activity.

7. Procedure before trial of aborigines.

There are certain formal steps which the law at present requires to be taken to bring a person accused of crime to trial. These formal preliminary steps should be abolished entirely where the accused is an aborigine. The present procedure works well in a fully civilised community, but is quite useless, and to some extent harmful, where aborigines come into the picture.

13 (1937) 7 OCEANIA 459, at 477.

When a murder is committed a coroner's inquest is held. The suspected aborigine has probably already been arrested, charged with murder in the police court, and there been remanded pending the result of the inquest. The coroner (with rare exceptions this will be one or other of the two stipendiary magistrates in the Northern Territory), after hearing evidence, commits the aborigine for trial if a prima facie case is made out. The police court proceedings are then withdrawn.

Where the offence is not connected with the death of a person, the suspected aborigine is arrested and brought before the police court where a preliminary hearing is conducted. At both the coroner's inquest and the preliminary hearing in the police court, witnesses are called by the prosecution. The accused has the right to cross-examine these witnesses. Where the accused is white, this right is often exercised, but not infrequently the legal advisers of the accused prefer not to disclose the defence proposed to be raised and hence abstain from serious cross-examination. Where the accused is an aborigine he is usually not represented in the police court and accordingly no cross-examination takes place. In the preliminary hearing in the police court (as also at the coroner's inquest) the accused person has the right to give evidence, but since the question at that stage is not whether the accused is guilty or not, but only whether the evidence justifies a committal for trial, the right to give evidence is seldom exercised by a white person. In my experience it was never exercised by an aborigine. I feel certain that both of the stipendiary magistrates in my time would have endeavoured to dissuade an accused aborigine from giving evidence if he showed any such inclination to do so. It is almost certain that the aborigine would, if he gave evidence, incriminate himself. At the preliminary hearing the accused is not usually represented by counsel, but in most cases an officer of the Welfare Department is present in court, although he takes no part in the proceedings. The examination of the witnesses is usually conducted by a police officer.

If the coroner or stipendiary magistrate commits the aborigine for trial in the Supreme Court the depositions are forwarded to the Crown Law Officer who, on the basis of the depositions, decides on the appropriate charge to be laid and in due course files an "information" in the Supreme Court which "information" comes on for hearing at the next Criminal Sittings of the Court. It is that Court alone which determines whether the accused is guilty or not, and which decides on the appropriate penalty if he is convicted.

In the meantime the aboriginal witnesses who gave evidence at the coroner's inquest, or at the preliminary hearing in the police court, are usually sent to the Bagot Reserve, if the trial is to be held in Darwin, or to the Bungalow Reserve, if the trial is to be held in Alice Springs. The accused is usually remanded in custody to the local goal to await his trial.

Quite frequently difficulty is experienced in holding witnesses in Darwin or Alice Springs while they are waiting for the trial. The formal recognizance to appear to give evidence has no meaning for them. If they decide to go "walk-about" there is no power that can prevent them leaving. Several cases have been postponed to a later sittings of the Court because witnesses were not available.

In my opinion the preliminary inquiries conducted by experienced members of the police force or officials of the Welfare Department are of far greater importance and value than the preliminary hearing in the police court or the inquest by the coroner and make those proceedings unnecessary. The only purpose, in law, as well as in fact, served by the coroner's inquest, or the preliminary proceedings in the police court, is to decide whether there is sufficient evidence to justify a committal for trial. That decision, I think, can be made, without hearing the witnesses, by any competent person with experience in the criminal law after a perusal of the police brief or the report of an officer of the Welfare Branch.

The coroner's inquest and the preliminary hearing in the police court have certain objectionable features. If one remembers the low degree of intelligence of the average aborigine, and his lack of acquaintance with our judicial tribunals and the rules there applied, it is obvious that the accused, if he thinks about the matter at all, will regard the preliminary hearing in the police court, or the inquiry before the coroner, as his trial. Usually he is not given bail after his arrest. After the hearing before the coroner or the stipendiary magistrate he is returned to the gaol. When some weeks later he is brought back, usually to the same court room, and the witnesses again give their evidence, he is bewildered. The same is true of the witnesses. They have told their story to a police officer whom perhaps they knew, they may have told their story to an officer of the Welfare Department of whose power over them and of whose attitude towards them they are aware, they have told their story again to someone "along that Court" and have noticed their words being put on paper by a typewriter, and now they are asked to tell it all over again to the "big

boss Judge"—"that old man sittin' up there." The effect must merely be to confuse all the aborigines who attend these successive hearings.

When a jury sits at the trial, the preliminary hearing has the further objection that the depositions of an aboriginal witness in the police court, or before the coroner, provide material for cross-examination directed to show that the evidence in the Supreme Court at the trial differs from the evidence the witness gave in the lower court. I never had the experience of an aboriginal witness adhering in the Supreme Court in every aspect to his earlier account. He would always assent (whether intentionally or not is another point which I shall discuss later) to many questions put to him by counsel for the accused and by answers thus elicited flatly contradict some parts of his earlier evidence. It is impossible to explain to an aboriginal witness that he has given inconsistent evidence and to ask for an explanation. There is sufficient difficulty if the contradiction is only between examination in chief and cross-examination at the trial. When the evidence given in the police court is also available to elicit discrepancies the position becomes hopelessly confused. Where I sat without a jury on the trial of an aborigine, I discouraged counsel in their attempts to cross-examine on the police court depositions because my experience was that discrepancies are the rule and not the exception and did not justify an inference that the witness is lying. Counsel knew that such divergent accounts had little influence on my decision as to the veracity of an aboriginal witness. Where a jury sat with me, because it is their function to decide the facts, and that involves coming to a decision as to whether a witness is speaking the truth or not, I did not feel justified in adopting a similar attitude. I am certain that some juries became confused by this type of cross-examination and have, because of differences between successive versions, wrongly regarded the aboriginal witness as untruthful.

The preliminary hearing in the police court in some cases also resulted in delay between the arrest of the aborigine and the date of trial in the Supreme Court. Where aborigines are concerned that delay should be as small as possible.

Where an aborigine is granted bail after the preliminary hearing, and is then, after some period of freedom, brought up for trial, the position in some cases becomes distressing. In March 1957, at Alice Springs, an aborigine was presented for trial. He had been released on bail after the preliminary hearing in the police court. He had been in gaol for some weeks awaiting the preliminary hearing. While on bail he had worked as a gardener at the Court House. After I had

found him guilty and sentenced him to a term of imprisonment, an experienced officer of the Welfare Department endeavoured to explain to the accused that his earlier incarceration was not the sum total of his punishment. I was informed that the attempted explanation was not successful. That aborigine probably has no high respect for the white man's law.

I therefore recommend the abolition of both the coroner's inquest and the preliminary hearing in the police court in every case where the suspected person is an aborigine. A former Director of Native Affairs (Mr. F. H. Moy, O.B.E.), in a memorandum to the Administrator, dated 3rd October 1951, made a similar recommendation. In that memorandum he said that he had discussed this matter with me and that I had agreed with him that the coronial inquiry should be abolished. I had forgotten this conversation until a perusal of the memorandum recalled it to my mind. In October 1951 my experience with aborigines was not great, but my views on this topic did not change after 1951; in fact I now say emphatically that the coroner's inquest and the preliminary hearing in the police court do far more harm than good where an aborigine is the accused.

8. **Responsibility for decision to prosecute.**

The coroner's inquest and the preliminary hearing in the police court both concern something I regard as of great importance: The selection of the best authority to decide whether to prosecute or not. Under the present system, in theory, the responsibility for the decision whether or not an aborigine is to stand trial for a serious crime rests on the stipendiary magistrate presiding at the preliminary hearing, subject only to the over-riding authority of the Crown Law Officer to refuse to prosecute. In fact, however, at present the decision rests with the sergeant in charge of the local police station. If he lays a charge the stipendiary magistrate is bound to conduct the preliminary hearing, and if the evidence adduced establishes a prima facie case against the accused, the stipendiary magistrate is bound to commit him for trial.

In the majority of cases there are probably no reasons why an aborigine who has committed a serious crime should not be brought to trial, and consequently it is of little importance who it is that sets the machinery in motion. Looked at from a more detached point of view there is, however, a serious principle at stake. Many have suggested that prosecutions against aborigines should be launched only with the approval of the Welfare Department. I found myself unable

to adopt this view. Traditionally it was the function of the Attorney-General (or of officials acting under his direction) to decide whether criminal proceedings shall be taken. It would be unwise to depart from this principle. To transfer the decision whether to prosecute or not to the Welfare Department would cast a duty to consider matters of law on persons unqualified by their training to come to a proper decision. The ministerial direction to which I have referred earlier, that proceedings should be taken against partly uncivilised aborigines only with the approval of the Welfare Department, is also unsound in principle but less open to objection. I suggest that the final decision should in the Northern Territory always rest with the Crown Law officer, but to ensure that he has all the relevant material before him I suggest that the results of investigations by the Welfare Department be made available to him if the Welfare Department thinks fit. I have no doubt that few prosecutions would be brought in cases where the Welfare Department held strong views that it was desirable not to prosecute.

The following procedure should be adopted when a serious crime is reported to have been committed by an aborigine:—

1. An experienced police officer should be detailed to make an inquiry and to collect statements from witnesses. If possible, he should have the assistance of a junior police officer.

2. The police officer assigned to investigate should at once notify the Welfare Department of the crime reported, and at the conclusion of his inquiries he should make available to the Welfare Department the evidence obtained by him.

3. The Welfare Department, if it sees fit to do so, should assist the police in making inquiries, or alternatively the Department should conduct an independent inquiry.

4. The results of the police inquiry should be sent with all possible expedition direct to the Crown Law officer for a decision whether an information should be filed or not.

5. The Crown Law officer should in each case consider whether proceedings should also be taken, either in the Supreme Court or in the Police Court, against any other aborigines in respect of offences connected with the incident under investigation.

6. If the Welfare Department has also conducted an inquiry, it should be free to submit the results of that inquiry to the Crown Law officer.

7. Pending the decision of the Crown Law officer no coroner's inquest should be held or any formal charge laid against a suspected aborigine.
8. Pending a decision by the Crown Law officer a suspected aborigine and any aborigines regarded by the police or the Welfare Department as possible material witnesses may be taken into custody in some convenient place, which place, with the approval of the Director of Welfare, may be some convenient police station.
9. If the Crown Law officer decides to prosecute, proceedings shall be commenced by information similar to the *ex officio* information.
10. If the Crown Law officer thinks a useful purpose will be served, he may direct that there be a preliminary hearing in the police court or that a coroner's inquest be held in lieu of a decision as to prosecution being made on the material forwarded to him by the police and the Welfare Department.

The suggestion to abolish the coroner's inquest may require legislation. The preliminary hearing in the police court can be dispensed with by administrative action, if the Crown Law officer is given power, pursuant to a delegation from the Attorney-General, to file an *ex officio* information where the accused is an aborigine.

There is no necessity for any legislation designed to prevent the trial of a wholly uncivilised aborigine who commits a crime while acting according to tribal custom. As I have already said, that case has been of infrequent occurrence and is likely to become even less frequent in future. If in a case of that description it were thought wisest not to prosecute, the Crown Law officer would, I have no doubt, consider representations from the Welfare Department to abstain from filing an information or to enter a *nolle prosequi,* i.e., not to proceed on an information already filed. As a last resort, the Court itself would have great regard in passing sentence to any representatives by counsel instructed by the Welfare Department that the accused deserved only nominal or no punishment.

I see no need for any alteration in the present system with respect to offences triable in the police court. Nearly all the aborigines who appear in the police court are more or less permanent residents of Darwin or Alice Springs or Katherine and are fully acquainted with the laws for the breach of which they are prosecuted. I do, however, suggest for consideration that the procedure outlined above should apply to "minor indictable offences." At present certain offences can

be tried either in the Supreme Court or the police court. I would suggest that the decision as to the appropriate tribunal in such cases be left to the discretion of the Crown Law officer.

The problem of offences arising from the consumption of liquor by aborigines will not be solved by prosecutions against aborigines guilty of the offence. The remedy for that evil does not lie in the realm of law but must be found in other directions. Even in the field of minor crimes investigations should not be limited to the discovery of offenders but should also be concerned with the aspect of extending to aborigines the protection of the law.

So far as offences triable in the police court are concerned, what is probably the most difficult problem of all is this: What is the best procedure to ensure that white persons who supply aborigines with liquor do not, if guilty, escape conviction? That problem falls outside the scope of these notes.

9. The conduct of a trial.

The present method of trial is not likely to lead to an unjust conviction; it has led to unjustifiable acquittals. I shall in succeeding sections make a number of recommendations for alterations to the present system.

The trial of an aborigine is and always has been conducted, as nearly as may be, in the same manner as if the accused were white, but of sheer necessity I have during my term of office permitted some departures, most of which were also permitted by my predecessors. That procedure works well in the case of a white person, but is unsatisfactory in many respects where the accused is an aborigine. Criticism directed to the procedure adopted at the trial of an aborigine is heard most frequently of all, but many of the critics, in my opinion, do not possess sufficient experience of trials in courts of law to be able to direct their criticism to the features which really deserve criticism.

I do not propose in these notes to discuss every aspect of the trial. I shall confine my attention to those matters where I think some change should be made. In the course of my discussion I propose also to show the departures from the rules applied in the trial of a white person which custom in the Northern Territory permits where the accused is an aborigine.

A. *Entry of plea by accused.*

In nearly every case where an aborigine is tried in the Supreme Court the plea is entered by counsel. Where a white person is on trial,

it is essential that he should personally utter the requisite words admitting or denying guilt. There are good reasons for allowing counsel appearing for an aborigine to inform the Court of the plea, although it represents a substantial departure from the ordinary practice. It would be impossible in most cases to explain to the accused the exact nature of the charge. If, for example, the charge is murder, I cannot conceive how, either in pidgin English or a native language, the words "did feloniously and of your malice aforethought slay" could be conveyed to the accused. It would also be impossible in most cases to explain to the accused the effect of his plea, namely, that a plea of guilty is a confession which obviates the necessity for trial, but that a plea of not guilty is not a denial of guilt so much as a demand that the prosecution prove the fact of guilt. I suppose the Associate could say to the accused, or ask the interpreter to say to him: "Now, which way you talk? You talk you bin proper finish killem that dead feller?" —(usually aborigines avoid mentioning the name of a deceased person)—"Or you talk you no more bin killem that dead feller? You talk you bin killem, all right, no more corroboree, you go Fannie Bay long time. You talk you no more bin killem them other boys and that Constable come here and tellem that feller Judge all about that trouble. You savvy that? All right. Now you tellem me, you bin killem that dead feller, or you no more bin killem?" Whether that would suffice to explain the effect of a plea must remain doubtful. Finally, there is a real risk that the accused in answer to the question, "How say you, are you guilty or not guilty" would immediately repeat the confession the prosecution proposes later to prove, that is assuming he had been made to understand the question.

It should be remembered that in charges of murder, the plea is always "not guilty." In other cases, pleas of "guilty" are frequent.

The question has been raised whether counsel who has been briefed by the Welfare Department should, without reference to the accused aborigine, enter a plea of guilty. The argument in favour of this action is that if on the depositions and other information available to counsel and the Welfare Department the only reasonable conclusions are (1) that the accused is guilty and (2) that the prosecution is able to prove his guilt, it is a waste of public money to plead not guilty. I am not fully convinced that defending counsel who is unable to obtain instructions from his client should plead guilty on behalf of the accused. Personally, I doubt whether I would have accepted that responsibility while I was still in practice. I appreciate the position in which counsel briefed to appear for an aborigine is placed.

He cannot obtain any instructions, in most cases, except from the Welfare Department. If he sought an interview with the accused he would probably be told a story which amounts to a full confession of guilt. The information he has in his brief induces in his mind a belief that his client is guilty. The alternatives open to him are to go through the motions of defending the accused or to assume that the aborigine would have accepted the advice counsel would have given him to plead guilty.

My suggestion would be, to overcome the scruples many have (and I include myself amongst those who are not happy), to give by express enactment power to the Director of Welfare to plead guilty for an aborigine and I would go so far as to extend that power even to a charge of murder. Perhaps the Director of Welfare should require, before he acts, a certificate from the Crown Law officer that in the opinion of the Crown the guilt of the accused can be established by legally admissible evidence; perhaps he should act only if also advised by counsel retained by him that no reasonable defence can be raised; perhaps, even, the plea should only be accepted if the Judge, after a perusal of the depositions and the Welfare Department file, thinks the plea is proper. Certainly such a plea should only be entered if a responsible official of the Welfare Department is himself satisfied of the guilt of the aborigine. Where the accused aborigine has sufficient knowledge of the proceedings, a plea of guilty should not be entered without his consent.

10. Juries where the accused is an aborigine.

Very soon after I assumed office I came to the conclusion that the system of trial by jury[14] should be abolished where the accused is an aborigine. As my experience has increased my conviction on this point has strengthened. My belief was based on (a) the verdicts in trials of aborigines for murder during the years 1944 to 1956, (b) the difficulties encountered in understanding and valuing evidence given by aborigines, and (c) the attitude many white citizens of the Northern Territory hold towards the application of the criminal law to aborigines.

It is only in murder cases that a jury is called on to determine the issue of guilt, and trials before juries occur only in Darwin and Alice Springs. Because there are differences between these two towns I discuss each separately. By way of introduction I draw attention to the following schedule:

[14] Only white persons have hitherto qualified for jury service.

Murder trials of aborigines from 1944 to 1956 (both inclusive).

Wells J.

	Darwin	*Alice Springs*
1944 to 1950—Number of cases	6	18
Verdict of guilty of either murder or manslaughter	1	6
Verdict of acquittal	5	11
Other outcome		1
	6	18

Kriewaldt J.

1951 to 1956—Number of cases	8	15
Verdict of guilty of either murder or manslaughter	4	8
Verdict of acquittal	2	6
Other outcome	2	1
	8	15

A. Darwin:

In Darwin the majority of the members of any jury empanelled in recent years have had little, if any, knowledge of aborigines. As the law stands, probably over half of any Darwin jury will be composed of comparatively recent arrivals and most of these will be civil servants. Before civil servants became eligible for service on juries there would have been little difference in outlook between Darwin and Alice Springs juries. Very few members of a Darwin jury are able to understand the "pidgin" counsel use to examine an aboriginal witness, and still fewer are able to understand the real import of the scanty answers given by the witness. It will be rare that any member of the jury will be able to determine which of several successive contradictory answers an aboriginal witness gives represents what he is trying to say or which of his answers contains the truth. In most cases I sat without a jury. I was conscious of all these, and other, difficulties but I was slowly learning. The overwhelming majority of jurors in Darwin have no

opportunity of gaining experience. I believe that in Darwin the eventual decision of the jury rested either on (a) the view they thought I took of the case, or (b) the view advanced by a member of the jury who claimed to have expert knowledge of aborigines.

It may be that the number of trials is too small to enable valid generalisations to be made, but for what my opinion is worth, I advance the theory that the five acquittals out of six trials in Darwin before Wells J. can only be explained by the attitude that white persons should not concern themselves with crimes committed by aborigines on other aborigines. Of the eight cases I heard in Darwin, the two acquittals came from juries before civil servants were eligible for service. The two juries in question were composed mainly of persons who had lived in Darwin before the war.

B. Alice Springs:

In Alice Springs the position is somewhat different because the proportion of civil servants is lower. In addition, the proportion of natives living in or near the town is greater. The difficulties to which I have referred in connection with Darwin juries do therefore not exist to the same extent. There is, however, one feature which is disquieting, namely, that many of the permanent residents of Alice Springs, some of whom have served on several juries during my years as Judge, hold the view that aborigines should never be tried in white courts. There is no doubt in my mind that many have given effect to that view by returning verdicts of not guilty where the evidence had established guilt. There have been cases in Alice Springs where the verdict in my opinion can be explained on no other basis.

C. General comments:

In an earlier section of these notes I referred to the view expressed by a former Crown Law officer in Darwin that a white jury was inappropriate where the accused was an aborigine because a man is "entitled to be tried by his equals". There is really no such rule of law. The word "peers", in the maxim usually quoted, does not enjoin the selection of a jury composed of individuals "equal" to the accused in social position, or intellect, or fortune, or in any other way. The law demands only that no person shall serve on a jury unless qualified to do so under the legislation from time to time in force and that jurors shall be free of bias for or against the accused. The type of jury formerly sworn to try a foreigner, the jury *de mediatate linguae,* composed as to one half of aliens, is no real exception to this concept.

The statistics of acquittals I have quoted do not suffice to prove my contention that a jury is not a proper tribunal to try an accused aborigine. Those statistics can be explained by the hypothesis that many unwarranted prosecutions were launched. I am satisfied this is not the case but still I do not rely only on the figures as to the percentage of acquittals for my opinion. My belief that a jury is not qualified to decide on the guilt of an aborigine rests on this: The factor which makes a jury a good tribunal in the ordinary run of cases, the ability to discern whether a witness is speaking truly, vanishes when the jury is confronted with witnesses of whose thought-processes they are ignorant. It was the consciousness of my own defects in this respect which made me adopt the view that the average person called on for jury duty, where the accused is an aborigine, is faced with a task which is beyond his powers. In addition many of the older residents of the Territory were conditioned by their past experiences to accept the view that the criminal law should not be applied to aborigines. I would therefore support any proposal that involved the abolition of the use of juries in cases where the accused is an aborigine.

11. Composition of tribunals to try aborigines.

From time to time suggestions are made that aborigines should not be tried by the ordinary Courts but by Courts specially constituted for that purpose. Those who are dissatisfied with the present system seem to regard an alteration in the tribunal as the solution for all the evils they deprecate.

One missionary in the Northern Territory whom I hold in high respect and who was regarded by me as a personal friend referred to this matter in a "news letter" which is circulated among friends of his mission (and he counted on me as one of them), where, after detailing the facts of the case I mentioned earlier of the accused who threw a boomerang thus breaking the arm of a young boy, he wrote: "In view of the aborigine population in the Northern Territory, it would be a step in the right direction if Native Courts, under supervision of a specially trained magistrate, would be established. This would ensure that the feeling for justice, which is strongly developed amongst our aborigines, would not be frustrated, but used to advantage in the process of assimilation." To give another example, while writing these notes I discussed some parts of what I had written with two clergymen and an intelligent member of the general public. All three seemed surprised when I said that I did not favour the establishment of special courts which applied rules of law different from those applied in cases where the accused was white. One final example

must suffice. Professor Elkin in his article on *Aboriginal Evidence and Justice in North Australia*[15] says that "a panel of sixty jurors presented a petition in April 1933, to Acting Judge Sharwood in the Supreme Court, Darwin, recommending that aborigines be tried in accordance with their own tribal customs and not under the presiding 'criminal code, on charges of murder, manslaughter, and other acts of violence, when the offences are known or are proved to be of a purely tribal nature . . . . We therefore pray . . . to seek a remedy for such a state of things by the establishment of a tribal court . . .' " (the literary style of the extract quoted by Professor Elkin suggests the question: Was a a Darwin juryman really the author of the petition? May it not have been that the learned Judge himself had some part in its composition?)

In the discussion of this aspect of the matter the distinction to which I have previously referred between serious crimes and minor offences must not be overlooked, nor must it be forgotten that at present the law, in the case of serious crime, provides one type of tribunal for murder cases and a different type of tribunal for other serious crimes. Before I proceed to express my views on the proper tribunal for each of these two classes of offences, I shall say a word or two about the suggestion in the petition of the Darwin jury that a "tribal court" should be established to hear cases "known or . . . proved to be of a purely tribal nature." Without pausing to examine the implications of the words "tribal court", several questions suggest themselves: What did the Darwin jury have in mind when it spoke of "offences . . . known or proved to be of a purely tribal nature?" Known to whom? Proved in what manner and to whose satisfaction? What degree of "tribal nature" is required to make the offence "purely" one of that description? Is lust, or anger, or the desire for revenge to be regarded as "tribal" or not? The Darwin jury, in my opinion, like most critics, expressed its views with insufficient knowledge either of the criminal law or the types of offences that come before the courts.

Proposals to establish special courts to try aborigines are not of recent origin. I have the impression that some who make this suggestion are thinking rather of the case where the accused is an aborigine but the victim is white. In every case where I ran across any references to this proposal the underlying reason (often not expressed but certainly tacitly assumed) is that a special type of tribunal is needed to prevent the unjust conviction of an aborigine. In my opinion it is

15 (1947) 17 OCEANIA 173.

just the reverse state of affairs that justifies any alteration in the present system. As the law at present stands there are too many unjustifiable acquittals.

In Western Australia proposals were made to a Royal Commission of Enquiry in 1934-1935 that special courts should be set up to try aborigines accused of crimes against other aborigines. This proposal received legislative effect in 1936 when section 59D was inserted into the Native Administration Act 1905-1936 of that State. I shall not refer to this enactment at any length for two reasons: (1) those who are interested in the provisions of the legislation and the operation of the special courts thereby constituted will find a full account in Professor Elkin's article; and (2) the section was repealed by Act No. 64 of 1954, section 60.

In the Northern Territory, Ordinance No. 14 of 1940 (which has never been proclaimed to come into force) provides for the establishment of "Courts for Native Matters". The jurisdiction of such Courts is not set forth in the Ordinance but is left to be prescribed by regulations. The power to make regulations would, I think, be wide enough to enable all criminal jurisdiction in cases in which aborigines are concerned to be transferred to those Courts. The Courts are to consist of "one or more Magistrates for Native Matters". The qualifications of these magistrates are left to the discretion of the Administrator who is given power to appoint them.

In the same year that the Native Administration Ordinance 1940 (No. 14 of 1940) was passed, an Ordinance providing for the establishing of a Native Constabulary (No. 13 of 1940) was also passed. This Ordinance has also never come into operation. There is probably some connection between the two ordinances.

Professor Elkin[16] says that the Native Administration Ordinance was suggested by Mr. E. W. P. Chinnery who had been appointed Director of Native Affairs in the Northern Territory in 1938. Mr. Chinnery had gained his experience in New Guinea. The Ordinance and the draft regulations under the Ordinance (which I have seen) bear obvious resemblances to similar legislation in New Guinea. My experience of the natives of Papua and New Guinea is limited to the few occasions when during the war I had occasion to visit those areas. It is therefore with some hesitation that I advance the view that legislation suited to Papua and New Guinea should not be adopted in the Northern Territory because conditions are not similar.

16 (1947) 17 OCEANIA 173, at 205.

After these preliminary remarks I shall turn to a discussion of the composition of tribunals to try aborigines for offences.

A. *Tribunals for hearing minor offences.*

I do not agree with those who advocate special courts for the trial of aborigines for offences of the type for which today aborigines usually appear in the police court. Such offences may safely be left to be dealt with by the ordinary police courts.

I would, however, recommend that only a stipendiary magistrate should sit in the police court when an aborigine is charged with an offence. If the court is constituted in some other way, for example by a special magistrate (in the Northern Territory some persons without legal training are appointed as special magistrates) or by two justices of the peace, the consent of an officer of the Welfare Department should be essential to the exercise of jurisdiction. I would also recommend that in such cases (i.e., where a stipendiary magistrate does not sit) the papers should be forwarded forthwith to the Director of Welfare so that the question of appeal can be considered. If an appeal is authorised by the Director of Welfare the time limit for appeals should be in the discretion of the Supreme Court instead of being fixed by the Ordinance as it is today. My belief is that the present system of punishment of natives for minor offences works well and without injustice to aborigines.

There is much to be said in favour of a suggestion some officers of the Welfare Department have made to me to the effect that the Welfare Department should have the power to require that any complaint laid against an aborigine in the police court be transferred to the Supreme Court for hearing. I think those officers were thinking mainly of situations where charges are laid against several aborigines all arising out of the same incident. At present it may happen that some of the aborigines are dealt with in the police court long before the other aborigines come up for trial in the Supreme Court. It would probably be best if all of the offenders were brought before the same court and at the same time.

These officers may also have had another type of case in mind. It does happen that in some cases a charge of common assault is laid by the police so that the matter can be disposed of in the police court although the facts warrant a more serious charge being laid. There is good reason for recommending that the Welfare Department should have power, if this occurs, to require the police court to commit the aborigine for trial in the Supreme Court on the appropriate charge.

Where a charge is laid against a white person of violence towards an aborigine, but the degree of violence is such that the case falls within the jurisdiction of the police court, personally I would not regard it as necessary in the interests of justice that the Welfare Department have a similar power. I would, however, maintain that it is essential that in such cases only a stipendiary magistrate should preside over the police court.

B. *Tribunal to try serious offences.*

I find myself in agreement, to some extent, with those who urge the establishment of special courts for the trial of aborigines accused of serious crimes.

(1) Murder cases.

Where an aborigine is concerned the distinction between murder and other crimes of violence has long ceased to have any practical effect. The death penalty is the only penalty for murder prescribed by law for white persons which explains why juries were retained for murder cases when the use of juries generally for criminal cases was abolished in the Northern Territory in 1921. Until the Criminal Law Amendment Ordinance 1939 was passed an aborigine convicted of murder was also sentenced to death. That Ordinance enacted that the Court where the accused is an aborigine "shall not be obliged to pronounce sentence of death" but may "impose such penalty as, having regard to all the circumstances of the case, appears to the Court to be just and proper."

Long before this Ordinance was passed the death penalty had in practice always been commuted. Once the death penalty is abolished there is no reason why a distinction should be made in the mode of trial between murder and other cases of serious crime. In my opinion the tribunal should be similarly constituted for both classes of crime. A perusal of the analysis of sentences imposed on aborigines found guilty of murder or manslaughter which is contained in an earlier section will show that neither Wells J. nor I consistently imposed heavy sentences on aborigines convicted of murder. The penalties on aborigines have been consistently lighter than penalties imposed on white offenders.

(2) Other serious crimes.

The trend of these remarks may be thought to be that I am in favour of the Judge hearing by himself all serious cases of crime by aborigines, but this is not the case. So far as white offenders are con-

cerned I did not shrink from the responsibility the law has placed on me. In trials of aborigines I had less confidence than in white cases in my ability to come to a correct decision, or to impose a proper sentence, and I would willingly have shared the responsibility with others—provided I had some assurance that their opinions were of any value.

The establishment of special courts to try aborigines would have the effect of depriving the Supreme Court of its criminal jurisdiction over aborigines. With all humility, I do not think that in the Northern Territory the Supreme Court should be deprived of that jurisdiction. Whatever the faults of the Supreme Court may have been, or are at present, I doubt whether any specially constituted court is likely to lead to any improvement. In the final analysis it is a matter of comparing the quality of the work done by one person with the quality of the work done by another. The total amount of criminal work in the Northern Territory in which aborigines figure is so small that the appointment of a full-time judge to preside over the new special court would not be justified. If, however, expense is no object, where will one find a person who is not only a competent lawyer but also a trained anthropologist?

The specific recommendation I make having regard to current conditions in the Northern Territory is that in all cases where the charge is that of murder, and in any other case where the Judge, after reading the depositions, thinks it advisable, there be two assessors to sit with him, but that in other cases the present practice of trial before the Judge alone continue. If this recommendation is adopted, it might be wise to enact that where assessors sit a unanimous verdict is necessary, or that a majority verdict be permitted only if the Judge is one of the majority party. The assessors should be drawn from a panel of persons who have had substantial experience of aborigines. It would probably be wise to exclude past and present police officers and officers of the Welfare Department from the panel of assessors.

I felt that my lack of training in anthropology was a disadvantage to me when the aborigine was the accused. The total absence of facilities for the Judge to acquire any such knowledge after he is appointed is obvious. As practical measures I would advocate that the Judge of the Northern Territory be given facilities to make frequent visits to aboriginal settlements and that the Darwin Supreme Court Library be provided with material relevant to the study of anthropology. At present this Library does not even subscribe to *Oceania*.

C. *Place of trial.*

In my own experience, and so far as I can ascertain from the Supreme Court records, aborigines were tried in the Supreme Court only when that Court has been sitting in Darwin or Alice Springs. The sparse population of the Northern Territory effectively prevents a jury being selected in most localities. The first trial of an aborigine by the Supreme Court sitting in Alice Springs did not take place until about 1936.

There is much to be said in favour of the suggestion frequently made that the trial of an aborigine should be conducted as near as may be to the scene of the crime. The additional expense caused by the adoption of that practice would probably not be great. The convenience of the white persons whose presence is required at the trial should not be regarded as of any importance. Modern methods of transportation are now available. If the crime can be investigated by the police and the Welfare Department on the spot, as it always is, there is no insuperable difficulty in the trial being held close to the scene of the crime.

Where white offenders were concerned I held sittings of the Supreme Court in surroundings my southern colleagues would regard as strange. At Anthony's Lagoon, for example, the Court sat for six or seven days on the verandah of the Police Station (with the thermometer on the wall some six or seven feet away from my table up to 106 degrees F.), while at Alexandria Downs Station a two-room house was adapted for use as a court by using the living room as the Court, the back verandah as my Chambers, the front verandah as the public gallery, and the second room as the robing room for counsel. I see no reason why the Supreme Court should not sit in similar surroundings to try charges against aborigines.

At the same time, some of the reasons formerly urged in support of the suggestion of trial near the scene of the crime have today now lost much of their force. The reasons formerly advanced were that the accused and the aboriginal witnesses were taken away for many months from their home country, and that during a great portion of that time they were kept near Darwin or Alice Springs and were there corrupted by contact with white civilisation. Today there are few aborigines who have not already been exposed to such corruption. Motor vehicles and aeroplanes have made distance of little importance. It is probably less expensive to transport the accused and the witnesses to Darwin or Alice Springs than to transport the Judge and his retinue and counsel to the scene of the crime.

On balance, however, I incline to the view that a trial in the vicinity of the crime is to be preferred in most cases.

If a jury is not required, there is no legal obstacle under the present law which would prevent a trial taking place near the scene of the crime. If a jury is required, the only places where sufficient white people live to enable a jury panel to be summoned are Darwin, Alice Springs, Tennant Creek, and Katherine. To hold a sitting of the Supreme Court in any place other than Darwin or Alice Springs at present requires the issue of a special commission by the Administrator directed to the Judge. The formalities attached to the preparation and publication of the commission probably explain why the Court has only sat in Darwin or Alice Springs to try aborigines. It would require only a minor amendment to the Supreme Court Ordinance to give the Judge power to hold a court wherever he thinks fit.