As I have stated, in order to test whether the defendant is liable, we have to determine whether he was *bona fide* in what he did. The matter is put in this way in the case of *Stewart* v. *Bell*, by Lord Justice LINDLEY: "What, therefore, has to be ascertained is whether the defendant acted *bona fide* in the discharge of that moral duty which he had, or whether he acted from some other unjustifiable motive, from some motive other than a sense of duty." In this case we have come to the conclusion that he acted from some improper motive because the words which the magistrate found him to have used could not have been believed by him. If a person, upon receiving information, grossly exaggerates it, he cannot contend that he *bona fide* believed that information. He admits that he did not know these people, and therefore he could not have added anything from his own knowledge, and, having so grossly exaggerated the information which he received from Taylor, he must be taken to have acted from an improper motive. For those reasons he is liable. The appeal must, therefore, be allowed, and the case remitted to the magistrate to assess the amount of damages.

BRISTOWE, J.: I am of the same opinion.

DE VILLIERS, J.P.: The appeal is allowed with costs in both Courts, and the case remitted to the magistrate to assess the amount of damages.

[A. D.]

REX v. ENDEMANN.

1914. *March* 29. *April* 12. DE VILLIERS, J.P., CURLEWIS and GREGOROWSKI, JJ.

Criminal Law.—Sedition.—What constitutes.—Oproer.—Incitement to sedition.

The crime of sedition bears the same meaning as "oproer" and implies a gathering or concourse of people in defiance of the lawfully constituted authorities for some unlawful purpose, and there must be something in the nature of an insurrection. (GREGOROWSKI J., *diss.*)

A person who incites others to sedition can under the common law only be found guilty of the crime of sedition if the sedition has actually resulted from such incitement and not otherwise. (GREGOROWSKI, J., *diss.*)

Appeal from a conviction by the assistant resident magistrate, Pretoria.

The accused was charged before the magistrate of Pretoria on two counts with the crime of sedition, the case having been remitted by the *Attorney-General* under sec. 88 of the Criminal Procedure Code. He was found guilty and sentenced to a fine of £10, or one month's imprisonment with hard labour, on each count.

The charges were that while a state of war existed between His Majesty's Government and the Government of the Union of South Africa on the one part and the German Empire on the other part, the accused " wrongfully, maliciously and seditiously contriving, devising and intending to endanger public order and tranquility, and to resist and defy the lawful authority of the Government of the Union of South Africa and of the officers of His Majesty and such Government, did wrongfully, maliciously and seditiously publish, utter, pronounce and declare amongst other words and matter the following, that is to say, on the 14th October, 1914, and at or near Pretoria in the district of Pretoria in the presence and hearing of B. C. Barrett and H. E. Mansfield, subjects of His Majesty the King, there residing: " The Government is rotten. The Government never tells us the truth and goes against the public. It is high time we had a Government that could tell the truth and not mislead us. The Government is cooking the news and telling lies . . . . " or words to that effect. During the month of August, 1914, and at Pretoria in the district of Pretoria, to one Henry Enslin, a subject of His Majesty, there residing: " The Africanders should not go to German South-West Africa, and if they did go they would cut their own throats, and would never become a nation. Commandant Opperman has said to General Smuts that if General Smuts would declare war on German South-West then they would first shoot General Smuts and then go to German South-West . . . If you rebel and you come in at night with your commando you must come in by the back " (meaning the back of certain buildings in Visagie Street, Pretoria, occupied by the Defence Department, and where arms and ammunition were then stored) " to get ammunition . . . " The said Karl Endemann when he so published, uttered or pronounced as aforesaid intending thereby to excite discontent or to bring into hatred His Majesty's Government, and to alienate the affection of the said B. C. Barrett, H. E. Mansfield and Henry Enslin from the Government of His Majesty the King and the Government of the

Union of South Africa, in open violation of His Majesty's laws to the evil and pernicious example of all others in the like case offending, and against the peace of our said Lord the King and the said Government of the Union of South Africa, and thus the said Karl Endemann did commit the crime of sedition."

T. J. Roos (with him *Gey van Pittius*) for the accused: The words alleged in the indictment do not constitute the crime of sedition. Even under English law, the charge could not be laid in this way; see Halsbury *Laws of England* (vol. 9, par. 902, p. 460; and par. 909, p. 463). The charge should be for seditious libel. If our law were the same as the English law, the charge should be seditious libel and not sedition. To constitute the crime of sedition in our law, there must be the element of violence. See *Voet* (48, 4, and 48, 6; also Rowson's *Translation of Voet* and notes thereto. The words charged can in no case be sedition; they may be an incitement to public violence. See Matthaeus, *De Criminibus* (48, 2, 5, 6 and 11); Moorman, *Over de Misdaden* (1, 2, p. 44); *Queen* v. *Kaplan* (10 S.C. 259); Rowson (*ibid*) (pp. 19, 22, 26, 39, and 40); *Voet* (48, 6, 2); Van der Linden, *Koopmanshandboek* (2, 4); Moorman, (*ibid*) (1, 3, 4, pp. 57, 58; 1, 4, 3, pp. 78 81); *State* v. *Phillips* (3 O.R. 216 at p. 239); Kersterman, *Aanhangsel* (p. 915, par. 9); sedition falls under the *crimen laesae majestatis*.

Moreover, sedition was a crime punishable with banishment, and, therefore, the magistrate had no jurisdiction; see Proc. 21 of 1902, sec. 35.

C. W. de Villiers, Attorney-General, for the Crown: The word "sedition" denotes what it means under English law. Seditious conspiracy and seditious libel are both covered by the word "sedition" in English law. Violence is not necessary to constitute the crime; sedition was defined in Ord. 38 of 1902, but that Ordinance had been repealed by Act 27 of 1914. See further *Cilliers* v. *the Queen* (1877-1881, K. 237). Seditious libel is included in the crime of *laesae majestatis*. See further, Van Leeuwen, *Rom. Holl. Recht.* (II, p. 257); Nathan, *Common Law of South Africa* (vol. IV, p. 2423); Damhouder, *Prac. in Crim. Zaken* (ch. 62 and 63). Sedition includes incitement to sedition.

[DE VILLIERS, J.P.: Does not the English law refer to the form of Government and not to the particular Government which is based upon party lines?]

I submit not; see also Odgers, *Libel and Slander* (pp. 479, 485). The magistrate had jurisdiction as the case has been remitted to

him under Ord. 1 of 1903; see *Queen* v. *Anderson* (4 E.D.C. 15); magistrate's cases reviewed (4 S.C. 106); *Queen* v. *Taleke* (5 E.D.C. 180). Counsel further referred to Gr. Plak. Boek (Vol. VIII., p. 570). In *Rex* v. *Celliers* (*loc. cit.*) the English definition of seditious libel was accepted.

Roos, in reply: *Celliers'* case was overruled by *Tom* v. *The State* (3 O.R. 176).

Cur. adv. vult.

Postea (April 12).

DE VILLIERS, J.P. (after stating the facts as set out above): The first question that arises is whether the facts set forth in the charge amount to the crime of sedition.

Sec. 18 of the Indemnity and Peace Preservation Ordinance, 1903, whilst defining what is meant by "seditious words," "seditious acts," "a seditious libel," and "a seditious intention," provided the punishment of imprisonment for a period not exceeding five years for a first offence. But this section has been repealed by sec. 20 of Act 27, 1914, and consequently the case must be decided under the common law.

Now, our common law on the subject is largely derived from the *Lex Julia Majestatis* (*Dig.* 48, 4, and *Cod.* 9, 8), and the *Lex Julia de vi publica* (*Dig.* 48, 8, and *Cod.* 9, 12); *cf.* also *Cod.* 9, 30. *De seditiosis*, *Ulpian* (*Dig.* 48, 4, 1), in speaking of the *crimen laesae majestatis*, defines it as a crime which is committed against the Roman people or its safety. "That person is guilty of it," he proceeds, "who *dolo malo* procures people armed with weapons and stones to be in the city (of Rome), or to be assembled together for the purpose of attacking the Commonwealth, Places or Temples to be occupied, gatherings and assemblies to take place, people to be collected for sedition (*ad. seditionem*) . . . or who has incited and stirred up soldiers through which sedition (*seditio*) and tumult (*tumultus*) against the Commonwealth results." But he is careful to point out (in sec. 2) that the crime of *perduellio* or high treason is only committed when the accused was actuated by hostile feelings (*hostili animo*) to the state or the sovereign. According to *Marcianus* (*Dig.* 48, 6, 3 *pr.*) a person is guilty of the crime of *vis publica* who has armed slaves or free men with the object of creating tumult (*turba*) and sedition (*seditio*), or (*idem* 5 *pr.*), who is guilty of incendiarism at an assemblage or gathering of people, a tumult (*turba*) or sedition (*seditio*).

While *Voet* (48, 4, 3) repeats the language of *Ulpian* he warns us that the crime of high treason is only committed if committed against the Republic and with a view to its overthrow, and he proceeds: "Hence since sedition is a crime which may be committed not only against the state but also with objects other than political, it follows that there are species of sedition which have no connection with *lesé-majesté*, as I have explained in my treatise *De jure militari.*" And in the latter treatise he says (sec. 39) that sedition (*oproer*) is a concourse of mutinous soldiers coming together in an assemblage, and called *seditio* in Latin, because they separate themselves and go away from the rest. In 48, 6, 2, *Voet* gives examples of persons guilty under the *Lex Julia de vi publica*, most of which are given in the Digest, viz.: Those who have formed a plan for the stirring up of a tumult or sedition, and maintain slaves or free men in arms; they who following a most evil example have raised a sedition and stormed towns, and with missiles and arms have seized upon goods; he who at any assemblage or gathering of people, causes a tumult or sedition, is guilty of incendiarism. Matthaeus, *de Criminibus* (48, 2, 5) quotes the words of *Ulpian* given above: *Quo armati homines cum telis lapidibusque in urbi sint conveniant adversus rempublicam, locave occupentur vel templa, quove coetus conventusve fiat, hominesve ad seditionem convocentur*, and says: All these are included in the word sedition, or at least make for sedition. He quotes with approval the definition of sedition cited by *Cicero*: "*eaque dissensio civium quod seorsim eunt alii ad alios,*" as a peculiarity of sedition, and explains that to constitute sedition there must be a *coetus multitudinis* or *turba*, it is not sufficient that three or four should be implicated; there should be ten or fifteen (47, 8, 4, secs. 2 and 3). He points out that the person responsible for the sedition (*seditionis auctor*) falls under both laws, *majestatis* and *de vi*, and that there are several kinds of sedition; some have for their object the death of the sovereign or his senators and the overthrow of the state (this is *perduellio*), others the dstruction of private persons. Damhouder (*Praktijk in Crim. Zaken*, 62,3) classes sedition (*seditie*) as a species of *lesé-majesté*, and uses the word *seditie* as equivalent to *oproer*. This is also the sense in which Van der Linden (*Koopmans Handboek*, 2, 4, 5) uses the word *oproer*, which is quite correctly translated by Sir *Henry Juta* as "insurrection," and by *Henry* (p. 318) as "sedition." Van der Linden is quite right when he classes sedition as a species of public violence, but he

omits to state that it may also fall under the *crimen laesae majestatis*, as Matthaeus points out. He defines the crime of sedition as the committing of acts of violence and force, by which the public order and tranquility are endangered, and the authority of the public officers and magistrates is attacked and set at defiance. This as a description of an ordinary *oproer* or sedition is probably correct, but as a definition is not comprehensive enough, since to constitute the crime of sedition it is not necessary that acts of violence should have been actually committed (Pothier, *ad Pand*, 48, 4, 1, sec. 7). Matthaeus (*ad Dig*, 48, 2, 6) also points out that not all who rashly join in a seditious meeting are guilty of high treason, but (where the object is the overthrow of the state) only the persons who are responsible for the meeting (*Dig*, 48, 19, 38, 2; Paul, *Lent*, 5, 22).

From the above it is clear that to constitute the crime of *sedition* or *oproer* it is not sufficient that merely three or four persons be implicated; ten or fifteen people must be concerned in it, or perhaps six may be sufficient under our local laws; it takes the form of a gathering or gatherings, in defiance of the lawfully constituted authorities, for some unlawful purpose, and when the object is the death or deposition of the sovereign or the overthrow of the state, it amounts to *perduellio* or high treason. A person who incites others to sedition is certainly guilty, as the *auctor* or *princeps* of the crime of sedition, but only when the crime itself is committed; if there has been no *oproer* or sedition he is only liable to be prosecuted for inciting to sedition (Act 27 of 1914, sec. 15).

As in the present case, it is not alleged that anything in the nature of *oproer* or sedition resulted as a consequence of the words or acts of the accused, the facts set forth in the indictment do not constitute the crime of sedition. The *Attorney-General*, however, attempted to justify the charge on the ground that by sedition is meant what has been called by some authors the *crimen laesae venerationis*. But the answer to this is that the word sedition is not capable of bearing this meaning in our law. Whether the facts set out in the charge amount to the *crimen laesae venerationis* need not be considered, as that is not the crime charged. It is said that where the counsellors of the sovereign are libelled, the crime of *laesae venerationis* is only committed if it is intended to strike at the sovereign. But no opinion need be expressed upon these matters at the present time.

As I have come to the conclusion that the facts set forth in the charge do not constitute the crime of sedition, I need not consider whether the magistrate had jurisdiction to try the accused.

The appeal must be allowed and the conviction and sentence set aside.

CURLEWIS, J.: This appeal was based on three grounds:—

(1) That the charge as set out did not disclose the crime of sedition as known in our Roman-Dutch law;

(2) that the A.R.M. had no jurisdiction to try the case; and

(3) that the evidence did not support the conviction.

As regards the first ground, there would have been little difficulty in deciding on this, if we had to deal with sedition as defined by Ord. 38 of 1902, sec. 18. It defined the expressions, "seditious words," "seditious acts," "a seditious libel," "a seditious conspiracy," and "a seditious intention"; it practically adopted the crime of sedition as known to the English law, and provided a certain penalty for the offence.

Section 18 has, however, been repealed by sec. 20 of Act 27, 1914, and nothing equivalent has been substituted in its place. Section 18 of the Act speaks of "high treason and sedition," but, seeing that the Legislature intended by the Act to repeal the definition of sedition as known under Ordinance No. 38 of 1902, I take the term "sedition" there to have been used by the Legislature in the sense in which it is known in our common law (the Roman-Dutch law).

Now, what is sedition as known in the Roman-Dutch law?

The word "sedition"—as the name of the crime in this charge—can only be understood as the English translation or equivalent of what the Dutch jurists spoke of as "oproer" or "seditio." Matthaeus treats of *seditio* under the heading of *crimen laesae majestatis*. In his book *De Criminibus* (Bk. 48, 2, 2), he adopts the definition given in the *Digest* (*Dig.* 48, 4, II.):—*Majestatis autem crimen est, quod adversus populum Romanum vel adversus securitatem ejus committitur*, and applies it to the more grave kind of *laesae majestatis* called *perduellio* (treason), that is *rebellio sumtis armis, initave factione adversus patriam vel principem.* They are called traitors (*perduelles*), *qui hostilia adversus principem vel rempublicam moliuntur.* He points out there are other less serious kinds of *laesae majestatis*, which concern the dignity or authority of the state rather than its overthrow, and he gives as an instance *ut si quis non quidem hostilia molitus fuerit, maledixerit tamen*

imperatori, which he takes from the Code. In dealing with *seditio* (sec. 5), he quotes the words of the *Digest, quo armati homines cum telis lapidibusve in urbe sint, conveniantve adversus rempublicam, locave occupentur vel templa, quove coetus, conventusve fiat, hominesve ad seditionem convocentur*, and such acts he says are implied in the word, or tend to, *seditio*. He likens a gathering of people to a mob (*turba*), and on the strength of the *lex de vi bonorum raptorum*, considers that to constitute a mob there should be 10 or 15 people. He then points out that there are different kinds of *seditio*; some have for their object the destruction of the prince or the senators or a revolution (*mutationem reipublicae*), and some the destruction of private persons; the instigators of the former are traitors (*perduelles*), and those of the latter fall under the *lex Julia de vi*. He also points out that only the instigators and leaders of the *seditio* are punished as traitors (*perduelles esse non omnes, qui tumultui temere se miscuerint, sed auctores dumtaxat et principes seditionis*), the multitude are treated more leniently. The *Code* (9, 30), deals with seditious persons under the heading *De seditiosis et de lis qui plebem contra rempublicam audent colligere. Voet* (48, 6, 2), gives *Gothofredus'* division of the *crimen majestatis* as (1) *laesae majestatis in specie*, or *perduello* (2) *laesae venerationis*, (3) *autoritatis seu potestatis publicae turbationis*, and points out (sec. 3) the same distinction between the kinds of *seditio* as does Matthaeus, and refers us to his treatise *de jure militari*, where he has more fully dealt with it. In that book (*Voet* "de jure militari," vol. 2, c. 4, sec. 39—the Dutch translation) we find:—"Oproer is een geroep van opgeruide krijgslieden tot een hoop te zaemen loopende. . . *seditio* genoemd in 't Latijn, omdat zij met gedeeltens ter zijde afgaen, en van de andere afwijken." He compares "oproer" with zamenzwering (conspiracy), and says (Art. 43):—"Aen oproer is niet zeer ongelijk zaemen-zweering in een quaede beteekening genoomen, voor zoo verre ze beide van onderdaenen 't zij burgers of krijgslieden, kan gepleegt worden . . .", and "Zamenzweering dan wordt allengskens en met voorbedachten raet na lange en rijpe overweeging van zaeken, om 't gemeenebest t'onderste boven te keeren, aengegaen; maer oproer wordt onvoorziens aengevangen en gelijk hij bij manier van overstroominǧ zich schielijk verheft, zoo koomt hij ook, na zeer zwaere beroertens, haestelijk te daelen en tot de voorige rust herstelt te worden" (Art. 44).

In dealing with the *lex Julia de vi publica*, *Voet* (48,6,2) says they are liable under this law who have planned to create riot or sedition or have kept free men and slaves under arms (*qui turbae seditionisve faciendae consilium inierint, servosque ac liberos homines in armis habuerint*), and the word *seditio* seems to be used by him throughout this passage in the sense of *oproer* or insurrection.

Moorman (*Misdaden* 1, 3, 1), in dealing with *Majesteitschennis*, follows the division of Gothofredus and deals with the crime under three headings: (1) Hoogverraad (by which he means *perduellio*); (2) Schennis van de achtbaarheidt van 's Lands Oppermacht; (3) Schennis van het publicq gezach van dezelve Oppermacht.

He says (Art. 2) of Hoogverraad (*perduellio*): "Het zoude een werk van een bijna oneindigen arbeid zijn hier te spreken van alle de verscheide wijzen, op welke dit Hoogverraad kan gepleegt worden. Wij zullen derhalven maar alleen gewagen van eenige van de voornaamste, welke wij in de wetten vinden opgenoemt." As an instance of Hoogverraad he gives *oproer*, and also draws the distinction between the class of *oproer* which falls under *crimen laesae majestatis* (majesteitschennis), and that which falls under *vi publica* (gewelt), and between the punishment of the instigators or leaders and their followers (Arts. 4 and 5). "Het is eene gelijke misdaad, zegt dezelve Ulpianus, *gewapent volk tegen de Republicq te doen zamenkomen, of te maken, dat eene vergadering, of toevloed van volk tot oproer worde bijéén geroepen.* Indien dit oproer tot verderf en ondergang van den Vorst, of tot verandering en omkering van den Staat der Republicq, of van de Hooge Regeringe derzelve, verwekt is, valt 'er geen twijfel aan, of men hebbe zulks te houden voor Hoogverraad, en als zodanich te straffen; maar als daar mede enkel wordt bedoelt het nadeel en bederf van zekere bijzondere perzonen, voor gene Leden van den Staat te rekenen, zo zoude zulk oproer geen Hoogverraad, noch Majesteitschennis zijn; en zodanige oproermakers moeten worden gestraft, niet volgens de wet tegens Majesteitschennis, maar volgens die, welke is gemaakt tegens gepleegt gewelt."

Damhoûder (*Crim. Prac.* C. 62, Van Nispen's Translation) states that the crime of *Gequetste Menschelijke Majesteit* is committed (*inter alia*) . . . "door oproer aan te rechten onder het volk," and in chapter 63, under the heading "Van oproer en seditie," he says: "Die eenig oproer veroorzaken tegens de Regenten en Oversten der Landen, Steden of diergelijke plaatsen alzoo dat

dezelfde gedood of vermoord werden, dezelfde begaan misdaad van gequetste Majesteit en zijn ook op dezelfde wijze te straffen . . . De oproermakers dewelke verbode vergaderingen onder het volk aanrechten, ende het zelfde tegen hare overigheid ophitsen, werden na de qualiteit van hare personen, en na de grootheid harer misdaden gestraft . . . . ."

" Den Autheur en het Hoofd van oproer, het gene ergens werd aangerecht, behoord terstond met de dood gestraft te werden . . ."

Van der Linden (*Koopman's Handboek*, 2, 4, 5) mentions " oproer" under the heading of *Openbaar Geweld*, and describes it as " het aanwenden van middelen van geweld en dwang, door welken de openbare rust en orde in gevaar gebragt, of het gezag der gestelde magten en ambtenaaren aangerand wordt," and he says that it frequently has its origin from political causes.

The general trend of these authorities is, it appears to me, to regard " oproer " as a substantive crime which may fall under the generic term *laesae majestatis*, or under that of *publiek geweld*, and as implying in the former case either a gathering or concourse of people (not necessarily ten or fifteen), or some individuals acting in concert, and having for its, or their, object a tumult or insurrection against the Sovereign or his Government.

Do the charges as laid in this case fall within this class of offence?

I may say that both charges would probably fall within the wide definition which is given to " sedition " in the English law, but it does not follow that they therefore fall within that term, or *oproer*, as known in Roman-Dutch law.

As regards the first charge, this cannot, in my opinion, be said in any way to fall within the term " oproer." It may possibly be considered as falling under the second division of *laesae majestatis*, viz., under the *crimen laesae venerationis*, (" schennis van de achtbaarheidt van 's lands oppermacht "), or under the crime of *Injurie*. In *Celliers* v. *The Queen* (1877-81, Kotzé at p. 251), Kotzé, J., said: " The crime of seditious libel as set forth in the indictment is a species of *crimen laesae majestatis*. But there is this distinction: Simply libelling the head of the Government, or the officers of the Government, is *crimen laesae venerationis*, and may be punished as such or as *injurie;* whereas printing a series of seditious libels *hostili animo, i.e.*, with the view of undermining the authority of the Government, or inducing the subjects to resist its authority and shake off their allegiance, as laid in the

indictment, is a species of *perduellio* or *verraad*. These terms include both treason and sedition as defined in English law." The term "seditious libel" may, I think, be regarded as conveying in the English language what is implied in the term "*laesae venerationis*." Moorman (1, 4, 3,) says: "Het wordt derhalven voor eene zeer zware en strafbare misdaad gehouden, zich oneerbiedich omtrent den vorst te gedragen, en iets te doen of te zeggen tot zijne verachting," and he classes it under the first or second division of *Majesteitschennis* according to the intent of the accused. On the other hand, in an opinion to be found in Bort's *Advijsen* (adv. 9), the view is expressed—following that of Carpzovius—that "Zware calumnie en lastering tegen de Hooge Overheid wordt hedendaags niet gehouden voor misdaad van gekwetste majesteit schoon zeer strafbaar." (See also Barel's *Crim. Adv.* No. 53). The *Code* (9, 30, 2) can hardly be taken as meaning that mere evil speaking of the Government to one or two persons would render a person liable to the punishment of sedition; the words "*tumultuosis clamoribus*," etc., imply something more than mere evil speaking in private.

As regards the second charge, I have felt considerable difficulty on this point. I think these words may be construed as an incitement of the person, to whom they were addressed, to resist and defy the lawful authority of the Government as set out in the charge, and even to something worse, and as such may fall under one or other division of *gekwetste majcsteit*, but I have come to the conclusion, though not without hesitation, that it does not constitute that particular form of *gekwetste majesteit* known as *oproer*. There must be something in the nature of an insurrection—either actual or attempted—before the crime of "oproer" can be said to have been committed or attempted; the incitement or "stirring up" must be of some of the people (*plebs*, volk). I do not wish to go so far as to say that the incitement must be of any particular number of individuals; there may be an incitement of only one, and that may result in an insurrection or rebellion, in which event the inciter may be guilty of *oproer*.

It may be said that if the charge as laid constitutes *gekwetste majesteit*, a generic term which would include "sedition" or "oproer," it would be mere technicality to hold that that offence was wrongly named in the indictment.

But I consider it of the utmost importance if a person is charged with a specific crime, that that particular form of crime should be disclosed in the indictment.

As we have seen from the authorities a person who is guilty of *oproer* as the inciter or author thereof may be punished as for treason, the gravest form of *laesae majestatis*.

I, therefore, am of opinion that the appeal must succeed on the first ground urged.

GREGOROWSKI, J.: The main grounds of appeal which have been urged in this case are the first two stated in the notice of appeal, viz.: (1) "That the evidence discloses no criminal offence, more especially not the crime of sedition," and (2) "that our common law does not know such a crime as sedition."

It will be more convenient to take the second ground first, that the crime of sedition is not known in our law. I do not think that this is an objection which can be maintained in the face of the authorities.

Van der Linden (p. 231 of the Dutch edition) mentions "oproer" or a species of "Openbaar geweld," and he defines it as "het aanwenden van middelen van geweld en dwang door welken de openbare rust en orde in gevaar gebracht of het gezag der gestelde machten en ambtenaaren aangerand wordt." He then states that the offence can be committed by different sorts of acts and various ways. *Henry*, in his translation, translates "oproer" by "sedition," and it clearly appears that the corresponding Latin equivalent is "seditio," which is a crime well known in Roman law (*Vid* Boey *Woordenboek* "Seditie" *Voet*, 48, 6, 2).

Code book 9 in title 30 following on a number of titles dealing with other crimes, treats of "*de seditiosis et de his qui plebem contra rem publicam audent colligere*," and the commentators on this title regard "seditio" as a substantive offence. It, moreover, is an offence apt to arise in camps and to be committed by soldiers (Peresius *ad Cod.* 12, 30 n. 42, 43, *Voet de Jure Militari*, Tit. V).

In Tredgold's handbook of *Colonial Criminal Law*, sedition is mentioned as a crime, and a form of indictment is given on page 383.

In *Queen* v. *Umdil Shewa* (I. Ap. Cas. 77), it is pointed out that sedition is a crime under our Common Law.

The second question is as to the scope of this offence, and whether it includes seditious libels and incitements to sedition. It was admitted that the accused could rightly have been charged with seditious libel, and that the evidence would have supported the charge, but it was said that sedition, if such a crime exists,

is a species of "Openbaar geweld," and is restricted to deeds of violence, and that in England the name of the crime in this instance would have been seditious libel, and that the prosecution should have followed the precedent set in *Queen* v. *Celliers* (1877-1881, Kotzé 237), where the accused was charged with seditious libel.

In English law the crime of sedition does not appear in legal nomenclature. The offence charged is either the misdemeanour of seditious libel or the misdemeanour of seditious conspiracy, but as pointed out in the argument, a mere conspiracy in our law is not an offence except in the case of treason, so that a seditious conspiracy in itself unless it were treasonable would not with us be a substantive offence. Under such circumstances the proper course would be to charge sedition as an offence, and then to set out the overt acts by which it has been perpetrated.

The main feature of sedition is the seditious intention. This is the case both in our law and in the English law, and the authorities in both systems of law carefully distinguish sedition from treason. Section 18 of Act 38 of 1902 is now repealed, but it would seem to be merely a statement of the common law, except in so far as it makes a seditious conspiracy without any overt act a substantive offence. In ordinary language and under the common law a person who speaks seditious words and does seditious acts, or publishes a seditious libel, or is a party to a seditious conspiracy which has been followed by overt acts in furtherance thereof, would be regarded as guilty of sedition in one or other of its forms, and it would not be proper to charge him with sedition, and then in the indictment to set forth the particular acts which constitute the offence of which he is alleged to be guilty.

It is admitted that seditious libel is an offence by our law (*Queen* v. *Celliers*), and if this is so it can only be such because it falls under *Cod.* 9, tit. 30, and it would be included under the crime of "*seditio*" discussed by the various commentators.

Cod. 9, tit. 30, makes a special point of persons who with a seditious intent incite others to insubordination against the authorities, and this is the form which sedition in its early stages always assumes before it breaks out into open insurrection and violence. Thus Peresius (*ad Cod.* 9, tit. 30) says: *Homines seditiosi qui vel clamoribus vel conspirationibus vel congregationibus vel exhortationibus seditiosis . . . plebem adversus magistratum seu rem publicam et eius quietam concitent.* Similarly Brunneman, in

his commentary on the same title, says: *Seditio est mobilis vulgi ad excitandum tumultum contra quietem publicam dolo facta concitatio.*

Matthaeus, *de Crim.* (48 tit. 2, cap. 2-5) also shows in what a wide sense the word *seditio* is used, and amongst the overt acts constituting the offence he instances the creation of a tumult or a riot with a seditious intent, and in order that such an overt act may be deemed to exist there must be a *turba* or crowd of at least ten or fifteen persons. The requisite is very analogous to the provision requiring a certain number of persons to constitute an unlawful assembly, or to form a riot. But the instances given by Matthaeus are not exhaustive on the subject of sedition, and it does not seem to me a necessary inference from what he says that in all cases of sedition it is an essential feature that there should be a certain number of person involved, or that such acts as seditious incitements by word or writing do not constitute sedition.

In my opinion the charges as laid in this case are good, and the objection made should be dismissed.

The appeal was allowed and the conviction and sentence set aside.

Attorneys for Accused: *Reitz & Pienaar.*

[G. v. P.]

R. v. BERTRAM DAVIS.

1915. *March* 8; *April* 14. BRISTOWE, CURLEWIS and GREGOROWSKI, JJ.

Criminal law.—Lottery.—Picture title competition.—Law 7 of 1890.

Criminal procedure.—Remittal to different magistrate.—Sec. 88 (*c*), *Ord.* 1 *of* 1903.

D inserted an advertisement in a newspaper containing a picture, and offered 1st, 2nd and 3rd and 50 consolation prizes for the best title to the picture. Competitors were required to send 1s. with each answer. The sole and final decision in the competition rested with a certain B. The prizes were awarded by B according to his judgment, *bona fide* given. upon the merit of the answers, based upon their originality or wit. *Held*, that this was a competition dependant upon skill and not chance.

A case remitted for trial under sec. 88 (*c*) of Ord. 1 of 1903 may be heard by a magistrate other than the one who took the preliminary examination.