EXPLANATORY MEMORANDUM

By His Excellency the High Commissioner

ON THE BECHUANALAND PROTECTORATE NATIVE ADMINISTRATION AND NATIVE TRIBUNALS PROCLAMATIONS.

In order to remove any misapprehensions which may have existed among the Bechuana in regard to the purpose and effect of the Native Administration and the Native Tribunals Proclamations of 1934, I think it desirable, as the representative of His Majesty the King in the Bechuanaland Protectorate, and with the concurrence of the Secretary of State, to issue the following explanatory statement.

The constitutional position in the Bechuanaland Protectorate is governed, in law, by various Orders-in-Council and Proclamations, of which the most important is the Order-in-Council of Her late Majesty Queen Victoria dated the 9th May, 1891. That Order-in-Council empowered the High Commissioner to exercise on Her Majesty's behalf all powers and jurisdiction which Her Majesty at any time before or after the date of the Order had or might have within the Protectorate, and to that end empowered him further to take or cause to be taken all such measures, and to do or cause to be done all such matters and things, within the Protectorate as are lawful and as in the interest of Her Majesty's service he might think expedient, subject to such instructions as he might from time to time receive from Her Majesty or through a Secretary of State.

Other provisions of the Order-in-Council empowered the High Commissioner—

(1) to appoint administrative and judicial officers and to assign their functions to them, subject to the preservation of his own powers and authorities in their entirety; and

(2) to provide by Proclamation, from time to time, for the administration of justice, the raising of revenue and generally for the peace order and good government of all persons within the Protectorate, including the prohibition and punishment of acts tending to disturb the public peace.

In issuing such Proclamations the High Commissioner was instructed by the Order-in-Council to respect any native laws and customs by which the civil relations of any native chiefs, tribes or populations under Her Majesty's protection were at that time (viz., in May, 1891) regulated, except in so far as the same might be incompatible with the due exercise of Her Majesty's power and jurisdiction.

The Order-in-Council required the High Commissioner to publish his Proclamations in the *Gazette*, and reserved to Her Majesty the right to disallow any such Proclamation.

The Order-in-Council provided also that, subject to any Proclamation lawfully issued by the High Commissioner, any jurisdiction exercisable otherwise than under this Order-in-Council of 1891, whether by virtue of any Statute or Order-in-Council, or of any treaty, or otherwise, should remain in full force.

Her Majesty reserved the power to revoke, alter, add to or amend this Order-in-Council at any time.

All references to Her Majesty in the Order-in-Council were declared by it to include Her Majesty's heirs and successors.

Four years after the issue of this Order-in-Council, the then Chiefs of the Bangwaketsi, the Bakwena, and the Bamangwato went to London and had interviews at the Colonial Office with the Secretary of State, Mr. Chamberlain. Some correspondence passed, from which I will quote one passage, as it defines the general principle which has guided successive High Commissioners and the officers serving under them in the administration of the Territory. The passage occurs in a Colonial Office letter written by direction of Mr. Chamberlain on the 7th November, 1895, to the Reverend W. C. Willoughby, (who had accompanied the Chiefs to England), and it is in the following terms:—

> "Each of the Chiefs Khama, Sebele and Bathoen shall have a country within which they shall live, as hitherto, under the protection of the Queen. The Queen will appoint an officer to reside with them. This officer will get his orders from the Queen through the Secretary of State and the High Commissioner. The Chiefs will rule their own people much as at present. The Queen's officer will decide all cases in which white men, or black men who do not belong to the tribe of one of the three Chiefs are concerned, or in which the punishment is death He will also have a right to hear an appeal in any very serious case, even if the punishment is short of death.
>
> "The people under the Chiefs shall pay a hut tax, or tax of a similar nature, but as the Chiefs wish it, they may collect—at all events for the present—themselves and pay it over to the Queen's officer, but this is not to be made a reason for paying over too little."

The general principle expounded in this passage has been applied, not only to the three Chiefs and tribes mentioned in the letter, but also to the other chiefs and tribes in the Protectorate.

The application of this general principle, in its combination with the provisions of the above-mentioned Order-in-Council of 1891, has resulted in the establishment of a method of administration which is described nowadays by the term "indirect rule"; or, in other words, a method of administration which preserves,—subject to the due exercise of the power and jurisdiction of the Crown, and subject to the requirements of peace, order and good government,—the tribal authority of the Chiefs and the native laws and customs, without however derogating from the duty of supervision and supreme control entrusted to the High Commissioner and carried out by him through the officers serving under him. The High Commissioner is responsible to the King, not only for the maintenance of law and order, but also for the welfare of the Chiefs and the people of all classes in the Territory, since all of them equally are living under His Majesty's protection.

The object of the Native Administration and the Native Tribunals Proclamations of 1934 is not to abolish the principle of this method of administration, but rather to provide for its continuance and its further development.

In the affairs of men nothing can remain stationary. As the years pass, conditions change, and institutions and forms of government which do not adapt themselves to changing conditions, and progress with them, lose their vitality and sink into decay. The Bechuana are no longer the very primitive people that they were some forty years ago. Contact with European civilisation, and the gradual spread of education have affected appreciably, though in varying degrees, many of their thoughts and ways of life, and systems and methods which may have sufficed forty years ago must, if they are to survive at all, be brought into line with changed conditions and must be rendered capable of further development in conformity with such further changes as the future may bring forth.

The two Proclamations have been framed with the intention of preserving the hereditary Chieftainship, preserving the exercise of tribal authority by the Chiefs, preserving native law and custom, and preserving the administration of justice by the native courts or Kgotlas, through making it possible for them to function satisfactorily under changed and changing conditions. The intention is to build up, not to destroy, native institutions, to develop and strengthen all that is good in them, and at the same time to enable the High Commissioner and the officers serving under him to discharge, in a manner duly defined so as to be understood by all, their duty of supervision helpfulness and guidance. It is not the intention that the King's Government should interfere unnecessarily with the Chiefs and tribes, but it is the intention that, if and when the necessity should arise, there should be no doubt or dispute as to the right of the Government to take such action as might be requisite for the promotion of the welfare and progress of the people, or for the prevention of any maladministration, oppression, or injustice.

If the two Proclamations are rightly understood, they will be welcomed by the Chiefs and people, as a charter of their liberties, an opportunity to maintain their institutions and customs by using and developing them in such a way as to let them become a help, rather than a hindrance, to further progress.

With this purpose in view the two Proclamations establish on a sound basis the principle of the administration of tribal affairs by and through the Chiefs, they provide for the necessary assistance in the practical development of that principle, and they pave the way for the eventual assignment of such further functions and duties as the natives may show themselves fit to undertake.

The two Proclamations have already been translated into Sechuana and circulated in that language in draft form so that the people might more easily understand them. They will now be recirculated in Sechuana in their final form, which embodies the various amendments made in them since the original versions were discussed with the Chiefs and in the Kgotlas. To assist people in studying them, I wish to call attention to a few points which might otherwise not be clear to them.

Native Administration Proclamation, 1934.

This Proclamation recognizes and gives legal sanction to the native customary law of succession to the Chieftainship. It does not empower the Government to appoint and dismiss Chiefs, as is done in some of the African Territories to which the principle of indirect rule has been applied. It confirms in the Chieftainship all Chiefs who are now lawfully holding office as Chiefs. When a vacancy occurs in the Chieftainship of a tribe, the High Commissioner does not select the new Chief, but it falls to the tribe in Kgotla to tell the Government who is the rightful successor to the Chieftainship according to native custom. As has always been the practice hitherto, his name is then submitted to the High Commissioner for recognition and to the Secretary of State for confirmation. Although he may be the rightful successor to the Chieftainship according to native custom, he cannot exercise the functions of the Chieftainship until he has been recognized by the High Commissioner, and in the meantime the person whose duty under native custom it is to summon the tribe to assemble in Kgotla when the Chieftainship is vacant will act as Chief. If the rightful successor to the Chieftainship appears, after public enquiry, not to be a fit and proper person to exercise the functions of the Chieftainship, the High Commissioner can decline to recognize him, or the Secretary of State can decline to confirm him in his office.

Or again, if at any time he neglects or fails to discharge properly his duties as Chief, or becomes physically or mentally incapable of carrying them out properly, or abuses his authority and oppresses his people, or otherwise proves to be a bad Chief, the High Commissioner can cancel his recognition, or the Secretary of State can cancel his confirmation, or the High Commissioner can suspend him from the exercise of his functions as Chief, but he will in every case first be given an opportunity to submit for consideration anything that he may wish to say in his defence. If his recognition or his confirmation is thus cancelled, or if he is thus suspended by the High Commissioner, the Chieftainship will not become vacant, but the Chief will not be allowed to exercise the functions of the Chieftainship until he has again been recognized and confirmed or until his suspension has been withdrawn, and in the meantime someone else will be appointed by the tribe (or, if the tribe fails to make such appointment, by the High Commissioner) to act in his place in the exercise of the functions of the Chieftainship. The deposition of a Chief (which means that the person deposed ceases to be Chief of the tribe for ever and the Chieftainship of the tribe thereby becomes vacant, just as if the deposed Chief had died instead of being deposed) can be effected only by the tribe itself, and then only if the High Commissioner, after referring to the Special Court for investigation and report any representations which the Chief concerned may have submitted to him, authorises the deposition. Methods are thus provided for the protection of a tribe against maladministration of its affairs, or against oppression, without recourse to violence or disorder. Whatever may be necessary for such protection can now be done peaceably and lawfully and with every reasonable precaution against the infliction of injustice on the Chief concerned. On the other hand, a Chief who conducts himself properly will be supported by the Government, and persons who conspire against him will be liable to severe punishment by the European Courts.

A Chief has duties, not only towards his tribe, but also towards the Government. Under the system of indirect rule he discharges functions in the administration of tribal affairs which under a system of direct rule would be discharged by the Government through its own officers. As the High Commissioner is responsible to the King for the welfare of all the people, so also must the Chief of a tribe be held responsible to the High Commissioner for the welfare of the tribe over which he exercises his functions. The duties of a Chief towards his tribe are based upon native law and custom. The duties of a Chief towards the Government are set forth in this Proclamation. It deals also with the duties of Headmen.

For the protection of the people against the imposition of unreasonable or excessive burdens on them, provision is made in the Proclamation that, before a levy can be imposed by a Chief on his tribe, the consent of the tribe in Kgotla and the written approval of the Resident Commissioner shall be necessary.

Also with a view to the protection of the people, the Proclamation limits by certain conditions the right of a Chief to exact compulsory labour.

The Proclamation prescribes that a Chief must follow the old-established custom of the Bechuana which requires him to exercise the functions of his office in consultation with his Councillors. In England the King acts in consultation with his advisers, who are chosen from among the members of his Privy Council, and persons are appointed as members of the Privy Council, not by virtue of birth, but by virtue of their services to the State, or of their ability and experience. Among the Bechuana the custom is said to have been hitherto that the Chief's Councillors are not persons specially appointed by the Chief, but only persons who are entitled by right of

birth to advise him as his Councillors. The Proclamation does not interfere with that custom, but it requires the Chief to tell the Government who his Councillors are, so that the Government may know their names. I feel, however, that the time must be coming very soon, if indeed it has not come already, when a Chief will not wish to look for advice only to those who are his Councillors by right of birth according to native custom, but will wish to include among his Councillors other natives whose wisdom, or character, or education, or experience would make their advice valuable in the interests of the Chief himself and of the tribe as a whole. It would seem unfortunate that the Chief and the tribe should be deprived of the benefits resulting from such advice, merely because the persons who are able to give it do not happen to be Councillors by right of birth, and the Proclamation therefore empowers the Chief, if he so desires and if the tribe in Kgotla approve, to nominate any such persons as Councillors in addition to those who are entitled to be his Councillors by right of birth. The Proclamation does not compel him to exercise this power, but merely enables him to exercise it. It is my firm belief that, before very long, even if not at once, the Chiefs and tribes will recognize the value of this power, that they will be glad to take advantage of it, and that they will be grateful for the inclusion of it among the provisions of the Proclamation.

The Proclamation does not affect in any way the right of the tribe to meet in Kgotla and the duty of the Chief to consult with the tribe assembled in Kgotla.

Native Tribunals Proclamation, 1934.

As has been mentioned above, the Order-in-Council of the 9th May, 1891, empowered the High Commissioner to provide from time to time by Proclamation for various matters, of which one was the administration of justice, and instructed him in issuing such Proclamations to respect any native laws or customs by which the civil relations of any native Chiefs, tribes or populations under Queen Victoria's protection were then regulated, except so far as the same might be incompatible with the due exercise of Her Majesty's power and jurisdiction.

It is obviously desirable that the constitution and functions of Native Courts should be clearly defined, so that there may be no doubt as to their powers and jurisdiction.

That this is not merely a personal opinion of my own will be seen from the following words which were addressed to Acting Chief Tshekedi of the Bamangwato by the Secretary of State, Lord Passfield, when Tshekedi was received by him in London on the 1st April, 1930:—

> "With regard to the powers of the Chiefs, I had in any case intended to take the opportunity afforded by your presence in England to refer to the question of making statutory provision in order to establish on a proper legal footing the jurisdiction and powers of the Courts of the Chiefs in the Protectorate when trying cases in accordance with native law and custom, and I am glad that you have mentioned this matter. It is not the fact, as implied in your speech to me, that this question has arisen out of the appeal which you made in a certain matter to the Judicial Committee of the Privy Council, though, as you are aware, the absence of statutory authority for the exercise of jurisdiction by the Courts of the Chiefs was mentioned in the Judgment of the Special Court of the Protectorate when the matter referred to was before it. The question of the authority and powers of the Chiefs' Courts is a matter of serious concern to the Government and the Chiefs, as well as to the people over whom the Chiefs exercise jurisdiction, and it is, of course, important, in the case

of the Native Courts as in the case of the European Courts, that adequate safeguards should exist to ensure the due and proper administration of justice, and that subject to such safeguards the authority of the Native Courts should not be open to question on legal grounds. I am advised that provision to enable the requisite legal powers to be conferred on Courts of Chiefs is contained in the High Commissioner's Proclamation of the 10th June, 1891, and I contemplate that the Resident Commissioner should be asked to examine the whole question, and after consultation with the Chiefs and the Native Advisory Council, to frame proposals which could receive the consideration of the High Commissioner and the Secretary of State with a view to regularizing the position and giving the requisite legal sanctions to the Chiefs' Courts in the exercise of jurisdiction according to native law and custom. That question will require careful consideration, and I expect you, as acting Chief of the Bamangwato, to co-operate with the Government in the consideration of this important matter of regularizing the position and defining the powers of the native Courts."

These are not words which either the High Commissioner or the natives of the Territory can disregard. The Proclamation which has now been issued, like the other (Native Administration) Proclamation, does not abolish the native institutions with which it deals, but is intended to place them on a proper legal basis and to give them a new lease of life under conditions which will make them suitable for adaptation to the present and future requirements of the Bechuana.

Under this Native Tribunals Proclamation the system of the trial of native cases by the Chief or Headman in the Kgotla is preserved, but the methods of trial are to be improved with the object of reducing the risk of confusion, or of miscarriage of justice, or of the infliction of punishments inconsistent with the state of civilization which is superseding the primitive conditions of bygone years. If trial in Kgotla is not to become so utterly out of harmony with modern development as to be doomed to early disappearance, it must be brought up to date in such a way that it can be recognized as a proper system of administering justice.

The purpose of this Proclamation is not to introduce European law or European procedure. The Proclamation provides that every Native Court shall exercise its jurisdiction in accordance with native law and custom. The cases will still be tried in Kgotla, but the Kgotla, when a case is being tried in it, will be called a native Tribunal, so as to distinguish its functions as a Court from its functions when it is dealing with matters other than the trial of cases. In order that native tribunals may be lawfully constituted, the Chief will be appointed by the Resident Commissioner to adjudicate upon and try cases, and the Chief will not be entitled to administer justice unless and until he has been so appointed by the Resident Commissioner. The High Commissioner is empowered to withdraw any such appointment, if he is satisfied that it is necessary in the interests of justice that the person so appointed shall not continue to act in that capacity.

There will be Senior Tribunals and Junior Tribunals. The Senior Tribunals will be those over which a duly appointed Chief, or some one appointed by the Chief to act as his deputy, will preside. The Tribunal presided over by the Chief in person will be called the Chief's Tribunal.

Junior Tribunals will be appointed where necessary. A Junior Tribunal will be presided over by a Headman whom the Senior Tribunal will appoint to preside over the Junior Tribunal. There will be a right of appeal from the decision

of a Junior Tribunal to a Senior Tribunal, and from the decision of a Senior Tribunal to the Magistrate's Court, and in certain cases from the Magistrate's Court to the Special Court.

The Chief is required by the Proclamation to nominate some of his Councillors to sit with and help him, or his deputy, in the trial of cases in any Senior Tribunal. These Councillors will be called members of the Tribunal, and the names of any of them who sit with the Chief or his deputy in the trial of any case must be recorded. It will be lawful to make some payment to them for their services if the Chief in Kgotla, with the approval of the Resident Commissioner, so decides. Their functions will resemble those of Assessors in a European Court. Their advice will be helpful to the Chief or his deputy in coming to a just decision, and it will be the duty of the Chief or his deputy to consult with them and consider their opinions before giving his decision. In a Junior Tribunal the Headman who has been appointed by the Senior Tribunal to preside over such Junior Tribunal will have to nominate some persons to sit with him and help him in the adjudication of cases. Their names also must be recorded, and their functions will be similar to those of members of Senior Tribunals.

A Junior Tribunal will exercise such jurisdiction as may be assigned to it by the Senior Tribunal. Senior Tribunals will have jurisdiction in all native cases except in those matters which under the provisions of the Proclamation are excluded from their jurisdiction. Such matters will be dealt with by the European Courts. A Native Tribunal may not try a case in which any of the parties is a person other than a native, and it will be an offence punishable by the European Courts for any person other than a native to take, or attempt to take, any case to a Native Tribunal.

The punishments which may be inflicted by a Native Tribunal will be in accordance with native law and custom, subject, however, to certain restrictions which are set forth in the Proclamation. For instance, corporal punishment may not be imposed on women, and the amount of corporal punishment which may be imposed on male persons may not exceed certain specified numbers of strokes and may be inflicted only under prescribed conditions. Indiscriminate or excessive flogging is not compatible with advancing civilization.

Every Native Tribunal, unless it has been specially exempted by the Resident Commissioner, is required to keep a proper written record of all cases tried by it. This is a very important and necessary provision for the avoidance of confusion or of disputes as to what took place. Exemptions will be given by the Resident Commissioner in the case only of Tribunals where there is nobody sufficiently educated to do the necessary writing. With the further spread of education the need for such exemptions will gradually disappear.

There are various other provisions which have been inserted with the object of supplying such safeguards as may be possible for the prevention of inefficiency, or unfairness, or dishonesty, or corruption, in the trial of cases by Native Tribunals.

Lawyers will not be allowed to appear or act for any party before a Native Tribunal. In cases tried in accordance with native law and custom before a Resident Magistrate, lawyers will be allowed to appear only with the special leave of the Resident Commissioner.

These are some of the principal points in the two Proclamations. I have left unmentioned a number of other provisions, which persons who read the Proclamations will, I think, be able to understand without further explanation.

Although these Proclamations are based upon native law and custom, some of their provisions may at first seem strange and difficult. I feel sure, however, that when experience of their working has been gained, they will be found to have destroyed nothing that was of value in native law and custom, and to have added nothing which the Bechuana in their present state of development will be unable to use for their immediate benefit and their future progress.

This explanatory statement will, like the two Proclamations, be translated into Sechuana and circulated.

H. J. STANLEY,
High Commissioner.

Capetown, 28th December, 1934.