property. It is therefore not possible that payment should be made at the moment of the actual passing of transfer. If we were to accede to Mr. *van Pittius'* argument, the vendor would have to part with his property before the purchaser paid the money and without any guarantee that the purchaser would pay. It seems to me that to push the rule laid down by the authorities to its extreme limits would be to do an injustice to the vendor. *Voet* says that where the rule cannot be strictly carried out some compromise may be adopted. It appears to me that a compromise must be adopted in cases like the present, and that the compromise which up to now has been adopted is a reasonable one, viz.: that if the vendor has done substantially everything necessary to carry out the contract, and all that remains is the formal business of obtaining registration and passing transfer, then he is entitled, at all events, to have the purchase money secured.

DE VILLIERS, J.P.: There will be judgment for £848 for plaintiff, against transfer, with interest as claimed in par. 5 of the declaration, with costs.

Attorneys for Plaintiff: *Stegmann & Roos;* Attorney for Defendant: *B. J. A. Lingbeek.*

[G. v. P.]

REX v. MALAN.

1915. *April* 20, 23. MASON and BRISTOWE, JJ.

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

The crime of sedition has the same meaning as "oproer," and denotes a gathering or concourse of people, or some individuals acting in concert, with the purpose of tumult or insurrection against the sovereign or the government. Unless it is alleged and proved that "oproer" had actually taken place, a person cannot be convicted of sedition or of incitement to sedition.

R. v. *Endemann* (*supra*, p. 142) followed, but its correctness doubted.

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

Accused was charged with the crime of sedition on three counts. The indictment alleged that whereas since the month of August, 1914, 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, and whereas rebellion had broken out in the Union of South Africa, the accused wrongfully, wickedly, maliciously and seditiously continuing, devising and intending to endanger the 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 of such Government, did wrongfully, unlawfully, maliciously and seditiously during the months of October and November, 1914, publish, utter, pronounce and declare amongst other words and matter as follows, that is to say: (1) to P. S. W. de Bruyn, a constable in the S.A. Police, residing at Pretoria: "The first chance I get I will go and join the rebel commando. Will you join the rebel commando near Donkerhoek? We can take the Police rifles and ammunition. If I had known Maritz had gone to join the rebel commando, I would have gone with him. Maritz (meaning the rebel leader) is coming up to the Free State to meet General Beyers and General de Wet (meaning the rebel leaders). They will hoist the Republican flag in Pretoria. There will be a Republic, and we shall have our own flag again . . . " or words to that effect. (2) To one Botha, in the presence and hearing of P. S. W. de Bruyn: "You must hurry up with your gun and go to Beyers (meaning the late General Beyers). You must tell General Beyers about the police, that he need not be afraid, as the police will not fire on him." (3) To one M. G. Oosthuizen, a constable in the S.A. Police, residing at Pretoria: "General de Wet (meaning the rebel General) has 21,000 men with him. The Swazis are killing the cattle and sheep of the farmers who had been commandeered by the Government. The rebels will make General Beyers president. It was wrong for General Botha to declare war against the Germans in West Africa. I hope the rebels will win . . . " or words to that effect. That the said accused when he published, uttered or pronounced as aforesaid, intended thereby to excite discontent and bring into hatred His Majesty's Government and to alienate the affections of the said De Bruyn, Botha and Oosthuizen 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 and 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 that the said Malan did commit the crime of sedition.

He was found guilty and sentenced to six weeks' imprisonment with hard labour on each count.

A. S. van Hees: There is no allegation in the charge-sheet that any sedition or oproer followed, and this case therefore falls within the case of *R.* v. *Endemann* (*supra*, p. 142).

[MASON, J.: The Court is bound by the decision in that case, but does not the fact that the charge-sheet alleges that rebellion had broken out alter the position?]

I submit not; the rebellion did not follow on the words spoken by the accused. Even if the words constitute an incitement to rebellion, they do not constitute the crime of sedition. Unsuccessful incitement is no crime under the common law.

C. W. de Villiers, Attorney-General, for the Crown: I accept the definition of sedition in *Endemann's* case, but this case is different. That case was one of seditious libel. I cannot contest the position that incitement ought to be specially charged if there is no riot or tumult. See *Queen* v. *Kaplan* (10 S.C. 259).

The charge-sheet alleges that rebellion had broken out; rebellion was actually existing, and accused then invited others to join the rebel commandoes.

Van Hees replied.

Cur. adv. vult.

Postea (April 23).

MASON, J.: The appellant was convicted of sedition upon three counts, and sentenced to six weeks' imprisonment with hard labour upon each count.

He appeals upon the grounds that the indictment does not disclose any offence, and more especially not the offence of sedition, and that the conviction is against the weight of evidence.

He was charged with sedition in uttering to three persons on separate occasions certain words, intending to excite discontent and to bring His Majesty's Government into hatred and to alienate the affections of the persons in question from His Majesty's Government.

There is no averment that as to the three named persons any result followed from these words, though the indictment contains in the preamble the statement that a state of war between His Majesty's Government and the German Empire has existed since August, 1914, and that rebellion has broken out in the Union of South Africa.

Counsel for the appellant contended that as no overt act of any kind was alleged to have resulted from the language used, and that as sedition necessarily implied some form of public violence, the indictment was bad, and he relied upon the decision of this Court in the case of *R.* v. *Endemann* pronounced last week.

The Court by a majority there decided that the word " sedition " bore the same meaning as the Dutch legal term " oproer," that " oproer " denoted a gathering or concourse of people or some individuals acting in concert with the purpose of tumult or insurrection against the sovereign or his government, and that without allegation and proof that " oproer " had actually taken place, there could be no conviction on the charge of sedition.

The Court was of opinion that in consequence of the repeal by Act No. 27, 1914, of the Peace Preservation Ordinance 38 of 1902, under which seditious offences are specially dealt with, recourse must be had to the Roman-Dutch law on the subject of " oproer " for the interpretation of the word " sedition." By that decision I feel bound, though this construction of the later statute seems to me open to doubt, as the view taken by the majority of the Court in *R.* v. *Endemann*, in my judgment, renders the word " sedition " superfluous, because all acts constituting " sedition " as so interpreted fall under the heading of high treason or public violence.

Sedition is a well-known English *nomen criminis* (see *R.* v. *Sullivan*, II Cox C.C. 44; 2 Stephen's *History of Crim. Law*, p. 298; Archbold, 22nd ed., p. 942), and if the English word is used presumably those offences are indicated which are also offences under Roman-Dutch law. Such a construction would, I venture to think, fill up the gap which exists between high treason and public violence, and thus bring within the purview of the section all those political offences connoted by the phrases *laesae majestas* and public violence.

The statutory provisions of the Peace Preservation Act only existed in the Transvaal and Free State, and its repeal can hardly affect practice in criminal law throughout the Union.

Sedition has, I believe, in other parts of South Africa, been used as in many other cases, mainly in the English sense as a *nomen criminis* for acts which are also offences under our common law; and it seems clear from the form of this indictment that it was so used in the present case. The indictment indeed seems based upon the form given in Archbold (22nd ed., p. 949).

As the facts charged are clearly an offence under our law, and as they are called by what would be the proper *nomen criminis* in English, the circumstance that the word which is used to translate sedition into Dutch or Latin has in Roman-Dutch and perhaps Roman law a somewhat different connotation does not appear a fatal objection to an indictment which conveys clearly to the accused the real nature of the charge he has to meet.

In have thought it right to indicate the reasons which have caused my doubts upon this point.

The only other question is whether the facts charged do not amount to an incitement to sedition, and if so, whether the accused can be convicted on a charge of sedition. That the facts stated in the first two counts in this case constitute incitement to sedition, and that this would under English law be itself sedition seems to me unquestionable. But the same remark applies to the second count in *Endemann's* case; yet the majority of the Court held the indictment to be bad, upon the principle that a person cannot be charged with the commission of a crime when the indictment only shows an incitement to commit, but not the actual commission of the crime. The *Attorney-General* did not contest the proposition, but maintained that the recital in the preamble that rebellion had broken out met this objection by alleging that "oproer" had actually taken place.

But this argument does not seem to me tenable. Unless the persons addressed had joined the rebellion, the accused cannot be said to have been guilty of "oproer"; what he said was still unsuccessful incitement and nothing more. It is not necessary in this case to determine whether unsuccessful incitement amounts to an attempt; there is much to be said in support of such a view, as successful incitement is equivalent to the commission of the offence itself both as regards guilt and form of indictment.

The decision in *Endemann's* case seems to me conclusive in favour of the appellant; the conviction and sentence must therefore be quashed on the ground that the indictment does not disclose the offence of sedition.

BRISTOWE, J.: I agree that this case is governed by *Endemann's* case. The points decided by the majority of the Court in that case are, I think, stating them simply as follows:

(1) The word "sedition," as used in sec. 18 (1) of Act 27 of 1914, is not to be construed in the ordinary English sense, but as being limited to the Dutch word "oproer," which means insurrection; (2) one man cannot commit the crime of "oproer," though he may incite others or even one other person to do so; and (3) incitement to "oproer" is a crime, but if it is not followed by "oproer," a man cannot be convicted of it on an indictment charging him with the larger offence.

In the present case what the accused actually did was to incite to rebellion, but there is no allegation and no proof that rebellion followed on the indictment. The *Attorney-General* pointed out that rebellion is alleged to have broken out, and he argued that that was sufficient because rebellion is a continuing offence. But according to the judgments to which I have referred (as I understand them), this is not sufficient. It must be alleged and proved that the "oproer" followed as the result of the incitement. The JUDGE-PRESIDENT uses the words "*auctor or princeps seditionis*," which can only bear that meaning.

I thought at first that the conviction might perhaps be supported under sec. 136 of the Criminal Procedure Code, but on consideration I am satisfied that to hold that would be to unduly strain the language of that section.

The accused is plainly guilty of inciting to sedition—if not of high treason, but unfortunately he has been charged with sedition. On the authority of *Endemann's* case we have no alternative but to quash the conviction.

I may add that I share my brother MASON'S doubts as to the correctness of the decision in *Endemann's* case.

I am not satisfied that it was necessary to go to the common law to determine the nature of the crime of "sedition" as constituted or recognised by sec. 18 of Act 27 of 1914. "Sedition" is an English word with a well-ascertained meaning, and I think it should be construed in its dictionary sense, more particularly as the word is one which has for many years been in familiar use in South Africa. And seeing that Act 27 of 1914 is in a great measure substituted for the Peace Preservation Ordinance of 1902, which contained a definition of "sedition" taken from English law, I feel little doubt myself that that was the meaning which the

Legislature intended the word to bear in the new Act. It is a further argument in favour of this view, that if this meaning is given to "sedition," then all the varieties of the Roman *laesae majestas* would be covered by the section. I am aware that the Dutch version of the Statute gives "oproer" as the equivalent of "sedition," but if there is a difference between the dictionary meaning of those two words, I think the proper course would be to look at the meaning and intention of the Statute regarded as a whole for the purpose of determining what it was that the Legislature really meant.

[G. v. P.]

KLATZKIN v. NOBLE, N.O.

1915. *April* 27, 28. DE VILLIERS, J.P., and BRISTOWE, J.

Practice.—Appeal by insolvent.—Security for costs.—Proc. 21 *of* 1902, *Rule* 60.

Where an unrehabilitated insolvent appeals from a decision of a magistrate, he should give security for costs of appeal before being allowed to proceed with the appeal.

Appeal from a magistrate's decision.

Appellant, who was an unrehabilitated insolvent, sued the respondent, the trustee in his estate for certain moneys, being remuneration for his carrying on business on behalf of the insolvent estate. The magistrate dismissed the summons with costs, and the appellant now appealed.

P. Millin, for the respondent: Appellant being an unrehabilitated insolvent should be ordered to give security for costs before being allowed to proceed with the appeal; see *Mears* v. *Pretoria Estate and Market Co.* (1906, T.S. 661, at p. 661; and 1907, T.S. 951, at p. 956); *Lange* v. *Claasen* (10 S.C. 243). He had to give security under Rule 60 of the Magistrates' Courts' Rules.

L. Greenberg, for the appellant: It is not necessary to give security for costs; there is no statutory provision to that effect. See *Siffman* v. *Weakley* (1909, T.S. 1095); *Blackshire* v. *Stegman, Esselen and Roos* (1906, T.S. 768).

Millin replied.

Cur. adv. vult.

Postea (April 28).