

# CIRCUIT COURTS IN THE CAPE COLONY DURING THE NINETEENTH CENTURY: HAZARDS AND ACHIEVEMENTS

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Es ist nicht leicht, sich heute von den Rahmensbedingungen der Rechtspflege in der damalige Zeit eine Vorstellung zu machen. Die über die weiten Entfernung des Westkap führenden, bei Wind und Wetter in zweispännigen "Cape cart" zu absolvierenden "circuits" waren mit grossen Strapazen verbundet. (Reinhard Zimmermann "Die Rechtsprechung des Supreme Court of the Cape of Good Hope am Ende der sechziger Jahre des 19. Jahrhunderts" in J van der Westhuizen *et al* (eds) *Huldigingsbundel Paul van Warmelo* (Pretoria, 1984) 286-307 at 290-291.

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To bring the administration of criminal and civil justice by superior tribunals of the colony as near to the residences of the inhabitants as the extent and circumstances of the colony would permit; and that it was considered that the institution of the circuit courts was highly expedient, as it would necessarily give a very great part of the population an opportunity of witnessing the administration of justice by the superior tribunals which they could not possibly otherwise have had; and that a knowledge of the rules and principles in which civil and criminal jurisdiction was administered in Great Britain, would thus be generally communicated to the great benefit and advantage of the colony; and also that a closer and more effectual check over the inferior tribunals would thus be kept up than could otherwise be had, besides the advantage the inferior judges themselves would obtain by witnessing the proceedings of the circuit courts. (Menzies J on the object and intention of the introduction of circuit courts: *Report from the Committee of Inquiry into the Judicial Establishment*, 1845)

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## 1 Introduction

The term “circuit court” is here used to denote the practice of having judges of Superior Courts travel around the country from one venue to another to hear cases away from the permanent (principal) seat of the court.<sup>1</sup> Circuit courts originated in England and were subsequently adopted and developed in former British colonies to deal with the problem of distance and isolation from the principal seats of Supreme or High Courts. Two notable examples are the United States and South Africa.

In the United States, “circuit riding” under the Judiciary Act of 1789 became part of the responsibilities of the justices of the Supreme Court. Their duties were onerous, and the practice was reviled by most justices who complained bitterly about the hazards and the physical hardship of the travelling, and about the fact that time spent on the circuit meant having less time to spend attending to their ever-increasing duties in the nation’s capital. Congress viewed the practice differently and for years the many efforts to abolish the practice that came before Congress failed. Indeed, as Glick puts it, the history of circuit riding can just as easily be called the “history to abolish circuit riding”.<sup>2</sup> The practice was eventually abolished by Congress with the Judiciary Act of 1891.<sup>3</sup>

In South Africa, despite hazards and hardships and complaints in the early years, circuit courts to this day form part of the legal landscape. This essay focuses on the formative years of the circuit courts at the Colony of the Cape of Good Hope during the period 1811 to 1900. An attempt will be made to evaluate the performance, achievement and impact of the circuit courts from a perspective somewhat wider than the strictly legal or legal-historical. The objective is not to produce a “new” history of the circuit courts, but having regard to the conditions under which they operated, to evaluate their achievement and their influence on the development of the administration of justice in South Africa.

By way of introduction, Sir George Yonge’s abortive 1801 proposal for the introduction of circuit courts will be briefly described.

1 In South Africa, lower (magistrates’) courts may also sit at venues other than the seat of the magistracy. Section 2 of the Magistrates’ Courts Act 32 of 1944 makes provision for periodical courts which may be held at a venue away from the seat of the district court. In Australia, legislation to rename the Federal Magistrates’ Court the “Federal Circuit Court of Australia” and to change the title of Federal Magistrate to Judge was passed in Nov 2012 available at <http://pandora.nla.gov.au/pan/132822/20130204-0704/www.attorneygeneral.gov.au/Media-releases/Pages/2012/Fourth%20Quarter/21November2012FederalCircuitCourtofAustraliaestablishedinlaw.html> (accessed 26 Nov 2012).

2 Josua Glick “Comment: On the road. The Supreme Court and the history of circuit riding” (2003) 24 *Cardozo LR* 1753-1843.

3 The twelve United States Courts of Appeal are traditionally known as “circuit courts”. Each of the Courts of Appeal covers its own individual circuit. For example, the United States Court of Appeal for the Eleventh Circuit deals with cases from the states of Alabama, Florida and Georgia. Most of the cases of the Eleventh Circuit are heard at the Court’s principal seat in Atlanta, Georgia. However, in keeping with the tradition of the circuit court system, the Eleventh Circuit occasionally hears cases in Jacksonville and Miami, Florida, and Montgomery, Alabama (<http://www.catea.gatech.edu/grade/legal/circuits.html> (accessed 26 Nov 2012)).

## 2 Sir George Yonge's proposal

Under the rule of the Dutch East India Company (VOC), the highest court at the Cape was the Council of Justice (Raad van Justitie) which held its sittings in Cape Town. The principal lower courts were the courts of Landdrost and Heemraad in each of the outlying districts.<sup>4</sup> The first British occupation of the Cape took place in 1795. The question of the establishment of circuit courts at the Cape was raised by the British Governor, Sir George Yonge, in letters dated 29 March 1800 and 5 January 1801 to Henry Dundas, first Viscount of Melville and Secretary for War and the Colonies from 1794 to 1801.<sup>5</sup> He advocated reform of the administration of justice because, as he put it in his letter of 5 January 1801, "neither the Government, such as it was, nor the Governed, such as they were, had any Notion of Justice whatever". The idea was warmly supported by Lord Hobart, successor to Henry Dundas as Secretary of State for War and the Colonies, who in a letter to Major-General Francis Dundas, acting Governor at the Cape 1801-1803, stated that the "annual Circuits to be made by two Members of the Court of Justice, according to Sir George's Letter of the 5th of January, cannot fail to produce beneficial Effects".<sup>6</sup> On 12 December 1801 Major-General Dundas, who had succeeded Sir George Yonge as governor, in a letter to Lord Hobart<sup>7</sup> expressed the view that the introduction of circuit courts "would unquestionably produce very salutary effects" and that "some such measure had long been necessary and ought to be immediately adopted". He refers to the situation at Graaff-Reinet where no regular police force had been established, "owing to the want of which, acts of violence and injustice pass every day unnoticed, and the greatest crimes are committed with impunity". The introduction of some form of circuit court was also mooted by the fiscal WS van Ryneveld who in 1801 in his *Kopie Plan ter Verbeetering van het Inwendige Bestier van die Colonie* proposed that a "respectable Commissie" be sent from Cape Town to the outlying districts in order to hear and decide cases "na recht en billykheid".<sup>8</sup> Nothing came of the idea at the time and the introduction of circuit courts was delayed until the British had reoccupied the Cape in 1806. Fryer suggests that the delay may have been due to two reasons: the fact that permanent occupation by England of the Cape was still in the balance, and the desperate state of the finances of the Cape at the time.<sup>9</sup>

4 See GG Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* (Cape Town, 1969) at 40ff.

5 George McCall Theal (ed) *Records of the Cape Colony* vol 3 (London, 1897) at 90, 370.

6 Theal (n 5) vol 3 at 481.

7 *Idem* vol 4 at 117.

8 KAB VC 100 at 16-17 (reference is to the Cape Town Archives Repository, followed by the relevant document series and the page number); see Visagie (n 4) at 93-94.

9 SWJ Fryer *Die Instelling van die Rondgaande Hof (Kommissie van Regspleging)* (MA, University of Stellenbosch, 1948) at 58.

### 3 The establishment of circuit courts in 1811

A proclamation establishing the first circuit courts at the Cape was issued by the Earl of Caledon on 16 May 1811.<sup>10</sup> Provision was made for the hearing of both civil and criminal trials on circuit by a Commission consisting of two members of the Court of Justice in the districts of Swellendam, George, Uitenhage, Graaff-Reinet and Tulbagh. The first circuit was held in 1811 and the second in 1812, and they were subsequently held every year until replaced by the circuit courts established under the First Charter of Justice in 1827. The second circuit became known as the black circuit ("swarte ommegang") because of the many charges of maltreatment of Khoikoi labourers that the missionaries Van der Kemp and Read, of the mission station at Bethelsdorp, raised against white colonists. The charges included seventeen of murder. The controversies arising from this circuit have sometimes given historians the impression that Caledon created the circuit court solely for the purpose of the hearing of Khoikoi labourers' complaints against their white employers.<sup>11</sup> The truth is that most of the accumulated complaints of the missionaries happened to be set down for hearing during the second circuit. The circuit court was designed to hear cases covering the full spectrum of criminal and civil law. In its report on Courts of Justice at the Cape to the Earl of Bathurst, the Commission of Enquiry under JT Bigge and WM Colebrooke pointed out that no less than 750 civil cases had been tried by the commissioners on circuit during the period 1811 to 1825.<sup>12</sup>

There were three principal factors which induced Caledon to proceed with the establishment of circuit courts. The first was that the administration of justice in the country districts was clumsy, unsatisfactory and very inconvenient for the inhabitants of the outlying districts. The second was that the highest court, the Council of Justice, was overloaded with work, which caused delays in the administration of justice. The third was that the Hottentot Proclamation of 1809 was deficient in that there was no impartial authority to see to the proper enforcement of its provisions. This was underlined by the frequent allegations of maltreatment made by missionaries, and the circuit court was seen as an appropriate mechanism to investigate and adjudicate upon the charges.<sup>13</sup>

10 *Proclamations, Advertisements, and Other Official Notices Published by the Government of the Cape of Good Hope from 10th January 1806 to 2nd May 1825* (Cape of Good Hope, 1827) (hereafter *Proclamations, Advertisements, and Other Official Notices*) at 153ff. The Proclamation is reproduced in part in GW Eybers *Select Constitutional Documents Illustrating South African History 1795-1910* (London, 1918) doc 67 at 103-104, only two of the seventy-one regulations appended to the Proclamation being reproduced.

11 Thus in *History Online* available at [www.sahistory.org.za/dated-event/judges-black-circuit-return-cape-town](http://www.sahistory.org.za/dated-event/judges-black-circuit-return-cape-town) (accessed 12 Nov 2012), mention is made of "the circuit court (Black Circuit) instituted by Cape Governor John Cradock to investigate serious charges brought by Dr JT van der Kemp and James Read ... in connection with murder and maltreatment of Hottentots (Khoikoi) by Whites".

12 The report dated 6 Sep 1826 is reproduced in Theal (n 5) vol 28 at 1-111. The observation referred to appears at 8-9.

13 Fryer (n 9) at 82-90; HB Giliomee *Die Administrasietydperk van Lord Caledon 1807-1811* in *Archives Year Book for South African History* vol 29(2) (Pretoria, 1966) at 310.

The Proclamation had a fourfold purpose.<sup>14</sup> The first was that the circuit courts should release the Council of Justice from having to determine causes arising in the outlying districts, cases which otherwise would have been heard by the Council of Justice in Cape Town. The second was to provide a more comprehensive and convenient administration of justice in the outlying districts.<sup>15</sup> The third object was to provide the government with comprehensive and reliable information about all matters of interest and importance in the outlying districts.<sup>16</sup> Lastly, it was to secure just and fair treatment of slaves and Hottentots.<sup>17</sup>

The Proclamation and the appended regulations constitute an important precursor to the Charters of Justice of 1827 and 1832 which introduced at the Cape the fundamental features characteristic of proceedings at common law, notably the orality, immediacy and publicity of its proceedings.<sup>18</sup> In short, a mode of trial was introduced in which proceedings took place in public, and in which *viva voce* oral evidence was adduced before the judicial officer or tribunal (jury) hearing and deciding the matter.<sup>19</sup> Thus regulations 27 and 32 appended to the Proclamation provided for the hearing, in a criminal trial, of the *viva voce* evidence of the witnesses called by the prosecution and of

14 Fryer (n 9) at 92-93; Giliomee (n 13) at 310.

15 These aims are spelled out in the preamble to the Proclamation.

16 This was provided for in reg 62 of the regulations appended to the Proclamation. The effect of the regulation is discussed below.

17 This was provided for in regs 63, 64 and 65 which provide as follows:

63. It is particularly incumbent upon the Commission that they, in their judicial capacity, take care that the Proclamation of the 1st Nov. 1809, respecting the treatment of Hottentots, be strictly followed up; and that, as much as possible, regularity respecting the service of those natives, as well proper treatment of them, be punctually observed.

64. The Commission is enjoined scrupulously to examine the records of punishments afflicted on Slaves by order of the Landdrost, in order to ascertain that no unnecessary severity be practised upon the unfortunate class of People.

65. The Commission shall likewise, as far as lies in their power, ascertain that no improper domestic correction has been used by Masters towards their Slaves, without the same being brought forward for legal interferences.

18 Jack I Jacob *The Reform of Civil Procedural Law and Other Essays in Civil Procedure* (London, 1982) “Civil procedure since 1800” at 205; Jack I Jacob *The Fabric of English Civil Justice* (The Hamlyn Lectures Thirty-Eighth Series) (London, 1987) at 5, 19, 21; JA Jolowicz “Orality and immediacy in English civil procedure” (1975) 8 *Boletin Mexicano de Derecho Comparado* 595-608.

19 In the Romano-Canonical procedural model which applied at the Cape before 1827, the evidence was gathered by an official who prepared a written report which he submitted to the judicial officer seized of the matter. On the Romano-Canonical procedural model which applied at the Cape, see Jerold Taitz “A further tribute to the Charter of Justice” (1979) 96 *SALJ* 470-475; GG Visagie *et al* *Die Kaapse Regspraak-Projek Die Siviele Appèlhof en die Raad van Justisie, Hofstukke en Uitsprake wat betrekking het op Siviele Sake 1806-1827* (Cape Town, 1989), also published in Koster-Van Dijk & Wijffels (eds) *Miscellanea Forensica Historica ter gelegenheid van het afscheid van Prof Mr J Th de Smit* (Amsterdam, 1988) 325ff; HJ Erasmus “The interaction of substantive law and procedure” in Zimmermann & Visser (eds) *Southern Cross. Civil Law and Common Law in South Africa* (New York, 1996) 141-161 at 143-145 and the references given there.

the witnesses called by the accused.<sup>20</sup> Regulation 40 made provision for the hearing of *viva voce* evidence in civil cases.<sup>21</sup>

Two of the most important regulations appended to the Proclamation are regulations 62 and 21. Regulation 62 provides:

Any complaint, however trivial, and all matters touching the morality and good Government of the Country Districts, shall be noticed by the Commission and reported to the Governor, and such steps may be taken as he may deem meet.

After the first circuit in 1811 the fiscal, Van Ryneveld, submitted a comprehensive report on a variety of matters: education, culture and religion, agriculture, Khoikoi and San people, slaves and domestic affairs. In subsequent years, the commissioners submitted similar reports after every circuit. The reports made an important contribution to the improvement of the state of government in the country districts.<sup>22</sup>

The provisions of regulation 21 were of crucial importance, both to the conduct of the proceedings of the circuit court at that time, and in the long term to the future administration of justice in South Africa. The regulation provides that “[a]ll examinations, in cases upon which a decision is to be given, shall be held in open court”.

Up to that time, the practice of the courts at the Cape had been that all judicial proceedings were carried on *foribus clausis*, with closed doors.<sup>23</sup> On 25 September 1813 Sir John Cradock issued a Proclamation<sup>24</sup> that all proceedings before the Court of Justice should be carried on in a locale with open doors. The preamble states that the beneficial effects of judicial proceedings being carried on in open court have been confirmed “in the proceedings of the different Commissions of Circuit in the Country Districts, agreeably to the Proclamation of the 16th May 1811”. The Proclamation was warmly welcomed

20 Reg 27:

In both cases mentioned in the three preceding Articles, the Commission is to commence the Trial on the prosecution of the landdrost; hear first the Witnesses each separately, then the accused as well as the Witnesses called by him; confront the accused with the Witnesses; and then, after having fully investigated all the circumstances, as far as the nature of the case will allow, declare, “that the Examination is closed”.

Reg 32:

But in case the accused does not confess the crime, the claim and conclusions are to be read to him in like manner, and every argument with which the Landdrost endeavours to prove the commission of the crime, distinctly explained to the Prisoner, whose reasons against the same shall be heard, and carefully noted down; upon which the Landdrost and the Prisoner being heard in reply and rejoinder, the Trial is to be considered as closed, and Sentence passed by the Commission according to law. In these cases, the Sentence may be appealed from.

21 Reg 40:

The Witnesses are to be heard in person before the Commission, and their depositions, as well as the rehearing of them, and the affirmation by oath, to be recorded in the minutes of the proceedings of the Commission.

22 For a detailed analysis of the reports, see Fryer (n 9) ch 8 at 166-193.

23 C Graham Botha “The early influence of the English law upon the Roman-Dutch law in South Africa” (1923) 40 *SALJ* 304-406 at 398.

24 *Proclamations, Advertisements, and Other Official Notices* (n 10) at 259. The Proclamation is reproduced in part in Eybers (n 10) doc 68 at 105.

by Sir John Truter, the last president of the Council of Justice.<sup>25</sup> The principle of the open court was further entrenched in the Ordinance that created the office of Resident Magistrate, section 8 of the Ordinance providing that in all criminal cases “the Witnesses against and for any accused Person or Persons, shall deliver their Evidence viva voce and in open court”.<sup>26</sup>

The fact that the hearings took place in open court was vital to the initial and the ultimate integrity of circuit courts. Though most of the charges of maltreatment and all the charges of murder were dismissed at the second circuit in 1812, it was through the public hearings, which attracted considerable public attention,<sup>27</sup> that *both* the maltreatment of the Khoikoi (there were numerous such cases<sup>28</sup>), *and* the fact that allegations of maltreatment were at times exaggerated or even baseless, were brought into the open.<sup>29</sup> On the one hand, the circuit court firmly brought home to the colonists the fundamental principle that no-one, whether colonist or Hottentot, was above the law.<sup>30</sup> On the other hand, it was brought home to the missionaries that their legitimate concerns for the well-being of the Khoisan people were not best served by reckless and defamatory allegations against the colonists.<sup>31</sup> The position is succinctly summarised by De Kiewiet:

The Circuit Court, freshly created in 1811, announced a new era by making itself accessible to the Hottentot as well as the European population. Of the cases promptly brought against European masters many were malicious, collusive and false. Certain missionaries undoubtedly overreached themselves by trying to strike a blow for their protégés. But other accusations were proven. The sentences which the court pronounced against white masters shook the Colony with indignation. The action of the court was a declaration that the protection of the law extended to the servant as well as the master. The social revolution had begun.<sup>32</sup>

The manner in which the circuit courts were conducted elicited high praise at the time. In its report to the Earl of Bathurst the Commission of Enquiry under JT Bigge and WM Colebrooke on courts of justice at the Cape,<sup>33</sup> lauded as a “salutary” improvement the Earl of Caledon’s institution of circuit courts in 1811 because, despite certain shortcomings in the administration of the courts, “some degree of relief has been afforded to the Inhabitants of the distant Districts from the expense of bringing their Actions before

25 Correspondence of Cradock and Truter on the Proclamation in Theal (n 5) vol 9 at 219, 236. See, further, WP Schutz “Open doors” (1993) 110 *SALJ* 597-598.

26 Ord 68 of 19 Dec 1827 (Cape), in Eybers (n 10) doc 73 at 109.

27 Fryer (n 9) at 144-146.

28 See, for example, George McCall Theal *History of South Africa from 1795 to 1872* 4 ed (London, 1915) at 261-263; GE Cory *The Rise of South Africa* vol 1 (London, 1913) at 211-216.

29 Cory (n 28) at 217-218.

30 See WM MacMillan *The Cape Colour Question; A Historical Survey* (Cape Town, 1927, repr 1968) at 91; JS Marais *The Cape Coloured People* (London, 1957) at 91, 120-121; CW De Kiewiet *A History of South Africa Social and Economic* (Oxford, 1941) at 46; Fryer (n 9) at 196.

31 Cory (n 28) at 206.

32 De Kiewiet (n 30) at 46.

33 The report dated 6 Sep 1826 is reproduced in Theal (n 5) vol 28 at 1-111.

the Court at Cape Town".<sup>34</sup> The salutary influence of the work of the commissioners on circuit was not confined to their legal work. The regular reports which they submitted in fulfilment of their obligations under regulation 62 played a vital role in the general improvement of government.

The circuit courts created in 1811 prepared and paved the way for the circuit courts established in 1827 under the Charter of Justice.<sup>35</sup>

#### 4 The Charter of Justice

The British were not impressed by the state of the administration of justice which they inherited upon the second British occupation of the Cape in 1806.<sup>36</sup> As we have seen, the Earl of Caledon endeavoured to resolve some of the problems by establishing circuit courts in 1811. In 1821 the Deputy Colonial Secretary, Henry Ellis, submitted a report which was strongly critical of the administration of justice at the Cape.<sup>37</sup> A commission was appointed to look into the matter.<sup>38</sup> In its report dated 6 September 1826, the commission recommended that the existing judicial machinery and procedural institutions be reshaped along English lines.<sup>39</sup> By letters patent of 24 August 1827, commonly known as the First Charter of Justice, the Council of Justice was replaced by the Supreme Court of the Colony of Cape of Good Hope. The First Charter was superseded by the Second Charter constituted by letters patent of 4 May 1834.<sup>40</sup> The adoption of common-law-based judicial and procedural institutions inevitably brought in its wake the adoption of the English law of evidence: this was done in Ordinance 72 of 1830.<sup>41</sup>

The Charter of Justice made provision for the establishment of circuit courts. Section 37 empowered the Governor to divide the Colony by Proclamation into two or more districts and to fix the boundaries of the districts. The districts were to be divided in such a way as to give the inhabitants of the Colony easy and convenient access to the circuit courts. Section 38 provided that circuit courts were to be held by the Chief Justice or one of the puisne judges of the Supreme Court of the Colony of the Cape of Good Hope twice a year in each of the districts. In terms of section 39, the circuit courts, which were courts of record, had the same jurisdiction and powers as the Supreme Court of the Colony of the Cape of Good Hope. Criminal trials were to take place before the circuit judge and a jury of nine men. Section 40 made provision for trial by a jury of six men if a jury of nine

34 *Idem* at 8-9.

35 See HB Fine *The History of the Cape Supreme Court and its Role in the Development of Judicial Precedent for the Period 1827-1910* (LLM, University of Cape Town, 1986) at 5, 409.

36 Botha (n 23) at 396-406.

37 Theal (n 5) vol 14 at 183ff.

38 The commissioners were John Thomas Bigge, a former Chief Justice of Trinidad, and Major WMG Colebrooke. See, further, PJ Van der Merwe *Regsinstellings en Reg aan die Kaap van 1806 tot 1834* (LLD, University of the Western Cape, 1984) at 239ff.

39 Theal (n 5) vol 17 at 333ff; vol 28 at 1ff.

40 See Taitz (n 19) at 470; Van der Merwe (n 38) at 287ff.

41 See JW Wessels *History of the Roman-Dutch Law* (Grahamstown, 1908) at 394.

could not be assembled.<sup>42</sup> Section 41 provided that all civil suits and actions be tried by the circuit judge without a Jury.<sup>43</sup>

Provision was further made for appeals to the Supreme Court in civil cases where the amount in dispute exceeded one hundred pounds,<sup>44</sup> or with leave of the circuit judge where the amount in dispute was less than one hundred pounds, if he considered the issues to be of such importance as to render it proper.<sup>45</sup> If it appeared to the judges that a pending matter could be more conveniently heard in the Supreme Court or in another circuit court, they could order the case to be removed to the other court.<sup>46</sup>

In a letter dated 5 April 1827<sup>47</sup> to Major-General Bourke at the Cape, Viscount Goderich, the Secretary for Colonies, commented *inter alia* on two aspects of the proposed circuit courts that did in due course give rise to problems. In regard to the territorial division of the colony into circuit districts, he said that “[i]t must be such as may most conveniently enable the Inhabitants to resort to the circuit courts, having always regard to the health and proper comforts of the judge by whom the journey is to be performed”. In regard to language he said:

The use of the English Language is required by the Charter in the Supreme Court, nor does there seem any reason longer to postpone the adoption of a measure which has been so long in contemplation. But in the circuit courts, it may, perhaps, be necessary for the present to continue the use of the Dutch Language.

Finally, Lord Goderich informed the Governor that he was prepared to allow an annual amount of six hundred pounds for the expenses incurred by the circuit judges and he directed that the allowance be disbursed in proportion to the length and expenses of the circuit.<sup>48</sup>

## 5 The first circuits

The first circuits<sup>49</sup> were proclaimed on 28 February 1828.<sup>50</sup> In terms of the Proclamation, the colony was divided into three districts:

One of which shall contain the Subdistrict of Clanwilliam and the Districts of Worcester and Stellenbosch; the other shall contain the Districts of Swellendam and George; and the

42 Repealed by the Criminal Procedure and Evidence Act, 31 of 1917; text of repealed part in Theal (n 5) vol 32 at 284.

43 The remainder of this section was abrogated by s 13 of Act 5 of 1879 (Cape).

44 Section 42.

45 Section 43.

46 Section 45.

47 Theal (n 5) vol 32 at 254-273.

48 *Ibid.*

49 See Fine (n 35) at 68-72; AF Hattersley “Early days of judicial circuits in South Africa” (1958/59) 13 *Africana Notes and News* 122-131.

50 The Proclamation is contained in the *Government Gazette* of 29 Feb 1828. The lengthy and wordy Proclamation took a form which was retained, with but minor changes, in all subsequent Proclamations throughout the period covered by this study.

third shall contain the Districts of Uitenhage, Albany, Somerset and Graaff-Reinet and the Subdistrict of Beaufort.

On 11 April 1828 a notice appeared in the *Government Gazette* giving the places and dates of the sittings of the circuit courts, as follows:

Western circuit: Clanwilliam 1 May; Worcester 7 May; Stellenbosch 26 May.

Midland circuit: Swellendam 1 May; George 7 May.

Eastern circuit: Uitenhage 1 May; Graham's Town 8 May; Somerset 23 May; Graaff-Reinet 27 May; Beaufort 6 June.

Detailed plans for the journeys were made in consultation with D Cloete, the former secretary of the Court of Justice. The arrangements were largely left in the hands of Judge Burton.<sup>51</sup> Judge Menzies chose the western circuit and Judge Kekewich took the midland circuit. The eastern was the longest and most arduous circuit and Judge Burton, the youngest of the trio of judges (he was thirty-four on arrival at the Cape), was "naturally expected" to take it.<sup>52</sup> A warrant was issued in favour of the judges for three hundred pounds.<sup>53</sup>

The midland circuit was uneventful and Judge Kekewich "professed himself gratified by the sanity of the verdicts [of the juries] at George and Swellendam".<sup>54</sup> The western circuit was marred by Judge Menzies' rejection of a number of persons who had been summoned as jurors, on the ground that they were not sufficiently proficient in English. This gave rise to a conflict of opinion among the judges – a topic to which I shall return shortly.

Judge Burton left Cape Town on 15 April in order to take the eastern circuit which was due to start at Uitenhage on 1 May 1828. His progress from Uitenhage to Grahamstown and thence to Graaff-Reinet received extensive and favourable publicity in *The Colonist*.<sup>55</sup> He was received with enthusiasm wherever he went. Upon his departure from Graaff-Reinet, Judge Burton was given a rousing farewell. The civil commissioner, WC van Ryneveld, commented favourably on the manner in which the proceedings in court had been conducted. He also expressed the hope that the judge would use his influence to prevent the exclusion of persons not acquainted with English from the list of jurors.<sup>56</sup>

51 Hattersley (n 49) at 124.

52 *Ibid.*

53 These financial arrangements were an improvement on the original plan which provided the judges with an official claim on the hospitality of the inhabitants whose houses were situated on the circuit routes. The new arrangement elicited favourable comment in 20 Mar 1828 *The Colonist* (cited by Fine (n 35) at 69).

54 Hattersley (n 49) at 124.

55 See Fine (n 35) at 69-71. Thus his opening remarks at Uitenhage were extensively reported in *The Colonist* of 20 May 1828. In Grahamstown he received an address from the Dutch inhabitants of Albany who expressed great pleasure at the introduction of British forms of justice, and in particular the establishment of juries (1 Jul 1828 *The Colonist*). At Graaff-Reinet he was met by local officials and a party of horsemen who greeted him with cheers and a discharge of firearms (26 Jul 1828 *The Colonist*).

56 26 Jul 1828 *The Colonist*; and see Fine (n 35) at 70-71.

The practice of having more than one circuit simultaneously did not continue.<sup>57</sup> Indeed, in his letter of 5 April 1827<sup>58</sup> to Major-General Bourke at the Cape, Viscount Goderich, the Secretary for Colonies, stated that “it does not ... seem desirable that any Judge should be required to perform more than two journeys in any one year. No two Circuits must be held at the same time, because it is not proposed to withdraw two Judges at the same time from Cape Town”.

The second circuit of 1828 was proclaimed in the *Government Gazette* of 29 August 1828. The colony was divided into the following ten districts: Swellendam, George, Uitenhage, Albany, Somerset, Graaff-Reinet, Beaufort, Worcester, Clanwilliam and Stellenbosch. On 19 September 1828 a notice appeared in the *Government Gazette* giving the places and dates of the sittings of the circuit courts, as follows:

Stellenbosch 3 October; Clan William 8 October; Worcester 18 October; Beaufort 25 October; Graaff-Reinet 30 October; Somerset 5 November; Graham's Town 11 November; Uitenhage 19 November; George 27 November, Swellendam 1 December.

The full circuit was undertaken by Judge Menzies – his account of his experiences on that circuit is considered below.

This pattern was subsequently followed consistently, except that the number of districts, the venues and the routes could vary. Thus, for the second circuit of 1829 the colony was divided into nine districts, the venues and dates being as follows:<sup>59</sup>

Stellenbosch 5 October; Worcester 8 October; Beaufort 16 October; Graaff-Reinet 20 October; Somerset 26 October; Graham's Town 31 October; Uitenhage 11 November; George 21 November; Swellendam 26 November.

It will be observed that the two circuits mentioned above each lasted two months; the second circuit of 1830 lasted three months, from 1 September to 6 December. If the second circuit of 1829 were to be undertaken by car today along the main roads linking the various towns, it would entail a trip of more than 1600 kilometres on good roads.

Judge Burton took the second circuit of 1829. He reached Grahamstown on 31 October 1829. From there he wrote a long letter to his brother Menzies in Cape Town.

## 6 Judges Menzies and Burton on their experiences on the early circuits

In his report to the Governor, Judge Menzies related his experiences on the October/November 1828 circuit as follows:<sup>60</sup>

57 Additional circuits only came into being upon the establishment in 1864 of the Eastern Districts Court with its seat at Grahamstown, when a separate eastern circuit was introduced, and the establishment in 1882 of the High Court of Griqualand with its seat at Kimberley, when a northern circuit was introduced.

58 Theal (n 5) vol 32 at 254-273.

59 *GG* of 4 Sep 1829 (Cape).

60 *Observations on some Parts of the Judicial System and Civil Establishment of the Colony of the Cape of Good Hope* KAB CO 372, cited by Fine (n 35) at 189-190.

I was able to accomplish it in nine weeks, only by continuing the sittings of the court, at the different towns, frequently till eleven and twelve o'clock at night, and some times till the morning of the following day, and by riding at the rate of between sixty and seventy miles a day, for several days successively, and, on one occasion riding eighty four miles, and, on another, one hundred and thirty miles in one day. I was sometimes under the necessity of causing the waggons, which conveyed the circuit clerk and my baggage, to travel all night in order that it might be able to reach the circuit town in proper time. During the nine weeks of my absence from home, I can safely say that, at a very moderate average, I was either on the bench or on horseback, for ten hours a day ... During the journey, I was often compelled to sleep in the waggon; and, except, while actually in the circuit towns, I was invariably obliged to lodge in the houses of the Boers, whose circumstances, accommodation and habits of life rendered my residence in their houses, during so long a period, very uncomfortable and irksome. From the experience I have acquired, during the last circuit, I feel myself warranted in stating that 'due regard to the health and proper comfort of the judge on circuit' requires that some alteration should be made on the present arrangements for holding the circuit courts.

These views were echoed by Judge Burton in his letter to Judge Menzies in which he related his experiences on the October/November circuit of 1829. The letter was written from Grahamstown in the first week of November 1829.<sup>61</sup> He begins by stating that he was late in arriving at Grahamstown because "the old Hartebeest" had been damaged in an accident and he had to wait for another wagon.<sup>62</sup> He found the hotel at Grahamstown "very clean and respectable". He continues to describe his experience of the circuit:

I have had a very arduous circuit; the travelling has been more disagreeable than before and the duty much heavier. In the Karroo I found it very cold; the rain which has fallen with so much advantage to this part of the country and which one therefore blesses whilst it pelts him most pitilessly, yet makes a journey through the Karroo very cold. I have travelled usually very early and have also gone into Court at seven in the morning, an arrangement which may be made at this time of the year altho' at no other and I think it suits the people who are in the habit of early rising, than keep them late at night ....

I have now reached my greatest distance from home but shall not consider the Circuit half performed until I leave Graham's Town next Monday morning. There is a delight in travelling homeward which perhaps made the Karroo more sufferable on my former journey than on this, but this circuit is a sad drawback upon one's happiness. To leave your wife almost alone for so long a time and yourself exposed to accident which might keep you apart for months is a hardship which ought to be summed up in our favour at the

61 The letter appears in FG Richings "The early South African circuits: An early letter" (1973) 90 *SALJ* 419-422 at 421-422.

62 "Hartebeest" was probably a pet name Judge Burton gave his own wagon. There is no mention of a coach, carriage or wagon with the general name "hartebeest" in H Van der Merwe *Die Tradisionele Wamakersbedryf in Suid-Afrika met Spesifieke Verwyssing na die Paarl* (MA, University of Stellenbosch, 1983) nor in J Malan *Rytyue van Weleer 'n Monografie van die Nasionale Kultuurhistoriese Museum* (Pretoria, 1981).

end of the case but which yet must not be expected to be at all thought of. I cannot believe that there is any colony where the Puisne Judges have so arduous a duty as the Circuit imposed upon them here and the remuneration if it end with the 1500 a year is wholly inadequate. But all this you know and feel as well as I and it is but malicious to remind you that you are yet to endure what I am enduring.

Like their American counterparts, the judges at the Cape found that their complaints elicited little sympathy. Fine suggests that the “Cape Governors were more concerned with the financial implications of the circuits and did not appear to be unduly concerned with the ‘health and proper comfort’ of the circuit judges”.<sup>63</sup>

In 1845 the Governor instituted a comprehensive inquiry into the judicial establishment. One of many issues set out in the terms of reference was “whether the circuit system was attended with beneficial consequences commensurate with its expenses, or whether it could be modified”.<sup>64</sup> The only improvement to come out of the inquiry, in so far as the circuits were concerned, was the abolition of the system of impressment for the transport of the circuit judges.<sup>65</sup> That the authorities were aware of the difficulties the judges experienced on circuit is apparent from a letter from Sir George Cathcart to Chief Justice Wylde in which the Governor states that he knows from experience “the unparalleled physical difficulties and inconveniences you have to encounter on these occasions, arising from the dangerous and sometimes almost impassable roads you have to traverse, and primitive means of conveyance, over a distance exceeding 1000 miles on each occasion”.<sup>66</sup> In 1859 there was extensive comment by Chief Justice Hodges and Judges Bell, Cloete and Watermeyer when the Colonial Secretary sought the opinion of the judges on the question of increasing the number of circuits from two a year to three a year.<sup>67</sup> The lack of improvement of conditions on circuit was again highlighted by the Chief Justice who said that during the 1863 circuit he had visited twenty-one circuit towns and had been absent from Cape Town for four months and seven days. He stated that the mental and bodily labour had been most severe, and that he was apprehensive about making a similar journey.<sup>68</sup>

There was to be an ironic twist to Judge Menzies’ remark that “‘due regard to the health and proper comfort of the judge on circuit’ requires that some alteration should be made on the present arrangements for holding the circuit courts”, and to Judge Burton’s remark in his letter to Judge Menzies that the latter was “yet to endure what I am enduring”. Many years later, in 1858, in his response to Sir George Grey’s plan to increase the number of circuits, Chief Justice Hodges said that the deaths of Judges

63 Fine (n 35) at 190.

64 *Report from the Committee of the Legislative Council on the Judicial Establishment 1845* (KAB CO 372).

65 Fine (n 35) at 191. The system was abolished by notice in the *GG* of 3 Jun 1847 (Cape).

66 *Cape of Good Hope Official Publications, 1854-1910* (Cape Town, 1854-1910) (hereafter *Official Publications*) A2-1854.

67 *Official Publications* (n 66) G45-1859.

68 Letter dated 8 Feb 1864 published in *Official Publications* (n 66) A4-1864.

Menzies<sup>69</sup> and Musgrave<sup>70</sup> had been hastened by their labours in the appalling conditions that then prevailed on circuit. Judge Menzies was already desperately ill when he left Cape Town in September 1850 to take up the circuit. He spent his last night in Cradock at the home of The Reverend Samuel Gray whose sister Lucy, in her comprehensive correspondence about her visit to the Cape, wrote that Judge Menzies was physically a broken man who had suffered agonies during the extended circuit. “He had to be carried from the carriage to his chair” she wrote, “and lifted on to the carriage again; and he is a man whose energy and determination will carry him through almost anything. His pride goes against assistance of any sort. He could scarcely articulate a word from shortness of breath, but pretended it is asthma. He may die any moment, yet intends to proceed with his journey tomorrow”.<sup>71</sup> The next day he left for Colesberg, where he died fifteen minutes after his arrival.

## 7 The hazards of travel

To put the complaints of the judges into perspective, regard should be had to the hazards of travel in the nineteenth century. Of travel in Europe during the early nineteenth century, Paul Johnson says that “[n]o figures are available for the total number of road accidents but they were probably more numerous, per person per hour spent travelling, than today”.<sup>72</sup>

On the circuits in the Cape there were accidents and mishaps aplenty. Judge Sampson said that “accidents by any cart in which I travelled were so frequent that I was regarded as the Jonah of the Circuit”.<sup>73</sup> Judge Cole, who described the roads as generally “bad and sometimes dangerous”, while on circuit as an advocate, was involved in an accident in which his cart capsized and he was dragged along bottom upwards for some distance by the frightened horses.<sup>74</sup> On the eastern circuit, Judge Sheil was seriously injured when on approaching the Umzimvubu River the horses bolted and his carriage overturned. He was taken to a nearby trader’s station on an improvised stretcher made from a broken door.<sup>75</sup> In 1865, in his evidence before a select committee appointed to consider and report upon the petition of the inhabitants of Calvinia for the establishment of a circuit court, Judge Cloete said that the road between Clanwilliam and Calvinia “is in an execrable state,

69 On the death of Judge Menzies, see C Graham Botha “The Honourable William Menzies 1795-1850” (1916) 33 *SALJ* 385-404 at 402-403.

70 The death of Judge Musgrave on 6 Oct 1854 as a result of fatigue and exposure during the course is dealt with in the *South African Commercial Advertiser* of 7 Oct 1854.

71 AF Hattersley *A Victorian Lady at the Cape* (Cape Town, 1950) at 52.

72 Paul Johnson *The Birth of the Modern World Society 1815-1830* (London, 1991) at 170.

73 Victor Sampson *My Reminiscences* (London, 1926) at 74.

74 AW Cole “Reminiscences of the Cape Bar and Cape Bench” (1888) 5 *Cape LJ* 1-12 at 7. He tells the story in greater detail in his *Reminiscences of my Life and of The Cape Bench and Bar* (Cape Town, 1896) (hereafter Cole *Reminiscences of my Life*) at 21-22.

75 George Randell *Bench and Bar of the Eastern Cape* (Grahamstown, *sd*) “History of the Eastern Cape Provincial Division” at 7; Sampson (n 73) at 73.

quite a disgrace to any civilized society", and added that "on one occasion the Chief Justice met with a serious accident, which nearly killed him".<sup>76</sup>

The roads in the Colony in the early nineteenth century were mere tracks carved by ox-wagons and horse-carts. Mountains and rivers presented formidable obstacles:<sup>77</sup> wagons often had to be unloaded, and sometimes taken to pieces and transferred to the backs of the oxen. The difficulties and dangers of crossing mountains are well illustrated by Mitchell's graphic sketch of Cradock Kloof (predecessor of the Montagu pass).<sup>78</sup> In 1843 when John Montagu initiated his ambitious road-building programme, the only pass in existence was Sir Lowry's pass, completed in 1836. Under Montagu's aegis,<sup>79</sup> the hard road across the Cape Flats was built (1845), and the following passes constructed: Houwhoek (1847), Mitchell's Pass (1848), Montagu Pass (1848), Bainskloof (1853), Pielenierskloof (Grey's Pass) (1858) and Meiringspoort (1858). Later in the century there followed the construction of, among many others, the famous Swartberg Pass (1888), with the result that there was a marked improvement in conditions of travel. But, as Burman points out,<sup>80</sup> "all these improvements had only speeded up transportation from the pace of the ox to the pace of the horse"; that is, from 2,5 miles per hour to 6 (or at best 10) miles per hour.

Before the coming of the railways, and even afterwards in areas not served by railway lines till the coming of the motor car, the principal modes of transport were ox-wagon, horse-cart and horseback. In the nineteenth century, advocates on circuit travelled in the rather basic Cape cart, which was then in common use.<sup>81</sup> During the second half of the century, various versions of the more sophisticated Phaeton "family", spiders, buggies, and surries, came into use.<sup>82</sup> Much of the transport of participants in the circuits was provided by Cape Malay contractors who were highly skilled horsemen.<sup>83</sup> In the last

76 *Official Publications* (n 66) A15-1865. Calvinia was granted its circuit court in 1869. In 1871 the inhabitants of Clanwilliam petitioned for the restoration of the circuit court at Clanwilliam, which had been removed in 1869 "without any sufficient cause or reason".

77 For a contemporary account, see Anon "Colonial roads, routes, and modes of travel. A sketch for home readers" in (Jan-Jun 1874) 8 *Cape Monthly Magazine* (New Series) 289-300.

78 In the William Fehr Collection, Rust and Vreugd, Cape Town. A copy of the sketch appears in Graham Ross *The Romance of Cape Mountain Passes* (Cape Town, 2002) at 65.

79 On Montagu's road building programme, see JJ Breitenbach *The Development of the Secretaryship to the Government at the Cape of Good Hope under John Montagu 1845-1852* in *Archives Year Book for South African History* vol 22(2) (Pretoria, 1959) 231-249.

80 Jose Burman *Early Railways at the Cape* (Cape Town, 1984) at 14.

81 On the Cape cart, see Malan (n 62) at 115.

82 On the Phaeton family of carriages, see Malan (n 62) at 104ff. Hattersley (n 71) at 52 refers to the improved comfort which the American spider afforded the judges on circuit.

83 Perceval Maitland Laurence *Collectanea. Essays, Addresses and Reviews* (Cape Town, 1899) "On circuit at the Cape" 290-304 at 294. James Rose Innes says that "we always engaged our carts from Hadjie Jatiem" who was "a good whip and a consummate horse master": *James Rose Innes Chief Justice of South Africa 1914-1927 Autobiography* with an introduction by BA Tindall (Cape Town, 1949) at 39. The contractors used the so-called "vastekapkar" or Malay cart which was drawn by four to six horses and which was frequently used for the conveyance of passengers with baggage. See Malan (n 62) at 117-118.

quarter of the nineteenth century the transport provided for judges had been considerably upgraded. Innes says that by 1878 a judge travelled in style: “[H]is equipage was provided by contract, and it never varies ... [a] heavy wagon for the luggage, provisions, and travelling requisites, and a tented spider and two riding horses for the judge.”<sup>84</sup>

The judge travelled in style ...



On circuit in the 1880s. The judge's coach at George  
(Collection: Cape Bar Library)

Despite the improvement of the roads and the upgrading of the means of transport, the reminiscences of participants in the circuits<sup>85</sup> are replete with stories about the hazards

84 Rose Innes (n 83) at 38-39.

85 The published reminiscences all date from the last quarter of the nineteenth century. Not one of the authors had first-hand experience of conditions on circuit before the improvement of the roads in the late 1840s and afterwards. A light-hearted account of life on circuit which pre-dates all published reminiscences appeared under the heading “Off on circuit” in (Jul-Dec 1870) 1 *Cape Monthly Magazine* (New Series) at 49-55, 372-378.

of travel: dusty roads,<sup>86</sup> hail- and snowstorms<sup>87</sup> and flooded rivers.<sup>88</sup> The delays caused by flooded rivers elicited the wry remark from Judge President Laurence, who was an accomplished Latinist,<sup>89</sup> that *judex expectat dum defluat amnis*.<sup>90</sup> They did not all wait for the waters to abate: Buchanan, whilst an advocate, once swam the swollen Gamka River to establish a link with the other bank;<sup>91</sup> as a judge he arrived at a circuit town with only the clothes he was wearing, having lost all his baggage in a flood. Chief Justice Hodges was once thought to have drowned, but arrived late having crossed a flooded river at a point below the regular crossing. There are no accounts of wild animals posing a serious threat, though Chief Justice De Villiers once saved his own life when, by alert and deft handling of a shot-gun, he killed a cobra on which he had stepped while shooting quail for breakfast on the road.<sup>92</sup>

An indication of the travelling time (Judge President Laurence once pointed out that distances at the Cape at the time were reckoned not by miles but by hours<sup>93</sup>) between various circuit court venues may be gleaned from the invitations to tender for the conveyance of inland mails which stipulated the required travelling time between towns – bearing in mind that the mails were expected to be conveyed at speed and delivered promptly. In the *Government Gazette* of 1 July 1842 in an invitation to tender, the following times are mentioned for the journey from Cape Town to George: Cape Town to Caledon, fourteen hours; Caledon to Swellendam, fourteen hours; Swellendam to George via Riversdale, twenty-six hours – that is, fifty-four hours for the full journey. Examples of other times mentioned are: Uitenhage to Graham's Town, fourteen hours; Beaufort (West) to Graaff-Reinet, twenty-four hours; Graaff-Reinet to Colesberg, twenty-four hours, and Graham's Town to Somerset, fourteen hours. In a *Memorandum Showing Time Occupied by Judges in Performing Western and Eastern Circuits* in 1866 and 1867, it is shown that the average duration of the western circuit was sixty-five days, and that in 1866 the so-called long circuit in the Eastern Districts lasted seventy-six days, which

86 Henry Juta *Reminiscences of the Western Circuit* (Cape Town, 1912) at 8 remembers carts “smothered in dust”.

87 Cole *Reminiscences of my Life* (n 74) at 38, 47-51. Juta (n 86) at 166 recalls a harrowing journey across the Swartberg Pass in a heavy snowstorm.

88 Cole Reminiscences of my Life (n 74) at 22, 47-51; John Kotze Biographical Memoirs and Reminiscences vol 1 (Cape Town, 1934) at 180-181. As a result of flooded rivers, it once took Bishop Gray, accompanied by his indomitable wife Sophie, thirteen hours to complete the sixty-five kilometre journey from Belvidere (near Knysna) to George: Thelma Gutsche *The Bishop's Lady* (Cape Town, 1970) at 104-105.

89 As a student he obtained a first in the Classical Tripos at Cambridge.

90 (n 83) at 293.

91 Kotze (n 88) at 180-181.

92 *Idem* at 179.

93 Perceval M Laurence *On Circuit in Kafirland and other Sketches and Studies* (London, 1903) “On circuit in Kafirland” at 2-3. In his evidence before the select committee appointed to consider and report on the petition of the inhabitants of Fort Beaufort for the establishment of a circuit court, a witness in answer to a question as to the distance from Murraysburg to Graaff-Reinet said “Ten hours”. He described the distance from Colesburg to Middelburg as “about ten hours”, and the distance from Middelburg to Graaff-Reinet as “twelve hours” (*Official Publications* (n 66) A3-1870).

was reduced to fifty-eight in 1867.<sup>94</sup> The area of jurisdiction of the Eastern Districts Court was in 1882 extended to include the Transkeian Territories and Griqualand East.<sup>95</sup>

In an effort to improve conditions on circuit, Sir George Grey in 1858 decided to increase the number of circuits to three per year. He requested the Colonial Secretary to obtain the views of the judges, but set about implementing the plan even before the judges had submitted their opinions.<sup>96</sup> The judges, Hodges (Chief Justice), Bell, Cloete and Watermeyer were opposed to the introduction of a third circuit. The plan was shelved in 1860.<sup>97</sup> The problem of additional circuits was resolved by the establishment of a separate Court in the Eastern Districts at Grahamstown. In terms of section 37 of the Act<sup>98</sup> which established this new Court, simultaneous circuits could be held in both the Western and Eastern provinces. The first such separate circuits were proclaimed in the *Government Gazettes* of 7 February 1865 (western circuit) and 10 February 1865 (eastern circuit). The establishment of a western and an eastern circuit extended the sittings of circuit courts to many more country towns than before. It does not, however, seem to have resolved the judges' problem of lengthy absences from home, long distances and hazardous travel. For example, the western circuit of the first half of 1865 commenced at Caledon on 15 March, and ended, after visits to eleven other towns, at Malmesbury on 6 May 1865.<sup>99</sup> The eastern circuit of the first half of 1865 commenced at Grahamstown on 1 March and ended, after visits to twelve other towns, at Somerset on 28 April.<sup>100</sup> Many of the problems relating to travel and accommodation were, at least in part, resolved by the coming of the railways (not all circuit towns were served by the railway). Building of railways started in earnest at the Cape in 1862, and by 1892 railway links from Cape Town, Port Elizabeth and East London with Bloemfontein and the Transvaal had been established.<sup>101</sup> The railways made a dramatic difference to the speed of travel and of postal communication. The journey between Beaufort West and Cape Town was reduced to a little over ten hours.<sup>102</sup> By way of contrast, in 1880 Innes' journey to Pretoria to take up a junior brief with Cole took ten days in all, even though he was able to travel by train from Cape Town to Beaufort West.<sup>103</sup> And when Chief Justice Kotzé brought

94 *Official Publications* (n 66) A8-1867.

95 Randell (n 75) "Requiem for the Transkei Circuit" at 108.

96 *GG* of 31 Dec 1858 (Cape).

97 The whole process is considered in detail by Fine (n 35) at 194-202.

98 Act 21 of 1864 (Cape).

99 GN 42 *GG* of 7 Feb 1865 (Cape); GN 72 *GG* of 7 Mar 1865 (Cape).

100 GN 47 *GG* of 10 Feb 1865 (Cape).

101 See, generally, Burman (n 80); and DH Heydenrych *Die Geskiedenis van die Spoorweë in die Kaapkolonie tot 1885* (MA, Stellenbosch University, 1965).

102 Burman (n 80) at 61.

103 Innes (n 83) at 47.

his family to Pretoria in 1878, the journey from Grahamstown in a “comfortable spring-wagon” took a leisurely twenty-two days.<sup>104</sup> The improvement in postal communication is illustrated by the correspondence after the Jameson raid between Chief Justices Kotzé in Pretoria, and De Villiers in Cape Town. On 30 May 1896 Judge De Villiers responded to a letter from Judge Kotzé written four days earlier, on 26 May 1896.<sup>105</sup>

Travel by rail was not only faster but also much more comfortable. Special railway carriages were made available to judges and their entourage on circuit, which included a chef for the preparation of meals in the special kitchen in the carriage. Such carriages were in use until at least the late 1980s. This was a significant improvement on the accommodation the judges sometimes had to endure.

## 8 Accommodation

Accommodation on circuit varied from satisfactory to very bad.<sup>106</sup> Judge Sampson found many of the hotels “unspeakable”, but much improved in later years.<sup>107</sup> The Government later resorted to hiring lodgings for the circuit judge at each of the various venues of the circuit. In the *Government Gazette* of 12 January 1854 tenders are called for the supply of lodgings for the circuit judge at the “next circuit”, tenders to be submitted to the Resident Magistrate of the districts concerned. The requirements were rather modest: a furnished sitting room and two bedrooms, one servant’s room, kitchen and pantry, with cooking utensils, table linen, crockery and cutlery. Fifty years later, in an advertisement dating from 1902,<sup>108</sup> it appears that the requirements for the lodgings for judges had been considerably upgraded: what was now required was a large and well furnished dwelling house, suitable for the judge and his party which would include his registrar, valet, coachman and stable keeper, cook, butler and housekeeper. The advertisement also called for the supply of provisions: meat, vegetables, fruit, bread, milk, table wines and spirits. As indicated above, with the coming of the railways, accommodation for judges on circuit was provided in special luxury coaches.

104 Kotze (n 88) at 432-435.

105 EA Walker *Lord De Villers and his Times. South Africa 1841-1914* (London, 1924) at 273.

106 Cole *Reminiscences of my Life* (n 74) at 22.

107 Sampson (n 73) at 82. Juta (n 86) at 150 commends Rankin’s at the entrance to the Meiringspoort, and Ben’s at George. As early as 1829, Judge Burton, as we have seen, expressed his satisfaction with the hotel at Grahamstown.

108 See Randell (n 75) at 111. See, also, Hattersley (n 49) at 125 for advertisements for lodgings in George.

Accommodation at Knysna ...



Western circuit – Knysna – ca 1895

Back: H Jones, JP F Watermeyer, CH Tredgold

Front: MW Searle, W Stoney, H MacLachlan

(Collection: Cape Bar Library)

## 9 The court venues

The courts in many of the smaller towns were wholly inadequate. Library facilities were non-existent. For the sittings of the western circuit at Worcester in 1829, only a hay loft was available.<sup>109</sup> In his letter in response to the Colonial Secretary's request for comment on Sir George Grey's proposal in 1858 to increase the number of circuits, Chief Justice Hodges referred to the "inconvenient and crowded courts" where the temperatures sometimes reached "above 100 degrees<sup>110</sup> in the shade", and stated that the health of the strongest man would give way "under such labours and their accompanying anxieties".<sup>111</sup> Many years later, Judge Sampson who joined the Bar in 1881, found that "many of the courts in which we had to practise were wretched places, with little or no

109 Hattersley (n 49) at 125.

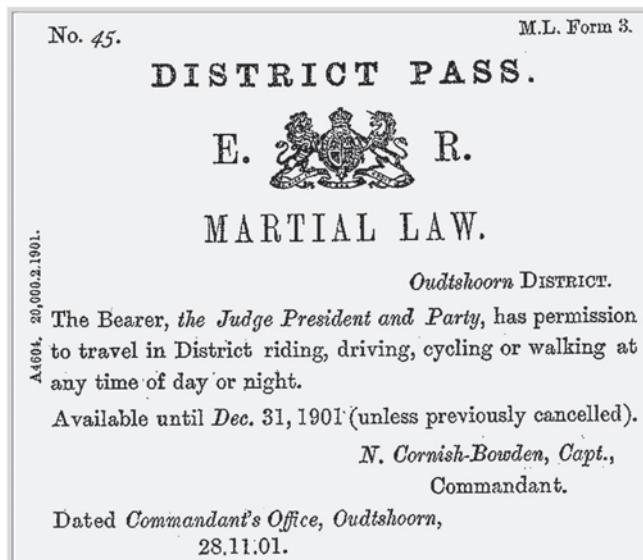
110 That is degrees fahrenheit, about 38 degrees centigrade.

111 Letter dated 12 Jan 1859: *Official Publications* (n 66) G45-59.

accommodation and a stifling atmosphere".<sup>112</sup> Even at the seat of the Eastern Districts Court in Grahamstown, the court was housed in the Commercial Hall, built in 1837, a building far from suitable for use as a court. It was replaced by a proper building only after 1911.<sup>113</sup>

## 10 Martial law

The Anglo-Boer War of 1899–1902 brought, if not further hazards, at least further inconvenience and irritation to judges on circuit. As a result of support for the Boer cause in many country towns and incursions into the Colony by Boer forces,<sup>114</sup> martial law was declared in several country districts.<sup>115</sup> Communications were disrupted but the circuits were not interrupted or suspended.<sup>116</sup> On the second circuit of 1901 Judge President Laurence and his party travelled under military protection from Mossel Bay via George and the Montagu Pass to Oudtshoorn where the circuit was held.<sup>117</sup> There is no record of judges on circuit being endangered by military action, but for travelling to circuit towns they were obliged to obtain passes from the military authorities.<sup>118</sup>



112 Sampson (n 73) at 82. The court houses in Natal were as bad; see P Spiller *A History of the District and Supreme Court of Natal 1846-1910* (Durban, 1986) at 13-15.

113 Randell (n 75) at 2-4.

114 Perhaps the best known incursion is that led by General JC Smuts – the story is told by Deneys Reitz in his classic *Commando A Boer Journal of the Boer War* (London, 1929).

115 In the *Government Gazettes* of 4 and 8 Jan 1901 martial law was extended to the districts of Fraserburg, Worcester, Sutherland, Prince Albert, Ceres, Calvinia, Clanwilliam, Piquetberg, Malmesbury, Tulbagh, Paarl and Stellenbosch.

116 Laurence (n 93) at 2-3 describes the interruption of communications.

117 *Idem* at 29-40: "How we went circuit in 'a sort of war'".

118 For a copy of such a pass, see Laurence (n 93) at 38.

## 11 Language, jurors and interpreters

At the opening of the first criminal sessions in Cape Town on 15 May 1828 Chief Justice Wylde announced that the judges had decided that jurors would need to have a sufficient understanding of English to enable them to follow the proceedings without the aid of an interpreter. As has been pointed out above, Judge Menzies on the western circuit at Worcester followed suit and rejected a number of persons who had been summoned as jurors on the ground that they were not sufficiently proficient in English. As there were not a sufficient number of jurors available with a sufficient knowledge of English to constitute a jury, he ordered the case to be removed to Cape Town for trial.

Judges Burton and Kekewich disagreed with the Chief Justice and Judge Menzies on this matter. A lengthy dispute ensued.<sup>119</sup> Eventually the Secretary for Colonies became involved and in 1834 the issue was resolved by the Second Charter of Justice, which provided in section 34 that no person otherwise competent to serve on a jury would be disqualified by reason of his ignorance of the English language.

Because some jurors and the majority of witnesses in the country towns were not proficient in English it was necessary to use interpreters. On occasion, especially in the Eastern Cape, double interpretation was required: one interpreter would translate from isiXhosa to English, and a second from English to Dutch.<sup>120</sup> Though there undoubtedly were competent interpreters,<sup>121</sup> complaints about the inefficiency of interpreters were common throughout the period covered by this study. In his letter of 1 November 1829 to his brother Menzies, Judge Burton fulminated over the low standard of the interpreters in his courts.<sup>122</sup> Eighty years later Sir Henry Juta, to bolster examples derived from his own experience, included in his *Reminiscences*<sup>123</sup> CJ Langenhoven's amusing "Die tweetalige vennis" which was written in 1906<sup>124</sup> – for the benefit of readers without Dutch, Sir Henry translates the interpreter's version back into English. In the published reminiscences of

119 The details of the dispute are considered by Fine (n 35) at 81-86. The erroneous view propounded by F St L Searle "Honourable Sir WW Burton" (1935) 52 *SALJ* 257-262 at 259, that Judges Burton and Menzies believed that a person who did not understand English was not qualified to sit as a juror, while Chief Justice Wylde and Judge Kekewich believed the opposite, is followed by Stephen D Girvin, both in his PhD thesis (*The Influence of a British Legal Education and Practice at the Bar on the Judges appointed to the Supreme Courts of Southern Africa, 1827-1910* (University of Aberdeen, 1990) at 164) and in his article "The establishment of the Supreme Court of the Cape of Good Hope and its history under the Chief Justiceship of Sir John Wylde" (1992) 109 *SALJ* 652-665 at 653. Ellison Kahn in turn follows Girvin in "Restore the jury? Or reform? Reform? Aren't things bad enough already" (1991) 108 *SALJ* 672-687 at 681. It was in fact, as Fine points out, Chief Justice Wylde and Judge Menzies who contended that knowledge of English was essential, while Judges Burton and Kekewich considered that it was not. Fine's view is shared by Hattersley (n 49) at 124-125.

120 Cole *Reminiscences of my Life* (n 74) at 101.

121 *Idem* at 8 (and see 102) describes JCB Serrurier, who was an interpreter in the Supreme Court in Cape Town, as "excellent". The virtues of the Rev DP Faure, who was a circuit interpreter from 1872 to 1880, are extolled by Innes (n 83) at 44.

122 In his letter of 1 Nov 1829 to Judge Menzies (see n 61 *supra*). Judge Burton found that while some interpreters were able to convey the judge's charge to the jury, they were quite incompetent when it came to the examination of witnesses.

123 Juta (n 86) at 113-130.

124 See JC Kannemeyer *Langenhoven. n Lewe* (Kaapstad, 1995) at 210, 225.

participants in the circuits, many stories are told about the *faux pas* of interpreters – some of the stories are amusing, others raise questions about the quality of justice achieved in the circumstances. Many of the interpreters (despite what Judge Burton said in this regard) had difficulty in properly conveying the judge's charge to the jury – Judge Cloete on one occasion, having addressed the jury at length in English, proceeded himself to translate into Dutch what he had just said.<sup>125</sup>

After 1827, trial by jury in a higher court became an integral part of the legal landscape, not only at the seat of the Supreme Court in Cape Town but also on circuit in the country towns. The inhabitants of the countryside, both English and Dutch colonists, willingly if not enthusiastically complied with the demands of jury service. In a note on trial by jury in the *Cape Law Journal* of 1885,<sup>126</sup> it is stated that “[i]n spite of enormous inconvenience to which they are put the jurors who are summoned feel a certain amount of pride at being called upon to assist in the administration of justice, and regard themselves as, to a great extent, responsible for its proper conduct”.<sup>127</sup> Local communities were keen to have the circuit court visit their towns, and through the years there were a number of petitions from townspeople pleading for such visits; from, for example, Graaff-Reinet<sup>128</sup> and Fort Beaufort<sup>129</sup> and the competing petitions from Clanwilliam and Calvinia referred to above.<sup>130</sup>

Judges Menzies and Kekewich reported favourably on the juries at Worcester, Swellendam and George during the first circuit in 1828. Judge Burton was less impressed with the jury at Graaff-Reinet, which he found “utterly incompetent” and caused to be replaced by a second panel which he found “most intelligent”.<sup>131</sup> Judge President Laurence says that the country juryman “tries to be fair” and if judiciously led, “generally succeeds in the attempt”. There were sometimes “rather eccentric verdicts”, but “really perverse verdicts are quite exceptional”.<sup>132</sup>

However, Judge President Laurence puts his finger on one troublesome feature of the system when he states that “diversities of race and colour of course complicate the situation”.<sup>133</sup> This is a factor not unique to the Cape. To this day the racial element may be an important factor in jury selection in the United States of America. Within the context of prevailing attitudes at the Cape, the problem was twofold: (i) jurors were mainly, but not exclusively, white; and (ii) in certain situations racial prejudices influenced decisions.

As to the first, after the establishment of the eastern circuit, African headmen were for a time appointed as jurors.<sup>134</sup> A white juror who refused to sit with them was severely

125 Cole *Reminiscences of my Life* (n 74) at 102.

126 Anon “Trial by jury” (1885) 2 *Cape LJ* 121-124 at 124.

127 Juta (n 86) at 80 supports this view.

128 *Official Publications* (n 66) C15-1859.

129 *Idem* A3-1870.

130 See n 76 *supra*.

131 Judge Burton in his letter of 1 Nov 1829 to Judge Menzies (n 61 *supra*).

132 Laurence (n 83) at 300-301; Juta (n 86) at 80 has similar views about the juries that “do their work very well on the whole”.

133 Laurence (n 83) at 301.

134 Kahn (n 119) at 687 points out that “after a couple of circuits blacks ceased to be on the panel of jurors”.

reprimanded by Judge President Barry who ordered him, “in great rage”, to take his place or risk being committed for contempt of court.<sup>135</sup> In an address to the Grand Jury at the opening of the criminal sessions on 7 November 1879, Chief Justice De Villiers said that he remembered “the intense excitement caused in one or two outlying districts by the report that some coloured men were to sit upon the jury. I have since that time presided at trials in remote country districts, where white farmers have, without a word of remonstrance, been called out with coloured men”.<sup>136</sup>

The second problem, to the chagrin of the judges, usually raised its head when the accused was white. For example, in 1877 Kotzé prosecuted before Chief Justice De Villiers on the eastern circuit in a case in which a white man was accused of the murder of a young boy in his employ. In the face of overwhelming evidence, the jury returned a verdict of not guilty. Turning towards the jury, the Judge said: “Gentlemen, I hope you are able to reconcile your verdict with your consciences.” He then caused a fresh jury to be empanelled for the next case.<sup>137</sup> A few years later, in his address to the Grand Jury on 7 November 1879, he said that there should be a refusal “to pander to the worst prejudices of the more ignorant portion of the white population”.<sup>138</sup>

In 1879 the verdict of the jury in the so-called Koegas murders triggered a *cause célèbre*: the defamation suit brought by the Attorney General, Upington, against Saul Solomon and FJ Dormer, respectively owner and editor of the *Cape Argus*. During the Koranna and northern border war of 1878 on the Orange River, two men, Bergman and Hennink, were charged with shooting male prisoners they were escorting, and, in what became known as the Koegas murders, three others, Smith, Duraan and Zoutaar, were charged with shooting five women and a little boy whom they had been ordered to convey from the area of hostilities to Victoria West. Both cases were set down for hearing in Victoria West before Judge Dwyer. Looking back, and with the benefit of hindsight, it would seem that setting down the cases for hearing at Victoria West was an error of judgment since an impartial trial was hardly possible there, if for no other reason, as Teresa Strauss points out, “than that a great number of men of that district, or their relatives or friends had actively participated in the northern border war”.<sup>139</sup>

The case of Bergman and Hennik was heard first. The jury acquitted the accused, “amid the cheers of a crowded court”.<sup>140</sup> The prosecutor, Jones, suggested to Upington, the attorney general, that the second case be transferred to another venue “on the ground that party feeling in favour of the prisoners in the Koegas affair appears to be so high that it will be impossible to obtain an impartial trial in that case”.<sup>141</sup> The attorney general

135 Sampson (n 73) at 72-73.

136 Cited by Walker (n 105) at 142. The liberal attitude of the judges does not seem to have prevailed: jury membership in due course became the almost exclusive preserve of white males. On the history and function of the jury in South Africa, see Kahn (n 119) at 679-687, and in (1992) 109 *SALJ* 87-111.

137 Kotze (n 88) at 206-207.

138 Cited by Walker (n 105) at 142.

139 Teresa Strauss *The War Along the Orange. The Korana and the Northern Border Wars of 1868-9 and 1878-9* (Cape Town, 1979) at 109.

140 Innes (n 83) at 41.

141 Text of the telegram from Jones to Upington, cited by De Villiers CJ in his judgment in *Upington v Solomon & Co; Upington v Dormer* (1879) 9 Buch 240 at 279.

declined to act upon the suggestion and the second case proceeded. The evidence against the accused was not as strong as in the first case, and was further marred by Dwyer J's strange ruling that neither a verdict of murder nor one of culpable homicide was possible in the absence of clear proof of death by the identification of the remains. The shooting had taken place a year before and no such evidence was produced. As a result only Zoutaar was convicted of assault with intent to do grievous bodily harm and sentenced to five years imprisonment; the other two were acquitted.

The Reverend DP Faure, the interpreter, wrote a scathing letter under the signature "Fiat justitia" to the *Cape Argus*. The editor, Dormer, "who wielded a powerful pen in the style rather of the bludgeon than the rapier",<sup>142</sup> followed this up with two editorials in which he charged the attorney general with conniving at a failure of justice for political ends (at the time the attorney general was also the Minister of Justice in the Cabinet) and called upon him to rebut the charge, or resign his office. Upington's actions for defamation followed. At the trial it was recognised that the editorials were grossly defamatory, and the only issue was whether they were fair comment on the facts. De Villiers CJ, Stockenström J concurring, held that the second editorial exceeded the limits of fair comment and gave judgment for the plaintiff in both actions. In view of all the circumstances, and to mark the Court's disapproval of the institution of two actions where one would have sufficed, the damages were nominal: one shilling against Saul Solomon with no order as to costs, and £5 with costs against Dormer.<sup>143</sup> It was, as Innes points out,<sup>144</sup> rather a Pyrrhic victory for Upington, for the court held that his failure to act upon the suggestion of the prosecuting barrister had been a grave error of judgment.

Except as part of the background, the Court was not concerned with the acquittal of Bergman and Hennink; in issue at the trial was the conduct of Upington and Dormer's fiery editorials. However, the case had wider significance: below the surface divisions simmered in Cape colonial society. The participation of the Korana in the 1878 war on the northern border was the last stance by a by now desperate people who had for many years been a thorn in the flesh of the colonists on the north-west border of the Colony.<sup>145</sup> During the nineteenth century, three major colonial expeditions were mounted against the Korana who occupied the small islands in the Orange River between Upington and the Augrabies falls.<sup>146</sup> Atrocities had been committed on all sides during the lengthy confrontation, the resulting hardening of attitudes toward the Korana being fed by racist prejudices on the part of colonial officials, colonists and other groups such as the Bastaards<sup>147</sup> who all "looked upon the Korana as an uncivilized, morally degenerate

142 Innes (n 83) at 42.

143 *Upington v Solomon & Co; Upington v Dormer* (n 141).

144 Innes (n 83) at 43.

145 Nigel Penn *The Forgotten Frontier. Colonist and Khoisan on the Cape's Northern Frontier in the 18th Century* (Cape Town, 2005) at 286.

146 Robert Ross "The !Kora wars on the Orange River, 1830-1880" (1975) 26(4) *J of African History* 561-576; Strauss (n 139) *passim*.

147 The word "Bastaard" was used to refer to those born of miscegenous relationships. In the Cape colonial context there were three major instances of miscegenation: whites with slaves; whites with Khoikoi, and slaves with Khoikoi – the offspring of the latter were known as "Bastaard-Hottentots". During the eighteenth century both "Bastaard" and "Bastaard-Hottentots" suffered increasing discrimination. Many of them left the colony and settled on the northern border on the Orange River where they were to play an important part in later years. See Penn (n 145) at 20-21.

and lazy people with an innate desire to steal cattle".<sup>148</sup> During the 1878 uprising, the Korana re-occupied the islands in the river, and stole the Bastaards' cattle. They were dislodged with great difficulty from unfavourable terrain. In this context of bitter warfare the prisoners were taken and the murders committed.

At the defamation trial the views represented by Saul Solomon were ranged against the attitudes and prejudices of the colonists. After the death of Solomon it was said in an obituary in the *Cape Times* that he "will be known to posterity as the greatest champion of native rights this country has ever seen".<sup>149</sup> The Court, De Villiers CJ and Stockentröm J, came out very strongly against underlying prejudices. De Villiers CJ (whose main judgement found support in a strong concurring judgment by Stockentröm J) said:

[W]e are fully justified in assuming that 'Fiat Justitia', who wrote under a strong sense of individual and public duty,[<sup>150</sup>] said nought but what was literally and absolutely correct. It amounts then to this, that the pure streams of justice have been polluted at their fount, and the question we have now to ask is whether the country is content to drink longer of these unwholesome waters.<sup>151</sup>

The Court had no hesitation in holding that the attorney general (and Minister of Justice) had committed a grave error of judgement. The Court further dissented from Dwyer J's ruling regarding the *corpus delicti*, and censured Dwyer J for writing an "inappropriate" letter to Saul Solomon.<sup>152</sup> The Court also expressed strong views about the undesirability of the attorney general holding political office.

In the final result, the judges firmly reaffirmed the principle entrenched since the first circuit courts established by Caledon in 1811, that "justice will and shall be done against those guilty of any cruelty to the black man".<sup>153</sup>

148 Strauss (n 139) at v. This view was shared by Theal (n 5) vol 4 at 31-32 who referred to the Korana as "ragamuffin vagabonds who refused to submit to the restraints of law and order and set the colonial government at defiance".

149 Cited by WEG Solomon *Saul Solomon. The Member for Cape Town* (Cape Town, 1948) at 331.

150 Despite praise for his action from Chief Justice De Villiers, the Rev Faure was deprived of his post, and of his livelihood, on the ground that as a civil servant he had not been entitled to write his letter. Innes (n 83) at 44 said that Faure emerged from his ordeal, "crippled in means but with flying colours".

151 *Upington v Solomon & Co; Upington v Dormer* (n 141) at 279.

152 Correspondence ensued between the colonial secretary and Judge Dwyer concerning allegations that in writing the letter, the judge had acted improperly and thereby disqualified himself from the discharge of the duties of his high office. In the end, no further action was taken but Judge Dwyer was severely censured by the colonial secretary who expressed the hope in a letter to him "that you will be more guarded in future" (Correspondence between the Honourable the Colonial Secretary and the Honourable Mr Justice Dwyer relative to a letter dated Oct 1879, addressed to Mr Saul Solomon in *Official Publications* (n 66) A5-1880).

153 *Upington v Solomon & Co; Upington v Dormer* (n 141) at 270.

## 12 Work

The work on circuit was relentless. The courts often sat very long hours – from early in the morning till late at night by the flickering light of candles.<sup>154</sup>

Fine has compiled tables depicting the number of criminal and civil cases tried in the Supreme Court at Cape Town and in the circuit courts during the period 1854 to 1863.

The figures for criminal cases tried on circuit are as follows:<sup>155</sup>

1854 – 307; 1855 – 242; 1856 – 230; 1857 – 306; 1858 – 398; 1859 – 729; 1860 – 466; 1861 – 406; 1862 – 344; 1863 – 512. By way of contrast, the number of criminal cases tried in Cape Town varied from forty-three in 1854 to sixty-six in 1863, with an average of about fifty cases per year.

The figures for civil cases tried on circuit are as follows:<sup>156</sup>

1854 – 443; 1855 – 578; 1856 – 521; 1857 – 280; 1858 – 258; 1859 – 348; 1860 – 324; 1861 – 287; 1862 – 485; 1863 – 573. The number of civil cases tried in Cape Town varied from 382 in 1854 to 1 286 in 1863, with an average of about 570 cases per year.

The same pattern emerges from returns of cases heard after the establishment in 1864 of the Eastern Districts Court. In a *Return of Cases Brought before the Supreme and Eastern District Court and the Several Circuit Courts* during 1867,<sup>157</sup> the registrar of the Supreme Court reported that during that year 388 civil cases and ninety-two criminal cases were tried in the Supreme Court, while in the circuit courts sixty-two civil cases and 386 criminal cases were tried. In a comprehensive *Comparative Return*<sup>158</sup> of the number of cases heard in the Supreme Court, the Eastern Districts Court and the western and eastern circuit courts during the years 1870 to 1872, the registrar of the Eastern Districts Court appended a table of all the cases, civil and criminal, tried in the circuit courts of the Eastern Districts between 1 June 1865 and 31 December 1872: a total number of 941 civil cases and a total number of 1 743 criminal cases. A *Return of Number of Cases Disposed of by the Higher Courts During the Last Three Years* (ie 1891, 1892, 1893)<sup>159</sup> shows that during the three years in question, criminal trials in the western circuit courts numbered 361, in the eastern circuit courts 1 573 and in the northern circuit courts 416. Defended civil trials numbered twenty-one in the western circuit courts, thirty in the eastern circuit courts and twenty-four in the northern circuit courts. In addition to the pressure of work to be done during the weeks on circuit, the judges had to deal with a massive load of work at the seats of the different courts: during the period 1891 to 1893, in the Supreme Court, Eastern Districts Court and the Griqualand High Court there was a total number of 478 defended civil trials, 413 undefended civil causes, 566 provisional

154 See Menzies' letter cited *supra* in the text to n 60; Sampson (n 73) at 65; Randell (n 75) at 6. Burton J preferred to start at 7 o'clock in the morning (in his letter referred to in n 61 *supra*).

155 Fine (n 35) app 6 at 221.

156 *Idem* app 7 at 222.

157 *Official Publications* (n 66) A15-1867.

158 *Idem* C2-1873.

159 *Idem* C1-1894.

cases, 3 965 motions, 181 appeals and no less than 9 868 reviews of criminal cases tried in the magistrates' courts.

The number of cases is indicative of the unremitting hard work done on circuit. The large number of civil cases tried on circuit is no doubt also indicative of a society that trusted its courts for the fair resolution of disputes.

Though much of the work, both criminal and civil, was routine, it is evident from cases that went on appeal to the Supreme Court in Cape Town that complex civil disputes were from time to time aired in the circuit courts. For example, a boundary dispute which involved the interpretation of an Ordinance, between the Divisional Councils of Port Elizabeth and Uitenhage was tried by Judge Fitzpatrick in Uitenhage on 28 October 1867. The dispute had major financial implications and a subsequent appeal against Fitzpatrick J's judgment was upheld.<sup>160</sup> At one stage, the circuit at George was inundated with boundary disputes between individual landowners, the disputes arising from bad surveying.<sup>161</sup>

In an arid country, water is a precious commodity. From the earliest days of colonial settlement at the Cape, there were frequent disputes about water rights.<sup>162</sup> Innes remembers a circuit at Oudtshoorn, a rich agricultural district, when the contested civil cases (all about servitudes and water rights) outnumbered those at Cape Town during the preceding term.<sup>163</sup> Principles underlying the then nascent water law of South Africa were often first enunciated in judgments given on circuit. Thus the principles governing the fundamental distinction between private water and public streams, which underlay the whole of South African water law until the repeal of the Water Act 54 of 1956 by the National Water Act 36 of 1998, derive from two leading cases originally decided on circuit; viz *Vermaak v Palmer*,<sup>164</sup> which was heard by Judge Smith at Uitenhage on 4 May 1875 (the judgment was handed down in Grahamstown on 31 August 1875),<sup>165</sup> and *Van Heerden v Wiese*,<sup>166</sup> which was decided by Judge Dwyer at Victoria West on 8 April 1880.<sup>167</sup> In both cases, an appeal against the circuit judge's decision was dismissed.

160 The judgment on appeal is reported as *Divisional Council, Port Elizabeth v Divisional Council, Uitenhage* (1868) 1 Buch 40.

161 Juta (n 86) at 157.

162 See CG Hall *The Origins and Development of Water Rights in South Africa* (LLD, Stellenbosch University 1935).

163 Innes (n 83) at 40.

164 (1876) 6 Buch 25. CG Hall assisted by AP Burger *Water Rights in South Africa* (Cape Town, 1974) at 47 says that the doctrine laid down in *Vermaak v Palmer* "has become an established principle of our law".

165 The judgment of Smith J is reported (at 28-31) along with the judgment given on appeal by de Villiers CJ.

166 (1880-1884) 1 Buch AC 5 of this case, Hall (n 164) at 21 says that the "clear statement of the common law has been generally accepted and it has never been departed from in the courts, nor altered by legislation".

167 Other decisions on the use of private water were *Nel v Potgieter* (1881) 1 Buch AC 22 in which a decision by De Villiers CJ given on circuit at Oudtshoorn was upheld on appeal, and *Erasmus v De Wet* (1867) 4 Buch 204 which was heard at Robertson in 1866 by Watermeyer J (there was no appeal against this judgment).

### 13 ... and play

Innes laments the loss, with the coming of the railways, of some of the “distinctive features” of the western circuit in particular: no longer were there saddled horses on the road, nor a procession of carts trailing along the country roads. And, above all, “those who remember the western circuit in its palmy days will always cherish the recollection of travel on the open road, of the conviviality and the fun, of the *noctes ambrosianae* when the work was done, and of the close companionship which knit us together”.<sup>168</sup>

“The free life in the open, the cheerful meals by the roadside, the clashing of wits ...”

(Juta *Reminiscences* (n 86) at 7)



Western circuit – on the road to Knysna – ca 1894

CC Cunrey, JA Joubert, JPF Watermeyer, MW Searle, JF Rubie, H Jones,  
 CH Tredgold, TL Graham  
 (Collection: Cape Bar Library)

168 Innes (n 83) at 46. Juta (n 86) at 7 fondly remembers the early circuits as events “full of pleasant anticipation”. The conviviality and companionship on circuit is also apparent from “Off on circuit” (n 85) at 49-55, 372-378.

The circuits afforded the members of the Bar, in the words of Innes, “an invaluable experience of corporate social life”.<sup>169</sup> It was not only a matter of jovial conviviality: in 1878 rules were adopted which for many years, deep into the twentieth century, governed arrangements and professional conduct on circuit. In this way, the circuits played an important role in forging the unity and the strength of the Bar as a profession.

The Bar on circuit ...



Western circuit, 1886

Back: W Syfret, Tom Graham, H Cloete, AW Searle, Ewald Esselen

Front: HH Juta, Unknown, JPF Watermeyer, JA Joubert

(Collection: Cape Bar Library)

The coming of the circuit court to a country town was an important event, looked forward to eagerly by the townspeople.<sup>170</sup> The social whirl at a circuit town was in 1870 described as follows in the *Cape Monthly Magazine*:<sup>171</sup>

169 Innes (n 83) at 38.

170 “Off on circuit” (n 85) at 49-50, 54.

171 *Ibid.*

After a good day's work comes a good night's fun. A dinner, a game of whist, a dance, association with the beauty and good-fellowship of our country friends, renovate one for the next day's work. And heartiness of Circuit amusement is the essence of its enjoyment. You feel your welcome is warm and meant: and you would be a great goose, indeed, not to reciprocate such genuine kindness by making yourself thoroughly at home, enjoying yourself accordingly.

At some venues there were sporting events: shooting, racing and cricket. An important event in the social calendar was the judge's dinner to which members of the Bar and local dignitaries were invited.

The authors of reminiscences are unanimous in their praise of the hospitality of the farmers along the way from whom the judges and counsel on circuit were sometimes obliged to seek overnight accommodation.

The social activity and social contacts and interaction on circuit should not be underestimated as a major contributing factor to the integration of the courts and the administration of justice into the social fabric and social conscience of the outlying communities.

## 14 Conclusions

The circuit courts established in 1811 constitute an important precursor to the Charters of Justice of 1827 and 1832 by which the fundamental features characteristic of proceedings at common law were introduced at the Cape. They also paved the way for the circuit courts established in 1827 under the First Charter of Justice, the predecessors of the circuit courts which to this day form part of the legal landscape in South Africa.

The adoption of a common-law mode of trial altered the judicial style at the Cape.<sup>172</sup> The role and status of both judge and legal representative underwent fundamental change. The judge assumed the passive role characteristic of the common law in contrast to the active participation in the proceedings of the judge in the civil-law model.<sup>173</sup> In the common-law model, the legal representative assumes the active role: he (during the period under review it was never a she) seeks out possible witnesses, interviews them, decides which witnesses are to be called, examines the witnesses in court and cross-examines the witnesses called by the opposing party. One of the most important changes was the adoption of the English style of judgment, personal and individualistic, with the possibility of dissenting opinions. The judgments of the Supreme Court at the Cape were also accorded the same status as the judgments of the English superior courts in the sense that the doctrine of precedent was soon invoked by both practitioners and the courts.<sup>174</sup>

The new procedural and judicial style was carried into the country districts by the regular visits of judges on circuit. The judges performed their task under extremely

172 Erasmus (n 19) and the references there given.

173 DE Van Loggerenberg *Hofbeheer en Partybeheer in die Burgerlike Litigasieproses 'n Regs-hervormingsondersoek* (LLD, University of Port Elizabeth, 1987).

174 Erasmus (n 19) and the references there given, to which may be added Fine (n 35).

difficult and often hazardous conditions. They stuck to their task with commendable tenacity and perseverance. As the years went by the roads, the means of transport and the accommodation improved but the physical hardship of “circuit riding” was never completely eliminated. The achievement of the Cape judges in the development of South African law, and their vital contribution to the survival of the Roman-Dutch law,<sup>175</sup> seem even more remarkable and praiseworthy if one considers that each one of them, for nine weeks or more of each year, endured the hardship and hazards of the circuits.

The circuit courts brought the highest level administration of justice to the outlying districts. The fact that the sittings of the courts were open to the public, and the fact that the community participated in the proceedings by way of jury service, contributed to the integration of the administration of justice into the social fabric and “judicial conscience” of the people in the outlying communities. The circuit courts played a major role in entrenching the English procedural and judicial style within the minds of the people.

The extent to which the judicial style established under the Charters of Justice became embedded in the consciousness of the people is borne out by the fact that when some of the Dutch settlers moved north during the nineteenth century, whatever their emotional attachment to their Dutch heritage and whatever their desire to retain the Roman-Dutch law<sup>176</sup> and Dutch institutions of state,<sup>177</sup> they established courts, including circuit courts,<sup>178</sup> on the Cape model. Thus in the Zuid Afrikaansche Republiek (ZAR) the administration of justice was in 1877 by an amendment of the Constitution (Grondwet) entrusted to a High Court of Justice of three judges, circuit courts presided over by a single judge, and landdrosten.<sup>179</sup> Even prior to the establishment of the High Court, criminal procedure was regulated by a detailed code<sup>180</sup> based on earlier Cape legislation,<sup>181</sup> while rules of civil procedure based on the Cape model were given a statutory basis in 1874.<sup>182</sup> In this way, in the words of Wijpkema, “was dus in die ZAR die Engels-Kaapse prosedure in kriminele sake en in 1874 ook in siviele sake tot grondslag geneem”.<sup>183</sup> A similar

175 See Rena Van den Berg “The remarkable survival of Roman-Dutch law in nineteenth century South Africa” (2012) 18(1) *Fundamina* 71-90.

176 *Ibid.*

177 See A Wijpkema *De Invloed van Nederland op Ontstaan en Ontwikkeling van de Staatsinstellingen der ZA Republiek tot 1881* (Pretoria, 1939).

178 In his *Biographical Memoirs and Reminiscences* (n 88) vol 1 at 458-488, Chief Justice Kotzé describes a long circuit through the Transvaal in 1877 which took the same form as the circuits in the Cape. Rider Haggard (later Sir), who was to become a famous author, was Kotzé’s registrar. Early circuits in Natal are referred to by Hattersley (n 49) at 128-131.

179 On the administration of justice in the ZAR, see JGK “The administration of justice in the South African Republic (Transvaal)” (1919) 36 SALJ 128-139; Ellison Kahn “The history of the administration of justice in the South African Republic” (1958) 75 SALJ 294-317; (1958) 75 SALJ 397-417 at 397; and (1959) 76 SALJ 46-57 at 46.

180 Ord 5 of 1864 (ZAR).

181 Ord 40 of 1828 (Cape); Ords 72 and 73 of 1830 (Cape).

182 Law 1 of 1874 (ZAR).

183 A Wijpkema *Die Invloed van Nederland en Nederlands-Indië op Ontstaan en Ontwikkeling van die Regswese in Suid-Afrika tot 1881* (Amsterdam, 1934) at 188.

situation prevailed in the Orange Free State Republic where in 1856 rules of civil and criminal procedure following the Cape model were adopted,<sup>184</sup> and in 1876 a circuit court and a High Court consisting of a Chief Justice and two puisne judges were established.<sup>185</sup> Cape Ordinance 72 of 1830 was the basis of evidential rules adopted in the Free State<sup>186</sup> and in the ZAR. The position in the latter is interesting: although there was prior to the Evidence Proclamation of 1902<sup>187</sup> no statutory basis for the application of English evidential rules in the territory, the High Courts (like the High Courts of the Orange Free State) always referred to English authorities on matters of evidence.<sup>188</sup> The position is accurately summarised by Hahlo and Kahn:<sup>189</sup>

Adjective law thus in large measure departed from Roman-Dutch principles and followed the principles of English law as adopted in the Cape under British rule. Even where – as with landdrosten and heemraden – institutions had a veneer of the old Cape under the Company, the substance beneath would be found predominantly English.

As Wijpkema puts it, the “Rules of Court”, by which he means the judicial and procedural style in English mode, “was te diep gewortel in Afrikaanse bodem, om somaar daarvan losgemaak te word”.<sup>190</sup>

Finally, from the outset, from the first circuits in 1811, the message was brought home that the courts were open to all the people of the colony, and that the protection of the courts extended to all of them. This message was again emphasised by Chief Justice De Villiers in 1868 in the defamation suit which sprang from the circuit-court sitting at Victoria West. It may be an ideal which was not always realised in practice, but an ideal and governing principle it remained.

## Abstract

The circuit courts established by the Earl of Caledon in 1811 introduced the fundamental features characteristic of proceedings at common law to the Cape and thus constitute an important precursor to the Charters of Justice of 1827 and 1832. They also paved the way for the circuit courts established in 1827 under the First Charter of Justice, the predecessors of the circuit courts which to this day form part of the legal landscape

184 By Ord 3 of 1856 (OFS) and rules framed thereunder by the Executive Council on 31 May 1856 (criminal procedure in superior courts); 20 Feb 1858 (civil procedure in superior courts); 27 Sep 1856 (procedure in inferior courts) – see HR Hahlo & Ellison Kahn *The Union of South Africa: The Development of its Laws and Constitution* (Cape Town, 1960) at 244 and esp n 78.

185 Ord 7 of 1976 (OFS).

186 Ord 6 of 1856 (OFS).

187 roc 16 of 1902 (T).

188 See Wessels (n 41) at 395; David T Zeffertt, A Paizes & A St Q Skeen *The South African Law of Evidence (formerly Hoffmann and Zeffertt)* (Durban, 2003) at 7.

189 Hahlo & Kahn (n 184) at 244-245. These words, which Hahlo & Kahn use with reference to the Orange Free State, apply with equal force to the situation in the Transvaal.

190 Wijpkema (n 183) at 199.

in South Africa. During the nineteenth century, judges of the Cape Supreme Court regularly visited outlying towns and districts to hear both civil and criminal cases. The circuits lasted for weeks and long distances were travelled under primitive and hazardous conditions. The judges and counsel often had to endure great physical hardship. They all stuck to their task with commendable tenacity and perseverance. In the circumstances, the contribution of the Cape judges to the development of South African law and to the survival of the Roman-Dutch law was a remarkable achievement. The circuit courts brought to the outlying districts the administration of justice at the highest level. The sittings of the courts were open to the public, and the community participated in the proceedings by way of jury service. All this contributed to the integration of the administration of justice into the social fabric and "judicial conscience" of the people in the outlying communities. The circuit courts played a major role in entrenching the English procedural and judicial style in the minds of the people, and in bringing home the message that the courts were open to all the people of the colony, and that the protection of the courts extended to all of them.