Mogotse's Goats and Other Cases before the Gaberones Magistrate in 1908

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This is a study of the cases that passed through the court of the Assistant Commissioner for the Southern Protectorate and Gaberones Magistrate in 1908. The aim is both to study the realities of the colonial judicial system and to provide a few glimpses of life in 1908 as it was captured in what amount to some accidental snapshots. Court cases provide a specialized but useful type of micro-history: "In the law-courts of any country and any age, human nature as it really is, not as we would like to be, is clearly and minutely revealed: the passions of men, their hopes, desires and fears, their baseness and occasionally their nobility."[1] This study concentrates on the substance of the cases, and what can be learnt from them.

By 1908, the early twentieth-century system of administration for the Protectorate had been established. A Resident Commissioner ruled in Mafeking, with district subordinates inside the Protectorate. Most of the territory remained under the administration of the chiefs in Tribal Reserves. Ralph Williams, the Resident Commissioner from 1901 to 1906, had reorganized the police into a separate Bechuanaland Protectorate Police under his command. Bechuanaland police included whites, Basotho, and some Africans from north of the Protectorate. The Assistant Commissioners were not only executive officers but had judicial powers, sitting as magistrates with "wide criminal jurisdiction powers, extending to the fullest terms of penal servitude". In cases of murder, the Magistrate carried out a preliminary hearing and the actual trial was before the Resident Commissioner. There was no judicial appeal.[2] It should be noted that the two Assistant Commissioners were only the most senior of a number of officials; magistrates with similar powers were located throughout the Protectorate.

The legal system, such as it was, was based on the Proclamation of 10 June 1891. The Protectorate received the law of the Roman-Dutch law of the Cape, as at 1891 (this was clarified by a Proclamation of 1909).[3] However, the Protectorate did not introduce trial by jury, which was then part of the Cape system. Partly this was due to concerns about the "anti-native sentiment" of Boer farmers.[4] Instead there was a dual system. The magistrates heard European cases, while most African ("Native") cases continued to be heard by chiefs in kgotla; though as we shall see certain African cases came before magistrates. In either case the magistrate could, and apparently usually did, sit with assessors, either European or African, to assist, though the judgment remained his.[5] The Gaberones 1908 case notes are unfortunately silent on assessors.[6]

As a result of the South African War, the neighbouring Transvaal was now a British colony, and in 1907 it had been given "responsible government" (settler rule) by the new Liberal Government in Britain. Within a short time the Bechuanaland Protectorate would face the threat of incorporation

1 Kathleen Freeman, *The Murder of Herodes and other Trials from the Athenian Law Courts* (London: Macdonald & Co., 1946) p 9.

2 Ralph Williams, *How I became a Governor*, (London: John Murray, 1913) pp. 277-8. It should be noted that rights of appeal in criminal cases had been very limited in England itself until the creation of the Court of Criminal Appeal in 1907.

3 I. G. Brewer, "Sources of the Criminal Law of Botswana", *Journal of African Law* vol. 18 no. 1 (Spring 1974) pp. 24–5; K. Quansah, *Introduction to the Botswana Legal System* 3rd ed., (Gaborone: Pula Press, 2001), p. 3.

4 Bojosi Otlhogile, "Assessors and the administration of justice in Botswana", *Botswana Notes and Records*, vol. 26 (1994) p. 77.

5 Otlhogile, "Assessors and the administration of justice in Botswana", pp. 78–9.

6 This is an area for future research.

into the new Union of South Africa.

The view of the Government Secretary, Barry May, was that the Protectorate in these years came close to meeting the adage "Happy is the country which has no history",[7] but 1908 did see several events worth noting. For most people the most important was probably the failure of the rains in the south of the country.[8] The years 1907–8 were very bad: in 1907 locusts had eaten much of the crop.[9] Meanwhile, a slump in diamond prices caused men to be laid off from the mines in 1908.[10] There was a surge in millenarian prophecy, often of an anti-European bent.[11] In August A. G. Stigand, as Acting Magistrate in Gaberones, described 1908 as a "starvation year", which was causing stock theft to become common.[12] In one case, a goat thief caught red-handed stated that he had not eaten for five days.[13] According to Stigand, such defendants found the idea of prison not unappealing, since they were sure to eat there. Stigand wondered if he should order such offenders whipped as a deterrent.[14] Francis Panzera, the Resident Commissioner, replied that while Stigand's belief that prison had ceased to deter was probably correct, it was wrong to act without proof, and that he did not approve of corporal punishment except in cases of brutality or in prison discipline. Unless it could actually be proved that someone had stolen in order to go to prison, he would not approve lashes.[15]

Customs revenue was down in 1908, but the Hut Tax was up, rising in April from ten shillings to one pound per hut.[16] Although this came at a time of hardship, the Government Secretary made the remarkable claim that "The additional burden thus placed on the natives was cheerfully borne."[17]

Colonial officers in the Bechuanaland Protectorate were appointed in a system based on the personal patronage of Britain's High Commissioner in South Africa, which survived after other colonies had adopted more professionalized systems. Recruitment tended to be from the police and from certain families, especially with early missionary connexion. Promotion was on the "office boy" system: appointment to a junior position such as Magistrate's clerk followed by gradual advancement.[18]

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7 *Colonial Reports 1909-10. Bechuanaland Protectorate. (No. 652)* Cd. 4964–26. p. 12.

8 *Colonial Reports 1907-8. Bechuanaland Protectorate. (No. 593)* Cd. 4448–2. p. 10.

9 London Missionary Society Archives, Box 68, Partridge (Molepolole) to Thompson, 16 Apr. 1907; Williams (Kanye) to Cousins, 17 May 1907, cited in Don Rempel Boschman, *The Conflict between New Religious Movements and the State in the Bechuanaland Protectorate prior to 1949* (Gaborone: Joint Editorial Board of the Department of History and the Department of Theology and Religious Studies, University of Botswana, 1994) p. 26.

10 Don Rempel Boschman , *The Conflict between New Religious Movements and the State in the Bechuanaland Protectorate,* p. 25.

11 Boschman, *The Conflict between New Religious Movements and the State in the Bechuanaland Protectorate,* p. 25.

12 Stigand to RC Mafeking, 11 Aug. 1908 encl. to 51/08, District Commissioner Gaberones (hereinafter DCG) 23/1, transcript of the Court of the Assistant Magistrate and Magistrate for Southern District of BP, Botswana National Archives (hereinafter BNA).

13 Rex v. Moko, Mashela, & (?) Fane, 21 Apr. 1908, 32/08 (case 32 of 1908 before the Court of the Assistant Commissioner and Magistrate for the Southern District of the Bechuanaland Protectorate), DCG 23/1, BNA.

14 Stigand to RC Mafeking, 11 Aug. 1908, encl. to 51/08, DCG 23/1, BNA.

15 RC to Stigand, 13 Aug. 1908, encl. to 51/08, DCG 23/1, BNA.

16 *Colonial Reports. Bechuanaland Protectorate. 1908-9. (No. 614)* Cd. 4448–23. p. 4. Ralph Williams had successfully resisted such a rise during his term, citing the Tswana chiefs' pro-British loyalties in the South African War: Quentin Neil Parsons, "Khama III, the Bamangwato and the British, with special reference to 1895-1923" unpublished Ph.D. thesis, University of Edinburgh, 1973, ch. 8.

17 *Colonial Reports. Bechuanaland Protectorate. 1908-9. (No. 614)* Cd. 4448–23. p. 4.

18 Neil Parsons, Prologue, in Charles F. Rey, (eds N. Parsons & M. Crowder), *Monarch of All I Survey, Bechuanaland Diaries 1929-37* (Gaborone:Botswana Society, & London: James Currey, 1988).

The Assistant Commissioner for the Southern Protectorate (based at Gaberones) was Jules Ellenberger. He only heard a minority of the 1908 cases, presumably being away from the Camp on various business—he was after all Assistant Commissioner for the whole South of the Protectorate. Most of the remaining cases were heard by A. G. Stigand. Stigand later attracted some public controversy. His wife lived in Europe and when, in 1911–14, he was Resident Magistrate in Ngamiland, he apparently took several Herero concubines. This might have not have caused so much trouble had he not also got involved in their families' quarrels with the Batawana rulers.[19] However he survived the scandal. In addition to these two, a few cases at Gaberones were heard before R. M. Daniel and A. W. Hodson, the latter a nephew of Beatrice Webb. Hodson, unlike the others, did not remain long in the Protectorate: he was transferred to Somaliland in 1912, and he ended his career as Governor of the Gold Coast.[20]

The Resident Commissioner, who was sometimes consulted, was Francis Panzera. Panzera was essentially a military man; he probably relied heavily on Barry May, the Government Secretary. Following the distinction usefully made by Neil Parsons between the "missionary" and "mercenary" traditions in Bechuanaland administration,[21] Panzera was a "mercenary"—unimaginative, content to support South African interests although happiest doing nothing in particular—while Ellenberger was a "missionary", belonging to the imperial trusteeship tradition.

One other figure should be mentioned: Native Trooper Sprigg, frequently making arrests, presenting evidence, apparently generally to the fore. He was presumably named after the Cape premier.[22]

The charges which came before the Magistrate could be classified in various ways. I have attempted to arrange them so as to make sense of the role of the law in the development of the colonial environment, rather than simply in legal categories. "Camp life" and "The new colonial world" group charges to do with the Magistrate's base and with new types of rules, such as requirements for permits and the regulation of the railway. ("The new colonial world" was by far the largest category, with a third of all cases.) The new rules either represented colonial authority or reflected technological and social change; in either case they were outside customary law. One case ("Boundary dispute") is *sui generis*. The other charges are ordinary major offences (theft, stock theft, assault and murder) which would have been equally crimes under customary law but happened to come before the Magistrate, and have been grouped under these headings; in each case the issue of why African cases came to the Magistrate is noteworthy.

The total number of cases is small: 69. There was no consistency as to whether defendants and charges in related cases were prosecuted together or separately, and exact statistics about the cases would have little meaning. The court sat on at least 43 days. There is no reason to think that the sample is particularly representative of crime in the area. Most crime was dealt with in the kgotla, and although homicide was routinely referred to the Magistrate, it was only in 1916 that the administration explicitly required this.[23] Crimes of disorder, and violation of the various regulations

19 Rey, (eds Parsons & Crowder), *Monarch of All I Survey*, p. 241 n. 18.

20 Arnold W. Hodson, *Trekking the Great Thirst: Sport and Travel in the Kalahari Desert* [1912] (Bulawayo: Bookset, 1999) new foreword by R. S. Roberts, p. (xv).

21 Neil Parsons, "Colonel Rey and the Colonial Rulers of Botswana: Mercenary and Missionary Traditions in Administration, 1884–1955", in J. F. Ade Ajayi and J. D. Y. Peel (eds) *People and Empires: Essays in Memory of Michael Crowder* (London: Longman, 1993) pp. 197–215.

22 Sir John Gordon Sprigg, 1830-1913, Premier of Cape Colony for times between 1878 and 1904. See Peter Joyce, *A Concise Dictionary of South African* Biography (Cape Town: Francolin, 1999) p. 250. In Lesotho such names were more common.

23 Otlhogile, "Assessors and the administration of justice in Botswana", p. 84n.8. The administration accepted the power of chiefs to inflict the death penalty in the early 1890s, and in 1897 the High Commissioner held that

which required permits to introduce stock, shoot game, and so on, were however clearly being detected and enforced mainly on a basis of random encounter.

One odd feature is the way that the same names keep cropping up in different combinations. Sprigg the Native Trooper gives evidence, but is himself on one occasion charged with assault. Sprigg's alleged victim was an employee of Mr Stigand, who was frequently acting Magistrate in the absence of Ellenberger. Stigand also appears as complainant in a case of cheque fraud. A Boer farmer appears twice the same day; once to give evidence against a goat thief and once to answer charges of carrying a gun without a permit. A trader appears on one occasion charged with assault, and on another occasion as a complainant in a theft case; another trader with the same name, presumably a relative, is charged with abusing a railway employee in a manner likely to provoke a breach of the peace. After a while it seems like a radio play put on without quite enough actors.

The main source for this study is the court transcript written by the magistrates. The transcript was written in longhand and transcribes proceedings in English (with occasional key phrases in the evidence also written in Setswana). Usually evidence is summarized, though the most important sentences or phrases are often written out in full. The legibility is fair but names can be difficult. (I have written all names and Setswana quotations exactly as given, without modernization.) The transcript served several purposes. Such transcripts were the normal practice in British courts, enabling the court to refer to evidence already taken for example. Also, the record was in some cases submitted to the Resident Commissioner for review. Sometimes this was a matter of procedure, as certain cases had to submitted for confirmation. In one case however the Magistrate forwarded the file because he was troubled by a feeling that he might have made a mistake. Unfortunately for the historian, the file does not usually record why the Magistrate gave a lighter or heavier sentence.

The ethnicity of complainants, accused, and witnesses is usually stated. (For Africans, "tribal" affiliation; for Europeans, nationality, and often ethnicity such as "Boer".) Clearly an awareness of this was considered essential to understanding and social interaction. It is notable that most recorded instances of insult contain a racial component: "masepa oa makgoa", "bloody, fucking, n*gger",* "mmago sebono ke wena wa Motswana".

Camp life

A significant number of charges arose from the special circumstances of the Gaberones Camp, which was located at the eastern end of what is now the Village suburb of modern Gaborone. The area still bears the name "Camp", but few relics now remain from the Camp of 1908. Gaberones was not really a town environment, despite the Proclamation of 1896 that applied such legislation for urban areas[24] as a ban on blocking streets, "wantonly irritating any cattle", loitering by prostitutes, the singing of obscene ballads, or, more puzzlingly, flying kites to the annoyance of any person.[25] (None of these gave rise to charges in 1908.) The core of the settlement was a police camp.

Offences such as public drunkenness were far more likely to be prosecuted in or around the Camp than elsewhere. A striking instance of this was provided by a Protectorate employee, who—

intervention even in major cases was discretionary. (Anthony Sillery, *Founding a Protectorate: History of Bechuanaland 1885–1895* (London: Mouton & Co., 1965) p. 155n.27.)

* In full in the original, in this and other quoted instances.

24 The Police Offences Act 1882 of Cape Colony, which in effect defined offences applicable to town life, was declared to apply to various places when they were considered to become townlike.

25 *Bechuanaland Protectorate. Proclamation No. 21 of 1896.* 29 Oct. 1896.

apparently during a court hearing on 22 July—became "very drunk and did enter the Court House and stagger about the verandah to the annoyance of the general public". This singularly unwise choice of venue led to a five shilling fine.[26] (To put this into perspective, the South African mines paid 20 shillings per month[27] and a goat could be bought for 15 shillings.[28])

The Assistant Commissioner was the chief administrator of the Southern Protectorate, and some of the cases reflect this rather than what would be usually considered criminal cases. Disciplinary offences at the Gaberones Camp and at the Gaol were prosecuted as offences in his court, there apparently being no separate (e.g. administrative) disciplinary procedure.

Gaol discipline included both cases of escape and minor internal offences. There were two cases of escape prosecuted in 1908. In one a prisoner had escaped two years earlier and had been apprehended in the Transvaal. He pleaded guilty and had three months added to his sentence.[29] In the other, a prisoner was recaptured shortly after his escape. Again, he was given three extra months.[30] This latter case led to a guard (Dumakole, whose negligence was blamed for the escape) being fined ten shillings.[31] Stigand, reporting on the incident to the Resident Commissioner, recommended a reward of five shillings for another guard who had caught the prisoner. The Resident Commissioner remarked of the hapless Dumakole, who had fired and missed repeatedly during the escape, "he seems really useless with a rifle at present".[32] Perhaps, of course, he had deliberately missed.

A third case of prison escape was detected but not prosecuted. After a Mokgalagadi was given a three month sentence for theft, it was realized that he was in fact a former prisoner who had been serving a longer sentence for stock theft in 1897 but had escaped. Stigand, however, wanted to let it go. It was so long ago, he wrote, and before the war. The Resident Commissioner concurred.[33]

An example of an internal Gaol offence is that of a prisoner who broke prison regulations by taking two pounds of meat and eating some of it. The accused testified that "I took the meat because I didn't get my portion a week before." He was given an extra seven days,[34] whereas a case of insolence and disobeying an order to be quiet received an extra 21 days, perhaps indicating the relative importance attached to maintaining order and especially due deference.[35]

A notable case of Camp discipline involved the Gaol Cook, Abram Malukwe. On 6 March he appeared before Ellenberger charged with being absent without leave from 2 p.m. to 5 p.m. on the previous day. He pleaded not guilty, and was supported by two guards who said there had been "no delay" (perhaps meaning that even if he came late, the meal had been served on time), but he was convicted and fined one shilling. Alfred Fosdike, the Acting Gaoler, said he had been warned before.[36]

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26 Rex v. Modise, 23 July 1908, 49/08, DCG 23/1, BNA.

27 Robin Palmer and Neil Parsons, "Introduction", in Robin Palmer and Neil Parsons (eds), *The Roots of Rural Poverty in Central and Southern Africa* (Berkeley: University of California Press, 1977) p. 14.

28 Neil Parsons, "The economic history of Khama's Country in Botswana, 1844-1930", in Palmer and Parsons (eds), *The Roots of Rural Poverty in Central and Southern Africa*, p. 127

29 Rex *v.* Petrus Raloboteng Moketsi, 27 Jan. 1908, 6/08, DCG 23/1, BNA.

30 Rex v. Rahidi Molefe, 12 May 1908, 34/08, DCG 23/1, BNA.

31 Rex v. Dumakole, 13 May 1908, 35/08, DCG 23/1, BNA.

32 Stigand to RC Mafeking, memo, 12 July 1908, and RC's annotations, encl. to 34/08, DCG 23/1, BNA.

33 Stigand to RC, 23 July 1908; RC to AAC, 25 July 1908, encl. to 45/08, DCG 23/1, BNA.

34 Rex v. Letloo, n.d., 64/08, DCG 23/1, BNA.

35 Rex v. July, n.d., 15/08, DCG 23/1, BNA. Also, of course, there may have been unrecorded previous offences.

36 Rex v. Abram Malukwe, 6 Mar. 1908, 22/08, DCG 23/1, BNA.

On 11 August Abram Malukwe the cook was charged with the theft of four candles, being government property. He denied the theft but was convicted and sentenced to one month.[37] It was evident that he had been under suspicion, and one wonders if the earlier case had been intended as something of a warning.

Native Trooper Sprigg, almost certainly a Mosotho, who featured frequently as a witness, found himself a defendant when he allegedly assaulted one Ñakaemañ, a servant of Stigand. He was found guilty but fined only one shilling in view of provocation. By Ñakaemañ's account, he had come to make enquiries about some confusing matter involving purchase of nails. After a time Sprigg said, "Are you still there, you Motswana, mmago nnyo,[38] about a matter which cannot be understood?" Ñakaemañ told Sprigg not to abuse him. Sprigg replied, "Now if I abuse you, mmago sebono ke wena wa Motswana,[39] what will you do to me?" As Ñakaemañ relates it, "I then swore at him, saying, 'Your mother has a mpapa", it is not mine who has a nnyo.'[40] Then the Police all spoke and I do not know to what purpose, but while I was listening to them the accused hit me on the head with a stick." Sprigg's account was less clear but his defence was that he had tried to end the encounter but had been unable to get away from the complainant, who had continued to abuse him.[41] There was clearly an ethnic aspect to the encounter between the Motswana Ñakaemañ and the Basotho police.

The new colonial world

The railway was an important new colonial phenomenon, which required regulation. Several Europeans were caught travelling on the railway without a ticket. In February a Scotsman, from Kimberley, was charged. He had been with three other white men, who had escaped when Native Trooper Sprigg tried to make the arrest. The defendant said, "We walked as far as Lobatsi from Mafeking. We called at the Police Camp at Lobatsi and asked for rations. We were told we couldn't have them. There was nothing else to do but to starve or jump the train. We jumped the train." He was fined ten shillings. Presumably they were headed for Rhodesia.[42] In April an American engineer and English coal miner were similarly caught. The miner, pleading guilty, said "I was footsore and I was tired and I will not do it again."[43] Later in the year a Scot was caught without a ticket: whereas the others had been riding goods-trucks he was travelling in third class.[44]

A court interpreter was convicted of fraud when he forged a cheque from Stigand (for seventeen pounds), and sentenced to two years without the option of a fine. An extremely careful account was given in evidence as to how the fraud was detected, including detailed analysis of the characteristics of the handwriting. The defendant, aged 23, was a nephew of Chief Linchwe of the Bakgatla, who appealed to the Assistant Commissioner for leniency, suggesting that a fine could be substituted. This was refused, but a subsequent appeal to the High Commissioner led to a reduction to twelve months.[45]

In an unusual case, an Indian was charged with culpable homicide as a result of workplace accident.

37 Rex v. Abram Malukwe, 11 Aug. 1908, 52/08, DCG 23/1, BNA.

38 "Your mother's cunt".

39 "Your mother's arsehole, you Motswana".

40 Ñakaemañ returns the insult: "*Your* mother's cunt".

41 Rex v. Martin alias Sprigg, BNA, DCG 23/1, 13/08.

42 Rex v. Harry Shand, 24 Feb. 1908, 19/08, DCG 23/1, BNA.

43 Rex v. George Johnson & Harry Slooper, n.d. Apr. 1908, 33/08, DCG 23/1, BNA.

44 Rex v. James Betts, n.d., 44/08, DCG 23/1, BNA.

45 Rex v. Israel Pilane, 5 Mar. 1908, 21/08, DCG 23/1, BNA.

Mokoko, an employee at a sawmill, was killed when he was caught up in the machinery of a steam engine. This happened because the defendant failed to prevent a build-up of wood in a place which made it necessary for Mokoko to step over the machinery. However, there were mitigating circumstances. The sawmill was normally run by another member of the defendant's family, his brother, who rented it. The defendant had in fact no business connexion with the sawmill and had merely agreed "to keep an eye on it" in his brother's temporary absence. He was nevertheless held to be responsible for the accident, which resulted from his inexperience. He was fined ten pounds.[46]

A significant number of cases related to actions which would once have been unremarkable, but which now required permits: bringing stock, skins or wagons into the Protectorate, carrying guns, shooting game, even possessing ostrich feathers. A licence was required to introduce liquor, and its quantity, destination, etc. were all (at least in theory) monitored.[47]

The "introduction into the Protectorate" offences related especially to the areas where the colonial borders had bisected the lands of the Barolong and Bakgatla, who therefore tended to cross borders informally a great deal. On 13 January, two Bakgatla were charged with introducing one kudu hide, two cow hides, and one pair of kudu horns, without permits. They pleaded guilty, although one, whose cattle post was on the Transvaal side of the Marico river, said he did not know it was illegal to bring in such items.[48] Such protestations of ignorance of the law were common. Nor were they unreasonable: eight months after this case the Magistrate discovered that the kudu horns had not, in fact, required a permit after all.[49] The sentence in this case was five shillings or one week, which was roughly typical. Sometimes the charge of moving stock without a permit was used as an additional charge in cases of stock theft, and then sentences could be significantly higher, for example five pounds or one month.[50]

A young Boer farmer was charged with shooting a springbok inside the Protectorate without a permit, springbok being classified as "large game". He pleaded guilty and was sentenced to three pounds or three weeks. The young man was on the land of a Mongwaketse who he evidently knew well. Some witnesses sought to exculpate the defendant by saying that the African had told him that it was all right to shoot springbok there, although the African denied this, saying that Bathoen, his chief, did not allow it. The main himself, however, did not claim that he had been told it was all right, but merely said that he was unaware that springbok counted as large game. He had heard it said that the rooibok was the smallest protected.[51] One can conjecture that the young man's family or friends aimed to excuse him at the expense of his African associate but that he was rather more honourable.

In another case, another young Boer (perhaps only a teenager) was caught, largely by chance, having just shot a steenbuck. (A Native Trooper at Lobatse heard a shot and went to investigate.) He did not have a licence but had been sent out by his father to shoot a buck; they had thought that the father's licence covered them both. He was charged only with carrying a gun without a licence and fined ten shillings or one week.[52] Europeans required a gun licence, costing twenty shillings per annum, but "Natives", interestingly, did not (in their own reserve).[53] For this purpose the definition

46 Rex v. Ismael Dada, 22 Mar. 1908, 26/08, DCG 23/1, BNA.
47 *Bechuanaland Protectorate. Proclamation* 23 Sep. 1892.
48 Rex v. Mokate & Ramokokone, 13 Jan. 1908, 3/08, DCG 23/1, BNA.
49 Rex v. Mokate & Ramokokone, 13 Jan. 1908, memo added 12 Sept. 1908, 3/08, DCG 23/1, BNA.
50 Rex v. Motlogelwa, 18 Jan. 1908, 5/08, DCG 23/1, BNA.
51 Rex v. Johannes Jacobus Britz, 21 Aug. 1908, 54/08, DCG 23/1, BNA.
52 Rex v. Cornelius Vosloo, 11 Nov. 1908, 67/08, DCG 23/1, BNA.
53 *Bechuanaland Protectorate. Proclamation* 12 Dec. 1892.

of a "Native" was the same as for sale of liquor: "The word 'Native' includes any aboriginal native belonging to any native tribe, and includes half-castes and all persons of mixed race living in any community, tribe, kraal or location."[54]

In most of these cases, it is notable that detection was a matter of a Native Trooper happening to come upon the scene. In the circumstances, it seems likely that those offenders who ended up being prosecuted were very unlucky. Perhaps a little more systematic was the attempt to maintain veterinary quarantine areas. At the end of January a series of prosecutions for moving cattle out of a quarantine zone were all dismissed for lack of evidence, the evidence being essentially circumstantial.[55] In July however a case was prosecuted successfully.[56]

A boundary dispute

Although the boundaries of the Tribal Reserves had been specified in 1899,[57] the exact boundary was not apparent on the ground in some places until a survey was done. This led to a problem when the survey showed that the official Bakwena-Bangwaketse line did not correspond to actual occupation.[58] Following a conference, a settlement was reached and a new boundary defined,[59] but before then, the dispute had led to several cases coming before the Assistant Commissioner.

In March a Mokwena took an ox team across the boundary and ploughed a furrow in a field where a Mongwaketse's corn was growing. He was fined the very large amounts of five pounds and ten pounds for the two offences.[60] The Magistrate reported to the Resident Commissioner that Bathoen, chief of the Bangwaketse, had said that he had asked Sebele, chief of the Bakwena, whether this Mokwena had acted on his orders, and received the reply that whether he had or not, "it was allright" [sic]. Ellenberger wrote that both parties had been warned not to do anything to cause trouble, and that he had deliberately imposed an unusually severe fine.[61]

In July, two Bakwena appeared charged with perjury. They had made depositions before the Assistant Commissioner in May, claiming to have witnessed Bathoen send out three armed regiments, with the orders "Go to the boundary and if you find that the Bakwena have destroyed my beacons you must fight." It was claimed that Bathoen had issued ammunition. In fact, as they well knew, there were no guns, no ammunition was issued, and Bathoen did not say "you must fight".[62] A statement from Bathoen was enclosed in the file denying the report. Both defendants pleaded guilty, and were sentenced to twelve months.

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54 *Bechuanaland Protectorate. Proclamation* 4 Apr. 1892.

55 Rex v. (?) Kgangere, 31 Jan. 1908, 8/08; Rex v. Lekwape, 31 Jan. 1908, 9/08; Rex v. Modise, 1 Feb. 1908, 10/08; Rex v. Petrus, 1 Feb. 1908, 11/08, DCG 23/1, BNA.

56 Rex v. Kokone, 2 July 1908, 41/08, DCG 23/1, BNA. A new policy on lung sickness was to be introduced in 1908–9: infected beasts were to be destroyed—whereas previously "salted" (beasts that had recovered and hence acquired immunity) were prized. Although a radical step it was (according to the official report) accepted. (*Colonial Reports 1908-9. Bechuanaland Protectorate. (No. 614)* Cd. 4448–23. p. 8.

57 See G. B. Gumbo, "The Demarcation of Reserve Boundaries in the Bechuanaland Protectorate", B.A. history research essay, University of Botswana, 1986.

58 *Colonial Reports. Bechuanaland Protectorate. 1908-9. (No. 614)* Cd. 4448–23 p. 7.

59 *Colonial Reports. Bechuanaland Protectorate. 1908-9. (No. 614)* Cd. 4448–23 p. 7; *Bechuanaland Protectorate. Proclamation No. 55 of 1908* (7 Sep. 1908)

60 The first being that of taking stock across a boundary with a permit, the second the unusual charge of "private violence".

61 Rex v. Molatlhogi, 10 Mar. 1908; AC to RC, 10 Mar. 1908, 14/08, DCG 23/1, BNA.

62 Rex v. Keithebetse, 22 July 1908, 46/08; Rex v. Tsikwane, n.d., 48/08, DCG 23/1, BNA. Presumably the sending of regiments to check the beacons was a real event as it was not denied.

Assault and breach of the peace

Most of the serious cases of assault which came before the court involved allegations of violence by white settlers against Africans. In one case, a Boer farmer was charged with striking a Molete boy, aged about 15, on the back with a sjambok for allowing the cattle to stray. The farmer was acquitted due to conflicting evidence. While one couple gave evidence of seeing the assault, another employee backed the farmer's version of events, and said that the complainant had had the scars when he first arrived to work there. The fact that the assault was alleged to have taken place six weeks earlier, and was apparently not reported then, although only a short distance from the Camp, also probably weakened the case.[63]

Two traders at Ootsi, Sam Bernitz ("Letsatsi") and Louis Heideman ("Rauko"), both of East European origin, were charged with beating a boy (Matsetse) with a sjambok, apparently in the mistaken belief that he had stolen goods from them. Their "shop-boy" Ché was subpoenaed to give evidence. The traders pleaded guilty and were fined one pound or seven days, and three pounds or two weeks respectively (the higher sentence going to Heideman, who had actually struck the blows). According to the evidence of various witnesses, which was not disputed, the traders found clothes in the shop-boy's hut, and for some reason thought that Matsetse had stolen them. They beat the boy. His legs were badly hurt with deep cuts. One of the traders then summoned Native Trooper Shale, and wanted him to arrest both the shop-boy and Matsetse. The trooper asked what had happened to Matsetse, whereupon Bernitz became angry and said (in Setswana) "Do not ask questions, but arrest this boy as he has stolen." After further enquiries, the trooper said he would take action about the assault, and Bernitz said, "I have told you that I have tried the matter, God damn it, bloody fool, go where you like, we cannot be arrested by native Police."[64]

Hugo Bernitz, another trader at Ootsi, perhaps related to Sam, had been in trouble a little earlier. He had sent his servant to take water illegally from Rhodesia Railways, for which the servant was fined one pound or 14 days. On hearing that his servant had been reported, the trader had gone and accosted Native Pump Boy Shilling at Oodi Siding, demanding "Are you the man who reported me[?]". He called him "a bloody, fucking n*gger" who "ought to have his arse kicked". Another witness especially noted that he "swore at [Shilling], saying that he was n*gger".[*] The trader was found guilty of conduct likely to cause a breach of the peace.[65] It is interesting that the racial insult was particularly noticed.

The total number of cases is too small to generalize with confidence, but the relatively low sentences for assault are striking when compared to the sentences for property offences. Two factors are probably at work here. One is the general environment of the time: European culture would have given a similarly high weighting to property in courts in Europe itself. But secondly, there is probably a racial factor involved.

Another case of assault involved alcohol. An African servant of a British police officer was charged, firstly, with being drunk on duty, and secondly with assault. He pleaded guilty to the first and said he could not remember about the second, and was found guilty on both. One morning, his master, Sergeant Cargill, heard he was drunk, and summoned him. Cargill was sitting in a deck chair on the hospital stoep. The servant came lurching up. Cargill said, "You're drunk, where did you get the liquor?" The servant caught hold of his arm and shoulder. Cargill said, "How dare you

63 Rex v. Hendrik de Beer, 4 Mar. 1908, 18/08, DCG 23/1, BNA.

64 Rex v. Sam Bernitz & Louis Heideman, 10 July 1908, 43/08 (out of order in file), DCG 23/1, BNA.

* In full in the original.

65 Rex v. Hugo Bernitz, 20 Mar. 1908, 24/08, DCG 23/1, BNA.

catch hold of me, let me go or I will hit you." The servant ran off into a room where guns and other weapons were stored; Cargill, fearing what he might do, knocked him down him and summoned other policemen. The servant was sentenced to two pounds or six weeks for assault.[66] This is a sentence comparable to that of the trader who severely beat a boy with a sjambok, although here the assault amounted only to drunken grappling with the officer. One obvious difference is the reversal of the races of complainant and defendant. However, another aspect is the fact that the servant's actions in going to the gun room did suggest a threat of lethal violence. There is the further consideration that the violence was against a policeman.

In the only purely African case, a Mokgatla was charged with assault with intent to murder, but this was reduced to common assault when the details emerged. Moiketsi was at the lands with his sons. One night, one son asked for milk with his porridge, and Moiketsi flew into a rage and snatched up what he thought was a stick to strike him. (Presumably some stages in the conversation, explaining why this request was so aggravating, have been omitted in the recorded narrative.) Unfortunately, in the dark he grabbed an assegai. The wounds were luckily much less serious than first thought. Everyone agreed that the act was out of character, and Moiketsi, expressing deep remorse for his over-reaction, got off with a five pound fine.[67] This case presumably came before the Magistrate rather than the kgotla because it was initially a charge of attempted murder.

Murder

One of the most interesting cases was a charge of murder, which was reduced to culpable homicide. In cases of murder, trial would be before the Resident Commissioner, with the Assistant Commissioners sitting as assessors. However, there was first a "preliminary examination" in the ordinary court, in which the case was in effect heard a first time. In this case, following the preliminary examination, it was decided to reduce the charge to culpable homicide, which was then tried in the ordinary court.

On 14 August, Zanekile killed Ngcazela (alias Kleinbooi) near Kgale Hill. This was not in dispute. Zanekile was charged with murder. The accused said that he had been fighting another man, namely Lolo, his brother, and that the deceased (Ngcazela) had tried to separate them. He had struck Ngcazela by mistake. An important witness Tom gave evidence that Zanekile and Lolo came to Kgale together to visit friends, and possibly relatives. They were all drinking traditional beer. In the evening there was a quarrel when the accused tried to grab a calabash, and fighting started. The deceased suddenly walked between Zanekile and Lolo—at this point they had not yet used their sticks although they had them in their hands—and he was hit by Zanekile's stick. (This would help to explain why Ngcazela was so unwise as to get into this situation.) "Both accused and [Lolo] were drunk. I could not say whether deceased was also drunk."[68] Lolo and the deceased's wife gave evidence about the quarrel.

So far, it all seemed to hang together, and a clear picture was emerging: a drunken fight in the dusk, a man unwisely stepping in just as sticks were raised, an unintentionally fatal blow. This was in fact the version of events the authorities eventually accepted. On this basis, evidence of intent to kill or do grievous bodily harm was lacking, and although, since there was intent to injure, it could not be treated as an accident, a light sentence (in terms of manslaughter) was appropriate. A sentence of

66 Rex v. Johannes Moale, 21 Mar. 1908, 25/08, DCG 23/1, BNA.

67 Rex v. Moiketsi, 16 Jan. 1908, 4/08, DCG 23/1, BNA.

68 Rex v. Zanekile alias Martin, preliminary examination, 24 Aug. 1908, evidence of Tom, 56/08, encl. to 62/08, DCG 23/1, BNA.

twelve months was passed.[69]

But there was more to the evidence. Three women gave a significantly different version of events. In their version, Zanekile had not used the stick that was produced in court. Rather he had struck with a mielie stamper, about three feet two inches long and the thickness of a woman's arm. These women stated that they had been looking for the mielie stamper but it had disappeared. (Ngcazela died on 14 August and the women were giving evidence at the preliminary examination on 24 August.) Also, they stated that Zanekile did not appear drunk, and that no provocation had been given.

Following their evidence Lolo was recalled, and said that he knew nothing about a mielie stamper, but that he could not be certain because the light was so bad. On the question of drunkenness, however, he admitted that they had had only one calabash of beer each.[70]

The relationships of the various witnesses are not entirely clear. Of the three women with the rival version, two were unmarried, and one was the wife of Tom, the main witness of the accepted version. The other group included the deceased's wife, his brother, and Tom, who appears to have been a friend or relative.

One possible interpretation is that one, or both, groups were engaged in improving the evidence to tilt the outcome one way or the other. Suppose that Zanekile killed Ngcazela in circumstances laying him open to a charge of murder or at least a long prison term; his relatives may well have decided to minimize further suffering for all concerned by presenting the incident as almost an accident; but, we can conjecture, some women refused to go along with this. The fact that the women had been actively searching for the vanished mielie stamper shows that they were positively seeking to make stronger charges stick. Or, alternatively, suppose that the accepted version is more or less true, but that these women had a serious grudge against Zanekile—given his apparent behaviour, not implausible. In that case, we would be seeing an attempt to frame him. In any case, there must have been serious tensions involved in these divisions, which in at least one case placed husband and wife on different sides. Zanekile, Ngcazela and Lolo were described as "Mxora" (most likely Xhosa), while the "mielie-stamper" women seem to be Tswana (Selapo, Monalepe) so there may possibly have been some ethnic factor involved.

The Crown Prosecutor (an official in Mafeking) evidently felt that there might in fact be a murder case here, but that the evidence was lacking, and that the accused was therefore entitled to the benefit of the doubt. The charge was reduced to culpable homicide. Moreover, once this had been done the case and the sentence were discussed entirely in terms of the facts as they had to be presumed on this now-accepted version of events.[71]

Theft

There are a limited number of cases of general theft, even considering that purely African cases would almost all be heard in the kgotla. This may indicate a low detection rate as much as a low crime rate. However, it is interesting to note that the singularly unappealing traders we encountered earlier both appear as successful complainants in theft cases. This could indicate that they were unusually hawk-eyed, or alternatively that local people felt unusually little compunction in stealing

69 Rex v. Zanekile, 4 Sept. 1908, 62/08, DCG 23/1, BNA.

70 Rex v. Zanekile, preliminary examination, 24 Aug. 1908, 56/08, encl. to 62/08, DCG 23/1, BNA.

71 RC's minute, 27 Aug. 1908; Crown Prosecutor to RC, 29 Aug. 1908; RC to AC, 1 Sept. 1908; AAC to RC, 4 Sept. 1908; RC to AAC, 9 Sept. 1908; encl. to 56/08, encl. to 62/08, DCG 23/1, BNA.

from them. Or perhaps it is just coincidence.

In July a Mokgalagadi was charged with breaking into a hut belonging to Hugo Bernitz (the trader who had sworn at Pump-boy Shilling) and stealing a sheep carcase and three-quarters of a bag of sorghum (value ten shillings). He pleaded guilty and was sentenced to three months on the first charge and one month on the second.[72]

In October, the other trader (Samuel Bernitz) had goods stolen—ladies' clothes, apparently one of his main lines. (This was the trader who had beaten a suspect.) Perhaps he had learnt something from his earlier experience, as this time he went with a police corporal to search the suspect's house. The accused, who came from Blantyre, in what is now Malawi, pleaded not guilty but was convicted and sentenced by Stigand to two months.[73]

In January Ellenberger heard a theft case against a Mohurutse of Dinokana,[74] who was accused of having stolen some items (mainly clothes, but also hut tax tokens) from people in Ramotswa. (This was presumably tried by the Magistrate rather than the kgotla because the accused was not a subject of the local chief, and in fact came from another colony.) The accused was found with the goods, and his explanation for this was unconvincing and uncorroborated. There was, in fact, an apparently overwhelming circumstantial case. Ellenberger convicted. However, he sent the file to Mafeking for review, writing "The behaviour of the accused throughout the proceedings was that of an innocent man, but in the face of the evidence against him, I did not feel justified in acquitting him."[75]

The Crown Prosecutor replied that if the Magistrate had any doubt, the accused should have the benefit of it, but that the evidence did seem very strong. He noted that in English law to be found in possession of goods just stolen, and to be unable to explain this, could be the basis of a conviction. However, one feels that this rather missed the point of Ellenberger's concern: the impression one gets from his notes is that he found the case technically unassailable, with no logical doubt, yet was troubled by a feeling that he might have got it wrong somehow, and was hoping that Mafeking might be able to help. But it could not.

In May Stigand heard a case in which an Indian storekeeper accused his clerk (also Indian) of theft. Here the parties were non-African, though not European. Interestingly, while the employer was Muslim, the clerk was Hindu, a difference which had apparently been causing tensions between the two, notably over food. Evidence was complex and conflicting, and acquittal was unsurprising.[76]

Stock theft

Livestock constituted a major form of wealth for Batswana at this time, and were easily movable; consequently, stock theft was naturally one of the more common crimes. Stock theft could be merely acquisitive crime, as apparently in the case of a Mohurutse who saw a flock of thirty-five sheep one day in early 1908 and decided, on the spur of the moment, to steal them. Unluckily for him, another Motswana saw him passing. The witness asked after his permit, and hearing that he had none, became suspicious, and raised the alarm.[77] However, especially later in 1908, in starvation

72 Rex v. Kwenampi, 22 July 1908, 45/08, DCG 23/1, BNA. This was the man who was identified, but not prosecuted, as a long-escaped prisoner (see above).

73 Rex v. (illegible), n.d., 65/08, DCG 23/1. BNA.

74 Also written as Dinokaneñ in the record. Dinokaneñ is the Setswana locative form of the name Dinokana.

75 Rex v. Rakoko, 28 Jan. 1908, 7/08, DCG 23/1, BNA.

76 Rex v. Dangi Joshi, 20 May 1908, 36/08, DCG 23/1, BNA.

77 Rex v. Molelowakgotla, 20 Feb. 1908, 16/08, DCG 23/1, BNA.

conditions, stock theft was increasingly motivated by hunger. But also, the importance of livestock as a main form of wealth meant that stock theft could also be the result of disputes and feuding. This seems to have been the situation in the particularly memorable and interesting case of *Rex* v. *Motlogelwa & Kefitlhile*,[78] a case of stock theft, heard by Acting Assistant Commissioner Stigand. On or about 28 November 1907, it was alleged, Motlogelwa, a Mokgatla aged about 17,[79] and Kefitlhile, an older Mohurutse, stole eight goats, the property of Mogotse, an old Mongwaketse man of Kanye.

During the ploughing season, Mogotse was out ploughing when he heard that his eight goats—all the animals he owned—had been stolen. He returned to Kanye and went to see Kgosi Bathoen, who gave him a letter to take to the police at Lobatsi. Mogotse then proceeded to his cattle-post at Gatupa, where he found that the goats were indeed missing. A herd-boy (Kgame, aged 13) told him that the goats had been stolen by Motlogelwa and another man he did not know. Kgame had been alone at the cattle post, and knew Motlogelwa, and he initially believed Motlogelwa's story that he had been sent by Mogotse to fetch the goats. The two men had killed and cooked one goat before going with the remaining seven.

Mogotse now set off for Lobatsi. *En route* he saw the tracks of his goats leading across the veld. Already having a shrewd idea of where they had gone, as he knew that Kefitlhile lived at Dinokana, near Zeerust, he did not follow the tracks but instead when on to Lobatsi, where he presented Chief Bathoen's letter to the police.

The police gave him another letter, addressed to the Transvaal police. (At this time, between the South African War and the formation of the Union of South Africa, Transvaal was a British colony.) Mogotse now set off for Dinokana, where he found the goats in Kefitlhile's kraal. He then went to Zeerust where he gave the letter to the police. The Zeerust police went out and arrested Kefitlhile, and told Mogotse to return to Kanye.

Back in Kanye, Mogotse was given a further letter by Bathoen, this time to the authorities at Gaberones. At Gaberones he was given a letter to take to the police at Lobatsi. From Lobatsi he went, with two policemen, to Zeerust. The policemen said they would bring the accused back, and Mogotse made his own way back to Kanye. It would seem that Mogotse, an old man, walked well over a hundred kilometres in a Botswana midsummer carrying letters between police forces.

The case opened in the Court of the Assistant Commissioner and Magistrate for the Southern District of the Bechuanaland Protectorate, at Gaberones, on 7 January 1908. After initial evidence the Magistrate, Stigand, adjourned the case in order to get more witnesses and bring the goats. Mogotse went with a Native Trooper of the BPP to Dinokana, and returned with the goats. They set off on 9 January, arrived in Dinokana on 12 January, and presumably reached Gaberones on 14 or 15 January.

On 15 January the case resumed. Five goats were tethered outside the court, and the Magistrate went out to inspect them. The full description of each goat was carefully noted in the record. Mogotse identified them as his goats, as did a more senior Mongwaketse, Rampofe, who appeared to confuse matters by referring to the goats as his own, and was asked to clarify:

> I have referred to the goats in question as being mine in the Secwana manner, as

78 Rex v. Motlogelwa & Kefitlhile, 7 Jan. 1908, 2/08, DCG 23/1, BNA.

79 The detail of evidence suggests this may have been an under-estimate. At this time Batswana generally did not keep track of exact birthdays, but tended to reckon age by regiments, which were formed every few years.

> Mogotse is my servant and his goats are in a manner of speaking mine. The goats are Mogotse's, but he is my servant.

Motlogelwa and Kefitlhile now gave evidence in their own defence. According to Motlogelwa, the goats were really his property. Mogotse was his stepfather, having lived with his (Motlogelwa's) mother, Dilwe, at Kanye since Motlogelwa was a small boy. Kefitlhile was Dilwe's brother, and hence maternal uncle or *malome* to Motlogelwa.[80] At some point Motlogelwa had given Mogotse four pounds to buy goats. In 1907, shortly before ploughing time, Dilwe had arrived in Dinokana and told them that Mogotse had driven her away. Motlogelwa, understandably angry, decided to go and get his goats. Kefitlhile claimed that Motlogelwa had gone alone, and that he had only learnt what happened later. Motlogelwa agreed that he had killed one goat at the cattle-post, but claimed that one goat had been left as he did not want to take Mogotse's last beast.

The case was adjourned again for the fetching of witnesses. On 30 January, a Mohurutse of Dinokana, named Seoke, gave evidence for the accused, stating that he had heard Kefitlhile tell Mogotse (last October) that Motlogelwa intended to recover his goats, and that Mogotse had agreed. Mogotse gave evidence again, denying that any such conversation had taken place. He had bought the goats (or rather the original breeding animals) from Maganeñ and Rakgañ, in exchange for a gun. This was about four years ago. As to Dilwe, he agreed that he had used to live with her, but he denied that Motlogelwa was her son. Motlogelwa had once lived with them but was not, as far as he knew, related. Dilwe had left him of her own accord, two years ago.

Maganeñ and Rakgañ confirmed that they had sold the goats to Mogotse, and were able to identify one of the goats before the court. Maganeñ added that he had promised Motlogelwa a goat in 1904 but had not given it because Motlogelwa had not worked the agreed period. One can speculate that this may have contributed to Motlogelwa's grievance: it is apparent that disputes involving Motlogelwa and goats went back some time.

On 31 January Stigand gave his verdict, convicting the two defendants. Their defence had been weakened by their conflicting testimony: for example their witness Seoke had said that both men had gone for the goats, having discussed it in advance, whereas Kefitlhile claimed that Motlogelwa had gone alone without telling him. Motlogelwa was sentenced to one year's imprisonment with hard labour, while Kefitlhile received nine months. The five goats were returned to Mogotse the same day.[81]

This case presumably came to the European courts because of the mixed tribal affiliations: a Mokgatla and a Mohurutse stole goats from the Bangwaketse Reserve[82] and the suspects had taken the goats to a different colony.[83] It is not clear why the case was heard at Gaberones rather than Lobatse. It is also unclear why Dilwe did not give evidence.

Juvenile offenders

There were two cases of juvenile offenders, aged 14 and 12, convicted of theft and attempted stock

80 This is somewhat puzzling given that they are said to belong to different *merafe*, although not impossible. Mogotse later denied their account of the relationships involved.

81 Of the original eight, one had been killed at the cattle-post, and two more were not accounted for. Motlogelwa's claim to have left one was not accepted, and Seoke's report that one had been eaten *en route* was unconfirmed.

82 This might be said to raise issues of internal conflict of laws. See A.J.G.M. Saunders, "The internal conflict of laws in Botswana", *Botswana Notes and Records*, vol. 17, pp. 77–88.

83 The file mentions an officer going to Zeerust to arrange extradition but details are limited.

theft respectively. In each case the sentence was caning (not ordered in any of the other cases). In such cases the record was sent to the Resident Commissioner for review before the sentence was carried out.[84] This meant that the convict had to be held for approximately five days. In the case of the older boy, it was noted on the file after sentence was carried out that "He is evidently an old offender as his back is full of marks of other canings."[85] Since he was not known to the colonial authorities, these were presumably in the kgotla, or perhaps in the Transvaal. The remark indicates that the "caning" used on juvenile offenders was severe enough to leave permanent scars.

Conclusion

There is a popular cliché of the colonial court, in which a young and inexperienced District Commissioner, without understanding of the society, deals rapidly with cases by means of biassed interpreters.[86] There may have been a basis of truth for this in some parts of the British Empire, but in the Bechuanaland Protectorate, it would appear, the pattern was quite different. The Bechuanaland magistrate in 1908, it would appear from these cases, dealt with his cases very carefully and deliberately. The case of *Rex* v. *Motlogelwa & Kefitlhile* (the theft of Mogotse's goats) has been given in detail—and even here much has been left out—partly to illustrate the care taken. The magistrates were speakers of Setswana (Ellenberger was bilingual from childhood) and they had years of local experience. Many of the advantages of the Bechuanaland magistrate would seem to have come precisely from the things which were later regarded as marks of the High Commission Territories' "backward" system, such as local networks and "office-boy" promotion rather than posting direct from the British elite. Of course, these advantages were no doubt off-set by serious disadvantages, but it is worth noting that the system was not entirely without strengths.

The Gaberones Magistrate proceeded in many ways more like a Continental magistrate, conducting his own investigation, even if necessary stopping to get more evidence, than an English one. Several reasons can be suggested for this approach. One is that the Magistrate was also, and indeed primarily, an administrator. The conflation of police and judicial functions would perhaps naturally lead to an inquisitorial system. (Earlier British models of the magistrate, before its separation from policing, may be usefully compared, as may the Irish Resident Magistrate system in the nineteenth century.) Another is the influence of the *kgotla* system, which was of course the predominant judicial model in the country. Magistrates no doubt found it easier to follow the expectations of the local people as to what constituted a proper hearing. It is notable that even when a guilty plea had been entered, detailed evidence would be given, including points that seem unnecessary even if the charge had been denied. For example, in the case of Trooper Sprigg's assault case, a police corporal explained that the complainant had said, in English, that that the man who had hit him was the man on his "left", and that he knew this even though he did not speak English, because the word "left" was used in drill.[87] While this is fascinating, it was in fact completely irrelevant, since the identification of Sprigg was not in dispute. But Batswana have never been admirers of undue haste, and, in contrast to the strictly controlled questions of an English trial, the full story was supposed to be told.[88]

Although, as A.J.G.M. Sanders has shown,[89] colonial legal process could be distorted by political

84 Rex v. Ramoholwane, 25 Aug. 1908, 58/08; Rex v. Josefa., 4 Nov. 1908, 68/08, DCG 23/1, BNA.

85 Rex v. Ramoholwane, 25 Aug. 1908, 58/08, 68/08, DCG 23/1, BNA.

86 Notably in Adaora Lily Ulasi's classic Nigerian novel *Many Thing You No Understand* (London: Joseph, 1970).

87 Rex v. Martin alias Sprigg, 13/08, DCG 23/1, BNA.

88 I am indebted to Tom Holzinger for the suggestion of the influence of the kgotla, and to Prof. Neil Parsons for the comparison of the Irish RM.

89 A.J.G.M.Sanders, *Bechuanaland and the Law in Politicians' Hands* (Gaborone: Botswana Society, 1992)

considerations in important cases, in all these cases it appeared that the magistrate had taken considerable care to act fairly. In the case of the boundary dispute, an unusual fine was imposed, since the Magistrate seems to have concluded that the action was in fact a planned provocation by Sebele, the chief of the Bakwena. In one case, Ellenberger agonized over whether he had made a mistake, but the evidence did seem conclusive, and he would have had to act on his intuition against the evidence in order to acquit.

Another point to emerge is the limited and somewhat random nature of the Magistrate's jurisdiction. Cases involving only Africans—the vast majority of the population—came to the Magistrate only when they fell through the gaps, geographic or legal, between the various tribal jurisdictions. (In one case Africans from outside the Reserve were tried in the kgotla, but the chief then sent the case for confirmation of sentence.[90]) Thus although interesting things can be learnt from the cases, it must be remembered how marginal the Magistrate's court was to most Africans' lives compared to the kgotla. The violent farmers and traders we encountered suggest that settlers may have been more of a problem for most Batswana than officials.

The cases also serve to show us a little of some otherwise little-recorded lives. On a day in January 1908, the Magistrate walked out of the court-house to inspect five goats tethered outside: a moment in an ordinary day for him, though an important day for several others present, momentarily appearing in a flashlit glimpse of the past, the accidental snapshot of the court records. Mogotse and his determined pursuit of his goats in the hot sun deserve to be remembered, as does the indecorous Trooper Sprigg. And whatever else Stigand did, let it be remembered that he once showed mercy when he caught an old escaped prisoner: "It is so long ago, and before the war."

90 Rex v. Twala *alias* Jim & Kokwe, 25 Aug. 1908, 57/08, DCG 23/1, BNA.