He thinks it would be found from experience that there is more danger from the present system, than there would be from the one he advocates.

(Page 7919/21)

Mr. J.W. Monogane, on behalf of the Krugersdorp Native Advisory Board, says underpayment of Natives causes crime, and instances their womenfolk who through lack of money stoop to making harmful beverages which are intoxicating, and sell them. Girls get mixed up with the making and selling of intoxicating drinks, and give way to immorality. (Page 7927)

With regard to immorality Mr. Monogane says that this evil appears where there is illicit selling of intoxicating drink, and that the men who go to such places to get such drink, eventually seduce the womenfolk. (Page 7929)

A Statement by the Sophiatown and Martindale Non-European Ratepayers' Association says the liquor queens and pilferers are the victims of a bad economic system. (Page 2 of Statement)

Johannesburg Sitting 18.5.1931

A Statement by the Independent Industrial and Commercial Workers' Union of Africa suggests abolishing prohibition.

Under the heading "Liquor Laws" the statement says whenever the average Native in Johannesburg gets into financial difficulties, he will sell liquor "or contravene some other regulations which exclude the European or vice versa." (Page 4 of Statement)

Mr. H.D. Tyamzashe, representing the I.C.U., complains that the Police entered his house at three o'clock in the morning on the pretext that they were looking for liquor. (Page 8071)

He instances a case in Ferreirastown where a woman was doing washing at the Crown Mines, and because her nextdoor neighbour was suspected of selling liquor, the police knocked at her door, saw the padlock outside and broke it.

In his own case the Police had no warrant, there were six of them, three European constables and three Natives. They were looking for liquor. He does not sell liquor.

Asked if the Police ought to be prevented from going into the house when they have very good reason for thinking there is illicit beer selling going on inside, Mr. Tyamzashe points out that if he replies to that question he will be contradicting his contention that prohibition should be done away with. Pressed on this point, he says that he thinks if they have good evidence that liquor is being sold in the house of "A", they should have a warrant to go inside there - which is a very easy thing. To the suggestion that by the time they have got the warrant the beer has flown generally, he says the Police more or less depend on very bad character Natives, - Natives who have no employer; they get the lowest class of criminal only, and that Native can give the Police any kind of information and cause them to break into the house of an

- honourable -

honourable man.

He is against total prohibition, he would like the position to be as it was in the Cape before the Liquor Bill came into force; in the Cape registered voters were allowed to have liquor, and he points out that in big towns like Port Elizabeth or East London, there is far less crime than, say in a small town like Pretoria. In such towns, where there used to be no prohibition, there was less crime, and in lonely parts of the Cape, even on lonely farms, European residents are quite safe.

into He says whenever the average Native in Johannesburg gets financial difficulties, he will sell liquor or contravene some other regulation which will exclude a European "or vice versa". (Page 8072/4)

Dealing with cohabitation of Whites and Blacks, Mr. Tyamzashe says he knows of places in Johannesburg where Natives stand in the street and merely when they pass they are called by White women for liquor; they say, "Come, boy; come and have a drink", and after that immorality takes place. As far as the European male is concerned, he brings the liquor to the Native female who is always in charge of his shebeen, and sooner or later fallsin love with a woman, but as far as the White women are concerned they simply call the Native to come and have a drink first. (Page 8078)

Note Mr. Tyamzashe and Mr. T. Mbeki, are both giving evidence on behalf of the I.C.U. and it is not quite clear how the following statements are divided between them.

It is very hard to say whether, if Native beer were to be allowed freely to the Natives - either by free home brewing, or home brewing subject to restrictions, or by any other means so that they could get it legally - a large number of those who now drink skokiaan and any of those other stronger things, would go back to the Native beer, because when once a person has been used to a thing it is very hard to get him back. The Native likes kaffir beer better than skokiaan. By merely allowing kaffir beer the liquor question will not actually be got rid of. It would turn away a large number of Natives from skokiaan and all those other things to kaffir beer. It will be easier to handle the problem of skokiaan when there is free kaffir beer: the reason why Natives drink skokiaan is that it is more quickly made than kaffir beer. They prefer kaffir beer; it does not make them so sick; but when they cannot get it they just take what they can get.

Asked whether he is in favour of Municipal brewing the witness says it all depends; he does not mind whether the Government or the Municipality do it, so long as the funds so derived go to the development of the Native. He would prefer home brewing. It is true there is the objection that home brewing makes it very much easier to have all these other noxious things, but that might be overcome by allowing the Native to brew a certain amount; if he is allowed to brew any amount, it may give him scope for brewing other things, like skokiaan.

Suppose a parafin tin full is brewed, the Native custom is to call in one or two friends - just as Europeans will have friends to tea - and give them a little. So Naturally he will brew more for his own requirements, as

- is -

as is done at Bloemfontein.

In the towns a large number of Natives have not their own homes and cannot brew, it is a difficult position as regards the single men: there might be Municipal brewing for the single men, and home brewing for families; but it all leads to the destruction of illicit brewing of things like skokiaan. That would be a suitable way out.

If these regulations were put into force, naturally at the start there will be an increase of drunkenness, because the Natives will overdrink themselves, but in the long run, it will gradually work down to moderation.
(Page 8079/82)

Mr. A. Friedheim, Inspector, Railway Police Headquarters, Johannesburg recommends as many State aided playgrounds as possible for Natives in as many centres as possible; that would do away with 50% of crime and drunkenness. He thinks that is the finest thing to counteract crime and drunkenness. (Page 8095)

Mr. Friedheim says, on the subject of kaffir beer - or total prohibition to Natives from brewing beer - this increases the sale of cheap brandies and wines and methylated spirits; and he would certainly recommend that the Government should not let anything stand in the way of Natives producing their Itywala and drinking it: he thinks a lot of crime and drunkenness would be prevented by allowing it to them. There could be restrictions as to the amount which they are allowed to produce; so long as they are allowed their kaffir beer within limits, the illicit sale of brandies and other cheap stuff would decrease, and drunkenness would decrease. The Natives in the towns who prefer these strong drinks to itywala, have learnt to do so from the White man, and the White people are making a fortune out of it. He would not be so certain that there is a certain proportion who would not go back to kaffir beer, he thinks 50% would go back to itywale if they were allowed freely to have it, and that is not bad by any means; he was in Rhodesia in the police for six years, and there he hardly say the Natives drink anything else but their own itywala.

Ways and means could be found perhaps to bring them back to their original drink. Perhaps they have only taken to the other drink because we have prevented, to a certain extent, the brewing of their own beers; so perhaps we are responsible for this state.

Before he can express an opiniom as to whether if kaffir beer were allowed freely, a large proportion of the Natives would go back to that and leave the other things, Mr. Friedheim would like to ask the opinion of the better class of Native and take his opinion on it, because we could only remedy the position with the assistance and the help of the better class Natives who would be only too willing to help.

Mr. Friedheim says municipal brewing would certainly prevent a lot of illicit brewing; it would prevent, perhaps every third hut brewing, the standard of liquor would be better, and it would not be too strong. The control would be infinitely better if it were brewed under the White man's care. It might not be quite applicable to the Reef; but the Reef is only a small proportion in comparison to South Africa. The Skokiaan drinking might have gone too far on the Reef, but heaps of things might be remedied in other centres - than -

than the Reef. It might be necessary to deal specially with the Reef, and with other areas where there are not (?) gold and diamond mines.

The compounds brew beer for their Natives, - the pure kaffir beer only - some of the Natives are satisfied with that and some are not. Some want the 'sting', they have got used to it. (Page 8098/100)

Johannesburg Sitting 19.5.1931

A Statement by Mr. W.G. Ballinger, Adviser to the I.C.U. dealing with inadquate wages paid to Natives, says the easiest and most remunerative way of adding to the family income is through illicit liquor and kaffir beer brewing. (Page 4 of Statement)

A Statement by Mr. A.W.G. Champion refers to the illicit Liquor Problem in industrial centres. He ascribes the problem partly to the Missionary Societies interfering with the Native wholesome food - kaffir beer. The law prevented the Natives having it, and so taught the Natives to find means of supplementing their incomes by selling this food. The Native finding his wages very low, and being unable to obtain any increase was forced to turn to the illicit brewing of kaffir beer, and to sell it "to those weak minded workers who wanted drink."

In this connection such Native traders were assisted by that class of Europeans who would offer him as many bottles as he could sell. There are today numerous Native bars whose licences are a fine before the Magistrates or imprisonment without a fine.

He says it is a well known fact that even illicit liquor selling started from the Mine compounds and their locations. (Page 2 of Statement)

Mr. Champion refers to Native women supporting their husbands, and says the women have better chances of getting money from liquor selling, and other means and washing and scrubbing of floors. (Page 8233 c)

Johannesburg Sitting 21.5.1931

A Statement by Mr. P. Hayes, ex Head Constable, C.I.D., says the practice of allowing Native girls to rent rooms in certain slum areas results in the manufacturing of skokiaan and other concoctions which are ruinous to the health of male natives; briefly this system is instrumented in causing methodical prostitution and illicit liquor dealing to develop in our midst. (Page 3 of Statement)

The Statement contains the following:-

"Regarding illicit liquor dealing, the Temperance "Associations and the Clergy are unconsciously the best "friends of the illicit liquor dealers and the trap boys and "conspirators who go around like wolves seeking some unfortunate "penurious widow who is in dire want of money for providing "bread and meat for her children. During the past 30 years "we have manufactured about 100,000 criminals relative to "contravention of the liquor laws. The situation today is "not a bit better than when we started, with one exception, "that when Justice Tielman Roos in his capacity as Minister "of Justice caused a fine to be given instead of 6 months' "imprisonment to persons who supplied liquor to prohibited "persons. In many cases Europeans were sentenced to six

- months -

"months for giving a tot or a bottle to prohibited persons. "Thousands of Native women have been imprisoned for supplying "prohibited persons with a mug of skokiaan or some other "concoction. Prohibition creates the demand. If the "authorities would allow a Native housewife to make sufficient "Kaffir beer from good, pure kaffir corn, the purchase of "poisonous concoctions by the wage earners of the household "would not eventuate. I don't approve of such women selling "beer made, but I would rather permit same than continue "the despicable dangerous trapping system with which is "enjoined perjury, conspiracy, humiliation and social ruina- "tion. The young children of parents charged re contravening "the liquor law go to court to listen to the cases and they "are conversant that perjury has eventuated during the hearing "of a case, with the result that they acquire the practice of "telling lies and very often pursue a criminal career "relative to illicit liquor dealing. Any prohibited person "can obtain liquor provided they are in possession of a handful "of silver. Therefore the best plan is for the Government "to open up kaffir beer shops in the various towns throughout the "Union so as to save our Natives from ruining their lives "and the health of their children by drinking poisonous con- "coctions which I have explained about and which have been "mentioned by Ex-Head Constable Hoffman in his evidence.

" Personally I have made several appeals to the "Temperance Societies and Clergy through the Press appealing "to them to remove the present system of temptation, trapping "conspiracy, bad example and humuliation, and social degrad- "ation from our midst by approving of supplying liquor to "Natives in the various Municipalities in the Union by the "Government at the lowest possible margin of profit, so as "to cause the illicit liquor dealer to disappear from our "midst and to cause the trap boy and such like conspirators to also police "seek other employment which would mean a great saving to the "Government relative to pay and prisons. Also, to supply "good liquor to the very many Natives who have an uncontrollable "desire for such beverage, and which under present conditions "causes them to visit slum yards and prostitutes so as to "satiate their appetite in this respect. I very much regret "to say that I have had no response from the Temperance "Societies and Clergy. Their policy is to let the present "system of trapping and tempting continue, thereby producing "a population of perjurers, and mentally defective persons.

"Kaffir Eatinghouse Keepers would suffer finan- "cially in the various municipalities if the Government opened "up kaffir beer and wine shops because their customers would "go to such places where I expect they would be able to buy "cooked meat, fish and bread, in addition to getting a good "drink. The Government must not consider their interests; "they must look after the interests of the millions of Native "labourers in the country which are an asset to the State. "Beer manufactured should be sold at 1d. or 2.d per pint and "should be made by an honest headman or Native who would "make it pure and good, same as at the kraals in the outlying "districts.

"I am prepared to advise the Government to sell "brandy and whisky and all other liquors which we have to the "Natives rather than allow the present despicable system "of trapping to continue, which will succeed in making "criminals of thousands of families in this sunny country "where there should be laws of justice, devoid of conspiracy "and without recourse to the machinations of trap boys "and conspirators.

"We should urge the Clergy to preach temperance "to the youthful Natives in our midst and to enrol them "in Temperance Societies and to make them take a temperance "pledge under a solemn vow making it obligatory for them "to abstain from all intoxicating liquor. This practice "is in operation at most of the Catholic Missions in the "country and it works very well. The person who is " temperate must not be allowed to manufacture criminals "in satiating his desire for liquor (?) We must do away "with this system." (Pages 4 to 6 of Statement)

Mr. A.W.G. Champion, says he is certain that some mine compound managers have actually been in league with illicit liquor sellers. There are Compound Managers who have been brought before the Magistrates with their Police boys, and, if he is not mistaken, some of them have actually been convicted of encouraging illicit liquor. The mines have their own kaffir beer, but, besides that, in the compounds themselves, there are boys selling kaffir beer, which they manufacture right inside the compound. He thinks the latest specific case of a compound manager being brought before the Magistrate was somewhere in the East, but he is not quite sure of the name of the mine. He mentions another case in Johannesburg, where a Native induna used to bank a lot of money - he was dismissed because it was found that he was brewing a lot of beer in the compound; he was dismissed but his boss was notdismissed. It is seldom found that the boss has nothing to do with it, the compound is so well looked after and supervised that it is hard to know these things, and the boss must have known.

(Page 8259/60)

P.T.O.

Johannesburg sitting - 22.5.1931

Mr. G.. Ballenden, Manager of the Municipal Native Affairs Department, City of Johannesburg, speaking of the housing of Natives, says there are numbers of houses where single rooms are being let out to families, for instance in Klipspruit location, who, the authorities definitely know, are merely there to make and supply liquor to mine Natives . (page 8327)

Mr. Ballenden says it is frequently said that low wages have definitely driven the Native to making and selling liquor. That is not altogether true. The liquor maker, that is, the man who makes skokiaan and kaffir beer - or the woman rather, is seldom the wife of a wage earner in the town. The big liquor makers and sellers are women who are not affiliated to any particular man - those who are generally known as the skokiaan queens. These people come here for the purpose of making liquor, not because of the lack of wage, anyway, but because of the ease with which they can make a big income. He thinks it is rather a libel on the Native population to say that they are generally driven to making liquor. The decent famuly, even on the wage they are getting today, does not resort to making liquor. A number of them do, but the majority do not. They are a special class who find it more convenient to make liquor, and easier to earn a living by that means, and prefer to do it rather than work.

It has become a special occupation among certain classes of Natives; with a certain proportion where it is an adjunct to other occupations. He thinks some of them have resorted to making liquor in order to eke out their mearge incomes; but with the majority of decent families, the wife goes out to do charring or washing, or something like that, but they do not resort to liquor. It may be done in the future, because of the big revenue to be derived and the ease with which it is derived from liquor, which may gradually encourage them into it; but at the present moment in many Native townships, Mr. Ballenden is emphatic that the majority of people who are even poor do not resort to selling liquor. He maintains that the majority of the Native families in Johannesburg are decent families.

It is a mis-statement to say that the extra 5/- or 10/- a week required when the earnings of the whole family only total 30/- while their expenses are 40/- generally comes from selling liquor, and he would like, on behalf of the Native residents in the locations, to refute that statement; not all families by any means resort to making and selling liquor, although they could do it. (Page 8333/5)

Mr. Ballenden would not say that there is a very large percentage - but there is a percentage - of the Native population which does not drink; they are not always educated Natives, he has found what are termed raw Natives, that is uneducated Natives from the Reserves, who definitely do not drink; but the majority of the Native men do drink kaffir beer. (Page 8337)

A statement by Dr. A.B. Xuma, M.D. says in some cases illicit liquor traffic is taken up as a last resort in order to make up the difference between wages and expenses. (Page 6 of Statement)

Dr. Xuma's statement contains the following:-

"LIQUOR AND THE BANTU

"Under the discussion on wages I pointed out that "because of low wages paid the Native workers, the wife "was sometimes driven to resort to illegitimate means of "supplementing wages such as illicit liquor traffic.

"WHAT ARE THE CAUSES OF ILLEGITIMATE TRAFFIC?

"(A) The chief and most important cause of the low "wages paid the male Native workers (a) Husband's wages "alone cannot support the family. (b) Mother, as should "be, must remain home and look after children at home and "the home. (c) Children too small,
"RESULTS:- Only course open to her to make ends meet is "to sell liquor.

"(B) Double stream legislation of prohibition for the "Bantu and license for the European. (1) Some black "people want liquor, the law says they won't have it. "White people can have all the liquor they want and they "know that the Black man wants it and will pay any price; "consequently they sell it to them. The Black man is "arrested for possessing liquor which he wants and for "which he has paid dearly and has not stolen because a "law is framed for him to prohibit him from drinking "what the people who legislate for him drink all around "him every day, hence he is a criminal for its possession. "(2) On the other hand, the White man who either pities "the poor black or makes a little profit by re-selling his "supplies to the Black man, is arrested and charged for "supplying. He also is made a criminal by a law that "serves no good purpose for any section of the community.

I am told that there are Europeans (males and females) who make a good living by having Native liquor sellers on a profit sharing basis. I cannot blame them both because the particular law offers them this opportunity. They are not inherently of criminal tendencies, but our social legislation and double stream policy makes them criminals,

WHAT IS THE WAY?

"(A) Prohibition for all. It is not because I believe "that you can make a people a community of Teetotallers; "no, I do not believe that you can make more moral by "legislation; but this will only provide a single "machinery that will be necessary to cope with all the "problems arising from prohibition irrespective of race "or colour.

"(B) Licence for all who desire to have an alcholic "beverage. The quantities may be controlled through "the bottle stores and the issue of licences.

"(C) Home brewed kaffir beer for the Bantu. Under "this system every housewife would have a right to make "and keep some kaffir beer for husband and grown up sons. "It may thus be possible as of old, to keep young Native "boys from (1) taking the drink habit too early in life. "(2) There should be a tendency to less drunkenness and "faction fights because most men will have a supply at "home which they may take ad lib. In this way they "take just enough quantities to quench the thirst and "satisfy the desire. Under the present restriction and "prohibition most men can get their kaffir beer only "Saturday afternoons and Sundays. It is sold in "measures or scales as they are called. This is a

"quantity which may be too much for one drink all at "once. He may not take it home, as he may be arrested "for possession. He must drink it all and at once "in order to give a chance for others to get their "measures and room to drink. If drinking and possession "of alcoholic beverage, and not necessarily drunkenness, "were not made a criminal offence one could take "his measure home or order it to be sent home as from "a bottle store and drink it at home and at pleasure. "As things are the man must drink the whole measure "hurriedly and at once. The result is that he becomes "drunk and often noisy. (3) There should be licence "for those people who want to commercialize kaffir "beer. There should be no arrests for possession but "for drunkenness and disturbance of (a) public peace. "This would save a good deal more of police-power and "free many constables to be on the trail of real crime "than these technical offences, (b) This would relieve "congestion of the Courts on Mondays by women "arrested merely for possession of kaffir beer or "liquor. What is the difference between a Black person "selling kaffir beer to her customers and a barman or "bottle store keeper. (4) No number of police will "alter these conditions of liquor traffic until the causes "have been removed - (a) low economic status of the Native "worker. (b) Double stream liquor legislation prohibition "for one section and licence for the other.

"Increase of police force to enforce this unreasonable "law would only increase our out-put in the manufacture "of criminals through this faulty and discriminating "legislation.

WHY DO NATIVES DRINK THESE CONCOCTIONS?

"Is it because they want a kick in the drink? No, it is "wrong for people to say that Natives drink them because "they want something with more kick in it. The fact "is that the women who sell liquor cannot risk preparing "their beer on Wednesday so that it will be ready for "consumption on Saturday or Sunday because the police "are likely to come, raid, and destroy the liquor and "arrest the possessor, who must either pay a fine or "serve a term of imprisonment. Now, in order to get "the kaffir beer ready for use on Saturday afternoon, "something like methylated spirits must be put in to "give it a kick in a few hours before men come from "work on Saturday and Sunday. The usual process requires "three or four days which is too long and risky. The "concoctions are added to make a get-ready-quick sort "of drink in the intervals between police raids. Let "us all work for a more rational legislation. Let us "be honest and face the facts.

"When I see hundreds of Black women going to jail every "Monday I do not think of them as criminals. I blame "the system under which they live. It must be changed."

(Page 7 and 8 of Statement)

Dr- Xuma says he has never known Native women come to town from any of the Territories or rural districts for the purpose of selling liquor. (Page 8344)

He says it is not true that liquor selling and prostitution go together; there may be individual cases, but it is not generally true, he personally knows many women who are selling liquor, and he has been near enough to watch the people going in; and most of these women are married women; and very often the husband is there when the

Incomplete

A closer examination of the Draft proclamation has emphasised its importance as a legislative measure, and attention has been more particularly fixed upon those provisions which are likely to affect relations between the Native people and the governing authorities with possible effects upon racial relations in South Africa.

Chapter II deals with the powers to be conferred on the Governor-General as Supreme Chief and upon the Native Administration in respect of Natives, while Chapter XVI contains provisions on Offences which have definite relation to the powers conferred in Chapter II. This memorandum is mainly concerned with these two chapters. There are nevertheless many matters which should be considered in the remaining chapters which deal with the powers and duties of chiefs, headmen and kraal-heads, personal status, customary unions and divorce, lobolo, the family system, succession and inheritance, medicine-men and herbalists, actionable wrongs and civil procedure. These require separate consideration not possible in the time available.

The Draft proclamation must, in this memorandum, be studied in the light of the three following considerations:-

(1) Important questions of principle are raised by the use made of the powers of legislation by proclamation.

(2) The New Code extends the powers of the Governor-General as Supreme Chief beyond those described in the Natal Code of 1891 and also confers wider powers on administrative officers.

(3) Under Section 1 of the Native Administration Act of 1927(as amended by Act 9 of 1929) the provisions of the proclamation in respect of the powers of the Governor-General as Supreme Chief and the Native Administration are applicable to the Transvaal and Orange Free State where,

- until the

until the passing of the Native Administration Act, the powers of the Supreme Chief were not as extensive as those embodied in the Natal Code of 1891.

LEGISLATION BY PROCLAMATION.

Prior to the passing of the Native Administration Act power to legislate for the Native people by proclamation was vested in the Governor-General in two ways:-

(a) In the Transkeian Territories under the Annexation Acts (1877, 1884, 1885, 1894) and Act 29 of 1897.

(b) In Natal, by virtue of his powers as Supreme Chief (Ordinance 3 of 1849 vested all the powers of a Supreme Chief in the Lieutenant Governor of Natal and Laws 26 of 1875, 44 of 1887 and 19 of 1891 successively continued these powers). Government Notice 194 of 1878, Section 1. declared that "The Queen's representative has as Supreme Chief of the Natives absolute legislative authority over them.....". This authority had been exercised in Proclamation dated 22/11/1862 in respect of the manufacture of shimian, clothing of Natives in towns, use of indecent language, refugee regulations, rain-making and witchcraft, carrying of assegais and knobkerries, disobedience to special police, and powers of punishment conferred on headmen (see Garthorne: Application of Native Law in the Transvaal). In the Transvaal, although Law 4 of 1885 Section 13 conferred on the State President as paramount chief all the power and authority which in accordance with Native laws, habits and customs are given to any paramount chief it was not considered to confer on him legislative authority and in Section 4 he had power only to issue regulations and orders "for the better working of this Law".

- The power -

The power to enact laws by Proclamation had been freely used in the Transkei, but mainly to enable the Administration to carry out more expeditiously those details of local government upon which it would be onerous for Parliament to have to legislate. The power was first conferred on the Governor to enable him to administer areas that had but recently been the scenes of warfare and were newly annexed. Act 29 of 1897, which has been brought into use in Section 8 of the Draft proclamation, was passed to deal with a state of rebellion and to ensure that the Government had adequate power of dealing with such situations (arising out of the famous case of Sigcau vs. Regina, 12 S.C. 256). This Act was Rhodes' reply to the action of the Supreme Court (under Chief Justice deVilliers) in declaring invalid a Proclamation which relying on the Pondoland Annexation Act, authorised the Chief Magistrate to arrest and detain Chief Sigcau "in such safe place as may be by the Governor from time to time determined". The Act was forgotten until 1926 when it was used to enable the Governor-General to issue a proclamation authorising the arrest and detention of a Native whose activities in the Transkei were causing unrest among certain tribes. This Act and the proclamation arising out of it bring into relief the fact that the Transkeian Administration had over a long period of years, been content to rely upon Parliament to confer, and upon the Courts to maintain, the powers necessary to enable it to control its large Native population.

In Natal little reliance had been placed upon the "absolute legislative authority " vested in the Governor as Supreme Chief,,for,from 1878, Native Administration was governed by the definite provisions of a Code, and

and after 1891 the Code could only be altered by Parliament, for Section 2 of Law 19 of 1891 provided that

"Any of the clauses of the said Code may from time to time, by Law duly passed by the Governor of Natal by and with the advice and consent of the Legislative Council be altered; added to or amended....."

Since the passing of the Native Administration Act in 1927, the Governor-General has three modes open to him for legislating in respect of Natives:

(a) By proclamation, under Section 25, in respect of Natives within the Native areas scheduled in the Native Land Act (No. 27 of 1913) or any amendment thereof, or within areas which Parliament may designate as Native areas for the purpose of this section.

(b) By regulations, duly proclaimed, of a general nature (under Section 27), and of a specific nature (under Section 5 and other sections).

(c) By proclamation amending the Natal Code, under Section 24.

All such forms of legislation are however subject under Section 26, to the veto of Parliament. It should be noted that the proclamations become law at once and are only modified or repealed if "both Houses of Parliament have, by resolutions passed in the same session, requested the Governor-General to repeal such proclamation or to modify its operation".

Section 25 limits the direct legislative power of the Governor-General to scheduled areas. Thus Natives outside those areas in all the Provinces are unaffected by any proclamation issued under Section 25.

Section 27 (1) authorises the Governor-General to make regulations with reference to a number of matters and ",.....(e) generally for such other purposes as he may consider necessary for the protection, control, improvement and welfare of the Natives, and in furtherance of peace, order and good government".

- It is -

It is improbable that this general clause has material effect beyond the scope of the subjects enumerated in the proceeding clauses. Somewhat similar clauses are to be found at the end of the byelaw sections in Local Government Ordinances. Their effect must be limited by the scope of the legislation as ascertained from what goes before. (Compare Buñu vs. Grahamstown Municipality 1910 E.D.L. 364 and Board of Trade vs. Block 13. A.C. 570). The preceding clauses relate to matters of decency and the preservation of the public peace. There is nothing in them to suggest that the legislature had in mind far reaching proclamations seriously interfering with what may be regarded as the fundamental natural rights of human beings living in a civilised state. Certainly it does not seem likely that any support for the more drastic of the provisions of the new code could be obtained from Section 27 (1) (e).

Section 24 enables the Governor-General to alter the Natal Code "from time to time", while Section 1 makes the Governor-General Supreme Chief of all Natives in the Provinces of Natal, Transvaal and Orange Free State "with all such rights, immunities, powers and authorities in respect of Natives as are, or may be, from time to time vested in him, in respect of Natives in the Province of Natal". These two sections, taken together, enable the Governor-General to use alterations of the Natal Code to deal with Natives inside and outside scheduled areas in those Provinces. The exclusion of Natives in the Cape from Section 1. makes it impossible for the Governor-General to deal with them in this way.

Thus Parliament has placed in the hands of the Governor-General more general and more specific powers than he, in practice at any rate, held before.

There are sound arguments both for and against legislation by proclamation. In favour it may be argued that (1) in the administration of large areas where local government has not been developed it is convenient that there should be easy means of dealing with administrative difficulties. It is not desirable that Parliament should be burdened with measures dealing with the prevalence of noxious weeds in certain areas and similar local matters; (2) in Native areas where local government has been developed, as in the Transkei, it is a convenient way of putting into force the recommendations of local Councils. Many, if not most, of the Transkeian Proclamations are the fruits of discussion in the local Councils and in the General Council; (3) where the Administration has to deal with a large Native population that has not yet attained to an understanding of modern methods of government, it is desirable that it should have a fairly wide legislative range, provided Parliament maintains a watchful eye upon the use made of the legislative and administrative powers vested in the Administration; and (4) where the conditions of Native life are changing rapidly legislation by Proclamation has the advantage of flexibility.

The objections are (1) it tends to relieve Parliament of moral responsibility for the good government of the Native people. Under the Native Administration Act, proclamations do not require the explicit sanction of Parliament; they become law <u>in the absence of objection</u> not in the event of definite consent; (2) it enables the Administration to cover up defects of administration by placing more penalties upon the governed for the non-observance of rules or laws which the Administration should have effectively enforced by efficient routine. Bad

administration of tax-collecting, for example, leads to poor taxation returns, and the administration immediatley / widens the range of the penalties for non-payment instead of improving the organisation of tax collection;(3) it evades the checks which Parliament provides against the autocratic tendencies of every Administration. The wide powers conferred on the Administration by the Native Administration Act have already encouraged the Administration to increase very greatly in 1931 the powers given to it in 1891 to deal with a people then much less subdued and civilised, at a time when the Administration was much less supported by police, by Courts and by the many modern adjuncts of civilised rule; and (4) it is too convenient a means of enforcing the policy of the moment of the party in power, without having to withstand detailed criticism in Committee or Parliament.

Since Parliament has deliberately given to the Governor-General wide powers of legislation it would not be profitable to oppose the system on grounds of principle, but the dangers are such as to call for a close scrutiny of the uses to which the system is put and of the extent to which the authority extends. And here two questions arise:

(a) Did Parliament intend that the Code should be used to legislate on questions involving such fundamental principles as the liberty of the subject and the right of trial?

(b) Has the Governor-General power to grant to himself as Supreme Chief and to his administrative officers the powers and immunities described in the Code?

With regard to (a) attention is drawn to two sections of the new draft Code which go beyond anything in the present Code.

Section 5. (1) The Supreme Chief, the Minister of Native Affairs, the Secretary for Native Affairs, the Chief Native Commissioner and native commissioners may command the attendance of chiefs and other Natives for any purpose and may require them to render obedience, assistance and active co-operation in the execution of any order.

(2) Disregard or defiance of any order made under the provisions of subsection (1) shall be deemed to be disregard or defiance of an order of the Supreme Chief and any Native guilty thereof or showing disrespect to any officer referred to in sub-section (1) shall be guilty of an offence.

(3) When any such offence as is in sub-section (2) referred to is committed under circumstances rendering prompt action necessary, any such officer as is specified in sub-section (1) may order the immediate arrest of the offender and call upon him to show cause why he should not be punished. Should he fail to furnish a satisfactory explanation such officer may summarily punish the offender by a fine not exceeding ten pounds or by imprisonment for a period not exceeding two months.

(4) Any action taken as in sub-section (3) provided by a native Commissioner shall be reported immediately to the Chief Native Commissioner who may confirm, reduce or disallow the punishment and in disallowing the same, order the offender to be prosecuted for the offence in a competent court.

(5) Any punishment imposed under the provisions of sub-section (3) shall, subject to the provisions of sub-section (4) on a cerificate under the hand of the officer who imposed it, have effect and be acted upon by the native commissioner of the district as if it were a sentence passed by him in the exercise of criminal jurisdiction duly conferred upon him under section nine of the Act.

(6) A Native summarily punished as in sub-section (3) provided shall not, unless the punishement be disallowed, be prosecuted in any court of law for the same offence.

While sub-section (1) has its counterpart in Section 36 of the existing Code, sub-section (2) is similar to Section 26 of Natal Act 1 of 1909 which was repealed by Parliament in the Native Administration Act. Sub-sections (3) to (6) are new.

Under this section an Administrative officer may issue an order (however drastic and unwise), call upon a Native Chief to carry it out (however unhappy its effect upon the Chief's standing with his people), arrest the Chief (if he fails or is unable to comply with the instruction) and send him to prison for two months. Sub-section (4) is no safeguard, for no Chief Native Commissioner would

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wittingly or readily disallow the action of a commissioner. And even should the punishement be disallowed, under sub-section (6) the same commissioner, sitting as a magistrate, may re-impose the sentence.

It is strongly urged that sub-sections (2) to (6) should be withdrawn entirely. Sub-section (1) read in conjunction with Section 155 should be sufficient to effect the purpose of the section. Section 155 reads "Any person who disregards or defies the authority of the Supreme Chief shall be guilty of an offence" The general penalty clause, Section 172, in the absence of Section 5(3) would enable the ordinary court of the Native Commissioner (under Section9 of the Native Administration Act) to punish an offender, who could then exercise the right of appeal.

Section 8. Whenever the Supreme Chief is satisfied that any Native is dangerous to the public peace, if left at large, he may by proclamation authorise the summary arrest and detention of such Native in such place and subject to such conditions as he may determine; provided that any Native so arrested and detained may after the lapse of three months from the date of his arrest apply to the Supreme Court for his release.

This section has been taken over from Cape Act 29 of 1897, already mentioned.

In this connection it should be noted that the following section of the 1891 Code has not been taken over in the Draft Code:-

Section 259. Every Native arrested and accused of any offence or crime shall without delay have the allegations against him specifically and clearly stated to him and be granted time and opportunity to arrange for his defence.

Section 8 therefore enables the Governor-General to cause any Native to be arrested without any actual offence having been committed and to keep him in prison for three months at a time, releasing him only to re-arrest and detain him for further periods of three months. Thus the "cat and mouse" method is made possible under the normal routine of administration.

What circumstances justify the use of such powers? Hitherto they have been used in times of war or rebellion, except in the solitary Transkeian instance of 1926, and Parliament has always been jealous to see that the Government upon taking to itself such powers came to it for indemnity. The Cape Act was in fact an indemnity, for it was not used after its enactment until it was revived in 1926.

The Supreme Courts have always upheld the right of the individual to find redress within their doors, and hitherto the Native people have had unbounded faith in the integrity and independence of the higher courts and in their ability to protect them from too harsh treatment at the hands of administrative officers. Chief Sigcau, who a year before had been overawed "with a display of machine-gun fire" to surrender his independent chieftainship in East Pondoland became involved in an alleged rebellion and was arrested. He applied to the Cape Supreme Court for his release, and much to Rhodes' annoyance, the Court found in his favour. "It is a hopeful sign", said Chief Justice de Villiers, "when a Native Chief seeks by peaceful means to obtain redress, instead of rousing his clan to rebellion".

The Chief Justice felt strongly on this question of arrest without trial. In the same judgment he said, "The Parliament of this country has never yet passed, and is not likely ever to pass a bill for the condemnation of an individual without any form of trial". The fact that the Cape Parliament did so pass a bill does not detract from the soundness of the great judge's view indicated by this emphatic form of his statement.

Did Parliament intend that the almost obsolete Cape Act should be extended to other areas by a proclamation

issued by the Governor-General? It is one thing for Parliament to assent, during a time of rebellion, to a measure of the nature of Cape Act 29 of 1897, it is an entirely different matter for it to hand over its responsibility on such a vital principle when there is no immediate danger to the state. The responsibility is not one that should be assumed without the explicit authority of Parliament, and it is certainly not a responsibility that should be thrust upon the Governor-General by his advisers.

But will the Courts support the Governor-General in the assumption of the power which it is proposed he should confer upon himself in this section? Is he as Supreme Chief a different person from the Governor-General who is the King's representative or 'other self' in this Dominion, and can he of his own will cause the arrest of any one? In his judgment in Sigcau vs. Rex, the Chief Justice said:

"As far back as the reign of James I it was held "by Sir Edward Coke, with the approval of all the other "judges, in the case of the Prohibitions that the 'King cannot "arrest any man', and that 'the King in his own person cannot "adjudge any case, either criminal or betwixt party and party, "but that it ought to be determined and adjudged in some court "of justice according to the laws and customs of England...' "In the Dutch law the transfer of full legislative power to the "prince was unknown except in the gravest emergencies and "judicial powers were always confined to the Courts of Justice".

The judgment in Sigcau's case was upheld by the Privy Council in Sprigg vs. Sigcau 1897 A.C. 238.

"Reference may also usefully be made to the case of Rex vs. Hildick-Smith 1924 T.P.D. 69. That was the case which held the "Colour Bar" regulations under the Mines and Works Regulations Act of 1911 to be <u>ultra vires</u>. At page 84 it is pointed out that even when it was enacting the

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