No Domicile

244

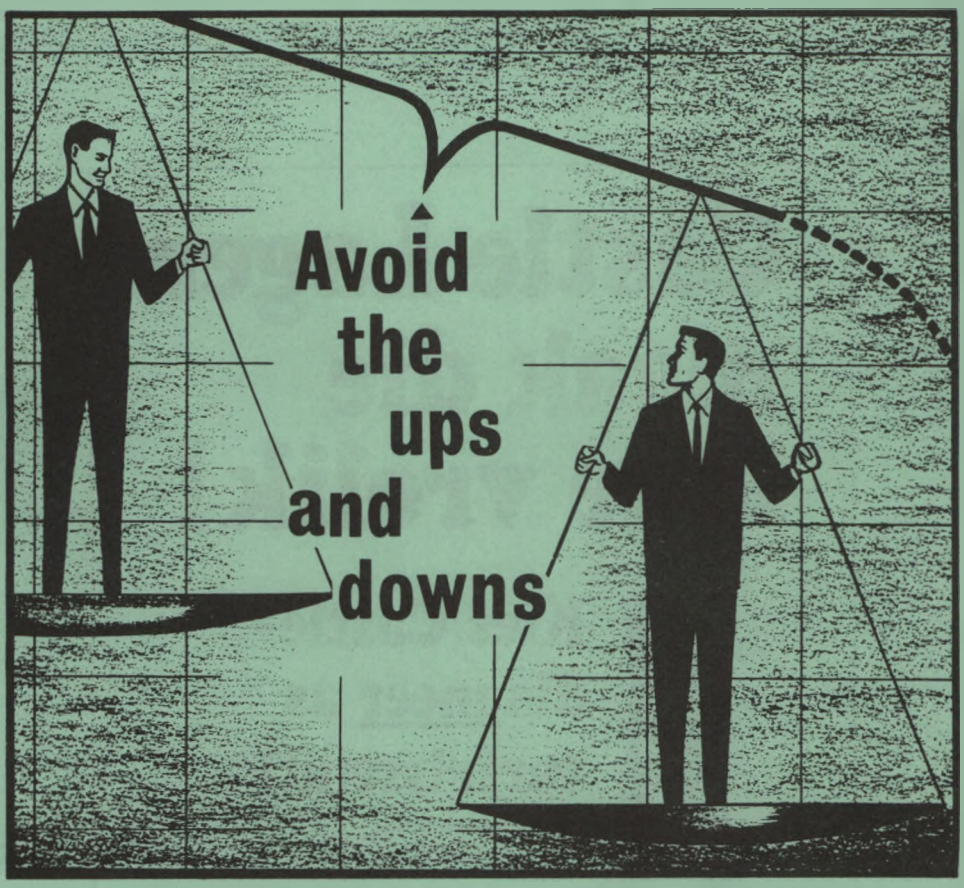
With compliments

D. Bekker

THE MAGISTRATE

DIE LANDDROS

VOL. 2 NO. 5



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VERVAARDIG IN SUID-AFRIKA EN RHODESIË

MEMORIALS (continued from page (1) 157):G.G. PHILIP - On the old road between Parys and Vredefort, 20 yards off the West side of the present National Road, three miles out of Vredefort, surrounded by an iron fence, stands a lonely stone monument erected 60 years ago in memory of a magistrate killed while travelling on duty.

The existence of this cairn was first brought to the writer's notice by Mr A.F. Wilson, Chief Magistrate of Durban, but much of the material for this note has come to light as the result of painstaking research undertaken by Mr G.J. Swart, Magistrate of Vredefort. Mr P.H.S. van Zyl, Magistrate of Parys, has also supplied certain particulars and there have been interviews with Mrs Isobel Cheeseman of Orchards, Johannesburg, who knew the subject of this note intimately. All this has enabled the writer to piece together the story of this interesting monument.

Vredefort was laid out as a township on the farm Vischgat in 1875 and in the following year Parys was laid out on the farm Klipspruit. Vredefort was officially recognised as a town on 21 May 1881 and in July 1881 W.A. Meerholz was appointed Special Justice of the Peace at Vredefort. One of the streets there is named MEERHOLZ STREET presumably after Meerholz. He was replaced in January 1899 by an assistant magistrate, Charles A. Fichart, who appears to have been a detached assistant magistrate since Vredefort at that time fell within the magisterial district of Kroonstad. In 1882 a Special Justice of the Peace, J.P. Steytler, was appointed at Parys. It would seem that he was replaced in 1897 by a detached assistant magistrate, Mr J.F. Iddekinge or Van Iddekinge. For a time (1897–1899) Iddekinge's clerk was Mr Henry Oostwald Vos whom we shall meet again presently.

When the Anglo-Boer war ended Vredefort was still a ward in the Kroonstad district; Parys was in the Kromelmboog Ward in the Heilbron district. It was decided to combine these two regions and the area comprising Vredefort and Parys became the Vredefort district with Vredefort as the seat of the magistracy (1902).

It is not clear who was the first magistrate of Vredefort but it appears to have been Capt. J. Edwards. The Parys people were dissatisfied with Vredefort being the seat of the combined district and a petition was drawn up and sent to the Government pointing out, inter alia, that Parys was the larger town. A Commission was appointed to investigate the matter and it decided that the seat of the magistracy should be at Parys. Upon the publication of the Commission's findings in 1903 Capt. Edwards who had been having a great deal of trouble with certain Vredeforters about repatriation irregularities simply packed up and moved to Parys, a clear case of a magistrate transferring himself. Edwards thus succeeded Iddekinge. Parys was duly proclaimed the seat of the magisterial district of Vredefort (1903 ~~or 1904~~), but Vredefort became a Periodical Court visited twice a week, later once a week, from Parys. Vredefort also had its own resident Special Justice of the Peace from 1907. A Government Notice of 1 July 1907 established a branch ~~Periodical~~ Court at Vredefort. ~~Why this was necessary is not clear for there was already a Periodical Court at Vredefort. However~~, In due course (1929) Vredefort became a detached assistant magistracy (under Parys) and in 1951 a full magistracy. It may be added that the building which for many years served as the magistrate's office at Vredefort was built in 1885. It was enlarged later. A new building which was erected recently was hired by the Government and the magistrate and staff moved into it on 25 February 1967.

Edwards remained at Parys until May 1904. From June 1904 to July 1907 the magistrate of Parys was Capt. E.B.S. Reading. (He was again magistrate at Parys from 1915 to 1919 when he became an Inspecting Magistrate and Inspector of Prisons. From 1924 to 1926 he was a Public Service Inspector. He had joined the Public Service in 1901. After his retirement he returned to Parys and is buried there.) The first newspaper to be printed in Parys was the "Observer" which was commenced by Josiah Angove in January 1906. It lasted for one year. The Principal of the School from May 1905 to December 1906 was Mr D. Chyne-Flett. The railway to Parys was opened on 23 December 1905. In 1908 a start was made with the building of a weir across the Vaal River. Reading assisted in persuading the Government to grant a loan for that purpose.

It was during the term of office of Capt. Reading that the event about to be described occurred.

On 26 November 1906, in the afternoon, George Gatherer PHILIP, assistant magistrate at Parys, district of Vredefort, was on his way back to Parys from Vredefort where he had presided at the periodical court. He was in a four-wheeled vehicle, known as a spider, drawn by a hackney horse, both belonging to his chief, Capt. Reading. The horse was a valuable animal which had served Capt. Reading throughout the Anglo-Boer War. With Mr Philip in the spider was another civil servant, James Collie, an accountant in the Colonial Treasurer's Department of the Orange River Colony. The two men were staunch friends. (After Union, Collie moved to Pretoria and was still in the Treasury in 1926).

It was a fine, warm day but in the afternoon dark thunder-clouds began forming in the North-East and at about 3 pm rain fell accompanied by hail and very heavy lightning. Philip was caught in this storm three miles out of Vredefort where the road traversed a rather long rise. It was at this point that a bolt of lightning struck the travellers. The theory was that the horse's sweat had attracted the electric charge for there were signs that the horse was struck first, the lightning passing back to Philip who was holding the reins. Both were killed instantly. Collie was hurled to the ground and was rendered unconscious. When he recovered the dreadful truth became all too apparent. Other persons arrived on the scene and the news was conveyed to Capt. Reading.

An inquest was subsequently held by Stanley Perkins, Vrederegter, Dr. W. Watt Green certifying the cause of death as shock due to lightning.

The mortal remains of Philip rest in the old portion of the churchyard in Parys. On the weathered sandstone gravestone the following inscription is to be seen:

George Gatherer Philip
Aged 29 years
Killed by lightning
26th November 1906.

Philip was born in Edinburgh, Scotland, where his father was a solicitor. He was the elder of two brothers and came to this country with the British forces during the Anglo-Boer War. His younger brother went to India. He also had a sister who was a schoolmistress in London and Paris. He was a tall, fair, well-knit man, with a charming, courteous manner, and well-liked by all with whom he came into contact.

After the peace treaty at Vereeniging Philip remained in South Africa in the service of the Department of Justice. While at Parys he became engaged to Miss Isobel Gollan, described as an attractive teacher, who was also born in Edinburgh and who had taken up a post in Parys before Philip arrived there. She was one year younger than he. It was Capt. Reading who broke the news of Philip's death to Miss Gollan. A year after the fatality she went to Johannesburg where she still lives, a gracious lady (now Mrs Cheeseman) who will be 89 in September. In Johannesburg she married Mr Arthur Laurence

Cheeseman who was a housemaster at the Jeppe Boys' High School from 1910 to 1937 and vice-principal at the time of his death on 15 April 1937. They had a daughter Rosamund Cheeseman who is headmistress of Waverley Girls' School, Johannesburg.

In the late afternoon of the day before his death Philip and some friends went down to the Vaal River where they had a little picnic and a row on the river until it became dark and they went home. Others in the party were Miss Gollan, Mr H.O. Vos, mentioned earlier, his wife Mrs Lilian Vos and Dr and Mrs T. Heaps.

Mr Vos, born in 1874 at Smithfield, was the son of Mr C. Vos, a land surveyor from Holland and M.P. for Smithfield during the time of the Republic. He entered the civil service of the Republic in Bloemfontein. He was magistrate's clerk at Parys until 1899 when he was transferred to Heilbron. After the Anglo-Boer war he returned to Parys, married in 1903, and was Town Clerk from 1904 to 1909. Then he resigned to become a law agent. In 1910 he became a member of the Town Council. He acted as Market Master for a few months. He was Mayor of Parys a large number of times between 1913 and 1935. The Town Hall of Parys is known as the "H.O. Vos Hall." He died on 1 June 1936.

His widow (born Baker), now 92 years of age, still resides in Parys. She was born at Humansdorp in 1874 of English parents. She taught at Parys before the Anglo-Boer War. During the war she went to Port Elizabeth, returning to Parys in 1903. She was the founder of the Child Welfare Society, the Red Cross and the Girl Guides of Parys.

Dr. T. Heaps was Mayor of Parys in 1907-1908.

The memorial stands opposite the very spot on the Parys-Vredefort road where Mr Philip's life came to such a tragic end. It is of sandstone, about 5 feet high. Set into the monument is a polished red-Vredefort-granite stone bearing the following inscription:

In Memory of George Gatherer Philip
A.R.M.
Vredefort District
who was killed by lightning
on the road opposite this cairn
26 Nov. 1906
Erected by his friends.

PLACE NAMES (continued from page 64) - We mentioned at p.46 ante that RIVERSDALE is named after Harry Rivers and GARCIAS PASS after Mr Garcia, both magistrates. The lastmentioned, Maurice Garcia, was magistrate of Riversdale from 1863 to 1877 and the pass was completed in 1875.

We wish to add to our list ROSE-INNES STREET, Riversdale, which is named after two magistrates of that name who were stationed there. The first was James Rose-Innes, C.M.G., who was magistrate of Riversdale from 1856 to 1863; the second was James Gerard Rose-Innes, who was magistrate from 1924 to 1926.

The firstnamed was the eldest son of the founder of the family line in South Africa, James Rose-Innes, mathematical professor and first Superintendent-General of Education in the Cape Colony. James (junior) was born in 1824 and was appointed magistrate at Riversdale on 29 January, 1856, and left on transfer to his birthplace, Uitenhage, in 1863. Not only was he the son of a mathematical genius but he was the father of Sir James Rose-Innes, Chief Justice of the Union from 1914 to 1927. In fact, the child who was to become C.J. lived in Riversdale from the age of one to eight and he mentions Riversdale in his autobiography. It is not easy to determine who is the greatest of all South African judges but Sir James has strong claims to that distinction.

James "Junior" was magistrate of Kingwilliamstown at the time of the Gaika War of 1878 and had wide responsibilities thrust upon him. Unruffled in any emergency, cool and efficient, he was thanked by the Governor for the able manner in which he had discharged his onerous duties. In 1879 he was appointed Administrator of Griqualand West, pending its annexation to the Colony. This was in fact the highest office any civil servant could be offered in the Colony. He eventually became Secretary for Native Affairs, a position he held for 16 years until retirement. He died in 1906 at the age of 82.

The second magistrate with the name Rose-Innes was stationed at Riversdale from 1 June, 1924, to 31 July, 1926. He was the son of Spencer Frederick Rose-Innes, a younger brother of James "Junior" aforesaid. In other words, he was a cousin of Sir James Rose-Innes, C.J., both being grandsons of the founder of the family in South Africa.

In the short period he stayed at Riversdale he became very popular. He took a keen interest in all local affairs. He was Chairman of the Divisional Council. A new bridge or causeway built over the Vette River at Riversdale in his time was named Rose-Innes Bridge and a scenic drive on the left bank of the river to the east of the town as far as the site of the old wabrug over the Kaffirkuils River downstream (opened on 29 March 1893) received the name of Rose-Innes Drive. The causeway was later replaced by a better bridge and its name disappeared with it. Rose-Innes Drive has also fallen into disuse. However, Rose-Innes Street, which received its name in 1938, remains as a memorial to two sturdy magistrates.

Mr A.F. Wilson, Chief Magistrate of Durban, writes to say that FIELD STREET, one of the most important thoroughfares in central Durban, is named after William Swan Field who was the first Collector of Customs and Resident Magistrate of Durban during the years 1849 - 1850.

We shall be pleased if readers will advise us of other magistrates who have similarly left their footprints on the sands of time.

Landdros Frans J.M. Botha, George, rapporteer dat daar ses strate behalwe VAN KERWELSTRAAT op George is wat vernoem is na landdroste. VAN KERWEL was landdros aldaar vanaf 1811 tot 1819 (kyk bls 51 hierbo). Die strate is WENTZELSTRAAT, BERGHSTRAAT, ASPELINGSTRAAT, DAVIDSONSTRAAT, FICHATSTRAAT en PALGRAVESTRAAT. Hulle is vernoem na landdroste W.A. Wentzel (1831-?), Egbertus Bergh (1837-?), Johan Gustaf Aspeling (1846-56), J.C. Davidson (1856-64), James Fichat (1865-?) en William Coates Palgrave (1881-?).

OUT OF THE PAST - UIT DIE VERLEDE: HILTON : Ensign G.A. Lucas of the 73rd Regiment was one of the survivors of the wreck of the "Birkenhead" off Danger Point in 1852. He was to become one of the greatest of early Natal Colonial magistrates, serving as such for many years in Klip River County (the present district of Ladysmith and surroundings). He bought the farm "Ongegund," overlooking Pietermaritzburg, against his retirement and renamed it "Hilton" after his old English home. In the sixties he assisted his friend, the Revd. W.O. Newnham, to found a college for boys at Ladysmith. On Lucas's retirement they removed the school to portion of the farm Hilton, over 3000 acres being sold by Lucas to the school authorities. Thus started the well - known Natal school, Hilton College.

B.E. CAMP, Durban.

Die eerste landdros van LYDENBURG was Jacob de Clercq, Jnr. Hy was die seun van Jacob de Clercq en Anna van den Berg. Hy is op 10 Februarie 1824 gebore en in 1848 is hy getroud met Martha van Rensburg. Uit die huwelik is elf kinders gebore. Hy het in Januarie 1850, toe Lydenburg aangelê is, die eerste landdros geword. Hy was toe 26 jaar oud. Met die afskeiding van Lydenburg as selfstandige republiek, los van die orige deel van die Transvaal, in 1857, het De Clercq as landdros 'n belangrike rol gespeel. Aan die einde van die vyftigerjare het hy sy betrekking neergelê en het verhuis na die Carolina distrik. Hy is in 1876 oorlede. Sy opvolger as landdros van Lydenburg was Cornelis Potgieter.

J.J. POTGIETER, Lydenburg, en T.R. MAXTED, Johannesburg.

MOET GETUIENIS ALTYD AFGELÊ WORD VANUIT DIE GETUIEBANK? Dit gebeur dikwels onder Bantoe dat as die beskuldigde gevra word of hy onder eed getuienis wil aflê hy bevestigend antwoord, maar sodra hy versoek word om oor te stap na die getuiebank dan sê hy dat hy verkies om te bly waar hy is en om getuienis af te lê van waar hy in die beskuldigdebank staan. As daarop aangedring word dat hy in die getuiebank moet gaan, dan verkies hy om maar liewer 'n onbeëdigde verklaring te maak vanuit die beskuldigdebank. In hierdie verband word aandag by artikel 227(2) gevestig. Die hof kan toelaat dat hy sy getuienis onder eed vanuit die beskuldigdebank aflê. Tewens ons suggereer dat wanneer die vraag aan 'n Bantoe beskuldigde gestel word of hy getuienis onder eed wil aflê daar geen verwysing na die getuiebank gemaak word nie - kyk R. v. Herbert, 1965 (2) SA.385 (SR.).

Die rede hoekom baie Bantoe nie in die getuiebank wil gaan nie is nie omdat hulle van plan is om nie die waarheid te praat nie maar omdat hulle 'n bygeloof het dat dit ongelukkig is om in dieselfde plek, waar die getuies wat teen hulle gepraat het, te gaan staan.

Dit word aan die hand gegee dat na die sluiting van die Staat se saak die volgende verduidelikings een vir een aan 'n onverdedigde Bantoe beskuldigde gegee word: (1) hy kan getuies roep, (2) hy kan getuienis onder eed aflê in welke geval hy deur die aanklaer gekruisvra kan word en so 'n verklaring kan meer gewig dra as 'n verklaring nie onder eed nie, (3) hy kan verkies om niks te sê nie. Slegs nadat hy verkies om getuienis onder eed af te lê kan hy versoek word om in die getuiebank in te gaan; as hy onwillig is om dit te doen moet hy toegelaat word om getuienis vanuit die beskuldigdebank af te lê. Dit is heeltemal verkeerd om te sê soos een regterlike beampte aan 'n beskuldigde gesê het: "As jy in die beskuldigdebank praat luister ek met een oor, as jy in die getuiebank praat luister ek met beide ore." Kyk Ferreira, bls. 395.

INHANDIGING VAN BEKENTENISSE - Dit gebeur dikwels dat 'n landdros aan wie 'n bekentenis gemaak is sy hof moet verlaat om in die Hooggeregshof die bekentenis te gaan inhandig. Met sy hofwerk kan nie voortgegaan word nie en die publiek en praktisyns moet wag totdat hy terugkeer. As hy in die Hooggeregshof kom moet hy staan en tyd verspil totdat die betrokke saak bereik word en dan eers word hy vertel dat die beskuldigde skuldig pleit of dat die bekentenis deur die beskuldigde erken word of dat die saak uitgestel is. Soms moet hy na 'n ander sentrum reis om 'n bekentenis in te handig en, daar gekome, vind hy dat sy getuienis nie nodig is nie. Onlangs moes 'n landdros driemaal baie ver reis in verband met dieselfde saak - tweekeer is die saak uitgestel en die derde keer was sy getuienis nie nodig nie - drie onnodige ritte.

Die Vereniging het gevolglik die volgende skrywe op 6 Augustus 1965 aan die Departement gerig:

"Ek is deur die Landdrosvereniging versoek om van u te verneem of die Strafproseswet nie sò gewysig kan word dat voorsiening gemaak word vir die inhandiging in die Hof van 'n bekentenis wat deur 'n beskuldigde persoon gemaak is sonder dat die persoon aan wie die bekentenis gemaak is persoonlik hoef te getuig, met die voorbehoud dat 'n afskrif van die bekentenis vooraf aan die beskuldigde besorg word en dat, indien dit nodig geag word of indien dit deur die beskuldigde verlang word, die persone aan wie die bekentenis gemaak was moet getuig, sy teenwoordigheid verkry kan word deur aan hom kennis te gee om die hofsitting by te woon.

Dit gebeur dikwels dat 'n landdros se hof gesluit moet word omdat die landdros die hoërhof bywoon om getuienis af te lê in 'n saak waar hy eenvoudig 'n bekentenis moet inhandig en waar geen vrae aan hom gestel word behalwe die gewone formele vrae in hoofverhoor. Soms moet landdroste lang distansies reis, selfs vanaf Suidwes-Afrika, vir hierdie doel en baie tyd word daardeur verkwis."

Die Departement se antwoord gedateer 8 Februarie 1967 is soos volg:

"(Ek wens) u mee te deel dat die voorstel van die landdrosvereniging, na sorgvuldige oorweging en oorlegpleging met die prokureurs-generaal, nie gesteun kan word nie. Die Departement is van oordeel dat getuienis van 'n bekentenis van die pleging van 'n misdryf van so'n aard is dat dit nie by wyse van formele inhandiging van 'n dokument gelewer behoort te word nie. Daarbenewens is meeste beskuldigdes wat bekentenisse maak waarskynlik ongeletterde en onbemiddelde persone en dit sal geen doel dien om vooraf 'n afskrif van die bekentenis aan hulle beskikbaar te stel nie. Sommige prokureurs-generaal het daarop gewys dat pro deo advokate soms ter elfder ure aangestel word en indien die teenwoordigheid van die persoon aan wie die bekentenis gemaak word verlang sou word, sal dit vertraging in die afhandeling van sake meebring.

Ter inligting word egter genoem dat die Departement tans 'n voorstel oorweeg dat albei voorbehoudsbepalings by artikel 244 van die Strafproseswet, 1955, geskrap word.

Ons is jammer dat daar geen vooruitsig is dat die ongerief wat landdroste moet verduur verminder sal word nie maar ons is bly om te verneem dat 'n wysiging van art.244 onder oorweging is.

In R. v. Harz, CCA.8/7/66, het 'n Engelse regter (CANTLEY,J.) hom soos volg uitgelaat: "The English case-law in relation to confessions has mainly developed during a period in legal history when most persons charged with criminal offences were poor, illiterate and pathetically ignorant and when moreover they had no right to go into the witness-box to deny or explain what they were alleged to have said. In those circumstances justice required that extreme and even exaggerated care should be taken to ensure that the jury did not hear any admission which was not clearly shown to have been voluntary. The situation today is very different. It seems to me the interests of justice would be adequately served if the principle were simply to be that no admission should be receivable in evidence if it appeared from examination of the circumstances in which it was made that there was any realistic danger that it might be untrue."

Ons wil byvoeg dat art.149 van die Evidence Act, 1958, van die State of Victoria, Australië (7 Eliz.2, No.6246) eenvoudig soos volg lees:

"No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge or other presiding officer is of the opinion that the inducement was really calculated to cause an untrue admission of guilt to be made."

VERSUIM OM TE VERSKYN – Die aantekening op bladsy 54 van volume 2 van "Die Landdros" het my geinteresseer. Op 'n vorige kantoor waar ek was, het ek dieselfde probleem gehad. Ek het dadelik beamptes was belas is met die betekening van dagvaardings versoek om pertinent onder 'n oortreder se aandag te bring dat hy persoonlik verantwoordelik is om te betaal en moet toesien dat skulderkenning betaal is of so nie moet verskyn. As 'n beskuldigde dan beweer dat sy werkgewer in besit van die dagvaarding is en versuim het om te betaal, het ek die betrokke beampte geroep as getuie en gewoonlik die verskoning verwerp. Ek is in elk geval van mening dat 'n verduideliking dat die werkgewer versuim het, nie 'n aanvaarbare verduideliking is nie. Die dagvaarding gelas tog immers duidelik die persoon aan wie dit uitgereik is om skulderkenning te betaal of, so nie, in die hof te verskyn. As hy nalaat, oortree hy volgens my mening die artikel en om te sê 'n ander persoon het nie opgetree nie, is nie aanvaarbaar nie – vgl. S. v. Berman, (1) DL.54(T).

G.J.J. JORDAAN, Kakamas.

ADDENDUM – In Vol. 1, page 54, line 6, add, after the word "sense": "See also S. v. Heyns, 1967 (1) PH.H. 109 (E)." (In this case it was held that a failure to comply with sec.309 (5), Act 56 of 1955, is not the equivalent of contempt of court. The learned judge said: "Art.309(5) skep 'n prosedure waarby bywoning van die hof afgedwing kan word maar dit stel nie 'n substantiewe oortreding daar nie en kan nie as minagting van die hof beskou word nie").

EXTRACT FROM A REPORT OF A LECTURE DELIVERED BY SIR ALFRED DENNING, LORD JUSTICE OF APPEAL, UNITED KINGDOM, in CAPE TOWN, UNDER THE AUSPICES OF THE UNIVERSITY OF CAPE TOWN ON THE 20th - 21st SEPTEMBER, 1954. THE LECTURE WAS DELIVERED EXTEMPORE. Reported in Butterworths S.A. Law Review, 1955:

You know, in England, whenever a judge takes his seat, counsel has only to rise and say: "My Lord, I have an application which concerns the liberty of the subject", and forthwith the judge will put every other matter aside and will hear that case. It may be an application for bail, or an application for habeas corpus; yet, however humble the citizen, if a question of his liberty is involved, that application is heard first, no matter what other cases, great persons, corporations, combines or commercial interests are concerned; they have all to wait.

EXTRACT FROM A LECTURE "THE TRADITIONS OF THE BAR" DELIVERED BY THE SAME SPEAKER AT THE UNIVERSITY OF THE WITWATERSRAND ON 27th AUGUST, 1954, UNDER THE AUSPICES OF THE FACULTY OF LAW. Reported in 1955 S.A. Law Journal, p.44:

Every member of the Bar knows how essential it is to be fair. The country expects it. The judges require it. No counsel now is allowed to suggest to the judge what a sentence should be. That is for the judge alone. No counsel must attempt by advocacy to influence the court towards a more severe sentence, though he may, and often does, draw the attention of the judge to any mitigating circumstances which may induce a lesser sentence. If counsel for the accused man should ask the judge not to inflict a prison sentence but to bind him over to be of good behaviour, counsel for the prosecution must not get up and say that he opposes it.

NUWE LEDE – Ons wil graag hoofde van kantore versoek om toe te sien dat alle landdroste en regsassistente in hul distrik bekend is met die bestaan en oogmerke van die Landdrosvereniging. Regsassistente wat vaste aanstellings as landdros of assistent landdros hou kwalifiseer vir lidmaatskap. Hulle moet natuurlik ook lede wees van die V.S.A.

ADVERTENSIES - In ons advertensieblaaie verskyn elke maand 'n lys vervoerkontrakteurs. Daar is etlike betroubare kontrakteurs wat nog nie gebruik maak van hierdie fasiliteit nie. Landdroste word vriendelik versoek om hierdie advertensiemedium onder die aandag van sodaniges te bring. Die tarief is slegs R2 per item per maand, vooruitbetaalbaar.

Daar is ook plek vir klein advertensies vir hotelle, motelle en losieshuise. Hierdie klein items kos slegs R1 elk en die name van moontlike adverteerders kan na die redaksie gestuur word. Ons sal dan die betrokke instansies per brief nader.

ARMS & AMMUNITION DEALERS - The following dealers in Firearms and Ammunition advertise regularly in "The Magistrate": LARRYS MOTORS (PTY) LTD., 110 Lancaster Ave., Craighall Park, JHB., Box 26, Craighall Park; Tel. 42-6091. FRITZ FELS & PHITIDIS (PTY) LTD., JHB., see half-page advt. every second month. PARAMOUNT ARMS & SPORTS CENTRE, JHB., see half-page advt. once a quarter.

REMORSE AS A GROUND FOR MITIGATING SENTENCE - There is a great deal of speculation nowadays about the nature of punishment - how far should it be preventive, or deterrent or reforming? So much so, in fact, that many magistrates probably feel that, like Omar Khayyam, they have

> "...heard great argument
> About it and about: but evermore
> Came out by the same Door as in I went."

Perhaps it is therefore with some relief that they can occasionally remind themselves that, whatever their personal views may be, they are required to follow certain broad principles laid down by higher courts.

In certain appeals reported in England in October 1966 - R. v. Hugman and others - the Court of Appeal (Criminal Division) enunciated a principle which is not often referred to, namely that genuine remorse on the part of an offender is a reason for mitigating the severity of the sentence which otherwise he would have received, even in grave cases.

This was indeed a grave case. All three accused pleaded guilty at the Old Bailey to culpable homicide: a man had died in a fire in a Soho club which the three had deliberately started - in spite of various setbacks - with a tin of petrol after an argument about money with some women who had accosted them.

The genuineness of their remorse, after they had sobered down, was evinced by the fact that about ten days later, having read about it in the papers, they went to a solicitor and took him to the police station and made frank statements about what they had done. They did so at a time when they could not possibly have been traced. But for their frank confessions nobody would have been charged with the offence.

On appeal, the Lord Chief Justice, together with Lord Justice Winn and Mr Justice Widgery, decided that the trial judge had given insufficient weight to the real remorse of the accused and accordingly their sentences were reduced.

In South Africa the position is stated by Gardiner & Lansdown (6th edn), p.667, to be as follows:
"A sentence should not be based upon grounds unconnected with the crime or the circumstances thereof, or the character and circumstances of the criminal. Thus it is improper to make a sentence lighter because the accused has pleaded guilty though regard may be had to manifestations of penitence, or heavier because he has pleaded not guilty - R. v. Jan, 4 (1884) EDC.102; R. v. Sekaba, 5 (1885) EDC.83."

Neither of these cases is authority for the phrase underlined above.

In Jan's case Buchanan, J. said: "To punish one prisoner more severely merely because he pleads not guilty while another who pleads guilty receives a lighter sentence, is decidedly an improper exercise of magisterial discretion." This dicta was however obiter because the conviction was quashed on the fround that the charge was incompletely framed.

In Sekaba's case Cole, J. said: "If it (the one sentence) was (more severe than the other) because the latter had pleaded not guilty and the former had confessed, the reason is a bad one." This dicta was also obiter because the proceedings were confirmed as being authorised by law.

In Natal a different view was taken in R. v. Mvelase & Ohs., 1958(3) SA.126. There the court decided that a judicial officer could differentiate between an accused who had pleaded guilty and a co–accused who had pleaded not guilty but it gave, we submit, a wrong reason. It was contended that the sentences of the appellants, who had pleaded not guilty, should be reduced to the same level as those who had pleaded guilty. It was HELD however that "those who pleaded guilty showed some degree of remorse and a readiness to take their punishment, and in such cases judicial officers traditionally and rightly are more inclined to blend a measure of mercy with the justice of punishment." HOLMES, J. continued: "I see no reason why this should not be done where only some of the accused plead guilty. I respectfully differ if there is anything to the contrary in The Queen v. Jan and The Queen v. Sekaba referred to in Gardiner & Lansdown." In other words he says the court may punish less severely the accused who pleads guilty in cases where the plea of guilty is due to remorse. One can however read into the judgment approval of the statement in Gardiner & Lansdown that regard may be had to manifestations of penitence.

The matter is very clearly set out in R. v. Mtataung, 1959(1) SA.799(T), where Hiemstra, J. stated: "That decision (R. v. Mvelase) was given on the basis that a plea of guilty is indicative of penitence and contrition on the part of the accused which has traditionally been regarded by the Courts as a mitigatory factor. I agree with that decision to this extent, that if the plea of guilty is indeed a manifestation of penitence on the part of the accused then it can be taken into account in favour of the accused as a demonstration of penitence. The mere plea of guilty as such, however, has not in this Court been regarded as in itself a mitigatory factor." Here we have clear authority for the words underlined in Gardiner & Lansdown, supra.

R. v. Mvelase was also commented upon in 76 (April 1959) SALJ.144 in which the writer of that note points out that an accused person who pleads guilty may be actuated by a variety of motives for doing so of which a genuine sense of repentance is only one. He may be aware that the State's case is overwhelming. In pleading guilty he may not feel the slightest trace or repentance. Moreover if the accused who pleads guilty is entitled ipso facto to leniency it would be difficult to assail the logical validity of the converse, namely, that he who pleads not guilty ipso facto shows a lack of penitence which justifies a heavier sentence. Every person has the right to plead not guilty and to require the State to prove its case.

One should bear in mind that it is not always easy to distinguish between genuine sorrow and remorse, and regret at having been found out.

In May 1959 the Natal Court considered the point under discussion in R. v. Mothokoa, 1959 (1) PH.H. 156, where Harcourt, A. J. said: "Any conduct which shows a lack of contrition on the part of the accused may properly be taken into account in the sense that it may induce the magistrate not to exercise clemency in the case of such an accused. It is improper however to increase the severity of the punishment merely because the accused may give such apparently false evidence as to lead to the possible conclusion that he was callous or wanton."

The position we submit is that where the accused is clearly and genuinely remorseful for having done wrong, or there is clear evidence of penitence dehors the plea of guilty, then the court may take it into consideration as a mitigating factor.

It is a pity therefore that in R. v. Mahlalose, 1961(1) PH.H.93, the Natal court confused the whole issue by stating: "In this case there was some prima facie evidence of repentance, apart from the plea. (I may add that it is open to a court to regard a plea of guilty as justifying the blending of 'a measure of mercy with the justice of punishment' - R. v. Mvelase)."

In S. v. Gumede and Nsindane & ohs., 1964(1) SA 413 (N),the following appears: "There is a further matter that calls for consideration. The magistrate suspended the whole of the sentence of imprisonment in respect of accused Nos. 6, 8 & 9 because at the trial they were very courteous and showed all signs of repentance, in contradistinction to the other accused. While it is always proper to give some weight in passing sentence to the degree of contrition displayed by an accused person the fact remains that these three accused pleaded not guilty with the other accused and never admitted their guilt. It seems to me that an expression of contrition should not make the difference between a sentence of 75 days' imprisonment and the same sentence wholly suspended on conditions that are far from arduous ... In view of the misdirection and the disparity between the sentences I am of the opinion that a portion of the sentences passed upon accused Nos 1 - 5 and 7 should be suspended."

S. v. Polmans, 1967(1)PH.H.55(N), is another case supporting Gardiner & Lansdown's dicta: "It is always proper to give some weight in passing sentence to the degree of contrition displayed by an accused person (S. v. Gumede 1964 (1) SA 413 (N) at p.417)."

Ferreira: Strafprosesreg has the following to say : (304) "Die howe is geneig om ligter te straf waar 'n beskuldigde skuldig pleit." (Mvelase's case and (1959) 76 SALJ 144 are cited. See however Mtataung's case, supra).

(569) "Waar 'n beskuldigde aan die ander kant boetvaardigheid en berou toon is die howe tradisioneel en tereg geneig om ligter te straf."

(572) "Alhoewel 'n hof gedrag aan die kant van die beskuldigde wat die afwesigheid van berou aandui, in ag kan neem om nie genade aan hom te betoon nie, is dit onreëlmatig om die vonnis te verswaar bloot omdat die beskuldigde duidelik vals getuig of valse antygings teen staatsgetuies maak of 'n gebrek aan eerbied aan die hof toon."

SPARE DIET AND SOLITARY CONFINEMENT - In S. v. Phakathi, 1967(1) PH.H.115(N), the accused (23) was convicted of assault with intent to do grievous bodily harm. He stabbed his girlfriend on the shoulder with a knife which had a blade 9" long. He had a record which included a sentence of 4 months' imprisonment and 4 strokes in 1964 for an assault with intent to do grievous bodily harm and another conviction in February 1966 for assault for which he was cautioned and discharged. He was sentenced by a magistrate to 6 months' imprisonment of which the first 30 days were to be served with spare diet and solitary confinement.

The Supreme Court struck out the spare diet and solitary confinement.

In R. v. Shangas, referred to in (1) TM.40, the learned judge said that the Courts had frequently indicated that the imposition of spare diet and solitary confinement was not a desirable course until it had been made clear that "a period of imprisonment of substantial character" had not proved efficacious. In R. v. Abrams, ibid. (or Abrahams as it is spelt in 1946 CPD.822) the judge used the same phrase - "a period of imprisonment of a substantial character" - and in R. v. Nortje, also cited in (1) TM40, the judge said that this form of punishment became appropriate only if "herhaalde kort gevangenistermyne of èèn betreklike lang termyn" had not proved efficacious.

Can it be said that the accused's previous sentence of 4 months' imprisonment was not a period of imprisonment of a substantial character? The learned judge merely said: "In the present case the accused has admittedly been to gaol for 4 months' and has had 4 strokes but in my judgment it is absurd to suggest that because that single sentence did not deter him from committing the present crime he should be subjected to spare diet and solitary confinement."

While the magistrate's sentence was undoubtedly severe we suggest with respect that it was not "absurd". The accused had not only been previously sentenced to 4 months' imprisonment for assault with intent to do grievous bodily harm but had suffered corporal punishment as well, yet that had not been a lesson to him. The magistrate felt that something in addition to 6 months' imprisonment (which is frequently imposed even on first offenders for stabbing) was called for. Instead of converting the proceedings into a preparatory examination he included some spare diet and solitary confinement at the beginning of the period of imprisonment. Even if the learned judge considered the result too severe, why describe it as "absurd"?

LOGIKA - Waar beskuldigde weggehardloop het nadat Bantoe inspekteurs by 'n hut aangekom het en in die hut is dagga en sekere ander persone gevind, het die hof beslis dat dit nie genoeg was om die skuld van die beskuldigde bo redelike twyfel te bewys nie - S. v. Kula, 1967 (1) PH.H.111 (OKA); Kyk ook (1) DL.138.

SILENCE OF THE ACCUSED BEFORE TRIAL - This question has already received attention in (1) TM 74. In R. v. Sullivan, CA.16/12/66, reported in The Times of 17/12/66, the appellant was convicted with one D of having smuggled watches into England from Switzerland. When the appellant was questioned by customs officers, he said: "I am not answering any questions." In his directions to the jury the trial judge said: "Of course, bear in mind that he was fully entitled to refuse to answer questions... But you might well think that if a man is innocent he would be anxious to answer questions." HELD, on appeal, that it was established by a long line of authorities that a judge was not entitled to tell a jury that it was likely that an innocent accused would have answered the questions put to him. There could be no doubt that the comment made in this case was inadmissible.

THIRD SCHEDULE, PART 1, GROUP III - In S. v. Stewart, TPD 20/1/67, the accused was sentenced by a magistrate to imprisonment for corrective training for housebreaking with intent to steal and theft. This sentence was imposed in terms of s.334 ter (2)(b) of Act 56 of 1955. The previous convictions disclosed one conviction for theft and one for housebreaking and theft. The only other conviction which could possibly be regarded as qualifying for a third conviction in the same group was a conviction for "attempting to defraud the S.A. Railways - boarding a train without a ticket." There was nothing to show that this was not the usual statutory offence of "boarding a train without a ticket" which is not the common law offence of attempted fraud. On appeal there was evidence that the conviction was one of contravening s.13(a) of the Railways Act, 1916. The sentence was set aside and the matter remitted to the magistrate for sentence to be imposed afresh.

INCRIMINATING ADMISSIONS BY ACCUSED : HEARSAY - In R. v. Mawaz Khan, & ano (1967)1 All E.R.80, the appellants were charged in Hong Kong with murder and the Crown relied on circumstantial evidence connecting both appellants with the crime and also on statements made to the police by each of the appellants, in the absence of the other, in which they asserted that they were both elsewhere at the time of the offence; they explained injuries they had sustained by saying that they had been caused while they were fighting together. The statements were admitted in evidence at their trial on the

ground that they showed that the accused had fabricated a joint story. Neither gave evidence at the trial. They appealed to the Privy Council, England, on the ground that the statements each had made, in the absence of the other, had been wrongly admitted against the other.

HELD (on 7/11/66) that the statements made by each of the appellants had not been admitted to prove the truth of the facts stated, but to show that in making the statements the appellants had acted in concert and that the fact indicated their common guilt. The statements were therefore admissible without breach of the hearsay rule and the appeals would therefore be dismissed.

The facts were that the murder took place on a certain night. When the appellants were next day questioned separately at the police station, each said, in the absence of the other, that they had spent the previous night at the Ocean Club and so were nowhere near the scene of the crime. The Crown relied on their statements and on certain circumstantial evidence. The admissibility of the statements was upheld on the ground that the statement of each appellant was used "to establish not the truth of the statement but the fact that it was made." The fact that the appellants each made statements, in the absence of the other, which were consistent with each other, was held to be "evidence of their guilt." Why this should be is not clear to the writer hereof. No such inference is essentially valid, since, if the appellants were in fact not at the scene of the crime at all, but somewhere else, the consistency of their statements to that effect would point to their innocence ! It does not seem to have been proved by the evidence of eye-witnesses that the accused were present at the scene of the crime: the evidence only contradicted the claim of the accused that they were at the Ocean Club when the murder took place. Attempts to destroy a positive claim by means of a negative one are inherently suspect. Thus when a man counters the suggestion that he was at A by asserting that he was at B, the fact that it is proved that he was not at B does not prove that he was at A. All that it proves is that he is a liar. A man may however have reasons for lying about B which have no possible connection with a crime with which he has been charged. The case of Mawaz Khan and another is indeed a strange case.

What is the answer to the following question? At the trial of A and B a statement made by B to a third person in which he admits his guilt and in which he also implicates A is led. In the statement B has said that he and A committed the crime. Three accessories whose evidence has to be carefully scrutinised give evidence. It is necessary that there should be some corroboration of their evidence. Can B's statement to the third party be used not to establish the truth of the statement, not to implicate A, but to corroborate the accessories?

The answer is no. The statement made by B is not admissible in evidence against A. That was held to be so in R. v. Qwabe, 1939 A.D.255. It is a statement made before the trial, reduced to writing before a third party and, as such, pure hearsay as far as A is concerned.

RATIO OF FINE TO IMPRISONMENT - It is a well-known principle that in sentencing an accused to the payment of a fine with alternative imprisonment the fine should bear some relation to the length of imprisonment considered sufficient as an alternative punishment - Gardiner & Lansdown (6th ed.) 698; Ferreira: Strafprosesreg (1967) 536-537.

At p.15 ante we stated that in Johannesburg "the ratio of fines to alternative imprisonment is, in general: Whites - R2 a day; Non-Whites - R1 a day." This is also the ratio, in the general run of cases, not only on the Witwatersrand but in all the other large cities. Naturally no judicial officer should regard himself as hide-bound by any fixed ratio of rands to days but we believe that what we have suggested above constitutes a useful guide in the ordinary kind of case where there is nothing exceptional one way or the other.

In the light of what has just been said it is not surprising that a sentence of 45 days' imprisonment imposed on a non-white as an alternative to a fine of R15 was criticised in S. v. Chiyi, 1967 (1) PH.H.49(N). The sentence was reduced to R15 or 15 days' imprisonment, i.e. R1 a day, which is precisely what we suggested. In the case mentioned the accused was convicted of supplying gavini to a certain person. She was sentenced to pay a fine of R15 or to undergo 45 days' imprisonment. In response to a request as to how the 45 days was arrived at, the magistrate indicated that the usual ratio when dealing with less serious cases was 1 to 3, thus R5 for 15 days. HELD: "The Attorney-General, to whom the papers were submitted, in his comments has rightly pointed out that judicial officers should guard against a tendency to regard themselves as hide-bound by a fixed ratio of rands to days and has expressed the opinion that the alternative of 45 days' imprisonment appears to be out of proportion to the fine of R15 and the gravity of the offence. I entirely agree ... If the accused is unable to pay the fine ... there would seem to be no justification for requiring her to serve so long a period of imprisonment as 45 days." The sentence was reduced to read: "Fined R15 or 15 days' imprisonment."

Although magistrates should not feel fettered by any fixed ratio of rands to days we can see nothing wrong in having some measure of uniformity. Indeed, in an article written by the Hon Mr Justice Cillie and the late Mr. Justice Kuper of the Transvaal bench in 79(1962) SALJ 180 under the title "On the System of Automatic Review and the Punishment of Crime" the following appears:

"V. Dagga Offences

The offences listed under this head related to the offences of supplying or being in possession of dagga. Only five of the sixty-four accused persons involved were not Bantu, and in forty-seven of the cases the persons were first offenders. The punishment depended almost entirely upon the quantity of dagga involved in the case and again the only comment we have to make is that there is a marked difference between alternative periods of imprisonment in relation to the same fines. The general pattern, as in the case of Bantu offenders against the Liquor Law, is one rand to one day, but the following variations occur:

(a) 150 rand or 150 days; 150 rand or 120 days; 150 rand or 180 days; 150 rand or 250 days.

(b) 200 rand or 200 days; 200 rand or 100 days; 200 rand or 180 days; 200 rand or 270 days.

(c) The usual ratio is one rand to one day, but cases have occurred as follows:

One rand to ½ day (200 rand or 100 days).
One rand to 4/5 day (150 rand or 120 days).
One rand to 9/10 day (200 rand or 180 days).
One rand to 1.1/5 days (150 rand or 180 days).
One rand to 1.1/4 days (120 rand or 150 days).
One rand to 1.1/3 days (200 rand or 270 days).
One rand to 1.1/2 days (80 rand or 120 days).
One rand to 1.2/3 days (150 rand or 250 days).
One rand to 1.4/5 days (100 rand or 180 days).
One rand to 2 days (30 rand or 60 days).

It seems to us that once the fine or the prison sentence has been determined upon, the alternative should be the same in every case where the first part determined upon is the same.

VI. General Comments

(a) Fines

In ** IV and V we have referred to the fact that considerable variations do occur between the periods of imprisonment imposed as alternatives to the same fine. This variation occurs in every class of crime in which a fine is

imposed. There can be no doubt that magistrates are justified in dealing with different offences in different ways. The period of imprisonment imposed as an alternative to a fine for a dagga offence may well be conceivably longer than the alternative to the same fine imposed for a motoring offence, and we therefore have no suggestion to make in regard to those differences. It does seem desirable to us, however, that, subject to one qualification, the periods of imprisonment for the same offence should always bear the same relation to the same fines, for example, all persons fined R50 for negligent driving should receive the same period of imprisonment, say three months, as an alternative, and the position should not arise as it frequently does that one magistrate would order an alternative of three months' imprisonment, another four or five months' and another two months'. The one qualification we have in mind and the one to which we have already referred is that in the case of the ordinary Bantu the fine should be smaller (for economic reasons) than the fine imposed upon a European for the same offence."

Not only should the fine bear some relation to the length of the alternative imprisonment but it should also bear some relation to the probable earnings and resources of the accused and the court should, before sentence, inquire into the accused's earnings and resources. There are many authorities on this point - G.& L. 698; Ferreira 536 - 7.

To this rule there are two classes of exceptions. One is that in cases of illicit trafficking in dagga or liquor or concoctions and similar offences heavy fines may be imposed and no inquiry into the prisoner's means need be conducted. The reason for this is twofold. In the first place illicit traffickers may be assumed to have been engaged in a lucrative occupation and able to afford to disgorge some of their resources; the object of the fine is to deprive them of some of their ill-gotten gains. Secondly, the accused in such cases really deserve imprisonment but are given the option to pay the fine if they have the money. (The writer hereof has seen a poorly-dressed Bantu, sentenced to pay a fine of R1000 for dagga-peddling, paying the fine then and there in Court in packets of banknotes). Here follow some cases in support of the view expressed above:

In R. v. Ah Wy, 1918 TPD 468, it was argued that there was no proof that a fine of R200 imposed for the illicit sale of liquor was likely to be paid. Per Wessels, J: "I do not think that this court can insist in every case that the magistrate shall satisfy himself that the fine can be paid."

In R. v. Zamba, 1943 OPD. 143 at 151, the judge said that a fine of R80 would not even cause temporary embarassment to a distributor of dagga. He also said that dagga is usually sold, at a handsome profit, by ounces or portions of an ounce and smoked in grains.

In R. v. Mbele, 1955 (4) SA.203(N), the judge said that there was a reasonable possibility that the appellant, as a dagga seller, had some available earnings and resources. Cases of dagga selling fall into a special category, he said; they are like cases where the court has to sentence persons convicted of profiteering or illicit liquor selling. In general such persons and others potentially like them have to be convinced by the heaviness of the fine that financially the game is not worth the candle.

In R. v. Budeli, 1956 (2)PH.H.228(T), the point was taken that the magistrate erred in imposing a fine of R400 or 2 months' imprisonment without having first ascertained appellant's ability to pay the fine. HELD, in cases of this nature heavy fines were imposed and the magistrate when giving an accused the option of paying a fine did not do so with the intention of keeping him out of gaol, the whole position being that if he could pay the fine he was given an alternative : if he could not, then he must serve a term of imprisonment. In cases such as this it was not necessary to make an inquiry with regard to the accused's financial position before deciding the quantum of a fine.

R. v. Kobani, 1957 (2) PH.H. 182(E), may, we suggest, be ignored since the matter does not appear to have been adequately argued and the previous decisions were not referred to.

In R. v. Melengwa, 1958 (1) PH.H. 98 (T), it was held that in the case of dagga growers the primary object in imposing a fine was not to keep the culprits out of prison but to deprive the growers and traffickers as far as possible of their profits.

The other exception is found in the class of case in which the circumstances are such that the accused really deserves to be imprisoned but is given the option to pay the fine if he has the money. In other words, the principle that inquiries into the accused's means need not be held in cases involving illicit profit-taking may be extended to other cases when there is a good reason therefor. Three such cases are quoted below. It is submitted however that this should be done with circumspection and should be limited to cases where the fine is imposed not in order to keep the accused out of gaol but to afford him a way of escaping merited imprisonment if he has the money.

R. v. Motlagomang, 1958 (1) PH.H.29 (T), was a case where the accused had deliberately burned reference books. HELD that as the object of the trial court was not to keep the accused out of prison but to impose a substantial sentence which would have a deterrent effect the sentence was in order. See also R. v. Mojafe 1958 (2) SA.116(T).

In R. v. Jessup, 1960 (2) PH.H. 200 (0), it was stated that "dit is nie gebiedend dat die landdros in elke geval 'n ondersoek na die vermoë van die beskuldigde om die boete te betaal moet instel nie. Klaarblyklik geld dit net in die gevalle waar die wetgewer bedoel het dat, indien moontlik, die beskuldigde uit die tronk gehou moet word of waar dit duidelik is dat die landdros se bedoeling was om die beskuldigde uit die tronk te hou. In die onderhawige saak" (bestuur onder die invloed van drank) "het appellant reeds een vorige veroordeling weens die bestuur van 'n motorvoertuig terwyl hy onder die invloed van drank was. Daar is niks om aan te dui dat onder die omstandighede die landdros vir appellant uit die tronk wou hou nie. 'n Vonnis van ses maande gevangenisstraf sonder die opsie van 'n boete sou 'n gepaste vonnis gewees het, maar om sy straf 'n bietjie ligter te maak het die landdros hom 'n keuse van 'n boete gegee. Dit is nie 'n geval waar, indien hy nie die boete kan betaal, dit die doel van die landdros se vonnis sal verydel nie."

In conclusion, it is of interest to note that in the above case of CHIYI the two Natal judges who dealt with the review on 9/12/66 did not approve of the ratio of R15 to 45 days (R1 to 3 days). They reduced the fine to R15 or 15 days' (ratio R1 to 1 day). But in S. v. Mtshali, 1967 (1) PH.H.68, two other Natal judges who on 16/9/66 dealt with an appeal set aside the sentence of cuts with a light cane imposed on two boys of 18 and 19 years respectively for the theft of ice-cream and substituted a fine of R5 or 15 days' imprisonment each (ratio R1 to 3 days) ! It does not appear from the report that any inquiry into their earnings or resources was held; possibly it was considered to be one of those cases in which the object was not to keep these boys out of prison but merely to give them the chance to escape imprisonment if they could buy such escape !

See also R. v. Frans, TPD.419; R. v. Nhlapo, 1954 (4) SA.56(T); S. v. Taurayi, 1963 (3) 109 (R). Readers can work out S. v. Mhlongo, 1966 (1) PH.H.123(N) and S.v.Sheswa, (89) 1967 (1) PH.H.140 (N) for themselves.

FOR NEW MAGISTRATES : THE WEIGHT OF EVIDENCE - We are told that witnesses must be weighed, not counted, but nobody can tell us of a readily recognised standard against which to weigh them. We are told that evidence is tested by cross-examination, but not how we are to know whether or not the test has been passed. It must be confessed at the outset that the purpose of this article is not to supply these deficiencies because these are matters in which there is no absolute standard of skill, and it must be doubted whether anyone ever reaches perfection in them. It may be that some are more gifted than others in this respect and start with that advantage, but there is no reason why any man or woman who has merited the compliment of being chosen for appointment to the bench should not acquire within a reasonable time sufficient skill to be able to take a share of the corporate responsibility of the court.

The right application of experience is all-important. We all start our service on the bench with a fund of it, accumulated at home, at work and in social contacts. Throughout our lives we are consciously or unconsciously weighing each other in the balance, attaching to each other's words the weight which our experience tells us they deserve. What we have to do in court is similar but not the same. The circumstances in which the witness speaks are not those of ordinary conversation, and his words may be influenced not only by those factors which would affect them elsewhere but by a host of others in addition. Of these the most obvious is that he has taken the oath. It is the fashion to belittle the effect of the oath, and it is true that if a witness has come to court determined to tell lies - or to tell a particular story which he has convinced himself is true - the repetition of the words of the oath is unlikely to shake his determination. Nevertheless we believe that the oath does have some effect, even on those witnesses who are not much influenced by its religious character : it is at the very least a reminder that the witness is there to tell the court what he knows and remembers and not as a participant on one side or the other in a legal contest. Probably the great majority of witnesses, having had this reminder, do try to speak the truth, the whole truth and nothing but the truth : some try harder than others, some are more successful than others, but most try.

Magistrates should remember that for a witness to speak the truth, the whole truth and nothing but the truth in court is not a simple or an easy matter. Cases are not uncommon in which a number of witnesses. having been present at the same events, give widely different accounts of them without any intention of lying, and the differences may arise from many different reasons. Some people see and hear less keenly than others, some are more alert than others at a given moment. Things may appear differently when seen from a different angle or from a closer or more distant point. All these considerations must be present in the mind of the magistrate when he is listening to evidence, and if he notices a discrepancy he must consider whether it is attribuatble to some such cause, if necessary asking questions to enable him to decide.

Recollection, too, is imperfect - the mere lapse of time may cloud or distort the memory of what was seen or heard. The law recognises this in allowing a witness to refresh his memory from notes, by requiring that they must be notes made at the time of, or soon after, the events of which he speaks. Other factors, too, may influence recollection. Every man is by instinct a judge and will begin to form opinions of events as soon as his senses tell him that they are occurring. If he sees a street fight he will begin to decide who is attacking whom, and if he sees a road accident he will begin to apportion blame. In this sense the completely independent, impartial witness does not exist. It may very well be that if he is asked about it later he will make a genuine effort to recall objectively what he saw and heard, and he may even see that his first impression was wrong. But the point is that the first impression did exist to be overcome. However coldly we may try to reason, we all tend to some extent to believe what we want to believe, and it must always be more attractive to believe that we were right than that we were wrong. There must always be a tendency for our recollection to harden in favour of that first, instantaneous judgment.

This, too, the magistrate must have in mind when listening to evidence, and in deciding how far it has influenced what the witness says in court he will bear in mind the circumstances of a court hearing. In most cases the witness has had plenty of time to think about his evidence. He has probably been questioned and had his attention drawn to specific points on which he will be asked to speak. He knows in advance that he will be taking part in the trial of an issue, and he would not be human if he did not at best begin to try that issue himself in his own mind, so that what he says in the witness box may be conditioned, whether he knows it or not, by the view that he takes of the case as a whole. In addition, he will be mindful of the public nature of the trial : at the time when he gives his evidence he is the central figure, to whom everybody present in court is (presumably) listening. He will not wish to let himself down, or to allow anybody to catch him out, and will choose his words accordingly. Having said one thing he will resist the suggestion that he should have said another, in case he should appear to be a fool or a liar.

The credit of a witness, it is said, is always in issue, which means that the other party or his advocate may ask in cross-examination questions designed to show that the witness is one whose sworn evidence is not worthy of belief. Here, again, the magistrate must watch and listen, bearing in mind the background of the witness and the case, in order to decide how far any defects which may be revealed in the witness's character are relevant to the issue to which the questions are directed – what weight, if any, is to be attached to his evidence in the case which is before the court.

It will be seen that the magistrate's appraisal of a witness depends to some extent on his understanding of everyday human psychology. The right application of this understanding can be achieved only by practice, which teaches the various signs and clues pointing to one factor or another in the witness's attitude and enabling the magistrate to weigh his evidence. It is only exceptionally that the truth or falsity of what a witness says can be demonstrated logically : the trap dramatically sprung in cross-examination is commoner in fiction – and legal biography – than in fact. Only by watching and listening to a witness is it possible to appraise him accurately – which is why the High Court has so often expressed reluctance to interfere, on the basis of written matter only, with a finding of fact arrived at after seeing and hearing the parties and witnesses themselves.

So much for the task of appraising the witnesses : but that is not all the magistrates have to do. They may be invited to infer further facts from those to which the witnesses have sworn, and in the end they must decide how far the facts they have found go to prove the issue which is before them. Suppose, for instance, some witnesses say that the accused's vehicle was three feet from the kerb and others that it was six feet from the kerb. The magistrates may be satisfied that six feet is the correct distance, but will still have to decide whether they should infer from that that the defendant was attempting to overtake : and if they decide that that inference must be drawn they must further consider whether the fact that he was attempting to overtake goes to prove the charge - say, careless driving – which is before the court. It is in this matter of drawing inferences that general experience of life and affairs is so necessary and yet so dangerous. The magistrate must be prepared constantly to draw on his general experience for help, yet must be constantly on his guard against the prejudices which every right-minded human being accumulates as a result of that experience. He may, for instance, legitimately infer from evidence of brake marks, engine noise, damage done, and the subsequent position of the vehicles involved that the defendant was travelling at more than the modest 10 m.p.h. to which he admits : but he must not draw that inference from the fact that the defendant was a newspaper van driver or a medical student and that in his view newspaper van drivers or medical students habitually drive too fast.

In the final task of deciding how the facts which are found bear on the issue which is before the court, the law helps a great deal, and most helpful of all are the law's requirements as to the burden of proof. He who affirms must prove is the rule : in general it is the task of the prosecutor in a criminal case or the complainant in a civil case to satisfy the court that

what he alleges is true. It is generally considered that the standard of proof is higher in criminal than in civil cases - that the one requires proof "beyond reasonable doubt" and the other only according to the balance of probability - but in either case the prosecutor or complainant must present his case first, and if the evidence he calls does not substantiate his charge or complaint, that is the end of the matter. The magistrate therefore has only to keep in mind the various ingredients of the case which the prosecution has to prove, and mentally - or on his note pad - tick them off as the case for the prosecution proceeds. In a theft case he will note in this way that there is evidence that the goods are such as are capable of being stolen, that they belonged to somebody other than the accused, that they were taken and carried away, that the accused did this, that he did it fraudulently and without claim of right, and that at the time of taking he intended permanently to deprive the owner of its possession. If at the end of the prosecution's case there is one of those ingredients which the evidence, if unanswered, would not prove to the satisfaction of the magistrate, he must give his opinion in favour of acquittal. Otherwise he must listen to the evidence given or called by the accused, this time bearing in mind not only the ingredients of the charge but also the evidence for the prosecution. At the end of the case for the defence he must consider the whole of the evidence for both sides, weighing the one against the other where they conflict, and must decide whether he is satisfied that the charge has been proved.

Many charges have intention as an ingredient, which the prosecution must prove. Obviously it would in most cases be a matter of some difficulty to prove by positive evidence what intention was in a man's mind at a given time, but the law presumes that he intends the natural consequences of his actions. Where this applies, therefore, the magistrate needs only to look for proof that something happened as a natural consequence of what the defendant did : there is then evidence that the defendant intended that something to happen.

Many other rules of evidence are designed - or at any rate have the effect - of simplifying the magistrate's task in weighing evidence : notably the rules which forbid the admission of hearsay and evidence of the accused person's bad character, and so protect the magistrate from the natural tendency to attach too much weight to evidence which cannot be tested by cross-examination (in the one case) and (in the other) evidence which goes to show that the accused is likely to commit an offence, rather than that he did commit it.

But this article is not primarily about the rules of evidence, and it would not be appropriate to attempt to treat them fully here. We should, however, refer to those instances in which the law lays down specifically what weight is to be attached to certain evidence, by requiring corroboration or indicating its desirability. One example relates to the unsworn evidence of children. In criminal cases a child of tender years who does not understand the nature of an oath but does understand the duty of speaking the truth may if he is of sufficient intelligence be allowed to give unsworn evidence : but nobody must be convicted solely on evidence so given - there must be other, sworn evidence corroborating it in a material particular and implicating the accused.

Finally, there are two cases in which, though there is no absolute requirement of corroboration, the law strongly indicates its desirability. Magistrates have to act as both judge and jury, and must give to themselves when considering the weight which is to be attached to the evidence they have heard, the directions which a judge would give to a jury in his summing up. Where the prosecution call as a witness an accomplice in the offence of which the defendant is accused - whether or not he has been charged as an accomplice - the judge always warns the jury that it is dangerous to convict on the uncorroborated evidence of an accomplice. Similarly on a charge of a sexual offence, the jury is warned that it is dangerous to convict on the uncorroborated evidence of the complainant. The magistrates in a case which is being tried summarily must give these warnings to themselves: it is possible that in an occasional case they may be so impressed by the evidence that they are completely satisfied despite the lack of corroboration, but the warning they must give themselves is a strong one, and such cases will be rare indeed.

(Taken over from THE MAGISTRATE (Britain) March 1958)

AFRICANA : BOOKS WRITTEN BY MAGISTRATES - Continued from page 62 - 63 - H.C.F. JACOBS, Additional Magistrate, Bellville : "Road Traffic Legislation (Cape) - Padverkeerwetgewing (Kaap)" (Juta, 1st ed. 1963, 2nd ed. 1967). This is a volume in both official languages containing the new Ordinance and Regulations, loose-leaf form, with full reference index and an index of decided cases from 1938 to date.

OLD SAYING -

The gates of Fame are open wide,
Its halls are awful full,
And some go in by the door called 'Push'
And some by the door called 'Pull' .
(Anon.)

KORRESPONDENSIE : LOUIS MEURANT - Van Prof. G.S. Nienaber, Universiteit van Natal, Pietermaritzburg :

"Geagte Heer, Dit was waarlik 'n blink gedagte van u om my die artikel oor Meurant in 'The Magistrate - Die Landdros,' deel 2, nommer 4, bls. 59, te stuur. Ek sou andersins nie daarvan geweet het nie, en die toeval tref nou so dat ek juis besig is om weer 'n deel oor Meurant se Afrikaanse stukke na 1861 persklaar te maak vir die Teksuitgawes. Ek kan dus nog hiervan gebruik maak. Baie dankie. Ongelukkig word nie gesê deur wie die artikel geskryf is nie. Kan u my dit op 'n poskaartjie laat kry? Dankie. Hartlike groete, G.S. Nienaber."

(Ons het die naam van die skrywer aan Prof. Nienaber bekendgemaak - Red.)

OOS-KAAPLAND - Die jaarlikse algemene vergadering van die Oos-Kaap streek van die LV word in die Hotel Elizabeth, Port Elizabeth, om 4 nm op Vrydag 7 Julie 1967 gehou. Alle lede in hierdie streek word vriendelik uitgenooi na die vergadering en die skemerkelkie daarna. Lede se gades sal by laasgenoemde ook baie welkom wees. Lede wat die partytjie gaan bywoon moet tog asb vir die landdros van Port Elizabeth, Mnr R. Stewart, voor 30 Junie laat weet. Lede wat iets op die sakelys vir bespreking wil plaas kan insgelyks van hulle laat hoor.

JAARLIKSE ALGEMENE VERGADERING : AFDELING WES-KAAP - Met die hou van die jaarvergadering is bewys gelewer dat die Landdrosvereniging 'n faktor is wat van krag tot krag groei en besig is om die verbeelding van sy lede deeglik beet te pak. 'n Getal van 44 lede het opgedaag en hierdie keer het nog meer afgeleë dorpe 'n lid gestuur. Buiten Kaapstad, Wynberg en Bellville was die volgende plekke verteenwoordig: Worcester, Vredenburg, Strand, Robertson, Grabouw, Malmesbury, Somerset Wes, Hermanus, Caledon, Bredasdorp, Swellendam, Moorreesburg en Bonnievale. Mnr J.N. Oberholzer, Hoofkantoor, was ook teenwoordig.

Die Voorsitter van die Sentrale Komitee het uit Johannesburg gekom en hierdie afdeling met sy teenwoordigheid vereer. Mnr Dekenah het weereens beklemtoon dat die Vereniging hom vir die voordeel van landdroste beywer maar het dit ook duidelik gestel dat landdroste steeds hulle deel moet doen - hulle moet studente bly en volhard om die regsberoep hoog te hou en die belange van die Departement op die hart te dra.

Uit die verslag van die Afdeling se Voorsitter, mnr C. Willman, het dit duidelik geblyk dat die Afdeling sy gewig dra, sake deeglik bespreek voor kommentaar gelewer en aanbevelings gemaak word en alles bestry wat landdroste kan skaad.

Die komitee wat verkies is vir die jaar is as volg: Mnr C. Willman - Voorsitter; Mnr E.R. van Rooyen - Sekretaris; Mnre A.J. Barnard, H.J. Powell en J.W. van Greunen - Lede.

Dit is met innige spyt dat die vergadering van Mnr Willman verneem het dat hierdie sy laaste jaar in die Voorsitterstoel sal wees. Hy tree uit die diens aan die begin van 1968. Die hele landdrosafdeling se beste wense sal hom vergesel.

Na afloop van die vergadering was daar oorgegaan tot heerlike happies en kappies.

E.R. v. R.

VERLOF AAN LANDDROSTE - Op 15 Desember 1966 is die volgende brief aan die Departement gerig :

"Tydens die jaarlikse algemene vergadering van die Vereniging op 18 November 1966 waarby amptenare van Hoofkantoor teenwoordig was, is die vraag gestel of daar nie 'n plan gemaak kan word om die aflospersoneel te vergroot of om die indiensneming van tydelike eenhede op 'n meer liberale basis te magtig nie sodat landdroste wat opgehoopte verlof wil afwerk meer verlof op 'n slag kan neem as wat op die oomblik moontlik is. Mnr C.J. Greeff en mnr C.R. de Wet Wessels het Hoofkantoor se moeilikhede verduidelik en dit is besluit dat die Departement versoek word om sy bes te doen om meer aflos beskikbaar te stel en om aan landdroste langer verlof met aflos op aanvraag toe te staan. Ek dra die besluit derhalwe aan u oor."

Hoofkantoor se antwoord van 5 April 1967 volg :

"Die Departement is terdeë bewus van die probleme wat daar met betrekking tot aflostoekenning vir verlofdoeleindes bestaan en doen alles in sy vermoë om beamptes sover moontlik tegemoet te kom. Solank die Departement gebuk gaan onder die heersende personeeltekort wat veroorsaak dat die aflospersoneel ook nie op volle sterkte is nie, sal daar nie in die vraag na aflosdienste voldoen kan word nie. In gevalle waar landdroste opgehoopte verlof wil afwerk, sal die Departement in verdienstelike gevalle oorweeg om die reël dat 'n tydelike eenheid slegs vir die jaarlikse verlofaanwas van 'n beampte goedgekeur word, te verslap en aflosdienste te verskaf."

VERTRAGINGS IN DIE SKEPPING VAN NOODSAAKLIKE POSTE - In ons Maart 1967 uitgawe (bls.44) het ons die korrespondensie - wat deur die Sekretaris van Justisie op 12/1/67 afgesluit is - gepubliseer. Daarbenewens het mnr C.J. Greeff by die Vereniging se laaste jaarlikse algemene vergadering die probleem as "a hardy annual" beskryf.

Nou lees ons in die Departement van Justisie se Jaarverslag vir 1966 dat "die Departement (verkeer) nou in die gelukkige posisie dat aanpassings aan die diensstaat van subkantore op 'n veilige, vinnige en wetenskaplike basis bewerkstellig word."

Ons hou van die woord "vinnige" en dit is verblydend om te kan aankondig dat daar aanduidings is dat daar reeds 'n groot verbetering in die tempo gekom het.

PREVIOUS CONVICTIONS TAKEN INTO ACCOUNT FOR VERDICT - In R. v. Holtzmann, TPD. 17/3/67, a magistrate convicted the accused of shoplifting. On appeal it was held that although there was a very strong suspicion that the appellant might have committed the crime the State had not proved her guilt beyond a reasonable doubt.

There was evidence that when the accused was stopped by the assistant manager after leaving the shop she exclaimed: "Moenie die polisie roep nie." The accused's case was closed without her giving evidence. The learned judge said: "Her reaction may of course very well be the reaction of someone with a sense of guilt; on the other hand it should be remembered that the appellant has a previous conviction for a similar offence ... and it may possibly be that she made the statement because, in view of her previous experience, she wanted to avoid being involved in any trouble with the police at all costs."

It is submitted with respect that when an appeal is being heard the evidence should be looked at as it was at the stage when the magistrate had to consider his verdict. At that stage the previous conviction was not before the trial court. If the magistrate could not have taken it into consideration, either in favour of or against the accused, in arriving at his verdict, how can an appellate tribunal take it into consideration in deciding whether the magistrate was right or wrong in arriving at his verdict?

DIE LANDDROS - THE MAGISTRATE

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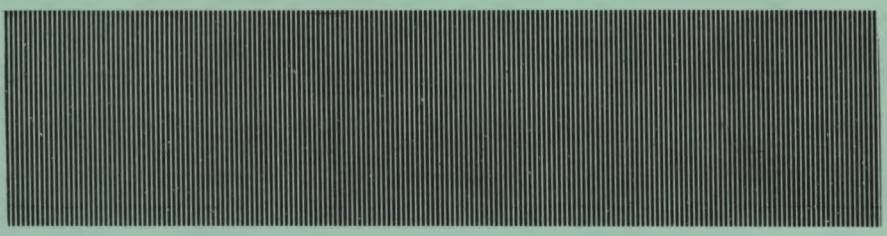

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