But if questions affecting the right of private prosecution are entirely beyond the powers of a Provincial Council, even when they affect municipalities, then it seems to me that the existing law is maintained by section 135 of the Act of Union. Under those laws the right of private prosecution is vested in the municipality. A repeal of them, so as to throw the cost of private prosecution upon the Union Government, would be ineffectual if the contention of the appellant be correct.

Objection was also taken that the summons was bad because it was in the name of Mr. Adams and not of the Municipality, but the form is in accordance with the practice and with Rule 68 of the Magistrate's Court Rules, and the objection must be disallowed.

I have come, therefore, to the conclusion that the respondent municipality in this case was entitled to prosecute, and that the appeal must, therefore, be dismissed.

[G. v. P.]

REX v. BLUMENTHAL.

1915. *August* 3, *September* 24. DE VILLIERS, J.P., MASON and CURLEWIS, JJ.

Magistrate's court.—Jurisdiction.—Geweld.—*Sec.* 35, *Proc.* 21 *of* 1902.

Geweld not being a crime now punishable by death, a magistrate has jurisdiction to try persons accused of committing it.

Appeal against a conviction by a magistrate at Johannesburg.

The accused was found guilty of *Geweld* and sentenced to a fine of £4 or 14 days' imprisonment with hard labour. The appeal was based upon the ground that the magistrate had no jurisdiction under sec. 35 of Proc. 21 of 1902 as the crime was one of those punishable with death.

J. Brink, for the appellant, referred to sec. 35 of Proc. 21 of 1902. *Geweld* is punishable with death or banishment: Moorman, *Over de Misdaden* (10, 2, 3); Van der Linden's *Institutes* (2, 4, 6).

[DE VILLIERS, J.P.: Should one not look at the facts charged under the name of *geweld* and see whether the death penalty is likely to be inflicted?]

I submit that there is only one crime of *geweld*, although there may be degrees of guilt.

Nightingale, for the Crown: Ideas as to punishment have changed. Perjury and bestiality were formerly punishable with death or banishment, but a magistrate can now try both crimes: *R.* v. *Anderson* (4 E.D.C. 15), where it was held that banishment is obsolete as a punishment for perjury. See also *R.* v. *Talleke* (5 E.D.C. 180). Section 88 of Cr. Pr. Code gives the Attorney-General power to remit cases for trial by a magistrate, and section 90 gives additional jurisdiction. The corresponding Cape Act is 43 of 1885. See also a review case reported in 4 S.C. 106; *Tom* v. *The State* (1896, O.R. 249); *Regina* v. *Undilimana* (1894, 15 N.L.R. 236); *R.* v. *Hardy* (1905, 26 N.L.R. 165). For a definition of *Geweld* see Moorman, *ubi supra* (1, 3, 4). The old punishments are to-day obsolete. If *geweld* involved the death penalty the accused would be charged with murder.

Brink replied.

Cur. adv. vult.

Postea (September 24).

DE VILLIERS, J.P.: The accused was charged with the crime of *geweld*. He was found guilty and sentenced to a fine of £4 or 14 days' imprisonment with hard labour. The first point that was taken on his behalf is that according to section 35 of Proclamation 21 of 1902 the magistrate had no jurisdiction as the crime is one of the crimes punishable with death.

Now there is no doubt that for some species of public violence the punishment in Roman-Dutch law was capital. Even in the time of Van der Linden such was the case. In speaking of the punishment for public violence he says (2, 4, 5): "As this crime may be committed by divers acts and in different ways, so also the punishments are various. Under very grave circumstances even capital punishment may be taken into consideration." And in the following section: "It is in the nature of this crime that it cannot be subjected to the same punishment, and one which is always applicable, but the punishment must be discretionary, varying according to the gravity of the crime and the manner in which it was committed, and hence there may be some cases in which capital punishment is applicable: *e.g.*, by robbing the attendants of the mails; and, on the other hand there may be cases

which are subject to slight punishments or to fines." Damhouder, one of the Counsellors of the Emperor Charles V. (*Practijk in Crim. Zaken*, c. 98, 2 and 3) confines the penalty of death to cases of public violence committed by means of arms resulting in death. Groenewegen (*de leg abr. ad. D.*, 48, 6) states that the punishment was in the discretion of the Court. In *Voet's* day the punishment of death was inflicted on housebreakers and armed highwaymen (*Voet*, 48, 6, 3). At my request the Registrar of this Division has communicated with the Registrars of the various Provincial Divisions in the Union as also with the Keeper of the Archives at Cape Town with a view to ascertaining if sentence of death has ever been passed in South Africa for this crime, and if so, whether it has been carried into execution. The answers are amongst the records. In no case has the death penalty been imposed except in the case of *seditio ad eversionem rempublicam*, or where this crime has been accompanied with murder. But according to our practice the indictment would probably specifically charge accused with murder. Besides, many of the harsher punishments of the Roman-Dutch law have fallen into desuetude with us. In no branch of the law has there been a greater advance within the last hundred years than in the subject of punishments. There can hardly be any doubt that, *e.g.*, for arson (V. d. Linden, 2, 4, 7), uttering counterfeit coin, (*ib.*, 2, 4, 4) and theft (2, 6, 2) capital punishment must be considered to be obsolete with us. It is true that in a case reported in 4 S.C. at p. 106, it was decided that the magistrate had no jurisdiction to deal with the crime of uttering counterfeit coin, because it is punishable by death, but the point was not argued and the judgment proceeds upon the admission of the Crown that such was the case. It is significant that the Crown contended that the magistrate had no such jurisdiction. An admission made under such circumstances is not entitled to much weight. Here in terms of section 35 of Proc. 21 of 1902, to oust the jurisdiction of the magistrate we must be satisfied that the specific crime or offence with which the accused was charged is punishable by death with us. In my opinion there is no doubt that (whatever may have been the Roman-Dutch law) the accused could not have been sentenced to death and in the present instance the magistrate, therefore, had jurisdiction.

(On the merits the appeal was dismissed, but his lordship commented on the inadequacy of the sentence.)

MASON, J.: The appellant was charged with and convicted of the crime of *geweld* in taking part in a riot and affray and inciting a crowd to violence. He was sentenced to pay a fine of £4 or to undergo 14 days' imprisonment with hard labour.

The first ground of appeal is that the magistrate had no jurisdiction to try the case under section 35 of Proc. 21 of 1902, because *geweld* is a crime punishable by death. This section gives the magistrate jurisdiction in all cases where a person may be accused of any crime not punishable by death, transportation or banishment.

It is not necessary to consider questions of transportation or banishment at the present time, because under section 242 of the Criminal Procedure Code, No. 1 of 1903, those are not punishments which can now be inflicted.

There can be no question that under Roman-Dutch law the crime of *oproer* or insurrection was punishable with death in very serious cases.

Now *oproer* is a species of the general crime of public violence, and there are undoubtedly many other cases of public violence or of crime accompanied by violence which were also punishable by death, but the real question for decision in this appeal is whether this punishment is applicable generally to the crime of public violence and if so whether it has become obsolete, assuming that the bare charge of *geweld* includes a charge of *openbaar geweld*.

The principles governing the obsolescence of laws were considered in the case of *Green* v. *Fitzgerald and Others* (1914, A.D., p. 88). It was there decided that adultery as a crime had become obsolete. Sir James INNES laid down that disuse of a law for a long period in the face of circumstances calling for its enforcement and such as to demonstrate that there was a general public consent to its abrogation was sufficient to prove that the law had become obsolete.

The law in question in that case was a Dutch statute, which had become part of the law of South Africa, had appeared in the old Cape Placaats, and had during the early history of the Cape actually been put into force.

In dealing with this question the general history of Roman-Dutch criminal law must be taken into consideration. It was not a well-developed code, nor even a fairly systematised body of jurisprudence such as the Civil law. As has been pointed out by Sir John WESSELS in his History of Roman-Dutch law, it was based mainly on the Roman law as developed by German jurists and

supplemented by widely diverse local legislation. We, therefore, find that a great many provisions of criminal law, and especially those dealing with punishment, were introduced by judges and jurists without the definite sanction of statute.

The Roman law under the name of the *Lex Julia de Vi Publica seu Privata* (*Institutes*, 4, 18, 8) punished those who were guilty of armed violence with deportation and of unarmed violence by confiscation of a third of the offender's property, but inflicted a capital penalty on those who were guilty of rape.

The *Digest* (48, 6), after dealing with the provisions of the *Lex Julia de Vi Publica*, states that the punishment is outlawry (*aqua et igni interdictio*) but that those who with arms and in company of a crowd pillage, break open or storm houses are punished capitally.

Special forms of violence are made punishable by death under special *leges* of the *Corpus Juris;* thus in *Digest* (48, 19 28) (*De Poenis*) the class called *Juvenes*, if repeatedly guilty of riot and sedition, might be put to death, as also highwaymen who used arms in their attack or committed repeated offences, and notorious robbers.

The *Code* (9, 12, 6) enacted capital punishment for those who by violence caused death in cases of disputed possession. In some cases death was inflicted upon slaves and persons of humble birth when others were only deported, for deportation was later on substituted for outlawry.

We may say in brief that deportation was the punishment for public violence, but that in the special cases mentioned, in the case of rape and in those instances where the violence also constituted *laesa majestas*, the sentence of death might be imposed.

Matthaeus (*De Criminibus*, 48, 4, 2 (1)) only refers to the Roman Law penalties for the crime of public violence.

Groenewegen (*De Leg. Ab. ad. Inst.*, 4, 18, 8), states that the punishment for public and private violence is by modern custom discretionary, and is proportioned to the circumstances and gravity of the offence. He cites, amongst other authorities, Consultation 320, Vol. I (*Dutch Consultations*), where it is said that according to modern customs persons committing violence upon anyone's house may be capitally punished.

Carpzovius (*Misdaden*, cap. 34), after referring to the Roman law generally, says that robbers and pillagers are usually punished with death (in these lands).

Moorman (*Misdaden*, 1, 10, 3), after referring to the Roman punishments, states that nowadays public violence is punished at the discretion of the judge.

Voet, in his chapter on the *Lex de Vi Publica* (48, 6, 3) states that the penalty for public violence is generally imposed in accordance with the circumstances and gravity of the offence at the discretion of the judge, but undoubtedly capital punishment may sometimes be inflicted for public violence, as frequently happens in the case of housebreakers, armed highway robbers, and those who rob the public mails. One of the Placaats is cited as an authority for the last proposition.

Van der Linden (*Institutes*, 2, 4, 4), after referring to sedition as a branch of the crime of public violence and as punishable in grave cases with death, deals (2, 4, 6) with the crimes of public and private violence, and says that the punishment is discretionary and regulated according to the enormity of the offence, and that there may be cases in which it may be punished even with death, as, for instance, stopping and plundering the mails, and for this he also cites the Placaat of the 6th December, 1646.

An examination of these authorities shows, in my opinion, that the crime of public violence was not punished with death except in those cases in which special provision was made for capital punishment. The robbing of the mails and housebreaking are examples of special statutory punishments. It is quite true that that species of public violence which received the name of *oproer*, and which was really high treason, was punishable with death.

There are a great many Placaats enacted in Holland, Batavia or Cape Town, which at some time or other were in force in the Cape Colony, and some of these deal with various species of violence and impose various penalties, such as fines, corporal punishment, spare diet, and banishment, but in cases of murder or malicious wounding death might be inflicted. Extracts of these Placaats are contained in an article in the *Cape Law Journal* (1897, p. 1).

There are special provisions in Natal with reference to faction fights amongst natives, and the Transvaal Law No. 4 of 1885, sec. 9, also deals with the same subject. In each case it seems not to have been contemplated that the death penalty should be imposed.

The result of enquiries made of the various Attorneys-General and in the Record Offices shows that the death sentence has not been imposed in South Africa as far as is known since 1805 for the crime of public violence unaccompanied by rebellion or murder, and

that with a few specified exceptions the death sentence has not been imposed for any offence other than murder, treason or rape. Certain persons were sentenced and executed in 1820 in the Cape for mutiny, armed public violence, accompanied with murder, wounding, robbery, plundering and desertion. Others charged with similar offences, except murder, were awarded various other punishments.

In Natal, sentences of death were passed between 1851 and 1869 in four cases of arson, two of sodomy and in two cases of administering poison with intent to murder; all the sentences were commuted.

I have had search made amongst the records in the Transvaal since 1877. There have been many prosecutions for public violence, but in no case in which that alone was the charge has the death penalty been imposed. Several cases also have been tried by magistrates and the sentences confirmed.

A great many natives were prosecuted during 1883 in connection with the troubles in Sekukuniland. The Kaffir Chief, Mampoer, was tried upon a single indictment charging him with the offence of murder, public violence, and rebellion (*oproer*), and was found guilty on the 20th September, 1883, and sentenced to death, and the sentence was duly carried into effect.

Another Kaffir Chief, Niabel, was charged also upon a single indictment with public violence and rebellion (*openbaar geweld en oproer*), was found guilty and sentenced to death on the 22nd September, 1883, but the sentence was commuted to one of imprisonment for life.

A large number of other natives were charged in the same month with public violence and rebellion and sentenced to imprisonment with hard labour.

In the charge against Niabel he was alleged to have wrongfully, maliciously, and with evil intention and design, violated the public security and peace by withstanding and defying the lawful authority of the Republic and by taking up, bearing, and using arms with the intention of resisting, as he did resist, the lawful authority of the South African Republic. These facts clearly constitute treason, and not only do all the old authorities mention death as a proper sentence in such cases, but that punishment has been inflicted in comparatively modern times, both in the Cape Colony and in Natal. There can be no doubt that cases of public violence, more espceially amongst the natives, have been frequent in South Africa, but in none has the death sentence been imposed to my knowledge.

Such briefly is the history of the law of punishment in connec-

tion with public violence, but the question as to whether it has become obsolete requires a consideration of the punishments which were applicable to other offences, and which are put on the same footing by our jurists.

I shall only refer to those cases in which the death penalty was considered appropiate by the Roman-Dutch writers. All of them state that sodomy is punishable with death, and on the 21st July, 1730, the States of Holland and West Friesland enacted a Placaat making the death penalty compulsory, though it was left to the discretion of the judge to determine, according to the gravity of the offence, what kind of death should be inflicted.

Repeated or gross cases of forgery or theft were also punishable by death. (Van der Linden, *Institutes*, 2, 6, 2 and 4; *Voet*, 47, 2, 17 and 18, and 48, 10, 8).

Housebreaking and cattle-stealing were punishable by death as well as the crime of robbery. Coining, which was regarded as a species of high treason, was also subject to the death penalty, and arson was not only a capital offence but was punishable in aggravated cases by burning alive. Even prison breach is, according to some authorities, a capital offence. (Van der Linden, 2, 4, 7.)

These punishments, though in accordance with the spirit of the age, and in accordance with what was during the early part of last century the law in England, have undoubtedly not been inflicted in South Africa during the past century with the Natal exceptions to which I have referred. That they have not been regarded as capital offences in most cases is clear from the fact that theft and fraud all over South Africa have been tried by magistrates under their summary jurisdiction. Indeed if we examine the Roman-Dutch authorities carefully, there is hardly a single offence which under certain circumstances may not be punishable with death. *Voet* states that the capital penalty may be inflicted in the case of extraordinary crimes (47, 11, 1), and there are authorities who lay down that the capital sentence is one which a judge may pass in cases where he has a discretion as to the punishment.

That large numbers of statutory penal provisions have become obsolete there can be no doubt, as for instance the punishment of death for bankruptcy, which was imposed by Charles V. and many other punishments mentioned in the old Placaats. It could hardly be maintained at the present day that the concealing of fugitives, the firing of bush, libelling the Government, or thefts from houses, shops and streets, are punishable now by death, or that civil servants

who absent themselves from church might for the third offence be imprisoned for one year with chains; yet these are all statutory punishments under old Cape Placaats.

So far as I am aware, the case of *Green* v. *Fitzgerald* is the first one in which our South African Courts have discussed the question as to a criminal law becoming obsolete.

There are some Cape cases upon the question of the magistrate's jurisdiction under a statute similar to the Proclamation 21 of 1902. In one case (4 S.C., p. 106) the conviction by a magistrate for uttering counterfeit coin was quashed upon the admission of the Crown that the crime of uttering counterfeit coin was punishable by death.

In the case of the *Queen* v. *Lottering* (13 E.D.C., p. 129) a conviction by a magistrate for robbery was quashed upon the same ground, as was a conviction for housebreaking with intent to steal in the case of *R.* v. *Cornelius* (1910, E.D.L., p. 116), but in none of these cases was the question discussed as to how far those punishments were still in force.

If we are to hold that the magistrates have no jurisdiction in cases in which under Roman-Dutch law the crime was punishable with death, regardless of what has been the actual practice in South Africa, there are few cases which could be tried by a magistrate under his ordinary jurisdiction, except those where such jurisdiction has been expressly given by local legislation.

I have come, therefore, to the conclusion that death was not the penalty for the general crime of public violence under Roman-Dutch law, and that even in those cases in which it might have been imposed, it has become obsolete except as a punishment for rape or certain treasonable offences.

It is quite true that the offence of public violence may be accompanied by murder, high treason, or rape; but if it is intended that evidence as to those offences should be led and the punishment should be inflicted, not for the offence of public violence, but for the other capital offence, the only procedure consonant with modern systems of administering justice is to indict the accused specifically for the capital offence.

So far as the Roman-Dutch authorities are concerned, they are far more emphatic in requiring the death penalty for repeated offences of theft or fraud or for the crime of sodomy or arson than for the offence of public violence coupled with other crimes.

The objection, therefore, to the magistrate's jurisdiction cannot, in my opinion, be upheld.

(On the merits his Lordship agreed with the JUDGE-PRESIDENT.)

CURLEWIS, J., concurred.

[A. D.]

JOHANNESBURG MUNICIPALITY v. JOLLY.

1915. *September* 8, 10, 27. CURLEWIS and GREGOROWSKI, J.J.

Negligence.—Construction of drains under statutory authority.—Diversion of rain water.—Damages to property.—Liability.

A municipality acting under statutory authority constructed drains and thereby diverted rain water from its natural course. After a heavy fall of rain the water overflowed the drains and caused damage to lower lying property, *Held*, that the municipality was not liable unless the construction of the drains placed a greater burden on such property either as regards the quantity, velocity or direction of the water which in the ordinary cause of nature would have flown over the property.

Appeal from a decision of the magistrate of Johannesburg.

The respondent, plaintiff in the lower Court, sued the appellant, defendant in the Court below, for £53 damages on the ground:—

(1) That she was the owner of stands Nos. 1483, 1485 and 1487 at the corner of First Street and Second Avenue, Bezuidenhout Valley.

(2) That the defendant constructed a road with guttering and kerbing in First Street.

(3) That by reason of the faulty, negligent, inadequate and unskilful construction of this guttering and kerbing, and the diversion of the natural flow of the surplus rain thereby occasioned the plaintiff's garden, well and premises were flooded on the 13th November, 1913, and the damage claimed was thereby caused.

The appellant admitted that respondent's property had been flooded and damaged, that guttering and kerbing had been put in First Street, and that by the construction of First and other adjacent streets and of drains and culverts therein the natural flow of storm water was diverted "in the public interest," and pleaded (1) "that the work was done under statutory powers that it was properly done and was "reasonably adequate to contain the flow of