

**ENTER THE BRITISH LEGAL MACHINE:  
LAW AND ADMINISTRATION AT THE CAPE 1806-1910**

by

A. Sachs

Introduction

When in 1814 pressure from British merchants forced court proceedings in the colonized portion of the Cape to be thrown open for the first time to the public, the existing court room in Cape Town was found to be too small to accommodate spectators. The site chosen for a new and larger building was the yard of the former Government Slave Lodge, which shortly after the second and final British occupation of the Cape in 1806 had been converted into a centre for administration (the slaves having been selected and removed by respectable people on payment of £30 per head). (1) The new court was duly completed and at the opening ceremony (1815) Chief Justice Truter declared that "it had been erected with great expense and peculiar ingenuity, purposely to give the administration of justice in this Colony, all the external lustre, which can tend to place its dignity and freedom in the most exalted point of view ..." (2)

The hoped-for lustre did not manifest itself immediately. The Cape judges were at various times in the Nineteenth Century accused of being impetuous, overbearing, theatrical, licentious, over-lenient, over-strict, lazy, intriguing, stupid, prejudiced, incompetent and deaf (3), and two of them (4) (including the first Chief Justice of the Supreme Court) were nearly impeached for misconduct. Part of the population adulated them for being representatives of British Justice, another part detested them in the same capacity, while the majority of the population were simply not asked for their opinion.

Yet, for all the criticism and controversy, respect for the judiciary grew amongst all sections of the community, especially during the long period when de Villiers was Chief Justice (1876-1910). Just as the elegant Supreme Court building in Cape Town gave lustre to the judges, so did the judges impart a measure of brilliance to the Cape administration. By the end of the century the Royal Colonial Institute in London was told that the Cape Colony had been particularly fortunate in its judges, who in point of integrity, learning and impartiality could bear comparison with any judicial body in the Empire. (5) The Cape Law Journal ('the oldest periodical of its type in English in the world') (6) agreed, declaring that the Cape judges were men of unquestioned probity and fearless

independence and that the Cape system of criminal law was nearly as perfect as could be desired and worthy of adoption by the British Government itself. (7) Fifty years later the distinguished South African historian de Kiewiet singled out the judges for the only undiluted accolade in a substantial book ("the specially brilliant role played by the judiciary in South African history"). (8)

This essay examines the growth of the legal system at the Cape from its "sorry state" at the beginning of the Century to its allegedly "near perfect" condition at the end. This was a time of conquest and expansion when the small refreshment station at the Western Cape grew to be the headquarters of a huge Colony which spanned the whole of Southern Africa. It was also the period when the discovery of diamonds and the rediscovery of gold opened the way for rapid industrial and commercial development. In this setting the law played a particularly important role. The courts were used both to extend the area of effective administration and to bind the diverse peoples of the territory to a common authority. At the same time the legal system developed sufficiently to cope with the problems thrust up by sudden economic development. A court-centred administration modelled on British lines but adapted to the Cape social situation became the basis for the extension of both political and economic control by the British. Eventually a British-type legal-administrative machine governed over the whole of South Africa.

Today the population group that runs this apparatus might have changed, but the system and techniques which they use remain largely unaltered. This applies particularly to the administration of justice. Judges, magistrates, lawyers, policemen and prison officers employ methods of organization and styles of work which are derived almost entirely from their predecessors in the Cape Colony; the Dutch settlement and the Afrikaner Republics might have provided much of current ideology, but it was the British colonies, and especially the Cape, that supplied present-day methods of rule.

### Transition

The short period of Batavian Republic Dutch Government rule at the Cape (1803-1806) saw the beginnings of many reforms initiated by the modern-minded Commissioner de Mist, not the least of which was the reconstitution of the Court of Justice around a core of salaried, legally trained judges enjoying considerable independence and prestige. Yet juridically speaking very little survived from that period, neither law reports, textbooks, opinions nor decrees. Outside of archival papers, the only physical relic of note was the Bench or, as a later judge was to put it, the Bench, denoting not a collective of judges but a collective of seats, consisting of five cane-backed chairs joined firmly together "to uphold ... the pipe-smoking ... grave and reverend signeurs ... who upheld the laws". (9) Only two of the incumbents stayed on after the Second British Occupation, neither of whom achieved any particular fame. Yet a number of other officials, some Cape-born, others out from Holland, elected to work for the

British administration even though this entailed an oath of allegiance to the British Crown. These men manned the lower ranks of government for two decades after the occupation, and filled nearly all posts connected with the administration of justice.

J. A. Truter (10), after having been under a cloud for his part in looting the Treasury as the British troops approached Cape Town, practised as an advocate and prosecutor until August 1812, when he was appointed Chief Justice. Thereafter he became the right hand man of successive governors and chief adviser on reform of land tenure (1813), tax collection (1814) and criminal procedure (1819). More than any of his colleagues he became the prototype Afrikaner who rose to high office by skilful collaboration with the British. Born in Cape Town in 1763 as plain Johannes Andries Truter, he died in 1845 heaped with honours as Sir John Truter, the first South African to have received a British knighthood (1820).

Other leading officials of the old regime who accepted office under the British included W. S. van Ryneveld (President of the Court 1809-1812), the Fiscal Dennyson, and G. B. van Blokland (secretary to the Court, until he returned to Holland in 1817). It was van Blokland (11) who prosecuted on the so-called Black Circuit of 1812 when, in a series of trials, Judges Strubberg and Cloete investigated complaints by missionaries that farmers had maltreated Khoi Khoi servants. It was van Blokland, again, who prosecuted the "Slagter's Nek rebels" after they had taken part in a short-lived armed revolt on the frontier when one of their neighbours had been shot dead whilst resisting arrest. The deceased had been determined to avoid going to court on a summons charging him with cruelty to a coloured servant, and when the authorities had sent armed Khoi Khoi police under white command to arrest him, he had fired at them and been killed. Eventually, five of the rebels were hanged in a grim public execution - Afrikaners of the East condemned by Afrikaners of the West.

The problem of fractious frontiersmen was not something that first arose during British rule. Since van Riebeeck's days, attempts had been made to keep under rein the more distant farmers, and in fact one of the first appearances in court by Truter as a young advocate had been in a case where he had sought and gained an order for banishment against a farmer "for cattle bartering from Hottentots and shooting some of the latter" (1789). (12) What was new about the British was their greater determination and efficiency and their greater willingness to incorporate armed Khoi Khoi into the police force. The Governors of that time were in general far less liberal in political outlook than their Batavian Republic predecessors had been. They came from a class of High Tory that tended to apologise for slave-owning and sympathise with the problems of landowners, and they loathed anything that smacked of Jacobinism. Yet, being autocratic Conservatives, they believed that the job of the Governor was to govern. How better both to govern more effectively and to quieten the philanthropic non-Conformist missionaries than by extending and invigorating the whole court system? Both to those who cried out for and to those who thundered against EQUALITY, the same answer could be given, one that combined the virtues of morality and effectiveness, of modernity and stability -

JUSTICE. Justice did not tamper with social differentiation, on the contrary, it regularized it; it gave all inhabitants a forum for the expression of grievances; it established the machinery for the systematic investigation of complaints; and it gave an aura of impartiality to the extension of government control. (13)

It was this very aura of impartiality that caused most affront to the white frontiersmen. The least that they expected of an active government - the only good government being a moribund one - was that it should be partial. Yet here was the law not only refusing to punish insubordinate servants but actually giving them a chance publicly to defame their masters. From now on it was clear that the law could be used to discipline not only coloured servants but also their white masters: thus, if a slave raised his hand to his master, he would be guilty of an assault; and if a master lashed his slave more than 39 times (reduced in 1823 to 25 times) (14), he too would be guilty of an assault.

This new willingness on the part of the courts to hear complaints from servants and to receive the evidence of Christian slaves (1823) and all non-slaves irrespective of colour or occupation would have counted for little, however, had there not been people prepared to bring cases of alleged cruelty to court. The men who did this in some areas and to some extent were the non-Conformist missionaries sent out mainly by the London Missionary Society. They were enthusiastic, practical and, above all, safe from reprisals; through their activities they added a new and enduring element to South African political life, the white man who acted as "champion of the natives" and did so by manipulating the machinery of white power rather than by helping to organize black resistance.

Whereas previously the VOC had issued a stream of decrees which had been little more than exhortations depending for their enforcement on the rather arbitrary will of the Governor of the day, new laws were promulgated with the intention and expectation that they would be obeyed. The conquest of 1806 was easy, but the establishment of an effective administration more difficult. In this connection the judges were to play a pioneering role as representatives of central (sovereign) authority. An early step was to send a Circuit Court to tour the interior (1811) and then to place magistrates on the frontier, with a view to incorporating Boers, Khoi Khoi and slaves more firmly into the Colonial legal order. This same court-centred system of administration was destined to be expanded and utilized to place conquered Africans and, ultimately, defeated Boer Republicans under Colonial government. Practice usually lagged far behind policy (15), and the civil servants lagged behind the judges. Only after the development of a proper system of roads and railways in the middle and latter half of the century did a coherent form of civil administration reach effectively into the interior. Yet slow though administrative and legal development was, it ultimately included the whole of southern Africa in its grid.

After the defeat of Napoleon and the Peace Treaty of 1814, the Cape was regarded by its rulers as a full British colony, to be

governed in the British interest. Lack of local educational facilities, together with a deliberate policy of Anglicizing the administration, made it inevitable that the ageing survivors of the Batavian Republic administration would be replaced by men imported from Britain. Commissioners of Enquiry were sent out from London and they recommended, inter alia, a complete overhaul of the judicial system, the introduction of British judges, the application of British court procedures and the gradual assimilation of the local Roman-Dutch law to that of England. The use of the English law of evidence, they asserted, could "not fail to produce the most beneficial consequences ... even under the disadvantages to which it is liable from the strong prejudices of the white population and from the imperfect sense of religious and civil obligation by which the uninstructed portion of the Colonial Population is distinguished". (16)

Following on their recommendations a Charter of Justice was enacted for the Cape in 1827 and confirmed by a second Charter in 1832. (17) These Charters, together with accompanying ordinances and rules of court, completely transformed the local judicial establishment. At the head of affairs were well-paid judges drawn from the English, Irish and Scottish Bars; at the lower end were magistrates invested with wide-ranging judicial and administrative responsibilities. The styles and forms of British legal procedures were introduced: preliminary examinations and trial by jury in serious criminal matters, furnishing of indictments, provision for bail, examination and cross-examination of witnesses, in fact most, if not all, of the characteristic features of the British trial based on the adversary system.

The proceedings of the new Supreme Court of the Cape of Good Hope were commenced on 1 January 1828, when four judges, nine advocates, four attorneys and eight notaries took the oath of allegiance. (18) The judges had been attracted by a good climate and a good salary (£2,000 p.a. for the Chief Justice and £1,500 p.a. for the Puisne Judges), although they were also said to have had more idiosyncratic motives as well. Thus one was alleged to have killed a man in a duel (Menzies) (19), another had already served as legal adviser to the Governor at the Cape (Kekewich), a third was a sailor turned lawyer whose globetrotting career was eventually to take him to five continents (Burton) (20), whilst the fourth was probably trying to get away from his wife (Chief Justice Wylde). As a group they were well educated - Menzies was a close friend of Sir Walter Scott - and they possessed a flamboyance, panache and independence of spirit quite new to officials at the Cape. Under the leadership the whole legal system took on a more vigorous character; one immediate consequence of their arrival was that demands for "freedom of the press" could now be met because newspapers could be made subject to the fixed provisions of the law as interpreted by the courts rather than to the capricious feelings of the Governor. These British judges may have been following in the wagon-ruts of their Cape predecessors, but they did so with an energy and a style that proved to be both new and lasting.

Liberty, Equality, Servility

The Charters of Justice and accompanying legislation made no reference to the colour or status of litigants or witnesses, and to that extent may be regarded as having entrenched the technical equality of all before the law courts. The criminal courts tried white, black and brown prisoners, and the civil courts heard litigation involving members of all racial groups. Witnesses of all colours and every station could give evidence, and theoretically there was no weighting in favour of or against any class or group of witnesses. In the field of substantive law, too, steps were taken to secure a greater measure of formal or civic equality - in fact, this was the only period in South African history when legislation was used to revoke rather than entrench race differentiation. Ordinance 50 of 1828 declared that "Hottentots and other free persons of colour are ... entitled to all the rights of law to which any other of His Majesty's subjects... are entitled". It also expressly abolished the Vagrancy laws of 1809 and 1819 which had prohibited all non-slave coloured persons from moving from one place to another without a written permit from a local official. Soon afterwards (1834) the owning of slaves was abolished throughout the British Empire, and the process of establishing formal equality was complete. Yet these measures made no provision for the acquisition by Khoi Khoi or ex-slaves of the land (21), education and political rights necessary for them to achieve any effective social and economic equality. Slave labour was converted into cheap labour; the great majority of coloured people at the Cape, whether ex-slave, Khoi Khoi, or descendants of mixed unions, had no means of subsistence other than to work for white employers on whatever terms were offered to them. Thus the actual situation of baasskap (domination) remained very much the same before and after the legislative reforms. The arming of Khoi Khoi troopers and the establishment of the Kat River Settlement might have counted for more than the statutory declaration, but this line of development was halted after the Kat River Rebellion of 1851 (22) and the arrival of representative government three years later. (Although the franchise was deliberately restricted on economic and not racial lines, no non-white was ever elected to the Cape Parliament.) (23) Masters and Servants laws (1841, 1856, and 1873) were made applicable to all masters and all servants, irrespective of race. They required that contracts of service be registered annually and provided that insubordination or desertion of service constituted criminal offences, but since most masters were white and most brown people were servants, the effect of this apparently race-free law was to consolidate rather than weaken race domination (24) The net effect, then, of these legislative measures was not to constitute a revolution but to remove certain barriers to emancipation; not to eradicate racial domination but to sanction its class rather than its colour or cultural aspect; and not to destroy privilege but to regularize its operation and restrain its arbitrary exercise. With regard to the use of force and the infliction of punishment, the area of permissible self-help open to farmers and other employers was reduced and the effective jurisdiction of the State increased. At the same time the State, with its extensive resources, could now be called upon to exercise publicly and on a

large scale the sort of control over labour which the farmers had formerly exercised haphazardly, in private and on an individual basis.

For many of the white frontiersmen the bargain appeared inequitable, and they voted against it with their wagons. To them the right to punish servants was a matter of discipline and not of law, and warranted interference just as little as did the right to punish children (or, for those who had had contact with schools, the right to chastise pupils). A farmer thought he knew far better than any magistrate how to handle his workers. A thrashing swiftly delivered seemed far more appropriate than punishment after a time-consuming trial at a distant court-house, especially since fines could not be met and imprisonment deprived the farmer of his labour. At a time when the magistracy had not been firmly established and police and penal establishments were almost non-existent outside of Cape Town (with killing, whipping and banishment being the main forms of punishment open to the court), the advantage of a court-centred system of controlling labour and maintaining "proper relations" between white and brown were not as obvious as they were to become later. To aggravate the feeling of injury, these apparently foreign ideas about the regulation of master/servant relationships were conveyed in a foreign tongue and, with the arrival of the new judges, by foreign men.

#### Robes and Ox-Wagons

These early British judges had a complicated task to perform, one not made easier by the wrangles, intrigue and scandal constantly associated with them. Today South African legal scholars tend to view their contribution purely in terms of the dispute as to whether English law has polluted or enriched Roman-Dutch law, and, looked at in this narrow way, all that need be said is that the Scottish Menzies was a "staunch upholder" of Roman-Dutch principles, whereas the other judges were more eclectic and inclined to fall back on English legal precepts. Their real contribution, however, lay not so much in what they did to the principle of the law as in what they did for the activities of the court. They invested judicial office, if not always with dignity, then with a sense of importance, and they drastically renovated procedures and methods of administration, bringing them into line with British practice. (25) Their job was not merely to interpret the law but to create it: thus they introduced new Rules of Court and drafted an ordinance which made English rules of evidence applicable to the Cape Courts; they also drafted ordinances dealing with the handling of insolvent and deceased estates, the setting up of a Land Register, the qualifications for jurors, and the establishment of the office of Master of the Supreme Court with responsibility for looking after the estates of minors and lunatics. (26) As general legal advisers to the Governor, they concerned themselves with all proposed

legislation, and not only with measures directly related to the administration of justice. It was Judge Burton, for example, who drafted the famous Ordinance 50 of 1828, for which activity the white colonists forgave him only when he later awarded damages for defamation against the missionary Philip. (27) In addition, the opinions of the judges were sought and given weight to by members of the Governor's advisory council and later by members of the legislature. Chief Justice Wylde was for a time, in fact, a member of the council of advice, but he proved to be so disputatious that he was diplomatically relieved of this office and told he was needed more urgently on circuit. When, however, representative government was inaugurated in 1854, he became *ex officio* President of the Legislative Council (like the Lord Chancellor in Britain who presided over the House of Lords), a position which his successors in office continued to hold until Union in 1910.

The judges "in those days were more jealous than they have always been since of the executive's use of emergency powers" (28), and exercised considerable influence over the drawing up of treaties with African leaders (where this was done) and defining the modes of government in the frontier territories. They saw themselves not as mere executants of the law but as watchdogs of constitutionality and representatives of the Crown. The military might conquer, but the judges were needed for good government. On one occasion Judge Menzies, while on circuit, was so anxious to keep Emigrant (Trekker) families under British jurisdiction that he actually purported to annex in the name of the Crown large portions of territory north of the Colonial border.

The varied nature of judicial functions nearly led to South Africa's first major constitutional crisis. During the anti-convict agitation in 1849 three judges, hearing an action for damages involving the Anti-Convict Association, were asked to recuse themselves, the grounds being that they had no legal power to send away convicts shipped to the Cape by the Colonial Office. After hearing this application the court dissolved in uproar, with two of the judges storming in and out of the room and the third nearly being chaired to the street by excited spectators. (29) This was one of the earliest and most successful examples of the use in a South African court of a procedural device to make a political point.

The Colony was poor but litigious (30) and the judges worked hard for their good salaries. Travel on circuit was particularly arduous, since by 1850 the court's jurisdiction extended to an area of 130,000 square miles, and distant towns were 800 to 900 miles apart. (31) Thus, twice a year every year for three months at a time the judges, who until 1860 travelled in ox-wagons over roads "in a state of nature", covered more ground than did the Voortrekkers, and they had to be on time. The towns were filled with prisoners waiting to be tried and with dignitaries waiting to be entertained (Nagmaal - the Dutch Reformed Church's Communion Feast - was usually made to coincide with the Circuit). (32) Each town accordingly represented a non-stop whirl of judicial and



gastronomic activity. The circuit judge was regarded as second in importance only to the Governor, and his arrival "in this Colony (where but few distinguished occasions occur) an event of peculiar import". (33) Thus the first judge to travel through the Transkei was greeted with triumphal arches, fireworks and addresses (though compulsory jury service dampened the enthusiasm). (34) Escorted into town by a cavalcade of police, the judges generally drove in open carriages with two horses while the local people stood in the street and removed their hats. (35) Whether or not justice was seen to be done, the judges were certainly seen, and so effective were they as recruiting agents that nearly all their successors on the bench in the late Nineteenth and early Twentieth Centuries came from small country towns. (36)

In 1865 a separate Eastern Cape Division of the Supreme Court was created with its headquarters in Grahamstown, but the successive annexations of the Transkei, East Griqualand and Pondoland soon meant that, instead of the judges having to cover one giant circuit area, they now had to cover two. Similarly, the establishment of a High Court in Kimberley (1880), later upgraded to the Griqualand West Local Division of the Supreme Court, did little to ease the pressure of travel on the Cape judges. The introduction of landau carts drawn by teams of horses opened up a new era of speed (36) but did little to overcome what was by now the greatest hazard of circuit travel - swollen rivers. Complaining of the absence of bridges, the Cape Law Journal pointed out that "the judge who perhaps but yesterday was seated in Court bewigged and scarlet gown'd ... may a day or so later be seen crouched in a small wooden box, suspended from a wire rope, being hauled by jerks across a rushing, flooded river". For counsel, the indignities could be even worse: "... On one occasion a smasher hat and an eyeglass constituted the only articles of apparel upon the form of the prosecuting Barrister, as he waded, holding his clothes aloft, through a river which was more than ordinarily full." It was not reasonable, concluded the Journal, that every six months a Judge and Circuit Bar should be expected to face odds in arriving on time. (38)

To get through all their work on Circuit the judges frequently held court at night. One energetic judge managed to handle cases in eleven circuit towns in only a month by means of sitting from 6 a.m. to near midnight and then leaving for the next town at daybreak. (39) As late as 1891 the Law Journal referred to the practice of lighting the court with candlesticks placed on the Bench, the jury-box and tables, with the result that "the effect at a recent sitting for the conclusion of a notorious murder case was quite ghastly". (40)

In Cape Town itself the activity of the judges was far less heroic. For some time there was so little work for them to do that three judges would sit together to hear the most trifling matters (1878). (41) This was so despite the fact that in 1856 the procedure of automatic review - "a unique South African contribution to criminal procedure" (42) - had been introduced, whereby all

magistrates' court cases in which the sentences imposed exceeded one month's imprisonment, or £5 fine, or twelve lashes, were automatically sent on review to the Supreme Court.

By the 1850s judges were no longer being appointed solely from Britain. The elevation to the Bench of such persons as Ebden, Cloete and Watermeyer (43), produced perhaps a lowering of judicial rhetoric but a raising of Roman-Dutch law scholarship (assisted by the publication of law reports dating back to 1828). (44) Until 1868 the Colonial Office kept a balance between British-born and Colonial-born judges, with the Chief Justice always being an Englishman or Scotsman, but from 1868 onwards all Cape judges were appointed from members of the Cape Bar (after the coming of responsible government in 1872, the Cape Government itself made the appointments). The quality of judges during the mid-century varied considerably. Thus Chief Justice Hodges (1858-1868), who was said to have no prejudices except against the letter "H" (45), was strong on improving jail conditions but weak on points of law, whereas his predecessor and successor, Bell (1855-58, 1868-74) (46), was strong on points of law but weak on tact. Newspapers were unafraid to attack tyrannical or unjust judges, and used the most scathing language (47) to do so. Judge Dwyer (1868-1886) was openly referred to as a "hedgehog" and a "ginger-pop" judge, and one paper ascribed his wearing of gown and wig to "the custom of covering those parts of the body which are in any way deficient". (48)

It was only when Paarl-born J. H. de Villiers was elevated to the Bench as Chief Justice in 1874 that the court received a leader who combined dignity, tact and legal acumen with a concern for improving the standards of justice. Merely 30 years old when he took office, it was expected that the passed-over judges would refuse to administer the oath to him, so "he rose from his seat and administered the oath to himself and said 'Call the first case, Mr. Registrar'". (49) For the next 36 years he presided with forbidding gravity over the court, achieving for it an international regard during a period when rapid economic and political development brought South Africa to the attention of the world. As a jurist, his greatest achievement was the way he moulded Roman-Dutch law to meet the needs of a modern, developing economy, for which he earned from his most eminent successor (Innes) the title of "master-builder of South African law". (50) His demeanour was as distinguished as his scholarship, and so great was his eventual fame that to appeal from a judgment of his to the Privy Council was regarded almost as an impertinence. What he brought to the Bench was a sense of authority. He was learned, grave, courteous and prepared to stand up to the Government; being unconcerned about unpopularity (or perhaps taking his popularity for granted) he became popular. A friend and protege of such liberal statesmen as William Porter and Saul Solomon ("champion of the natives"), he took his stand on "the fundamental principle that no man's fundamental rights should depend on the colour of his skin". (51) More than most of his contemporaries in the upper reaches of Cape society he saw what a valuable role the Supreme Court could play in integrating conquerors and conquered into a common society sharing common values and standards of conduct. Unlike most of his colleagues who belonged to Volunteer Regiments, he was not a military man, but a strong believer in civil authority. He publicly condemned moves to make flogging compulsory for

stock-thieves, and on at least two occasions severely embarrassed the Executive by ordering the release on habeas corpus (and its Roman-Dutch equivalent) of non-white political leaders (William Kok and Pondo chief Sigcau).<sup>(52)</sup> To arguments that the detention of such "troublemakers" was necessary for the security of the Colony, he replied that "actual justice done with an equal hand does more to keep the peace than anything else". <sup>(53)</sup>

Contrary to the current notion that South African judges have traditionally given politics as wide a berth as possible, de Villiers never left politics alone <sup>(54)</sup> (nor did Kotze, the Chief Justice of the Transvaal Republic, who stood against Kruger for the Presidency, nor did most of the Chief Justices of the Orange Free State, who actually became President). He considered standing for public office on a policy of "broad South Africanism", and when the National Convention met after the Anglo-Boer War to consider union of the four colonies, he was the natural choice for President. For twenty years he worked actively to create an Appeal Court for all states in southern Africa, seeing in it the forerunner of political union; when, eventually, such Union and such Court were simultaneously established in 1910, he presided over the Court as first Chief Justice of South Africa.

### Barristers and Gentlemen

By accident or design the first case on the roll of the new Supreme Court in 1828 involved the appointment of an advocate (named Hofmeyr) to look after the interests of a child of a slave who was claiming that he had been manumitted. <sup>(55)</sup> At that stage the Bar consisted of only nine advocates, all of whom had been either judges or advocates in the previous court, and additions thereafter came very slowly. In the ten year period 1828 to 1838 the average annual number of admissions was one (total 9), whereas in the thirty year period 1838 to 1868 it dropped to less than one (total 21). <sup>(56)</sup> In the next twenty years (1868-1888) the annual average rose to three (total more than 60), though many of the new advocates would have been enrolled in Cape Town merely as a preliminary to practising in the Eastern Cape or Griqualand West, or the Orange Free State or Transvaal. When J. H. de Villiers commenced practice in 1866 there were only four advocates in Cape Town, and this included Attorney-General Porter (accordingly there were as many judges as counsel).<sup>(57)</sup> By the time James Rose-Innes joined the Bar (1878) the number in practice had risen to twelve <sup>(58)</sup>, and by 1901 the Law Journal was able to report that "Themis smiles in the forum on more than thirty ardent admirers". <sup>(59)</sup>

Of the first thirty advocates admitted after 1828, approximately half had English and half Afrikaans names. All except two had qualified by virtue of having been called to the Bar either in London, Edinburgh or Dublin; although in 1854 examination courses had been provided for at the Cape, until well into the Twentieth Century the great majority of aspiring advocates proceeded

to Britain (and often to Holland) for their legal education, which often included taking degrees at Cambridge or Oxford. Out of all the many well known judges who sat on the Bench during this period, only three (Buchanan, Immes and Curlewis) had received all their legal training in South Africa.

Most of the early advocates with British names appear to have been servants of the Crown or else immigrants, who came to the Cape for personal as much as career reasons, such as health (Thomas Upington, Robert King) and shipwreck (Alfred Cole). The Irish Bar contributed a particularly large number of advocates and judges (Porter, Griffiths and Upington - all Attorney-Generals - Fitzpatrick, Dwyer and Connor - all Judges - and King, Q.C.), prompting the Law Journal to carry an article by an American lawyer who protested that Ireland was the only country in the world where English was spoken and the Irish did not rule.

The Cape Bar accordingly was small, elitist and strongly influenced by British styles and traditions. The division between Bar and Side-Bar was maintained, as was the practice of appointing judges purely from the ranks of practising barristers. In the latter part of the century the title Queen's Counsel was awarded to certain leading advocates, and although all advocates and many judges discarded the wearing of wigs (60), presumably because of the heat, they continued to wear English-style gowns and bibs. The advocate's oath of admission involved not only a declaration of fealty to Victoria but a solemn undertaking that "... I do from my heart abhor, detest and abjure as impious and heretical that damnable doctrine and position that Princes excommunicated ... by the Pope ... may be deposed or murdered by their subjects ..." (61) Catholics not planning to kill Victoria were, however, admitted, as was at least one Unitarian (Porter) and one Jew (Jacobs). Most of the advocates were members of the Anglican or Dutch Reformed Churches, with a fair sprinkling of non-Conformists and Presbyterians. Many of the leading South African lawyers - both English and Afrikaans - were Freemasons. There were not many schools at the Cape, but nearly all the Colonial-born advocates who subsequently achieved fame seem to have attended only two, the South African College School in Cape Town and, more remarkably, a Reverend Templeton's school at Bedford in the Eastern Cape. This latter school had within its walls at one time a future Prime Minister (Schreiner), two future Chief Justices (Immes and Solomon) and a number of future eminent lawyers and civil servants. (62)

Friendships at the Bar tended to be strong and lasting, partly because the number of advocates was so small and partly because the hazards of the Circuit were so great. (63) The association which produced the most enduring results was the one between the ageing Attorney-General Porter and the youthful advocate de Villiers. Porter was the most distinguished lawyer and gifted orator at the Cape during the middle portion of the Nineteenth Century; a Unitarian of strongly liberal views, he used all the authority of his office to encourage a low and non-racial qualification for the franchise for the first representative government (he drafted the Constitution). (64) He was a vigorous opponent of the death penalty, and his failure to persuade

the Cape Parliament to abolish it was one of the factors which persuaded him to refuse the Chief Justiceship in favour of de Villiers. (65) He turned down all the many honours offered to him, refusing even to allow his portrait to be painted, but possessed such authority that he could silence the most querulous of judges (doing so once with the famous statement that a witness had in error "addressed me, my Lord, as 'My Lord', my Lord, instead of my Lord, my Lord, as 'My Lord', my Lord"). Porter took de Villiers under his wing, sponsored him for Parliament and encouraged his candidature for the Chief Justiceship; he also transmitted to him a calm, eloquent style and a deep respect for justice through law. Porter and de Villiers may be regarded as the individuals who did the most to establish the traditions and ethics which South African barristers like to feel characterize their profession, with Innes and Schreiner being their most influential successors.

In those days admission to the Bar led almost invariably to a successful political and judicial career. Young barristers on circuit were quickly snapped up as Parliamentary candidates, and once elected could aim to become Attorney-General - a sort of Minister of Justice practising at the Bar - and then, possibly, even Prime Minister (Upington, Schreiner). Progress was often extremely rapid. Thus Thomas Upington, the "Afrikander from Cork", arrived in Cape Town in 1874 aged 30 and broken in health; within four years he was Attorney-General and within six Prime Minister. (66) Of the twelve advocates at the Bar when Innes commenced practice in 1878, ten became judges, the eleventh a Secretary for Justice in the Transvaal, and the twelfth the man whom Gandhi described as that "famous barrister of South Africa, Mr. Leonard". (67)

By the end of the century the development of the diamond and gold fields in the north had drawn many Cape Town and Grahamstown lawyers to Kimberley, Pretoria and Johannesburg, where the volume of work was greater and the scale of fees higher. (68) They took with them the styles and traditions of the Cape, and practised before judges many of whom had themselves come from the Cape (Kotze's first circuit as an advocate had been with de Villiers as judge). (69) Thus in 1903 a writer in the Law Journal claimed that the "Cape Colony, like Africa of old, may well be called the nutricula causidicorum - the nurse of lawyers - and every South African colony, except Natal, owes the majority of its Bench, Bar and Side-Bar to the parent colony". (70)

#### Attorneys and Law Agents

For a few years after 1806 attorneys were admitted to practice by the favour of the Governor without having to pass examinations or serve indentureships. (71) The Charters of Justice and accompanying Rules of Court entrenched the existing division between advocates and attorneys and made it correspond to the English division between barristers and solicitors. (72) They also provided that prospective attorneys should serve five years' apprenticeship as

articled clerks as a prerequisite for practice, but that persons qualified for practice as solicitors in England, Ireland and Scotland were automatically entitled to practice at the Cape. (73)

Originally there were even fewer attorneys than advocates at the Cape, with only four being admitted at the opening of the new Supreme Court in 1828. (74) For many years they all had their offices in Cape Town, and visited the outlying centres only when the circuit court went round. (75) Nearly all court work was done by law agents, who had no legal qualification (76) but were entitled on payment of a fee to appear in the magistrates court. Examinations for attorneys were introduced only in 1877 (77) and were gradually made more stringent; prospective attorneys were also called upon to bear the burden of fees and a premium, which in 1884 amounted to £182.10.0., plus board and lodging for three years estimated at a further £450. (78) In that year 63 attorneys joined the newly incorporated Law Society with headquarters in Cape Town, while a further 53 belonged to the Eastern Districts Law Society. Gradually the law agents were squeezed out of practice, and at the turn of the century "almost every town, village and hamlet [had] as many and often more attorneys than it [could] support". (79) In Oudtshoorn alone there were upwards of twenty practitioners, and complaints were loud and frequent about the overcrowding of the profession. (80) Unlike the local advocates, the Cape attorneys were for the most part "home-grown and home-trained", and consequently the Cape Side-Bar was far less affected by English methods and traditions than was the Bar. (81)

By and large attorneys in the Cape never achieved the eminence of their colleagues at the Bar. The only distinguished jurist to emerge from their ranks was C. H. van Zyl, father of a future Governor-General, who collected the first large law library at the Cape, wrote important text-books on procedure and practice as well as many articles for the Law Journal, and did more than any other single person to promote legal education at the Cape. (82) The Cape Law Journal was launched by a young and enterprising attorney (W. H. S. Bell) in 1884, and at least three Cape attorneys went on to achieve prominent positions in political life (J. W. Sauer, de Waal and Hull). As a profession, attorneys handled a wide variety of legal matters for clients and did much work preparing for trials, but their main contribution to public life in the Cape may have been in the economic rather than the purely legal field, where they negotiated sales, drafted agreements and acted as auctioneers and estate agents.

#### Magistrates, Justices of the Peace and the Law Department

The administration of justice at the local level was transformed in 1827 when Resident Magistrates were appointed to replace the local officials (landdrosts and heemraden) left over from the Dutch era. (83) The magistrates were full-time employees of the Colonial Government, who combined the administrative tasks of receiving taxes, issuing licences, collecting information, publishing

government notices and solemnizing marriages, with the judicial tasks of hearing all but the more serious criminal and civil cases. Though their jurisdiction was limited in civil cases to relatively small awards and in criminal cases to short terms of imprisonment, heavy lashes and low fines, it was in their courts that most trials took place and it was they who represented the administration of justice to the man in the veld. (84)

Their training was minimal and they often lacked the finesse required to handle the frequently conflicting demands (85) of the review judges, their departmental heads and the local public (usually meaning the local white public). Although some magistrates were highly qualified and competent, "many such appointments also went to retired sea-captains and other gentlemen whose ignorance of law and procedure was abysmal". (86) At a later stage senior officers of the Cape Mounted Rifles were often made magistrates, presumably on the premise that their fierce demeanour would compensate for their lack of legal knowledge. (87)

Pressure from local white employers was strongest in cases of desertion or refusal to work, and stock theft or theft of produce. In such cases magistrates were expected to ensure that the accused were punished as severely as they would have been by the employers themselves in the days of self-help. Throughout the century the question of punishment of farm labourers continued to be fiercely argued. In 1892 there was a Cabinet crisis over whether a magistrate named Bamberger should be removed from the Bench after he had been criticized by the Prisons Commission for "extreme harshness to Native offenders and refractory Native servants". (88) Strong support for Bamberger came from farmers throughout the Colony, and in 1894 the notorious "Strop Bill" (Flogging Bill or, as Olive Schreiner called it, Every man beat his own kaffir bill) (89) was placed before Parliament, which if passed would have once more legalized the thrashing of servants. As members of the local white community, country magistrates were kept well aware of farmers' feelings. Even in the towns magistrates were subjected to pressure by white employers; in one case a lady of standing is said to have called out loudly to a magistrate trying an employee of hers for desertion: "Punish her Percy!" (90)

In the early years when communications were very poor and the administration even poorer, a large number of justices of the peace were appointed to exercise judicial-cum-police functions in the country districts (1827). (91) As the magistracy advanced so did the justices of the peace retire, until eventually they became little more than commissioners of oath. By 1894 they held court only in the most far-flung districts, trying a total of 1,400 cases (compared with nearly 50,000 criminal cases in the magistrates court). (92) The majority of cases which they heard related to the Masters and Servants Acts, with the balance being made up mainly of charges of assault, vagrancy, drunkenness and theft.

The country magistrate's duties were as multifarious as his

procedures were informal. A policeman turned magistrate later wrote in his memoirs of the time when he was appointed to the Northern Border magistracy (1873). (93) His jurisdiction covered an area of 89,000 square miles, and he had power to impose 36 lashes with a cat; amongst his first tasks was that of chasing African and San "squatters" off certain pieces of land. He carried his records in a wagon and held court anywhere. In one case a Boer charged with assaulting an African rode up to the wagon at breakfast time with the witnesses, who had all come to eat. "The table cleared, the accused stood up for trial just where he had sat, I sitting in my chair the same. A £5 note protruding from his pocket was the penalty imposed. Afterwards he shod my horse gratis ..."

Although procedures in the larger centres were never as casual as this, lawyers constantly complained of the magistrates' lack of legal knowledge (as well as of their tendency to act as judge and prosecutor at the same time). (94) The judges were often extremely severe on the magistrates, on occasions being content not only to upset their verdicts (95) but also until 1870 even to order them personally to pay the costs of successful appeals (one of these orders for costs was in turn successfully taken on appeal to the Privy Council, which led to a caustic newspaper suggestion that the Judges should now be ordered to pay the cost of this later appeal). (96)

The procedure of automatic review mentioned earlier helped to raise standards in magistrates courts, even though (1894) only a tenth of convictions were so reviewed and only one in a hundred of the reviews led to a conviction being quashed. (97) Those cases in which magistrates were overruled frequently got into the press and the law reports, and also could have affected promotion prospects. Magistrates had no security of office as had the judges. They were employees of the Government, selected, promoted and transferred by the Law Department.

The Law Department came to be regarded as "the crack Department" (98) of the Colonial Government, an indication perhaps of the important part played by the law in the general field of administration. Of all the Government departments it demanded the highest educational standards and offered the highest pay. The political head of the department was the Attorney-General, who was responsible for courts, police, prisons, the legal profession, preparation of indictments and drafting of legislation. Eminent lawyers and statesmen such as Porter, Upington, Innes and Schreiner gave the office a special distinction, while at the end of the century the permanent head of the department, Sir John Graham, became a legend amongst civil servants for his industry and high standards. (99) After the conquest of the Republics in the Anglo-Boer War (1899-1902) many Cape officials in the Law Department were sent to the Transvaal to establish a new judicial system there. The statutes which they prepared were based largely on Cape models, and in their turn became the basis for the organization of courts and rules of evidence and procedure adopted by the whole country after Union.



### The Land Register

The development of efficient methods of regulating land ownership and transfer was one of the preconditions for economic growth in the Colony. In 1811 a debt register was compiled, and in 1813 land ownership stabilized by a special proclamation. Thereafter all previous records of land transfers were bound into a set of consecutive volumes (1821), and the Register of Slaves was made into the Registrar of Slaves and Deeds with departmental responsibility for ensuring swift, accurate and accessible registration of deeds (1828). (100) The number of deeds passed in the first half of the century remained low, rising from 244 in 1806 to 564 in 1810 to 1200 per annum in the early 1840s (101); the creation of machinery for registration did not mean that it was used. In 1844 a comprehensive Land Register was established, but by 1848 (before the extension of the Colony's boundaries) little more than half the surface area of the colony was thought to have been granted in legal title. (102) By 1892, however, the number of deeds issued each year had shot up to over the 10,000 mark (103), and the methods of indexing, description and enumeration had proved so effective that the Cape Land Register had become the basis for similar Registers not only in Natal and the Republics (and, ultimately, the Union of South Africa) but also in "other colonies and states". (104) In the opinion of the Law Journal it was a matter of wonder that the Cape system ("perhaps the most simple and complete in the world") had not been adopted in England. (105) To this day it continues to have fervent admirers. (106)

### Law Enforcers: Army and Police

Punitive raids, wars of conquest, the suppression of crime and the maintenance of "proper relations" between masters and servants were so closely interrelated in the Colony that police and military functions were often inseparable.

The military consisted primarily of Imperial troops (107) who started off by garrisoning the Cape but who increasingly became involved in frontier warfare. It was they who finally accomplished what the colonial forces had been unable to do, namely the conquest of African tribal groups who fiercely fought for their cattle, pasture-land and water supplies along the Colony's eastern frontier. By and large British troops were not drawn into police work, but they provided the shield of force behind which para-military forces and ordinary police units could operate. At no stage did the white Colonials have any permanent military force of their own; in the first half of the century they formed mainly Afrikaans-speaking commando units, in the second half mainly English-speaking Volunteers, but always they enrolled for military duty on a part-time basis only.

Until the 1850s the Commandos were frequently called up to fight on the frontier. They were mounted infantry who wore rough

clothes, elected their own officers, and were prepared to leave their farms for only a few months at a time. (108) Although their numbers in battle increased from 800 in the Frontier War of 1811 to 1800 in 1819, to 1800 + 1000 reserves in 1835, to 5000 + 3000 reserves in 1846, they combined badly with regular troops and their military effectiveness declined (109), probably because their African opponents were increasingly able to match them in guns and horses.

From the 1850s onwards the Commandos were largely replaced on the frontier by the Volunteers, who were based mainly in the towns and organized along British lines. (110) Many judges and lawyers joined the Volunteers - "exchanged the gown for the sword" - and even the normally pacific Porter was praised for his military ardour. (111) In peacetime the Volunteers indulged in uniformed parades, while "the possession of a rifle and the opportunity of buying ammunition was much sought after in a country where everybody was scared of a native uprising, everyone wanted to shoot game, and many were keen on target shooting". (112) In wartime the Volunteers usually served as support troops for the Imperial forces, but occasionally they took part in "small native wars" as members of purely Colonial expeditions. By 1894 their numbers were just short of 6000 but thereafter they dropped to 3400 (1899) and rose slightly again to 4000 (1910). (113)

Because of their part-time nature Commandos and Volunteers could not be integrated into any permanent machinery for law enforcement, so that a special force had to be created to fill the large gap that existed between the military and the constabulary. This special force of "soldier-policemen" (114) was the well known Cape Mounted Rifles (CmR) whose name had first belonged to a cavalry regiment of khoi khoi troopers maintained by the Imperial authorities.

In about 1850 a number of volunteer detachments of armed mounted police formed up on the Eastern frontier, and in 1855 the newly established Cape Parliament consolidated these loose forces into the Frontier Armed and Mounted Police, consisting of about 500 officers and men. (115) The officers were British and at first most of the men were young white farmers, who were said to be especially good at tracking cattle, but later the farmers' sons were replaced by recruits from Britain. (116) Their task was to pacify the border areas and to create a court-centred administration in the Transkei, but they also "helped to realise the Government policy towards the Griquas and Basutos", and their activities became increasingly military in character. (117) During the 1877 frontier wars they were granted a higher military standing than either the Volunteers or the Burghers (Commandos) (118), and in 1878 they were reconstituted into the Cape Mounted Riflemen with a specifically military organization and an express directive to act as "the Permanent Colonial Forces both for police and defence". Inspectors and sub-inspectors became Captains and Lieutenants, and their responsibilities now included "any and every duty bearing upon the maintenance of order either within or outside [their] special territory". (119) Their numbers varied from around 750 in peacetime to around 1000 during war, and finally ended up in 1910 at a little over 700. (120)

Because the CMR was so heavily involved in military work on the frontier, a second force had to be created to do police work in the interior. In the early 1880s the Cape Police force was established with this end in view, and by 1884 it consisted of nearly 900 men grouped in eight districts throughout the colony. (121) Because they had so many duties - listed under 21 heads which included patrolling, tracing criminals, inspecting native locations and visiting pounds - the Law Journal considered it "amusing to remember that the Cape Police are under the control of the Law Department and not that of the Colonial Defence ... [They] really constitute a valuable military and not a civilian corps". (122) While generally praising the Police and complaining that they were overworked, the Journal pointed out that they tended to be too influenced by pressure from local inhabitants and sometimes strained evidence to get a conviction (123): "a man of weak character might sometimes find it difficult to refrain from making an accused or suspected person talk ..." (124)

In addition to these para-military police forces, whose functions were clearly related to the conquest, integration and subordination within the Colonial legal order of Africans, Griquas and San in the east and north of the Colony, there were police forces who had "ordinary" police duties similar to those carried out by policemen in England. The oldest of these was the Municipal and Harbour Police Force, which was established in 1840 as a replacement for the traditional "systems of police and nightly watch heretofore existing" in Cape Town and district. (125) This was followed in 1847 by the creation of a hierarchy of policemen in the country districts appointed by resident magistrates. (126) Kimberley subsequently obtained its own municipal police force, while the rural police were eventually integrated into the Cape Urban, Rural and District Mounted Police, who looked after all the remaining towns and villages. Finally, to complete the bewildering list of police forces, a special Native Affairs constabulary was set up in the Transkei.

For a long time these various "ordinary" police forces remained small compared to the two para-military ones, but towards the end of the century they began to expand rapidly while the Mounted Rifles and the Cape Police remained static. Thus in 1884 there were just under 600 ordinary police, in 1894 over 1100, and in 1910 nearly 2500 (including 700 Native Affairs Police). (127) As far as racial composition was concerned, whites always outnumbered non-whites and it seems that most, if not all, senior command positions were occupied by whites. In the Transkei the largely white Cape Mounted Rifles were eventually equalled in numbers by the largely African Native Affairs Police, but elsewhere the ratio, in 1910, was approximately 5 white policemen to every 1 non-white. (128)

### Prisons and Punishment

The abolition by the British in the Cape in 1796 of extraordinarily barbarous punishments, such as breaking on the wheel and mutilation, left the judges and magistrates power to impose only ordinarily barbarous punishments, such as hanging, flogging and imprisonment. Banishment, transportation, the pillory and the treadmill were gradually done away with, and imprisonment and flogging emerged as the major weapons of the criminal law. As civil government was extended into the interior via the expanding system of magistracies, so were new jails and convict stations built throughout the Colony. By the end of the century there were a large number of small prisons dotted throughout the country rather than a few large prisons in selected centres. (129) Standards seem to have varied considerably, from bad to atrocious. Thus Chief Justice Hodges refused to convict a prisoner charged with jail-breaking, on the grounds that the prison was so tumbledown and overcrowded that he would not punish anyone for attempting to get away "from such a wretched hole". (130) In 1889 bad hygiene led to outbreaks of smallpox and measles in two prisons and the spread of a disease in a third, which necessitated the prisoners being assisted, some even carried, into court. (131) Criticism was levelled at the rule that "life" prisoners not only had to do hard labour but also had to spend all their years in chains. (132) Spare diet and solitary confinement were imposed excessively in some prisons, with the result that a special circular was sent to Magistrates and Warders to regularize and control the position. (133)

Of about 61,000 persons charged with criminal offences in the magistrates' courts in 1894, approximately 55,000 were found guilty and 42,000 admitted to prison. (In the Supreme Court 800 indictments led to a further 600 convictions.) At the end of the year there were only 3,000 persons in custody (134), which suggests that the overwhelming majority of prisoners had received very short-term sentences. Sentences of ten years' penal servitude, so common in Europe, were said to be almost unknown at the Cape, where even five years hard labour was regarded as an exceptional punishment. (135)

In the early part of the century capital punishment was imposed for a wide variety of crimes, and as late as 1831 a man was hanged for sodomy. A survey published in 1897 (136) suggests that in the 1830s the Supreme Court judges imposed death sentences for serious cases of housebreaking, arson, cattle-killing, theft, incest and rape, and attempted murder, but that thereafter the death sentence was reserved almost exclusively for murder. (137) Death sentences passed in 1841 and 1862 on persons found guilty of rape seem to have been matters of note, and in 1888 a book reviewer in the Law Journal doubted whether persons found guilty of rape would ever again be sentenced to death. "It is highly questionable", he observed, "whether the morbid sympathy created by the severity of the punishment for the doomed man might not weaken the results expected from the penalty, and add another wrong to the injury already sustained by the woman." (138) Ten years later, however, the Chief Justice condemned to death a prisoner who had pleaded guilty to rape and attempted murder. (139)

It has already been mentioned that Attorney-General William Porter attempted to get Parliament to abolish the death sentence. The question of abolition was debated by members of the newly created Forensic Society in 1893 (140), while the Law Journal contained a number of articles which favoured abolition (the first strongly retentionist article appeared only in 1909). (141) Although death sentences were always imposed for murder, once even by de Villiers on an undefended man (142), there are indications that it was sparingly carried out. Thus the Cape Statistical Register for 1894 records that only one inquest was held consequent on a judicial hanging, and seems to record no other figure for death by execution. (143)

If lynching is as American as cherry-pie, then flogging is as South African as biltong. The authorities at the Cape never seem to have been in doubt about the necessity for using the cat and the cane as major instruments of punishment. What was at issue was whether farmers and local officials should legally be allowed to thrash servants and whether the law should prescribe compulsory whipping for stock theft. Neither of these demands was, in fact, acceded to - thanks partly to the energetic opposition of de Villiers, who saw it as his duty to mention during the course of an address to a jury (1884) that the 30,000 lashes administered in one year in the Eastern Province alone, where stock-theft was on the increase, were proof that lashes were not the infallible preventative they had been represented to be. Far better, he declared, to concentrate on an efficient police force, properly regulated canteens, and control of smuggling. (144)

On the whole, magistrates were more prone to be influenced by the demands of white farmers than were the judges. "In some districts", wrote the Law Journal, "a 'flogging magistrate' is popular though he may not be humane." (145) In 1894 magistrates imposed whipping in slightly over 1,000 cases, while a further 118 prisoners were whipped for disciplinary offences in prison. (146)

Prison was also used to hold civil debtors, insane persons, and witnesses who the authorities feared might abscond. Civil debtors could spend years in prison. The judgment creditor had to pay maintenance for an incarcerated debtor, and one Cape merchant is reported to have set aside £3,000 in his will to ensure that a debtor of his was maintained in perpetuity - only a sermon by a well known Bishop (Gray) on the "Unforgiving Spirit" caused him to relent. (147)

A feature of the system which, by then, was widely known as "British justice" was that agents of the law were themselves subject to the law. Thus special regulations penalized cruelty or corruption on the part of policemen and warders, and although it was difficult to enforce such regulations, in 1894 over 300 Cape Policemen, guards and constables were convicted under them (compared nearly 500 prisoners so convicted). (148)

Black and white prisoners were locked up in the same prisons, a fact which Judges regarded as constituting a special degradation for the whites and hence a reason for imposing lighter sentences on them. (149) Criticizing this approach, the Law Journal suggested an opposite course so that the treatment of whites "while in durance vile should be at least in proportion to the height from which they have fallen, a level upon which Europeans are credited almost with an incapacity for crime". (150) The Journal was also critical of the fact that whites in a convict establishment and certainly in a jail constituted an upper class of prisoners. By 1894 just over 1,000 prisoners (i.e. a third of the end of year total) were accommodated in single cells (151), from which it might be inferred that association between black and white prisoners took place more at work than in the cells.

There were nearly 450 jailers in charge of prisoners that year, when separate figures for the racial composition of the prison staff were not given. There did not seem to have been any rule forbidding non-white warders from being in charge of white prisoners; on the contrary, later evidence suggests that such a situation was not uncommon. (152)

Some judges made a point of visiting prisons with a view to exposing abuses, and in an address to a jury in Cape Town which was widely reported a judge went out of his way to criticize the fact that prisoners were not classified. (153) Administrative tradition rather than scientific policy governed penal practice, which might have been as well for the prisoners considering the level of penology in those days. In 1892 the Law Journal carried an article by a relatively enlightened Transvaal judge under the heading "The Scientific Study of the Criminals", in which the judge set out the scientifically established distinguishing features of the criminal: sugar-loaf form of head; large lower jaw; projecting ears; pale complexion; early wrinkles; abundant hair (baldness rare); rarely good-looking; an extraordinary and ape-like agility, enabling him to effect escapes in a wonderful manner; insensitive to pain (an argument against flogging). The judge pointed out, however, "that an individual was found with all the features of the criminal, but who had notwithstanding led a most respectable life". (154)

### White Justice

Though the British Government insisted on the technical equality of all before the law, it did not insist on equality of all behind the law, that is of all those at the dispensing rather than receiving end of justice. The administration of justice in the Cape in fact remained almost exclusively in the hands of white men - Colonial Office appointees, retired Imperial officers, immigrants from Britain or their descendants, and anglicized Afrikaners. Not only judges and magistrates but all advocates and attorneys seem to have been white, though there were a few law agents who were not. In the court-room the only non-white person to occupy any official position of importance was the interpreter (who might have been of any race).

Although the law relating to the selection of juries contained no colour bar, juries tended to be dominated by whites. For many years multi-racial juries were not uncommon in Cape Town, and some were even empanelled in outlying areas, but by the turn of the century juries, in practice, consisted of white men only. (155) As a result there were many blatant miscarriages of justice, especially in cases where white employers had been charged with thrashing non-white employees. With wry pride Judge Cole in his reminiscences recalled two occasions from his early days as an advocate when clients of his had benefited from this situation. In the first, he had defended an Englishman charged with the unmerciful flogging of an African servant. The jury were all English-born, and he asked them: "Do you think it more likely that a Kafir should come here and lie or that an Englishman, your own countryman, should commit atrocities?" The judge's summing up was strongly against the accused, but without even retiring the jury acquitted. In the second case, a wealthy Afrikaner farmer had been charged with murder as a result of his having thrashed to death an African servant with a sjambok. After spurious medical evidence had been given, the accused was acquitted, and the cheering spectators wished to carry Cole on their shoulders out of court. (156) In 1892 the Law Journal referred in strong terms to what had become known as the "East London Case", in which a jury had acquitted a man called Hart and his accomplices on a charge of causing the death of an African by inhuman flogging, torture and exposure. "The presiding Judge, Mr. Justice Jones", it wrote, "pronounced the verdict to be a disgrace to the community and declined to thank the jurors ... for their services." (157)

The strengths and the weaknesses of justice at the Cape were well brought out in two matters which stirred enormous controversy at the time. The first was the "Koegas Atrocities" case (1879), which arose out of the shooting in cold blood of captured San prisoners, including women, by white farmers in the north-west Cape. The farmers were charged with murder, and despite a strong summing up against them by the judge, they were, amidst great applause, found not guilty. The furious judge wrote to Saul Solomon asking him to take up and publicize the matter, which Solomon did through the medium of the Cape Times. The paper attacked the jury but more particularly the Attorney-General (Upington) for his failure to have the trial and a second, similar one transferred to an area where a less partial jury might have been selected. The Attorney-General sued Solomon and the editor of the paper for libel, and the case was heard before two judges in Cape Town, one of whom was de Villiers. De Villiers held that the most gruesome atrocities had been committed against defenceless prisoners, and that the Attorney-General had behaved reprehensibly, but that nevertheless criticism of him had gone too far and he should be awarded nominal damages. (158)

The other case (1885) flowed from the shooting in the eastern Cape of an African by a farmer named Pelsler. Despite many contradictions and improbabilities in Pelsler's story, the Solicitor-General (159) of the Eastern Cape accepted that Pelsler had acted in self-defence, and declined to prosecute him. A Reverend Don thereupon wrote stinginglly to the press about the Solicitor-General's

dereliction of duty, and mentioned in terms that Pelser was "a wretched murderer". The Solicitor-General retaliated by indicting Don for criminal libel, and the case came before a judge and jury in Grahamstown. Neighbours of Pelser's had previously threatened to take the law into their own hands if Pelser was charged, and now Pelser supporters nearly swayed the jury at a bar to which they retired each evening. In the end, however, the jury found in favour of Reverend Don, who was praised by the judge and then by the Law Journal for "lending himself ... to the cause of free discussion and impartial justice". (160)

These two cases illustrated that, though the courts might not have been all that effective in preventing atrocities by whites against blacks, they would give a fair measure of protection to whites who exposed such atrocities.

The one place where an exception was made to the use of white-dominated juries was the Transkei, where for a time all-African juries were empanelled in cases in which Africans only were charged. Despite the fact that "the native juries acquitted themselves most satisfactorily", they were discontinued. (161) Tribal chiefs in the Transkei were allowed to exercise limited jurisdiction over matters involving tribal law and custom, but otherwise the active and extensive judiciary in the Colony remained totally in white hands.

If the first half of the century saw the progressive abolition of restrictive laws imposing disabilities on brown men in the western Cape, the second half witnesses the progressive extension of such laws to black men in the eastern Cape. Pass laws were revived, this time to deal with so-called "native foreigners". (162) As the borders of the Colony were pushed further and further up the coast, such "native foreigners" became British subjects, remaining "natives" as far as duties were concerned and "foreigners" as far as rights were concerned. A similar development took place in relation to "locations". At first, they were tracts of land on the border set aside for African occupation, but gradually they came to be any area defined and set aside for African residential purposes, "the cramped and neglected fragments, like flotsam and jetsam in a flood tide of white settlement, that have become the normal portion of the Bantu population all over South Africa". (163) The combination of locations and pass laws is referred to in a law report late in the century, which speaks of a large pass raid by police on the Queenstown location, after which arrested Africans were brought in batches of 20 before the court. (164) Special legislation was also passed to restrict access by Africans to the so-called white man's liquor; though the Innes Act, as the legislation was called, was intended to be a temperance measure and to protect Africans, it, in fact, led to increasing harassment by the police and a strong sense of grievance. Racial disabilities could also be imposed by administrative action taken in terms of avowedly non-racial statutes. Thus Africans were deliberately lured to the mines and railways by the promise of guns, and then later disarmed by boards set up in terms of the Peace Preservation Act of 1878 (165) which did more to destroy the peace than any other contemporary piece of legislation. There was no dissimulation about hut and labour taxes, which were differentially



imposed with the open purpose of forcing Africans to work for white employers. As Innes put it: "Labour meant labour for other people. No toil, however strenuous, upon a Native's own land was dignified enough to satisfy the tax collector." (166) On the diamond fields at Kimberley another feature of South African life made its first appearance: the housing of African contract labour in compounds. (167) Introduced first as a security measure to prevent diamond smuggling, compounds soon proved to be a cheap and convenient measure for controlling migrant workers.

More and more the legal machine which affected the whole population was hitched to the administrative machine which affected Africans only. The established police, court and prison system was used to penalize Africans who broke the special laws aimed at their control. The law thus became involved not only with the maintenance of "proper relations" between masters and servants but also with the perpetuation of quasi-colonial relationships between whites and Africans. The process was uneven, and thousands of African Parliamentary voters were exempted from most disabilities. Compared with what was to come, the number of Africans prosecuted in terms of differential legislation remained relatively small. Yet a legal-administrative machine for the control of Africans was created which was to be imported in more rigid form into the Transvaal after conquest, and which was then to return to the Cape in harsh all-Union legislation.

It should not be inferred from the above remarks that all the time of the courts was taken up directly with maintaining master/servant and white/black relationships. Out of 47,000 prosecutions brought in the magistrates' courts in 1894 (168), only about 7,700 were brought in terms of special legislation of the kind mentioned: Masters and Servants Act (4000), Pass Laws (1500), Vagrancy (1200), and Trespass (1000). Of the other offences, Drunkenness alone accounted for over 11000 prosecutions, Theft for 5000, Assault for 5000, Municipal Regulations for 3500, the Scab Laws for 1500, and Swearing for 1000. Many of these latter prosecutions involved protecting the property, persons and peace of the white community, but at the same time 10,000 out of 61,000 persons charged in all these cases were white. (Whites represented 25% of the total population of 1,500,000 and were responsible for 16% of all charges.) It should be remembered, too, that the magistrates' courts also heard 20,000 civil matters involving claims totalling £200,000, in respect of which most debtors were probably white.

In the Supreme Court much of the time of the judges was taken up with criminal trials involving such charges as murder, housebreaking, stock-theft, and embezzlement. The law reports, however, contain many references to disputes over wills, insolvency, companies, insurance, contract, banking, claims for damage, divorce, water rights and mining claims, while towards the end of the century litigation was indulged in over barbed wire, bicycles and telegraph poles. There were a surprisingly large number of cases involving internal wrangles, mainly over property and partly over doctrine, in

the Dutch Reformed and Anglican churches and in the Moslem community; there were also, by contemporary standards, an extraordinary number of actions for defamation.

Judging from the names of parties as revealed in the law reports and in the digest of cases in the Law Journal, most civil disputes involved white litigants only, whereas most criminal prosecutions involved non-white accused. Yet there were also cases of non-whites suing whites over land and cattle or for wrongful arrest, of whites suing non-whites for breach of contract or eviction, and of non-whites suing non-whites for all sorts of matters. As has been shown above, there were also thousands of whites prosecuted for criminal offences.

The outcome of criminal trials was by no means a foregone conclusion in favour of the prosecution: in the Supreme Court 25% of accused persons were acquitted compared with 10% in the magistrates' court. (169) The law reports also contain many reports of cases from the magistrates' courts where convictions and sentences were overruled or modified on review or appeal in the Supreme Court. Judgments might be reversed on procedural grounds, on points of statutory interpretation and on the evidence. In one case, for example, the judges overruled a decision that a servant who went to the police to lay a complaint against his master about his pass was unlawfully refusing to work. In another, they disagreed with a magistrate who held that the fact that an African was drunk proved in itself that he was in possession of intoxicating liquor. In a third, they quashed a conviction on a non-white for assaulting white police, on the grounds that the police had effected unlawful arrest which could lawfully be resisted by force.

The Supreme Court judges had no testing right in relation to legislation similar to that enjoyed by their namesakes in the United States of America. The sovereignty of the Cape Parliament was subject only to the overriding authority of the British Government, whose veto could not be invoked by the courts but only by an appeal made directly to the executive authorities in Whitehall. (170) The fluctuating concern of the Colonial Office in London for the welfare of non-white British subjects may be regarded as the Imperial substitute for a Bill of Rights. Non-white leaders might look to the courts for a favourable interpretation of, or so-called loophole in, a Cape Act, but if they wished to have the Act as a whole set aside they had to proceed to London (where, invariably, they were fobbed off). (171)

With regard to subordinate legislation and administrative actions, the position was different. Here the Supreme Court had limited powers of intervention. If a by-law or regulation was uncertain, impossible to enforce, or in any way contrary to the provisions of the enabling Act of Parliament in terms of which it had been passed, then the Court could declare it ultra vires. In this connection it was presumed, on the British model, that Parliament did not intend to permit subordinate authorities such as municipalities to impose special disabilities on any class or section of the community. The Court would accordingly declare that discriminatory by-laws were ultra vires,

provided, however, that Parliament had not expressly or by necessary implication authorized such discrimination. Similarly, there were a number of rules of construction which enabled the Court to review the actions of particular officials or boards or other administrative bodies. It was presumed, for example, that a person invested with a particular discretion would exercise it himself and not delegate it to a subordinate, and that no person should be deprived of rights by discretionary activity on the part of officials without his first having been granted a hearing by such officials. If, however, Parliament clearly intended the administration to exercise autocratic powers, then the Courts would not interfere.

The Cape Supreme Court, therefore, played an effective constitutional role only in the fields of review of subordinate legislation and of administrative and police actions. Schooled in British procedures and applying British canons of construction the judges supervised large areas of administration and local government. They did so on an ad hoc basis and only in relation to concrete disputes, either civil or criminal, which came before them. Nevertheless, they frequently handed down rulings which embarrassed the administration or the police, and by so doing earned for themselves a reputation for independence and impartiality.

The court system at the Cape, then, fulfilled a variety of complex and inter-related functions. It was central to the spread of government, both geographically and in terms of population groups. It integrated black, white and brown into a common polity in which different rights, duties and disabilities attached to different sections. The lower courts helped to keep the peace, collect debts, and maintain relations of domination between master and servant, and white and black. The higher courts supervised the lower courts, regulated proprietary transactions of merchants and landowners, protected the reputations of leading citizens, scrutinized the actions of the administration, and both maintained and restrained the power of the dominant section of the community. As a whole the court system emphasized on a day to day basis the subordination of all inhabitants of the Cape to a common law-making authority. Together with the expansion of a single-market economy, the promotion of a single language (English), and the propagation of the belief in a single deity (God), the extension of a single court-centred administration may be regarded as one of the main integrative forces in South African social history.