

An Evaluation of the Judge Presidency  
of John Dove Wilson of Natal (1910 - 1930).

By

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## Abstract

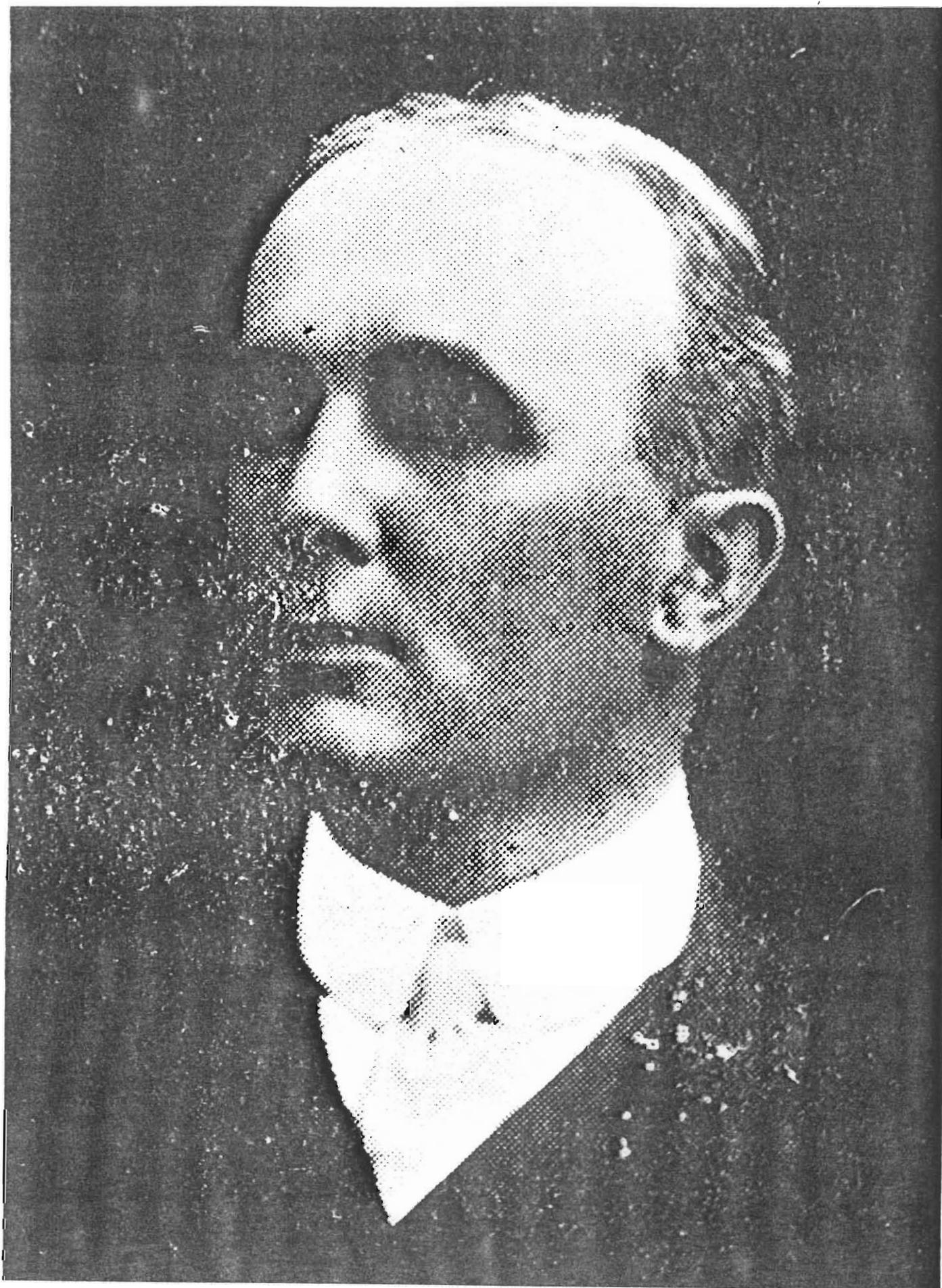
John Carnegie Dove Wilson, a Scot, was Judge President of the Natal Provincial Division from 1 January 1911 to 28 April 1930. The Court had reached its nadir during the previous two decades following the death of Sir Henry Connor in 1890. Connor CJ's successors did not match his stature, and the puisne judges were either English-trained, drawn from the Civil Service, or were poorly qualified members of the Bar and Side-Bar.

Dove Wilson JP was ideally qualified to bring about a change in the status of the Natal Court. He effected this change partly by playing a leading role in delivering the judgments of the Court. In addition, there were certain characteristics of his judicial personality which helped him to achieve this. The first of these was his ability to deliver extempore judgments, which he did frequently and with considerable success. The second was his prodigious memory which ensured that he was a particularly good trial judge. He also earned a reputation outside Natal with his work as an Acting Additional Judge of Appeal and, more importantly, as President of the Special Treason Court. Two of his main concerns were that the time of the Court should not be wasted and the rules of procedure should be complied with. Occasionally he recommended changes which would bring the Natal Court into line not only with the other Courts of the Union but also other jurisdictions, particularly England and Scotland. Perhaps more

than anything Dove Wilson JP showed that an open-minded attitude to case law could lead to acceptance of Natal decisions by the other provincial divisions.

The positive aspects of Dove Wilson JP's personality were not overshadowed by certain shortcomings, which included the failure to put to use his knowledge of Latin in the translation of the institutional writers. A more severe shortcoming was a degree of clinical over-detachment and lack of sympathy, particularly in criminal cases.

On balance Dove Wilson JP left the Natal Court the richer during his term of office. Future Judge Presidents could build on the foundations laid by him.



John Carnegie Howe Wilson MA LLB  
Natal Provincial Division



Sir John Carnegie Dove Wilson  
Judge President  
1911-1920

## FOREWORD

I would like to express my appreciation to a number of people who have assisted me with my research. First there is the staff of the Killie Campbell Africana Library who willingly acceded to my many requests for newspapers and microfilm. The staff of the Don Africana Library and the GMJ Sweeney Law Library were also very helpful.

I am also grateful to a number of people overseas who assisted me. Mr Paul Cullen, Clerk of the Faculty of Advocates, Edinburgh, arranged for a search to be made of records kept in the Faculty Office and Advocates' Library, and supplied several useful newspaper articles. Professor Francis Lyall of the Department of Public Law, Aberdeen University, arranged for Mr Colin McLaren, Archivist and Keeper of Manuscripts, to supply me with a record of Dove Wilson's studies at the university. Professor Robert Black of the Department of Scots Law, Edinburgh University, supplied several articles from the Scots Law Times and provided encouragement in the early stages.

I am particularly indebted to Miss Sheila Dove Wilson for her willingness to talk about her father. This was invaluable in providing many personal anecdotes about John Dove Wilson's life. Without this assistance, my thesis would have lacked the personal dimension.

However it is to my supervisor, Professor Peter Spiller, that I owe

the greatest thanks. From the very beginning he has willingly encouraged and supported me in my endeavours. I value very highly the many useful comments and insights which he contributed.

Lastly I would like to thank my aunt, Mrs Joan MacLachlan, who so willingly agreed to undertake the mammoth task of typing the manuscript and who did so in such an intelligent manner.

I record finally that this thesis is substantially my own work, save in the respect I have acknowledged above. I also declare that this thesis has not been submitted for a degree in any other university.

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DURBAN, 1987

## CONTENTS

Foreword	ii
Preface	v
Chapter 1 : John Dove Wilson and the Natal Provincial Division 1910 - 1930	1
Chapter 2 : Civil Cases	30
Chapter 3 : Criminal Cases	87
Chapter 4 : Reasoning ability and leadership of the Court	123
Chapter 5 : Legal authorities	145
Conclusion	177
Appendix A	187
Appendix B	190
Bibliography	191
Table of Cases	194

## Preface

The study of legal history is still in its infancy in South Africa. More particularly, it is only recently that a comprehensive survey of legal matters in Natal up to 1910 has been completed<sup>1</sup>. The object of this study is to remedy the deficiency which exists in the analysis of legal affairs in Natal between 1910 and 1930. Further, the legal system today rests on the foundations of the past, and for this reason it is important to assess the contribution made by one who was at the helm of the Supreme Court in Natal after Union.

In the Natal colonial era, the high point reached during the Chief Justiceship of Henry Connor (1874 - 1890) was followed by a marked decline in the conduct of the Natal Supreme Court. A series of undistinguished judges<sup>2</sup> of limited ability reduced the status of the Natal Court to a position far below that of its neighbours, notably the Cape Court of De Villiers CJ and the Transvaal Court of Innes CJ. It was to this setting that John Dove Wilson came in 1904, and six years later he was to begin his lengthy Judge Presidency of the Natal Provincial Division of the Supreme Court of South Africa. It will be one of the main concerns of this thesis to detect the extent to which Dove Wilson JP restored the status and esteem of the Natal Court to its former levels.

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1. See Peter Spiller A History of the District and Supreme Courts of Natal 1846 - 1910 (1986).

2. Notably Bale CJ and Wragg, Turnbull, Finnemore and Beaumont JJ.

At the outset of this study, a general survey is made of the Court in Natal during the years 1911 - 1930. Succeeding chapters examine in greater detail specific areas of Dove Wilson JP's judicial activity in civil and criminal cases. A further chapter will be devoted to an analysis of his leadership of the Court and his reasoning ability. The penultimate chapter examines his use of legal authorities (notably case law and the standard texts), and the concluding chapter evaluates his overall contribution to the legal process in South Africa.

## Chapter 1

### John Dove Wilson and the Natal Provincial Division 1910-1930

Following the passing of the South Africa Act on 19 August 1909, the Union of South Africa came into being on 31 May 1910<sup>1</sup>. Part Six of the South Africa Act created a single Supreme Court of South Africa, with an Appellate Division at its apex, and provincial and local divisions at its foundations<sup>2</sup>. Each provincial division was to be headed by a Judge President, and, in Natal, following the death of Bale CJ on 1 November 1910<sup>3</sup>, John Dove Wilson assumed the post of Judge President<sup>4</sup>.

John Carnegie Dove Wilson was born at Stonehaven, Kincardineshire on 27 April 1865<sup>5</sup>. He was the son of John Dove Wilson DL, LLD, himself an advocate and former Sheriff-Substitute of Aberdeen, Banff and Kincardine. He went on to become Professor of Scots and Roman Law at Aberdeen University<sup>6</sup>. Dove Wilson Junior was himself educated at the West-End Academy and Collegiate Schools, Aberdeen, and also privately. On completion of his schooling, he entered Aberdeen

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1. EH Brookes & C de B Webb A History of Natal (1965) 247.
  2. Sections 95, 96 and 98.
  3. AA Roberts A South African Legal Bibliography (1942) 347.
  4. When Bale CJ went on leave from August 1910, Dove Wilson J became Acting Judge President.
  5. Biographical information is derived from: (1905) 4 Natal Law Quarterly 1 ; (1915) 32 SALJ 205 ; (1935) SA Law Times 89 ; J Minto & WG Tulloch Records of the Arts Class 1881-85 (1908) 96f; (1904) 12 Scots Law Times (News) 71; (1911) 18 Scots Law Times (News) 193; (1935) 43 Scots Law Times (News) 111; The Scotsman, 24 April 1931.
  6. (1908) 15 Scots Law Times (News) 149f.

University in 1881 in order to read for the MA degree. In his final year (1885), his subjects were Moral Philosophy and Natural History<sup>7</sup>. Not unexpectedly, in view of his father's background, Dove Wilson then proceeded to Edinburgh University to read for the LLB (the choice of university was probably dictated by his father's association with the Law Faculty at Aberdeen).

He graduated cum laude in 1888 and was admitted a member of the Faculty of Advocates in the same year. As a very junior advocate, practice was slow to come. He thus maintained himself and acquired valuable experience by acting from time to time as Sheriff-Substitute of the Lothians and Peebles at Edinburgh, and occasionally of Aberdeen, Banff and Kincardine at Aberdeen. In addition, he was for five years a reporter on the staff of the Authorised Reports of the Court of Session<sup>8</sup>.

It was however not too long before Dove Wilson acquired a good practice in Edinburgh, and he also appeared in cases in London before both the Privy Council and the House of Lords. In 1903, he became Extra Advocate-Depute (or Junior Crown Prosecutor) on the Glasgow Circuit. In addition to this work, he was an examiner in law to the University of Aberdeen during 1903-4. Having acquired a variety of experience, he took silk in 1904, the same year in which he was offered a puisne judgeship in the then Supreme Court of Natal. This Court, in the opinion of the Colonial Office and its advisers,

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7. Ms. U.1., f. 170 (Aberdeen University Library).

8. Minto & Tulloch op cit 97.

required an infusion of fresh blood. Dove Wilson JP was duly appointed as from 10 October of that year. With him he took his wife, Margaret Kirkpatrick Borthwick, whom he had married in 1900, and his daughter, Sheila (b.1901)<sup>9</sup>.

In the Natal Law Quarterly, it was reported that "nothing but gratification was felt when it became known that Mr JC Dove Wilson, an eminent Scotch KC, had accepted the Judgeship ..."10. The same article also said that "in the short time that he has been here, Mr Justice Dove Wilson has made it clear that we have secured an exceedingly able man, possessed of great legal acumen, a man of such great force of character, painstaking and unsparing of himself"11. These comments serve to confirm the confidence which was placed in him by a writer in the Scots Law Times : "The post to which he has been appointed is an important one, and it is felt that his appointment is one which will do credit not only to himself but to the Bar of Scotland"12.

Between 1904 and 1910, Dove Wilson J rose swiftly through the judicial ranks. He was promoted from third to second puisne judge on 1 December 1904, first puisne judge on 31 May 1910, Acting Judge President on 20 August 1910, and Judge President on 1 January 1911<sup>13</sup>. Local response to his elevation was favourable. The Natal Witness

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9. (1911) 18 Scots Law Times op cit and Miss Sheila Dove Wilson.

10. (1905) op cit.

11. Ibid.

12. (1904) op cit.

13. Spiller op cit 128.

noted that since 1904 "he has distinguished himself as a judge by his quick and keen grasp of all the intricacies of the Law"<sup>14</sup>. The same newspaper noted that "his Lordship brings to the position an experience and judgement which have been greatly added to in the arena over which he will in future preside, and the honour to which he has been called is a fitting recognition of abilities of which he has ever given evidence during the six or seven years he has been a judge in the Supreme Court of Natal ..."<sup>15</sup>. Three days later, it was further noted that "he has ... on many occasions showed himself to be a 'strong' judge, as the term goes, a fact which has commanded public confidence, just as it has demonstrated an essential qualification for the Bench"<sup>16</sup>.

At the same time as he was appointed Judge President, Dove Wilson JP became Chairman of the Council of the Natal University College, and he occupied that position until his retirement in 1930<sup>17</sup>. By all accounts he acquitted himself in this rather different role with considerable distinction : "Much of the credit for the smooth functioning [of the College Council] and the happy atmosphere which has always prevailed in its deliberations ... must go to the example set by the Hon. John Dove Wilson ... Before the outbreak of the Great War ... his wise judgement, kindly good humour and shrewd common sense

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14. 28 December 1910.

15. Ibid.

16. 31 December 1910.

17. NUC Magazine Commemoration Number (1909 - 1930) 24.

had formulated standards that were to endure in Council well beyond his retirement from it in 1930"<sup>18</sup>.

Upon his arrival in Natal in 1904, Dove Wilson J secured for himself and his family a home in Mountain Rise called Barnton (after the well-known golf course in Edinburgh)<sup>19</sup>. It was here that his son, Geoffrey, was born in 1908<sup>20</sup>. When he was not occupied with his work at the Court, Dove Wilson JP revelled in several outdoor pursuits. As is suggested by the name of his home in Pietermaritzburg, he had a passion for the game of golf. He also enjoyed playing tennis, and, when he could, freshwater fishing : salmon in Scotland and trout in the Drakensberg. Scot to the bone that he was, he was particularly fond of wearing tweed and used to enjoy trying his hand at the bagpipes. His typical daily routine went as follows : after rising at 6.30 a.m. he would usually go riding (with his pointer dog of which he was very fond). After breakfast, he would make his way to the Court in order to prepare for the day's work. Following the morning session, he would take his lunch at the Victoria Club. When the Court rose following the afternoon session, he would spend his time giving instructions to his gardener at Barnton. Following the evening meal at 7.00 p.m. (he used to like his meals on time), he retired to the library (his study). He usually worked from 10.00 p.m. to 2.00 a.m.

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18. NUC Magazine Commemoration Number (1949) 4.

19. For this and other details, I acknowledge the assistance of Miss S Dove Wilson.

20. Geoffrey Dove Wilson took his degree at Caius College, Cambridge, and thereafter practised as a solicitor with the firm of MacKenzie and Kermack (now Bonar MacKenzie) in Edinburgh until his death in 1958.

before retiring to bed for a few hours sleep. He also found time to indulge in his other passion : the reading of detective novels<sup>21</sup>.

Dove Wilson JP always took care to ensure that his friendships and public activities did not place his impartiality in jeopardy. The Natal Witness observed that "the office of a judge necessarily and rightly forbids the cultivation of individual intimacy. Sir John has managed to continue a capacity for sharing in the enjoyment of life without forming those close individual ties which might bring friendship into conflict with impartiality. It is difficult to do so"<sup>22</sup>. At the same time, Dove Wilson JP was a popular figure on those occasions when he did appear in public. The Natal Mercury noted that "those who knew him socially, when he doffed the judge's gown for the more friendly and intimate associations of the golf course, or of his own immediate circle of friendship, knew him for what he was : one of Nature's simple gentlemen, urbane, courtly, when occasion demanded with an old-world gallantry smacking almost of the dandy ways of the Regency, and kindly to all. A rather bluff nature hid a heart of gold that held nothing but good feeling for all"<sup>23</sup>.

In recognition of his work in Natal, Dove Wilson JP was knighted in 1918, the honour being accorded him in the New Year honours. The Natal Advertiser commented that "the elevation to the dignity of

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21. Keeping him regularly supplied with such reading matter was the duty of his daughter, Sheila.

22. 30 April 1930.

23. 30 April 1930.

Knighthood will be welcomed throughout Natal"<sup>24</sup>. On the same day, an editorial in The Natal Mercury noted that "among the New Year honours none is more merited than the Knighthood conferred on the Judge President of the Natal Division of the Supreme Court of South Africa, and felicitations will be showered on Sir JC Dove Wilson from all parts of Natal ... his attainments are such as have won him respect throughout the whole legal world of the Union. Fearless in his judgments, scrupulously careful in his investigation of intricate cases, Judge Wilson has secured the regard of litigants as well as the members of the legal profession"<sup>25</sup>. The Times of Natal heaped similar praises on him : "The Knighthood which has been conferred upon him is a graceful and timely recognition of ability and honour ... Sir JC Dove Wilson has maintained at a high level the reputation which he won years ago, and in a quiet but unmistakable way he has ever revealed a many-sided interest in life"<sup>26</sup>.

Whilst Judge President of the Natal Court, Dove Wilson JP was called upon to undertake other duties. In 1922, he became President of the Special Treason Court, arising out of the miners' riots<sup>27</sup>. This appointment caused Dove Wilson JP's absence from Natal from 25 July to 31 December. There can be very little doubt that he found this task a great strain; his daughter remembers thinking that he looked as though

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24. 3 January 1918.

25. Ibid.

26. Ibid.

27. See the report in The Natal Witness, 7 July 1922.

he was going to suffer a nervous breakdown<sup>28</sup>.

More frequent absences from Pietermaritzburg occurred due to Dove Wilson JP being appointed an Acting Additional Judge of Appeal in Bloemfontein in the years 1911-4, 1917-8, 1920 and 1923. After 1923, pressure of work in Natal precluded his accepting further such acting appointments. In the light of the frequency of these acting appointments the question arises why Dove Wilson JP never secured a permanent appointment as a Judge of Appeal. If he had been offered such a position, there are no indications that he would not have accepted, as he had a great respect for the Chief Justice, Lord de Villiers, and for his successor, Sir James Rose Innes. His esteem for the former is indicated by his oration on the death of De Villiers in September 1914, as reported in The Times of Natal:

"We, whose task it is to interpret and administer the Roman-Dutch law, have lost him who for a long period of over 40 years has been its living embodiment, who by generations yet to come will be regarded as he is by us, as one of its greatest moulders and exponents. Natural ability and capacity, acquired learning, knowledge of the law, sense of justice, and of mercy, powers of speech and silence, capacity for work, strength and courage, dignity, benevolence. There is none of the great qualities to go to make a great judge which was not his ... For myself I can only say it will always be a source of great pride and satisfaction that I have been privileged from time to time since Union to be associated with him, and come under his inspiring influence and his commanding and even kindly personality"<sup>29</sup>.

I propose to defer further discussion on why Dove Wilson JP never

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28. Miss S Dove Wilson.

29. 8 September 1914.

became an Appeal Judge to a later chapter when I shall be evaluating his contribution, not only to Natal, but to South Africa as a whole.

Dove Wilson JP retired as Judge President on 30 April 1930, some twenty years after assuming that position, and some twenty-six years after his arrival in Natal. His wife and daughter preceded his return to Edinburgh in 1929. The years in Natal had never been particularly happy ones for Lady Dove Wilson, as she had had difficulty in adjusting to the climate and was plagued by ill health. She consequently seized every opportunity to make return visits to Edinburgh (often in the company of her daughter). His wife's discomfort no doubt persuaded Dove Wilson JP to retire to Edinburgh, although the presence there of his son Geoffrey also contributed. His return to Edinburgh pleased his many friends and former colleagues in that city, because, as early as 1911, the following comment is to be found in the Scots Law Times : "His friends in the Parliament House are always pleased to see him when he returns to this country on leave, and wish that he could do so oftener"<sup>30</sup>.

Local newspapers were unanimous in their praise of Dove Wilson JP at the time of his retirement. The Natal Witness declared that "the South African judiciary is losing one of its most competent and efficient officers ..." <sup>31</sup>. An editorial in The Natal Mercury expressed similar sentiments, namely, "that he has left the South

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30. 1911 op cit.

31. 29 April 1930.

African Bench richer than he found it ... None has contributed more fully in generous measure to the dignity and to the reputation of the South African judiciary than Sir John Dove Wilson"<sup>32</sup>. Many references were made in these reports to his abilities as a judge:

"His brilliance did not stop at decisions; it went further into his delivery and summing-up. There was rarely an address or speech by him which did not carry in it a masterly handling of words, a sparkling string of polished phrases or some passage which lifted what otherwise might have been a dull, tricky case into the light of the understanding of all men [and] to those who sat below him and listened to his handling of evidence and his masterly analysis of facts as he marshalled and passed them in array before his searching mind, his intellectual brilliance was constantly emphasised not merely by his erudition, which is assumed to be the possession of every judge, but by his polished dictum and a masterly command of words and polished phrases expressing his meaning with a precise and forceful clarity that was inescapable. He had pre-eminently those qualities of the judge's mind, chief of which John Buchan has called the fine flower of legal training - the judicial temperament - a quality that has been commented upon by numerous writers from Cicero downwards"<sup>33</sup>.

On his return to Edinburgh, Dove Wilson led an active retirement. In April 1931, it was officially announced by the Home Office that the Home Secretary had appointed a committee to inquire into the existing methods of dealing with persistent offenders<sup>34</sup>. Its brief included the making of recommendations to change the existing law and its administration. Dove Wilson was appointed as Chairman of that particular commission. Two years later, in June 1933, he was appointed by the Secretary of State for Scotland to be Chairman of the

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32. 30 April 1930.

33. Ibid.

34. The Scotsman, 24 April 1931.

Committee on Scottish Health Services<sup>35</sup>. Whilst still in harness, Dove Wilson died on 18 April 1935, some nine days short of his seventieth birthday. Another member of the committee remarked that "Sir John C Dove Wilson had won the affection and respect of all members. He was an ideal chairman ; his urbanity and good-humour, shrewdness and capacity for weighing evidence impressed both members and witnesses throughout the inquiry. At any time he would have been difficult to replace, but at this critical stage of the inquiry his death is an exceptionally heavy loss"<sup>36</sup>.

Tributes on the occasion of his death also appeared in newspapers in Natal. A headline in The Natal Witness read as follows : "Sir John Dove Wilson - a greatly loved man - Judge, Sportsman and Friend"<sup>37</sup>. In the same report, there were further references to his ability : "An extremely popular man, Sir John Dove Wilson was recognised as a judge of discernment, sympathy and firmness. He was held in esteem not only in judicial and legal circles but by all with whom he came in contact. He was blessed with an abundant sense of humour, to which he added a ready wit, and was known not only for his able utterances from the Bench, to which he brought dignity and power, but for his eloquence at public ceremonies ... "<sup>38</sup>.

To mark the occasion, a special sitting of the Supreme Court was held. Those present were Judge President R Feetham (Dove Wilson's

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35. The Scotsman, 20 April 1935.

36. Ibid.

37. 23 April 1935.

38. Ibid.

successor), Mr Justice JA Hathorn, Mr Justice AF Carlisle, Mr Justice CWH Lansdown and Mr Justice TF Carter (former Judge). On this occasion, Mr Justice AAR Hathorn said of him :

"No man in my experience had the personal qualities so proper in a judge as he had ... He was a master of facts and those of you who knew him remember how he appreciated fact the moment it was given a bearing in the evidence of the case before him. He was able to weigh a case, even if it lasted a day or more than a day, to marshal his facts, forgetting nothing and putting them in their natural order, so that his charges to juries were models of what such charges should be.

He was a master of the extempore judgment - a difficult art if ever there was one. Picture him delivering such a judgment, framing it, framing his sentences, using such language that it was a pleasure and a profit to listen to him ... He was a master of the spoken word, and spoke fairly frequently outside the Court. His speeches were remarkable for their completeness: the substance, the structure, the language, and not least, the voice"<sup>39</sup>.

FN Broome, speaking on behalf of the Natal Society of Advocates, chose to say the following of him : "Foremost of his qualities was his understanding of the devious workings of the human heart, a quality that made him the foremost South African trial judge of his time. The qualities he displayed as a judge we admire, but it is the man we loved"<sup>40</sup>.

The preceding information provides an important context within which Dove Wilson JP's abilities as Judge President must be assessed. In the opinion of the various people who are quoted, he appears to have

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39. The Natal Witness, 25 April 1935.

40. Ibid.

made a deep impression, not only for his undoubted legal acumen but also because of his amiable nature<sup>41</sup>. In the succeeding chapters I intend referring to specific areas of the work of this, Natal's first Judge President. Only once this task has been completed will it be possible to assess, objectively, his contribution to the legal process in Natal.

It would be a failing merely to assess the work of Dove Wilson JP in a vacuum, without considering the legal milieu within which he worked. For this reason, I turn to consider the Court over which he presided. Upon Dove Wilson's appointment as Judge President in 1911, the other judicial officers were William Broome (First Puisne Judge), Thomas Fortescue Carter (Second Puisne Judge), and Kenneth Howard Hathorn (Third Puisne Judge).

William Broome<sup>42</sup> was born on 12 April 1852 at Zante in the Greek Archipelago where his father was a chaplain in the Royal Navy. He was educated at Victoria College, Jersey, and came to South Africa in the year in which he turned twenty. Three years after his arrival, he entered the Natal Civil Service. He resigned in 1882 in order to practise as an advocate and attorney. In 1885 he returned to the Natal Civil Service, and in due course he became Assistant Colonial Secretary, Magistrate of Newcastle, Registrar of the Supreme Court and

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41. One inexperienced advocate would no doubt not have agreed with this generalisation : he received a dressing down from Dove Wilson JP and was heard to remark to a more experienced colleague that "there was nothing of the dove in him" (Miss Sheila Dove Wilson).

42. Roberts op cit 351.

finally Chief Magistrate of Durban. He acted as a judge on two occasions before being appointed to a permanent position on 1 December 1904. Broome reacted to the offer of a judgeship as "a piece of good fortune that I had never believed to be at all probable"<sup>43</sup>. He penned the following comments in his diary:

"It must not be supposed that I accepted this important office lightheartedly and without serious consideration and some misgivings. I have never been vain enough to imagine that my legal attainments approached the standard required of a judge of anything like high calibre. And I was never a fluent or ready speaker. On the other hand, I was not an untried man and the Chief Justice and the Bar, to whom my limitations must surely have become known during the year in which we have been associated, had unmistakably shown their approval - had even gone out of their way to give expression to it. Naturally, the position of a judge had its attractions, apart from the fact that it carried with it a salary (at that time £1 750 per annum) far beyond my most sanguine expectations. Again, it would enable us to settle down in a more permanent home away from the coast and among our friends in Pietermaritzburg - we had never felt quite at home in Durban"<sup>44</sup>.

Dove Wilson JP regarded Broome J as "a very valuable colleague"<sup>45</sup>.

That Dove Wilson JP did regard Broome J as an asset is clearly revealed in the first year of his Judge Presidency when Broome J was the only puisne judge to be called upon to deliver judgment<sup>46</sup> (neither

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43. FN Broome Not the whole truth (1962) 22.

44. Op cit 23.

45. Op cit 111.

46. Cf R v Vallabh 1911 NPD 9; Symons & Moses v Davies 1911 NPD 69; Pietermaritzburg Corporation v GA & AS Nathan 1911 NPD 130; Westermeyer v Rex 1911 NPD 197; Forbes v Rex 1911 NPD 202; Hay v Poynton 1911 NPD 336; Williams v Reynolds 1911 NPD 414; General Iron & Hardware Co v Estate Molyneux 1911 NPD 427; Jeewa Hassim & Co v Licensing Board, Alexandra 1911 NPD 473; Haffajee's trustee v Haffajee 1911 NPD 489; Manson v MacNamee 1911 NPD 509.

Carter nor Hathorn JJ were accorded that honour). This is all the more remarkable when one considers that in almost every other reported decision in that year, Dove Wilson JP pronounced judgment. In other cases, where Broome J concurred in Dove Wilson JP's leading judgments, he would sometimes qualify his concurrence with useful additional comments and insights<sup>47</sup>.

William Broome's son, Frank Napier Broome, commented that his father was "painstaking, thorough and dignified, and he was seldom wrong"<sup>48</sup>. This was particularly noticeable in 1912 when (whilst Dove Wilson JP was on leave from April to September) Broome J delivered the first five reported judgments of the year. In the case of Haslett & Co v Kelso<sup>49</sup>, Broome J delivered the main judgment while Hathorn J dissented. Dove Wilson JP, on his return, agreed with Broome J. Furthermore, Broome J was accorded the task of delivering judgments more often than either Carter J or Hathorn J. The trend which was set in the first two years of Dove Wilson JP's Judge Presidency, continued in the remaining six years of Broome J's time on the Bench. Part of the reason for his comparative activity was no doubt the fact that "his written judgments were models of correct English"<sup>50</sup>. The comment that he was "firm, upright and a most conscientious hard worker"<sup>51</sup>

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47. In Wills v Suddaby 1911 NPD 19 he remarked : "I agree with some additions". And in Dickson v Fraser 1911 NPD 403 he merely said that "I have come to the same conclusion upon the grounds stated by the Judge President".

48. Broome op cit 111.

49. 1912 NPD 42.

50. Broome op cit 111.

51. Op cit 23.

seems to be reflected in the actual quantity of work done. Broome J retired at the end of 1917 having lost all taste for judicial work following the death of his wife in that year<sup>52</sup>. This is indicated by the fact that he travelled until 1923, before settling in Cape Town, where he died in 1930<sup>53</sup>.

Natal's second puisne judge, Thomas Fortescue Carter<sup>54</sup>, was born near Liverpool on 2 March 1856, and was educated at Buckfast Abbey in Devonshire. Owing to the early death of his father, he was forced to seek work reporting for newspapers. This brought him to Natal where he took up the position of official shorthand reporter of the debates in the Legislative Council. During the first Anglo-Boer War, Carter was a reporter for The Times of Natal, The Natal Mercury and The Times of London. As a result of his experiences during this war, he published a book entitled A Narrative of the Boer War. On his return to Pietermaritzburg, he became the editor of The Times of Natal. It was during this time that he had his first exposure to the law, and he qualified himself for admission to the Natal Bar as an advocate by sitting throughout a year in Court for two-thirds of the days of every term and for two-thirds of the hours of each day's sitting. He subsequently became an attorney and notary public, and practised in Ladysmith.

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52. *Op cit* 111.

53. His son, Frank Napier Broome (educated at Hilton and Oriel College, Oxford) was appointed as a judge on 19 July 1939 and went on to become Judge President in 1950 following the retirement of Roy Hathorn. His grandson, JJ Broome, is presently a judge in the province.

54. Biographical information is derived from Roberts *op cit* 351 and 43 (1926) SALJ 247.

As if he had not pursued sufficient varying careers, Carter entered the political arena in 1904 when he was elected as member for the Klip River division in the Legislative Assembly. Two years later, he became Minister of Justice and Minister of Public Works. In 1907, he was appointed as Attorney-General, and remained in that office until May 1910 (he had been made a KC in 1908). One of the last acts of the expiring Natal Government was to appoint Carter to the Bench. Among the few positive aspects of his judicial personality were "his shrewd common sense, his kindness and his sense of humour"<sup>55</sup>. Furthermore, he was "probably shrewd and penetrating in his examination of facts"<sup>56</sup>. The South African Law Journal commented that "few judges, however, are more tender to genuine cases of distress and poverty, especially when women and children are concerned. In order to experience what solitary confinement actually means, he had himself shut up in a solitary cell for a considerable time - enough to realise how terrible such a punishment is"<sup>57</sup>. Carter J did have many shortcomings : "He was an irascible judge, he was short-sighted and if a record was not easily legible to him he was inclined to refuse to hear the case, and known on one occasion to pick up the record, tear it up and stalk off the bench in a rage ... he was not notable for his knowledge of the law [and] he was a severe criminal judge"<sup>58</sup>. The South African Law Journal expanded on this by saying that he was not "deeply versed in the civilian authorities ..."<sup>59</sup>. Frank Broome

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55. 43 (1926) SALJ 249 f.

56. Mr Justice Fannin The Supreme Court of SA from 1910 onwards (unpublished memoirs)(1986) 1.

57. 43 (1926) SALJ 250.

58. Fannin op cit 1.

59. 43 (1926) SALJ 250.

classed him "as the worst judge to sit on the Natal Bench this century"<sup>60</sup>.

The above comments can be tested by referring to the reported cases. Here it can be noted that more often than not Carter J stated : "I agree" or "I concur"<sup>61</sup>. It is evident from a scrutiny of the reported cases from 1911 to 1930 that Dove Wilson JP used Carter J as little as he could. His most frequent appointment was to the Criminal Sessions - there was almost never one to the Civil Sessions. In private, Dove Wilson JP used to refer to him as "Old Carter"<sup>62</sup>. Fannin J commented similarly when he said that "some irreverent articulated clerks used to call him Mr Justice Necessity"<sup>63</sup>.

Carter J eventually retired on 1 October 1931, at the age of seventy-five. This was due to his appointment prior to Union which exempted him from the mandatory retirement age of seventy<sup>64</sup>.

Kenneth Howard Hathorn<sup>65</sup>, Natal's third puisne judge, was born on 2 June 1849 in Salford, England. Almost exactly one year later, he arrived in Natal with his parents who had come to take up land under

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60. Broome op cit 112.

61. Cf Leathern v Tredoux 1911 NPD 409 ; Grundy v Schram 1915 NPD 555; Beetar v SAR & H 1920 NPD 14 ; Marlow v Rex 1924 NPD 214 ; Rex v Wallace 1927 NPD 10 ; Pillay v Licensing Officer, Umkomaas & another 1930 NPD 111.

62. Miss S Dove Wilson.

63. Fannin op cit 1.

64. Broome op cit 114.

65. Biographical information is derived from Roberts op cit 363 and 44 (1927) SALJ 1.

the Byrne Emigration Scheme. His father eventually became Master of the Supreme Court. Hathorn Junior was one of the original pupils at the opening of Maritzburg High School (subsequently Maritzburg College). On completion of his schooling, he was articled for two years, and was admitted as an attorney on 9 November 1881. The following day he started for the Diamond Fields in order to make his fortune, but he returned in November of that year after a bad attack of fever. During his father's illness, he acted as Master of the Supreme Court. Not long after his father's subsequent death, he started his own practice, and practised on his own until 1877, when he took Arthur Weir Mason into partnership<sup>66</sup>. He was admitted as an advocate in the same year. During the early years of the twentieth century, Hathorn sojourned to England, and was called to the Bar at the Inner Temple on 19 June 1901.

Like Carter, Hathorn for a time also dabbled in politics : from 1901 to 1906 he was one of the four members representing Pietermaritzburg in the Natal Parliament, but, unlike Carter, he never held office in the Government. He was also a director of several companies and this tended to interfere with his practice at the Bar. On 28 May 1910, he and Carter (then Attorney-General) were sworn in as third and second puisne judges respectively. The then Chief Justice, Sir Henry Bale, had mentioned the possibility to him on a number of occasions, but, when the firm offer arrived, it was reported to have come as a great

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66. The firm of Hathorn and Mason continued until the appointment of the latter as a judge in 1896.

surprise<sup>67</sup>.

Frank Broome offered the following comparison between Carter and Hathorn JJ : "Hathorn was a man of very different type, always courteous whilst Carter was rude and overbearing, always slow and careful to a fault while Carter was slapdash, quite a good lawyer while Carter knew no law at all"<sup>68</sup>. A further compliment was paid to him by the writer in the South African Law Journal : "Those who practised before him will always remember the scrupulous care with which he weighed the facts of a case and the courteous manner in which he listened to the arguments"<sup>69</sup>. Dove Wilson JP certainly placed greater trust in Hathorn J than in Carter J, and frequently entrusted both criminal and civil cases to him.

In the early years of the decade, Hathorn J did not appear frequently as the presiding judge. In 1911, for example, there was only one occasion when he delivered the judgment of the Court<sup>70</sup>. But, from October to December of 1922, Hathorn J was Acting Judge President, due to the absence on leave of both Dove Wilson JP (who was sitting on the Treason Court Bench) and Carter J. For the most part, he was content, like Carter J, merely to agree or concur, but sometimes he added certain qualifications. In the case of Estate Amod Jeewa v Kharwa<sup>71</sup>, Hathorn J agreed with Dove Wilson JP "but only in certain aspects"<sup>72</sup>.

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67. 44 (1927) SALJ 3.

68. Broome op cit 112.

69. 44 (1927) SALJ 3.

70. Nduzulwana v Estate Pattison 1911 NPD 180.

71. 1911 NPD 371. See also Meischke v Jorissen 1922 NPD 144 and Natal Fertilizers Ltd v Van Dam & others 1922 NPD 157.

72. 1911 NPD 371 at 378.

On a limited number of occasions, he dissented and gave minority judgments<sup>73</sup>.

A writer in the South African Law Journal praised Hathorn J for his attitude towards more inexperienced advocates : "... It is worthy of remark that the most inexperienced juniors received at his hands exactly the same careful and polite attention as the most experienced seniors, with perhaps the addition of some extra sympathy and help if he found them in a difficulty"<sup>74</sup>. In regard to criminal cases, the same writer remarked : "As a criminal judge his kindness of heart and sympathy for all unfortunates were notorious and the accused was usually to be congratulated if his trial happened to come in a session presided over by Mr Justice Hathorn"<sup>75</sup>. As a young advocate, Frank Broome remembered him as "a very lovable character, and I remember with gratitude many friendly acts and pieces of good advice of which I was the fortunate recipient"<sup>76</sup>. The common opinion is that his great failing was his involved orders for costs : he disliked awarding a rule nisi for the very reason that this might lead to the piling up of costs<sup>77</sup>. Frank Broome referred to his orders for costs as being "involved and embarrassing. Frequently he would give judgments from which both sides wanted to appeal."<sup>78</sup>.

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73. Cf Haslett & Co v Kelso 1912 NPD 42 and In re Hulett & Sons Ltd 1912 NPD 555.

74. 44 (1927) SALJ 3.

75. Ibid.

76. Broome op cit 112.

77. 44 (1927) SALJ 4.

78. Broome op cit 112.

Hathorn J resigned from the Bench on 29 March 1926, and remained in Pietermaritzburg until his death in 1933. Like Broome J, Hathorn J also founded a legal dynasty : his son Roy Hathorn<sup>79</sup> also became a judge and eventually Judge President in succession to Richard Feetham<sup>80</sup>. His grandson, Anthony, became a judge of the High Court of Southern Rhodesia<sup>81</sup>.

The retirement of William Broome at the end of 1917 necessitated the appointment of a successor. Frederic Spence Tatham KC<sup>82</sup> took the oath on 1 February 1918. For the first time since Union, Natal acquired a judge who had been born and bred in Natal, and more particularly Pietermaritzburg. He was born there on 15 April 1865<sup>83</sup> and received his education at Bishop's College. At the tender age of fifteen he served in the Basuto War, and by the following year he was a sergeant. Almost ten years later he was involved in the siege of Ladysmith. During the Great War in Europe, he held the rank of Lieutenant-Colonel and was awarded the DSO.

Despite his activities in various wars, Tatham found time to qualify for admission as an advocate, and was admitted in 1886. In doing so, Tatham set something of a precedent<sup>84</sup> because he very seldom worked as

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79. Roberts *op cit* 363. He was educated at Caius College, Cambridge.

80. In July 1939.

81. He, like his father, was also educated at Caius College, Cambridge. He was at Cambridge with Geoffrey Dove Wilson (Dove Wilson JP's son).

82. Roberts *op cit* 378 ; 35 (1918) SALJ 389.

83. A mere twelve days before Dove Wilson himself.

84. Continued most notably by Harold MacKeurtan : Cf Spiller *op cit* 124.

an attorney : all of his energies were devoted to arguing cases in Court. This was unlike many of his colleagues who performed both functions. Having taken silk in 1903, Tatham was regarded by Frank Broome as "supreme"<sup>85</sup>. Further, Broome said that

"he was a magnificent orator with an immense public appeal. But it was not his oratory that was the foundation of his supremacy as an advocate, but rather his deep understanding of forensic tactics and of all the arts of advocacy. He did not merely, like many of the old school, set out to persuade the Court that his client ought to win ; he showed the Court, by reasoned argument, how that result could be achieved. He was not a great lawyer but he knew, or knew where to find, all the law his case needed . In the true sense of the word he was brilliant ... [he] would have shone in any company"<sup>86</sup>.

Despite having a busy practice as an advocate, Tatham was elected as the member for Pietermaritzburg in the Natal Parliament in 1893. He refused Government portfolios on two occasions, because of his legal practice, and eventually retired in 1907 for health reasons.

There can be little doubt that Dove Wilson JP regarded Tatham J as a very useful addition to the Natal Bench. Even though he was the third puisne judge, Tatham J played a more active role than either Carter or Hathorn JJ. He sat with Dove Wilson JP more often than either of the other two judges. During February 1918, his first year, Tatham J on two occasions sat as the presiding judge<sup>87</sup>, whereas the other two judges did not sit as presiding judges. It must not be imagined that

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85. Broome op cit 117.

86. Ibid.

87. Mungal v Shaik Mahomed 1918 NPD 57 and Durban Corporation v Trustees, Durban Light Infantry 1918 NPD 81.

Dove Wilson JP and Tatham J were always in agreement with one another, as Tatham J's dissenting judgments show<sup>88</sup>. Gradually, as the years progressed, Tatham J began to assume greater responsibility for presiding over the Court, and he was ready to make a contribution even when he concurred<sup>89</sup>.

Frank Broome regarded Tatham J "as a far better judge than either of his colleagues at that time"<sup>90</sup>. But he also observed that

"as so often happens with outstanding advocates, he was something of a disappointment as a judge. His quick brain and eloquent tongue were of little value on the Bench without the ballast of a judicial temperament. Too often he would arrive at a quick conclusion without following the tedious process of weighing up the pros and cons"<sup>91</sup>.

Tatham J remained second puisne judge until his retirement in June 1931, and at no time did he receive an offer of judicial advancement from one of the other provincial divisions.

The vacancy created by the retirement of Hathorn J was filled by Ernest Lewis Matthews<sup>92</sup>, born on 12 April 1871 in Gloucester, England. He received his education at King's College, London, before proceeding to Balliol College, Oxford, where he read history (graduating in 1892). On coming down he became a member of the Inner Temple, and was called to the Bar in 1895. He arrived in South Africa

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88. Cf Platt v Commissioner for Inland Revenue 1919 NPD 234 and Rex v Mtanga & Mdonswa 1919 NPD 341.

89. Cf Makala Zikalala v Groenewald 1922 NPD 150.

90. Broome op cit 112.

91. Op cit 111 f.

92. Roberts op cit 371 ; 44 (1927) SALJ 309.

in 1902, having previously practised in London. Although he was admitted as an advocate on 5 June 1902, he secured for himself the post of Assistant Legal Advisor to the Crown Colony of the Transvaal. His main tasks included representing the Transvaal Government in civil cases, appearing for the Crown in criminal prosecutions and appeals and redrafting the Transvaal statute book. The quality of his work ensured his promotion to Senior Legal Advisor in 1907. During this time, he worked closely with both General Botha and General Smuts. In 1910 he became Senior Legal Advisor to the Union Government and two years later he was appointed KC. In 1914 he was made a CMG on the recommendation of General Botha.

When appointed as third puisne judge of Natal on 14 April 1926, Matthews J was no stranger to Natal, as he had acted as judge for a total of over sixteen months on occasions between 1919 and 1923<sup>93</sup>. It can thus be seen that he had had considerable experience as an acting judge in Natal. Whilst holding these acting appointments, Matthews AJ regularly delivered judgments of the Court<sup>94</sup>. During this time he was as active as Tatham J.

During the first year of Matthews J's permanent appointment, Dove Wilson JP was on leave and Carter J had been appointed as Acting Judge President. Despite this, Matthews and Tatham JJ more often than not

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93. 4 August 1919 to 18 December 1919 (during the absence on leave of Hathorn J) ; 1 June 1921 to 9 December 1921 (during the absence of Dove Wilson JP) ; 24 July 1922 to 31 December 1922 (once again during the absence of Dove Wilson JP) ; 1 July 1923 to 31 July 1923 and from 1 October 1923 to 15 October 1923.

94. Cf Estate Raath & another v Estate Bells & others 1922 NPD 323 ; Chadwick v Atkinson's Trustees 1922 NPD 359 ; Rex v Johnson Moses 1922 NPD 380 ; Harvey v Harvey 1923 NPD 281.

acted as the presiding judges, with Tatham J carrying the heavier load<sup>95</sup>. On Dove Wilson JP's return in 1927, he and Tatham J most often acted as the presiding judge, although Matthews J did do his share of the work. There are many illustrations of cases where he was content to concur in the judgment of his brethren, and virtually none where he dissented<sup>96</sup>.

Opinions of his ability as a judge are that on the whole he deserved praise. Mr Justice Fannin refers to him as being "quite a good lawyer"<sup>97</sup>. Furthermore, he remembered that "he was a kind man and one whom everybody liked to appear before. He was generally liked and respected. His nickname was Judex and everybody referred to him as such"<sup>98</sup>. The writer in the South African Law Journal noted that he was "pre-eminently at ease on the frequent occasions when statutes or regulations have to be interpreted or harmonised"<sup>99</sup>. It is perhaps for this reason that Frank Broome commented that "one was always conscious of his civil service background"<sup>100</sup>. He nevertheless condescended to say that "for all that he was a good judge, and the quality of his judgments improved as he got older. He was particularly good on the interpretation of statutes, for he had had

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95. The following are some of the cases over which Matthews J presided during 1926 : Dastazoir v Inspector of Police, Durban 1926 NPD 175; Akoon v Rex 1926 NPD 306 ; Tongo v Mission Press 1926 NPD 320 ; Ex parte van Rooyen 1926 NPD 408 ; Shanks v Shanks 1926 NPD 512.

96. Cf Rex v Korsten 1927 NPD 12 ; AM Lokhat Ltd v Bodasing 1927 NPD 460 ; Ex parte Windsor 1928 NPD 319 ; Rampersad v Stone 1930 NPD 90.

97. Fannin op cit 2.

98. Ibid.

99. 44 (1927) SALJ 312.

100. Broome op cit 113.

considerable experience as a parliamentary draughtsman"<sup>101</sup>. With regard to his "Bench Personality" and his command of extempore English, he was found to be "lacking"<sup>102</sup>. The South African Law Journal said of him : "It is unfortunately often the case that his judgments cannot be fully appreciated until they are seen in writing. Mr Justice Matthews has not a powerful voice and as he delivers a judgment orally, the Bar and the shorthand writers may often be seen cupping their ears in a heroic attempt to hear what is being said"<sup>103</sup>.

Owing to ill health, Matthews J was forced to retire in March 1938 and Broome said that "the Bar, the legal profession generally and the public were all very sorry when failing health compelled him to retire before he reached the age limit"<sup>104</sup>.

It remains, in this brief synopsis of the judicial personnel in Natal from 1910 to 1930, to consider those who held acting appointments (Matthews AJ having already been referred to). In 1912, Sir Percival Maitland Laurence<sup>105</sup> was appointed as Acting Judge President from 2 April to 8 September<sup>106</sup>. Educated at Corpus Christi, Cambridge and Lincoln's Inn, he was for seventeen years Judge President of the High Court of Griqualand. He retired in 1913. During 1914, James William Fairbridge Bird was appointed acting judge from 1 June to 30 November - he never secured a permanent appointment as a judge in South Africa.

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101. Ibid.

102. Ibid.

103. 44 (1927) SALJ 313.

104. Broome op cit 113.

105. Roberts op cit 369 ; 30 (1913) SALJ 204.

106. Cf The Times of Natal, 6 April 1912.

The previous year Frederick George Gardiner<sup>107</sup> was appointed from 27 March to 31 August due to the absence on leave of Broome J. He had been educated at Bishops in Cape Town and thereafter at Keble College, Oxford and the Middle Temple. In 1914, he was elevated to the Cape Provincial Division, and eventually became Judge President there in 1926<sup>108</sup>. Finally, in 1928, Manfred Nathan was appointed from 14 August to 14 December - he too never secured a permanent appointment.

The preceding information indicates that Natal had mixed fortunes with regard to her judicial personnel during the first twenty years after Union. On the one hand there were judges such as Broome and Tatham JJ who could be relied upon to provide support for their Judge President. Of course, each had minor faults, but their overall contribution was solid. Then there were judges like Hathorn and Matthews JJ who were perhaps less useful because of various deficiencies but who were certainly adequate. Finally, there was Carter J who should never have been appointed as a judge in 1910<sup>109</sup> : he was seriously lacking in any formal legal training and consequently his usefulness only extended as far as criminal matters. What has become clear then is that the Natal Provincial Division needed to have someone at its helm to provide direction and support. The biographical information on John Carnegie Dove Wilson suggests that he fulfilled this task very ably, and that he set an example that could be followed by his less able brethren. At the same time, there were certain shortcomings which I shall be highlighting in the body of this

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107. Roberts op cit 361.

108. 31 (1914) SALJ 426.

109. Cf the interesting point raised in Fannin op cit 1.

thesis<sup>110</sup> ; these do not however detract from the overall impression of excellence.

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110. Cf 105.

## Chapter Two

### Civil Cases

In this chapter it is my intention to examine a number of the civil cases over which Dove Wilson JP presided. In doing so, I shall begin by evaluating different areas of substantive law before considering procedural cases. I shall also be referring to certain cases in order merely to illustrate the type of cases which were heard. Whilst referring to cases of interest, I shall also be providing illustrations of Dove Wilson JP's reasoning ability and commenting on his leadership of the Court<sup>1</sup>. Most of the time he remained at the Court in Pietermaritzburg, and chose to send his brethren to Durban in order to preside over the civil sessions. It would however be incorrect to say that he never undertook duties in Durban himself, because there are several occasions when he did so<sup>2</sup>.

Dove Wilson JP was frequently called upon to adjudicate in matters falling within the ambit of the law of succession. Certain judgments concerning the interpretation of wills showed Dove Wilson JP following the accepted reasoning in these issues, and he refrained from breaking new ground. In Manning v Estate Manning<sup>3</sup>, the plaintiff claimed an order of Court declaring a particular bequest lapsed or otherwise null and void and that therefore the sums involved were to fall into the

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1. A more thorough evaluation will be found in Chapter 4.
  2. For example : September 1913 ; July 1915, 1917, 1927, 1929, and September 1929.
  3. 1913 NPD 313. Cf Smith & another v Bird & others 1924 NPD 381.

residue of the estate. In delivering judgment, he admitted that "... I am unable to understand what it was that the testator actually desired should be done, or how it was to be carried into effect; and no one has come forward to try to establish any claim"<sup>4</sup>. After reviewing the available evidence he came to the conclusion " ... that we must take the bequests in favour of these three institutions as being void for uncertainty and regard them as never having been written"<sup>5</sup>. There were nevertheless occasions where he was able to interpret a badly drawn will satisfactorily. Thus in Molyneux v Estate Molyneux and others<sup>6</sup> he confirmed that

"... although ... I have found considerable difficulty in construing the provisions of this very badly drawn will, I think that the objects of the testator - to be gathered from a consideration of the will as a whole - were these :

- (i) He made provision for his widow, which takes the shape of the payment to her during her life of half of the income arising from the investment of the trust estate created by the conversion of his estate at his death into money.
- (ii) The other half of the income is to be held by the executors and reinvested, to form part of the fund which is ultimately to go to the heirs under the will"<sup>7</sup>.

Having initially construed the provisions of the particular will to read as set out above, Dove Wilson JP went on to say that he was "of opinion that the widow has no right to have that half of the

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4. At 319.

5. Ibid.

6. 1913 NPD 386.

7. At 390.

income which is not specifically appropriated to her added to the funds so as to increase the income of which she is to enjoy the half ..."<sup>8</sup>. On another occasion, in Marshall v Marshall's Executors and Hill<sup>9</sup> he said that "...I do not find myself driven to do violence to what appears to me to be the plain and primary meaning of the words of the will"<sup>10</sup>.

A most important matter came before the Court in the case of Estate Seedat v Rex<sup>11</sup>. This case demonstrates Dove Wilson JP's ability to deal with a particularly thorny issue with sensitivity and justice. It also shows how he was able to marshal a considerable body of authority (more properly to be considered in Chapter Five), extract the essence applicable to the matter being heard by him, and analyse the various issues in a logical order<sup>12</sup>. Briefly, the facts were as follows. A Mohomedan domiciled in India married X and had four children by her. In 1902 he became domiciled in Natal, remaining there until his death. However, whilst on a visit to India in 1904, he married Y and duly had six children, some of whom were born in India and the others in Natal. The question which arose was as to who was to pay succession duty under Act 35 of 1905. Dove Wilson JP isolated the issue very early on in his judgment, when he said that

"the question turns on the meaning to be given to the terms 'lineal descendant' and 'spouse' as

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8. At 393.

9. 1914 NPD 548.

10. At 552.

11. 1916 NPD 535.

12. Cf Master, Supreme Court v Hutchison's Estate 1918 NPD 87.

occurring in the Successions Duty Act. The Act is a Natal one, and the words must therefore be given the meaning which they have in the Roman-Dutch law. Now it is settled beyond dispute that a marriage which is Mohomedan and therefore polygamous is not one which can be recognised in South Africa no matter however much it may be recognised elsewhere. From this it follows that any claim on the part of these Mohomedan wives or on the part of the children of the second wife to be regarded as otherwise than strangers in blood must be ruled out"<sup>13</sup>.

The next problem to which Dove Wilson JP addressed himself was the legitimacy of the children. After referring to a considerable number of authorities, he said that "we came to the conclusion therefore that the recognition of these children's legitimacy involves no approval or recognition of their parents' polygamous union as marriage ...[this] may be a thing altogether apart from their parentage, and may be recognised extra-territorially although by the law of the country where the recognition is sought, their parents were never validly married at all"<sup>14</sup>. He concluded therefore that "... we should not be justified in regarding the children of the first marriage ... as having been bastardised by their removal to Natal"<sup>15</sup>.

Turning my attention to aspects of the law of property, I refer in the first instance to Carter v Driemeyer<sup>16</sup> which concerned the servitude of via necessitatis<sup>17</sup>. The relevant Board had had to make a decision

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13. 1916 NPD 535 at 539.

14. At 544f.

15. At 547.

16. 1913 NPD 1.

17. Cf Estcourt Corporation v Chadwick 1925 NPD 239 where counsel tried to argue that the words "right of way" were ambiguous. Dove Wilson JP refuted this, saying that "there is no room for any question of latent ambiguity" (at 244).

as to whether or not such a servitude should be granted. Dove Wilson JP carefully reviewed the law in regard to the granting of a servitude and in doing so also referred to pertinent legislation. Having done this, he came to the conclusion that the Board had not supplied reasons for its finding and he thus said that "... it may be gathered that [the Board] were influenced by the greater convenience to the respondents of the road which they asked for, and perhaps also by an impression that appellant was acting in an unneighbourly way in closing it up. But that is not sufficient"<sup>18</sup>. Based on his review of the law he stipulated that there had to be evidence "bringing the way asked for within the legal conception of a way of necessity"<sup>19</sup>. On this basis, he concluded that the decision of the Board should be reversed<sup>20</sup>. A more common type of case was that dealing with the validity of a Natal bond, for example South African & General Investment & Trust Co Ltd v Smith<sup>21</sup>. Despite the fact that the law in Natal was not in accordance with that in the Cape and the Transvaal, Dove Wilson JP concluded that "that per se would not be a reason for altering the current of our own decisions ... Upon the whole matter I think this is just peculiarly one of those cases in which a Court is bound by its previous decisions"<sup>22</sup>. This case reveals a number of things, perhaps most of all how resilient the Natal bond was. Dove Wilson JP was not swayed by the fact that the other provinces operated

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18. 1913 NPD 1 at 5.

19. Ibid.

20. For a fuller discussion of administrative law cases cf 49ff.

21. 1913 NPD 142.

22. At 143.

differently to Natal, and it was sufficient for him that the reasoning behind the system was sound. Finally, the case shows that, even in 1913, there was still evidence of Natal's parochial attitude to judicial precedent<sup>23</sup>.

The case of Estate Whittaker v Union Government<sup>24</sup> provides an excellent illustration of the commendable way in which Dove Wilson JP decided a matter on prescription<sup>25</sup>. First, he set out the law on the matter, coming to the conclusion that "it is settled that by the Roman-Dutch law prescription runs against the Government in respect of lands which are alienable"<sup>26</sup>. Thereupon he considered HG MacKeurtan's argument, although "shortly stated"<sup>27</sup>, and referred to all the main issues raised by counsel, either refuting or supporting them. Having proceeded via this route, he concluded that "the Crown has intimated its assent to relinquish its prerogatives to this extent"<sup>28</sup>.

Dove Wilson JP is regarded by certain commentators in Natal as being the pre-eminent trial judge of his time<sup>29</sup>. In no better place is this revealed than in the law of delict. In Whittaker v Hine<sup>30</sup> the main issue was the rights of neighbours (nuisance). After hearing a

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23. Cf Chapter 5.

24. 1915 NPD 580.

25. Cf Union Government v Diedricks 1915 NPD 458 and Gifford NO v Owen, Hopley, Arnold and Fagaza 1916 NPD 197.

26. 1915 NPD 580 at 592.

27. Ibid.

28. At 594.

29. Cf Broome op cit 111.

30. 1912 NPD 72.

considerable body of evidence from witnesses, Dove Wilson JP was required to assess this evidence, and that he found this a difficult task is reflected in his comment that "such conflicts of evidence are unfortunately only too common in nuisance cases"<sup>31</sup>. He resolved the conflict by saying that "it is to defendant's credit that he does seem to have taken exceptional care. But that his exertions have failed is we think established, and the extent to which they have failed is to be gathered from the evidence of the plaintiff"<sup>32</sup>. An area which more commonly required Dove Wilson JP's attention was negligence. A rather unusual set of circumstances prevailed in the case of Chabot v Master & owners SS Umgeni<sup>33</sup>, where the plaintiff had fallen through a gap between the gangway leading to the shore and the defendant's ship. He subsequently admitted that he had been aware of the gap prior to the accident. Dove Wilson JP opened his judgment with the statement that he saw no reason to differ from the judgment of the magistrate in the Court a quo. He went on to find that the plaintiff

"exercised no care of any kind, nor was it a case where he had suddenly to make up his mind in face of sudden crisis or danger ... I do not find that the accident was proximately due to the defendant's negligence. There was negligence, it appears to me, on the part of the plaintiff in the final or critical stage and it was that negligence which caused the accident"<sup>34</sup>.

Frenkel & Co v Cadle<sup>35</sup> is a good illustration of Dove Wilson JP's

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31. At 81.

32. At 83.

33. 1914 NPD 140.

34. At 143f.

35. 1915 NPD 173

sound understanding of the law relating to negligence - most notably the causative aspect. A wattle plantation was destroyed by fire allegedly due to a grass fire started by defendant. Dove Wilson JP warned that

"the burning of grass lands even when properly supervised must in this country be attended with a certain amount of risk. Here no supervision whatever was exercised, and we are surprised to find so many responsible witnesses for the defence who declared that they would have done just as the defendant did ... If as we think in the present case, it has been established that the lighting of the fire, even in the circumstances spoken to by the witnesses for the defence, was in itself negligent, and that the burning of the plaintiff's plantation is the natural and direct result of that negligence, it is quite immaterial whether that result was one which the defendant could be reasonably expected to have foreseen or not; if that is the direct result of his neglect he is liable"<sup>36</sup>.

In neither of the past two cases was there any question of contributory negligence - unlike in Trevor-Smith v Walters<sup>37</sup>. Here a pedestrian was knocked down by a car. In delivering judgment, Dove Wilson JP noted that "plaintiff was himself going to witness the departure of a train, and ought to have known that other traffic might follow him out of Church Street, as defendant's car did, and overtake him, although like defendant's car, travelling at no excessive speed. There was therefore not only cause for taking the reasonable care which is always incumbent on a pedestrian on a street, but, especial cause for it"<sup>38</sup>. He also found that the driver of the car

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36. At 185.

37. 1928 NPD 351.

38. At 354.

had been negligent and concluded that "the negligence of both parties was simultaneous at the last stage of the event, and the decisive cause of the accident was therefore the negligence of them both"<sup>39</sup>. On a practical note, this type of case became more frequent - due no doubt to the increased presence of the motor car<sup>40</sup>.

Dove Wilson JP's reputation was further enhanced by a series of cases dealing with complicated claims arising out of accidents at level crossings - beginning with Maydon v Union Government<sup>41</sup>. He found that it was the plaintiff's failure to exercise ordinary care which was the proximate cause of the accident. A much better-known case<sup>42</sup> was that of McRitchie v SAR & H<sup>43</sup>. Dove Wilson JP's charge to the jury will be analysed fully in order to show his insight into a matter involving alleged negligence by both parties, and as an outstanding example of his ability to deliver an extempore charge which was at the same time coherent, logical and sound of legal principle<sup>44</sup>. Dove Wilson JP directed the jury that "negligence must be such as can be regarded as the proximate cause of the accident"<sup>45</sup>. He then proceeded to set out what he meant by proximate cause :

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39. At 355.

40. Cf Katzenstein v Duvenhage 1929 NPD 294 where the same issue was more fully considered. Harmsworth v Smith 1928 NPD 174 considered briefly whether or not a boy of four could be guilty of contributory negligence.

41. 1916 NPD 497.

42. Cf Broome op cit 110f.

43. 1918 NPD 312.

44. Counsel in the case were JS Wylie KC for the plaintiff and HG MacKeurtan (with him EA Selke) for the defendants. For biographical details cf Spiller op cit 124 and 129.

45. 1918 NPD 312 at 315.

"What is meant by 'proximate cause' I think can be made pretty clear by reference to the circumstances of the present case. If you are satisfied that there was negligence on the part of the Administration in any of the respects which are alleged, you then have to consider whether or not the results of such negligence could have been avoided by the use of ordinary care on the part of the driver of the motor car. If on the facts you come to be satisfied that that is so, the proximate cause of the accident would not be the negligence of the Railway Administration, but the subsequent negligence on the part of the motor car driver in not exercising the ordinary care which would, notwithstanding the negligence of the Railway Administration, have obviated the accident. The law does not impose liability for negligence beyond that negligence which is the proximate or nearest cause of the accident"<sup>46</sup>.

Perhaps the greatest value of the address lies in Dove Wilson JP's appreciation of the added complication that the plaintiff was merely a passenger :

"If you think that the accident was due to the combined negligence of the Railway Administration and of the driver of the motor car occurring simultaneously, so as to afford to neither the reasonable opportunity of thereafter avoiding the accident which would not have occurred but for the negligence of both, then the proximate cause is the combined negligence of both, and it will afford no defence to the Administration in a question with the plaintiff, who was not herself negligent, to show that the driver of the motor car was also negligent ... in order to recover the plaintiff must show in any case that there was negligence on the part of the Administration"<sup>47</sup>.

Dove Wilson JP thereupon considered each of the grounds of negligence alleged but he warned the jury that "you must confine yourselves to

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46. Ibid.

47. At 316f.

the grounds which have been pleaded because they constitute the only case which the defendants have to answer"<sup>48</sup>. Later in his charge, he pointed out that "the Legislature of this country has permitted the Railway Administration to make use of high roads for the purpose of level crossings without imposing upon it the duty of providing gates, or keeping these gates shut during the passage of trains ... It would, I think, in these circumstances, be exceedingly unfortunate if it were to be thought by motorists that the fact of railway gates being open in Natal is an intimation that it is safe to cross the railway"<sup>49</sup>. He also expressed his personal view that he wished "it were the law that the Administration were bound to provide gates and gatekeepers, or bridges or subways at every important crossing ... Motorists, as I have said, provided that the Administration uses reasonable care in running their trains, have to look out for themselves"<sup>50</sup>.

The third ground of negligence which was alleged was that the defendants had hung out or allowed to be hung out a blanket near to and at the side of the railway crossing which obstructed the view, and had built or allowed to be built a hut or servant's room at the side of the crossing which further shut out the view. Dove Wilson JP cautioned the jury that "no liability attaches to the Administration merely because the crossing happens to be a dangerous one"<sup>51</sup>. In

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48. At 317.

49. At 318.

50. At 317f.

51. At 321.

addition, on this ground of negligence it was also alleged that there was a want of whistling, or want of whistling at the proper place. He told the jury that "if you are satisfied that whistling at the whistle board was not a proper and usual and sufficient indication to people at the crossing of the approach of a train then you will find that there was negligence; but if you are satisfied that it was, then there will be no negligence in this respect"<sup>52</sup>. He also noted that there was no question of any negligent failure on the part of the driver to stop after the collision.

In the final part of his judgment, Dove Wilson JP considered whether or not there was any negligence on the part of the driver of the motor car :

"He is bound to exercise to the utmost his powers of sight and of hearing; he is not absolved from that duty because, for instance, a bell which is placed at the side of the road to ring when trains are in the vicinity is not in order and is silent; neither does the fact of the railway gate being open absolve him from that duty ... There is only one safe rule for the driver of a motor car in this country, and that is to approach every level crossing in the expectation of seeing a train upon it at any moment ; he must be ready at once to take every precaution to prevent a collision ; he must have his car under such control that he can pull up at once. It is his duty always to look, always to listen, with all the care of which he is capable; and it may be his duty to stop if the circumstances are such that he cannot reasonably place faith either in his powers of sight or hearing ... The driver's duty is not exhausted by doing his best to see or hear. If with the exercise of all due vigilance it is impossible to see or hear unless he stops, then he must stop; and in the vast majority of cases, if

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52. At 322.

not in all, if he does so, he can ensure a safe crossing"<sup>53</sup>.

There were also situations where the Judge President dealt with actions under the actio iniuriarum, particularly defamation. In Marwick v Dube<sup>54</sup>, he revealed his understanding of the liability of a newspaper for the publication of material. Certain defamatory statements had been published in the Ilange Lase Natal. Dove Wilson JP set out very carefully the liability of the publishers of the newspaper<sup>55</sup> :

"It is immaterial what the intention of the publisher may have been. If he has published, without excuse or justification, something which appreciably injures the reputation of another or reflects upon his character which holds him up to hatred or obloquy, or tends to injure him in his trade or profession, the publisher is guilty of libel ; and it is libellous to impute to the holder of an office that he has been guilty of improper conduct in that office, or even in the absence of improper conduct, that he is incompetent or unfit for the post"<sup>56</sup>.

On the evidence, he found that the plaintiff was entitled to succeed, and he awarded him damages assessed at £100<sup>57</sup>.

I now turn to some of the cases falling within the ambit of the law of husband and wife. Divorce actions were fairly common and there were naturally occasions when sordid details came out into the open.

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53. At 323f. The case was confirmed by him in Union Government v Lee 1927 NPD 202.

54. 1917 NPD 361.

55. Cf the report of the case in The Natal Mercury of 16 August 1917 and 4 October 1917.

56. 1917 NPD 361 at 368.

57. Cf Hooper v Moore & Varty 1921 NPD 96.

Regarding one such case, the following report appeared in The Natal

Witness :

"In the Supreme Court yesterday, during the case of a defended divorce trial, in which there was an allegation of adultery, accompanied by some sordid details, counsel for the plaintiff, the lady, asked that the public and the press be excluded from the Court room.

The Judge President stated that the Court had no power to exclude either the Press or the public in such a case as this, but he said he could rely on the Press not to report details which would unnecessarily wound and injure the parties in the case, and would not report sordid and revolting evidence. That his Lordship's faith in the discretion of the Press was justified is proved by the fact that none of the papers reported the proceedings in the case"<sup>58</sup>.

Aside from confirming the amiable relationship between Dove Wilson JP and the Press, there was also an implied moral condemnation of the behaviour of the parties, for in a different report in The Natal Mercury he had said that "unfortunately in these days, young men and women allowed themselves a latitude which was unheard of until recently, and behaved with impunity in a manner which would have been impossible thirty years ago"<sup>59</sup>.

In the case of Anderson v Hesom<sup>60</sup>, the main issue was the interpretation of "household necessaries". Aside from referring to it on grounds of legal merit, this case is an example of a typical case heard by Dove Wilson JP. He said that

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58. 22 February 1924.

59. 14 July 1927.

60. 1913 NPD 63.

"there is no doubt on the authorities that a wife buying, on her own credit, household necessities binds herself, but only to the extent of one half if the husband's consent to her orders is either express or implied, in which case he is bound for the other half ; if there is no such consent, or it is shown that credit was given exclusively to the wife, she is liable for the whole ... But to make the wife liable at all it must be shown that credit was given to her and not solely to the husband, because if the tradesman gave credit to the husband there is no authority for saying that he can sue the wife ; and of course he must show that the orders were given by the wife. It is impossible on the admitted facts in this case to say that it is established that any credit was given to the wife - such as it is the evidence points the other way - nor to what extent she herself gave the orders"<sup>61</sup>.

A more unusual case was Burgers v Knight<sup>62</sup>, where the husband had never consummated the marriage<sup>63</sup>. It also appeared that he had signed a document saying that he was unfortunately medically unfit to do so. Dove Wilson JP concluded that "there is evidence ... upon which we may infer physical incapacity and not mere unwillingness to consummate ... we are not in a position to know whether the incapacity is the result of a latent defect or of a visible one, owing to defendant's refusal to be examined"<sup>64</sup>. He therefore granted the decree of nullity prayed for.<sup>65</sup>

Similarly unusual circumstances prevailed in Schnaar v Jansen<sup>66</sup> where

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61. At 66. Cf Foxon v Foxon 1914 NPD 9.

62. 1916 NPD 399.

63. Also reported in The Times of Natal, 3 October 1916.

64. 1916 NPD 399 at 402f.

65. Cf Friedman v Friedman's Executors 1922 NPD 258 where Dove Wilson JP concluded that there had been a valid marriage. The case was reported in The Natal Witness, 5 August 1922.

66. 1924 NPD 218.

there was an action for breach of promise of marriage. With this judgment, Dove Wilson JP set a valuable precedent which is still applied today.<sup>67</sup> The defendant attempted to plead justification :

"The circumstances which he pleads as justifying the breaking of the promise are that an uncle of the plaintiff is married to a native woman ; that the brother of the plaintiff was convicted of housebreaking with intent to steal and theft ; and that another uncle of the plaintiff was hanged for the murder of his wife ... No decisions of the South African Courts have been cited in support of this plea, and I am not surprised. I should be surprised to find that there was any decision that the discovery, subsequent to the engagement, that the relatives of one of the parties were not such as the other would desire, would give the other the right to break off the contract. If a man engages himself to a woman without having satisfied himself as to her relatives he takes the risk of their being unsatisfactory. And even if it can be said that there is an authority in the institutional writers supporting such a plea, the fact that it has never been appealed to and applied in the Courts is sufficient warrant for regarding it as obsolete and no longer the common law of South Africa, especially as the discovery after engagement by one of the parties that the other has objectionable relations is not unlikely to have happened frequently"<sup>68</sup>.

I now turn my attention to various aspects of public law, and first of all to the interpretation of statutes. In Inspector of Nuisances, Durban v Vogel<sup>69</sup> there was a contravention of section 14 of the Adulteration of Food Act of 1901. Dove Wilson JP found that there was "nothing in section 50 of the Act, nor in the other sections dealing with analysis which would limit the application of the word 'seller'

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67. Cf HR Hahlo The South African Law of Husband and Wife (1985) 51.

68. 1924 NPD 218f.

69. 1911 NPD 397.

in the section to the immediate seller to the purchaser. The Act strikes at the person who contravenes it. Appeal fails"<sup>70</sup>. In Union Government v Mudaly<sup>71</sup> an indentured Indian was required to pay the sum of £3 under Act 17 of 1895 :

"The plain intention of the statute is that an unindentured Indian entering into a two year's contract of service shall obtain protection from any claim for the arrears of the licence money which he has incurred up to the time of his entering such service, and that protection shall endure for the two years, and altogether, if on their expiry he returns to India. But there is nothing in the Act which I can see in any other to modify or repeal section 6 of the Act of 1895, which makes all such Indians liable for the payment of licence money every year. I therefore think appellant was properly found liable"<sup>72</sup>.

It can be seen that referring to the "plain intention" restricted the area in which Dove Wilson JP could interfere.

A different principle of interpretation was applied in Saw v Rex<sup>73</sup> where the appellant had been convicted of being in possession of native gold. Dove Wilson JP said that "there can be no doubt, I think, that one of the main objects of this Act is to protect mining and to prevent illicit dealing in unwrought gold or precious metal ..."<sup>74</sup>. Having referred to the main object of the Act, he

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70. At 401.

71. 1912 NPD 52.

72. At 54.

73. 1915 NPD 357.

74. At 361.

nevertheless said that

"I regret to have to come to this conclusion in the present case looking to the fact - so far as I know - that silver is not mined for in this country, or at any rate not to an appreciable extent ; and that since this Act was passed it has never before this case been thought necessary to put in force its penal provisions in circumstances like the present. But while that is so I cannot refuse to give effect to the provisions of the Act according to what I think is their meaning"<sup>75</sup>.

In Yenka Reddy v Naidoo<sup>76</sup>, Dove Wilson JP found that an association which had as its object the advance of money was directly struck at by the terms of Act 31 of 1909 "which seems to me too clear to permit of construction otherwise than in their plain and literal sense ..."<sup>77</sup>. Similarly, in Platt v CIR<sup>78</sup>, he added that "having regard to the frame of the Act, a right of appeal to the Supreme Court must be given either expressly or by necessary implication from the language used and cannot be presumed. The Legislature in my opinion have conferred on this Court not an appellate, but merely a declaratory or consultative jurisdiction on the law, and ... they appear to me to have avoided the use of any language or any forms of procedure which involve the right of appeal"<sup>79</sup>. The above cases show that Dove Wilson JP preferred an interpretation arising out of the Act in question itself. But Dove Wilson JP did not always choose a restrictive

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75. At 362. Cf Commander v Collector of Customs 1920 NPD 35.

76. 1916 NPD 210.

77. At 213. Cf SAR & H v Wood & Sons 1920 NPD 199.

78. 1919 NPD 234.

79. At 245.

interpretation. Thus in Commander v Collector of Customs<sup>80</sup>, he said that

"I take the rule of construction to be that prima facie general words are to be taken in their larger sense, unless you find something in the context which plainly shows tht they are intended to be read in a more restricted one ... That we may have regard to ... prior legislation ... as explanatory of the definition in question is, I think, clear. Customs Management Acts and their relative tariff Acts may, I think, very fairly be taken to be statutes in pari materia ..."81.

The final case on interpretation which I refer to is City and Suburban Gold Mining & Estate Co Ltd v CIR<sup>82</sup>, where Dove Wilson JP said that

"the rule is that words occurring in a statute are to be read in their ordinary sense, giving them their full meaning and capacity, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the statute in which case their ordinary meaning may be modified so as to avoid that absurdity and inconsistency but no further ... It has been urged that the words now in question, if accepted in their ordinary sense, will give rise to results so extraordinary and anomalous that they cannot have been intended. But that is a wide field in which I do not feel called upon to wander. If the words have a definite and unambiguous meaning, as I think they have, and are uncontrolled by the context, it is not permissible to speculate as to intention. We must take the Legislature to have intended what it has said, without regard to consequences".83.

The criticism which may be levelled at this judgment is that the Judge

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80. Cf n 75 above.

81. 1920 NPD 35 at 40 and 43.

82. 1923 NPD 177.

83. At 180. Cf Castelijm v Sim & others 1929 NPD 253.

President gave too much credit to the Legislature for its ability in drawing up legislation. A bolder approach may have been more appropriate in this particular case.

Dove Wilson JP spent a fair amount of his time dealing with cases falling within the ambit of administrative law. I have classified these cases into general administrative law decisions and those concerned more specifically with appeals from licensing boards. In respect of the former, the cases tend to show that Dove Wilson JP cast upon those with the authority to make decisions the responsibility of ensuring that there was no bias towards the concerned party, and that he interpreted the enabling provisions very strictly. In Hoosian v Pietermaritzburg Corporation<sup>84</sup>, certain buildings inhabited by the appellant had been declared unfit for human habitation in accordance with the procedure set out in one of the bye-laws. The appellant was subsequently charged with a contravention of that provision of the bye-law because he continued to inhabit the buildings. Dove Wilson JP commented that

"this bye-law, while it may operate justly enough in the case of the owner, operates unfairly where the occupier is concerned. In effect, it permits of the ejection of an occupier, by the determination of a tribunal, which has never given him an opportunity of being heard ... For these reasons I think we must hold that the objection to the bye-law as being ultra vires is good, and sustain the appeal"<sup>85</sup>.

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84. 1915 NPD 433.

85. At 437.

Similarly, in Robinson v Durban Corporation<sup>86</sup>, he found that "the action of the Town Council, however well intended, in granting the application of the club, was ultra vires and illegal ... The land was dedicated to the use of the public as a whole in perpetuity, and the effect of restricting its use to a private body would be to make the public trespassers if they went without invitation or permission"<sup>87</sup>. Finally, in Karodia v Dundee and District Chamber of Commerce & Smith<sup>88</sup>, Dove Wilson JP remarked that the Court

"can entertain such questions as whether the discretion was exercised in good faith after fair enquiry, not arbitrarily or capriciously, but bearing in mind the interests of both the public and the applicant, and within the limits of the Statute ... I do not think that the enquiry for us is whether in fact [the official] was disinterested in hearing and disposing of the appeal and did bring an unfettered and unbiased discretion to its consideration. It is sufficient that there is room for reasonable suspicion that he did not ..."89.

The above comments on general administrative law provisions apply more fully to those cases which were appeals from licensing boards. In the case of Licensing Board (Durban) v Arnold<sup>90</sup>, Dove Wilson JP found for the Licensing Board because "[it] had regard to the character of the applicant, and to the manner in which she had conducted any licensed retail business in the past [and] Licensing Boards are perfectly right

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86. 1916 NPD 436.

87. At 437f. Cf Sunckar & Behayi v Chief Magistrate, Pietermaritzburg 1916 NPD 452 where the Government acted ultra vires the powers which it had granted to a Rules Board.

88. 1918 NPD 237.

89. At 242 and 246.

90. 1911 NPD 27.

in so proceeding"<sup>91</sup>. In Rawat v Licensing Board, Pietermaritzburg<sup>92</sup> however he commented that "before we can properly dispose of this matter I think we must remit the case back to the Town Council in order that it may state the reasons which led it to the exercise of the decision ..."<sup>93</sup>.

The chief interest with these cases lies in the number of occasions when a decision was made by the relevant Licensing Board on racially-biased grounds. This can for example be seen in Goga v Ladysmith Licensing Board<sup>94</sup> which was an appeal from the Licensing Board of Ladysmith, affirming the decision of the Licensing Officer, refusing the transfer of a retail licence held by one G to a partnership consisting of G and his son GA. Dove Wilson JP noted that

"in matters of this kind the jurisdiction of the Court to entertain any appeal upon the merits is ousted, but nevertheless are empowered and required to see that an appellant has had a real hearing of his case, and there was no gross irregularity in the proceedings ... It is not essential, as I think the Board has thought, that the applicant should be able personally to keep books in the English language, and so far as the record shows GA was not afforded an opportunity by the Board of submitting any proof of his being able to procure the proper keeping of such books ... I think therefore that the case must be viewed in this light, not that the Licensing Officer and the Board have exceeded their jurisdiction in any way, but that they have unwarrantably limited it"<sup>95</sup>.

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91. At 29.

92. 1917 NPD 458.

93. At 461.

94. 1912 NPD 642.

95. At 646 and 649. Cf Ebrahim v Estcourt Division Licensing Board & Robinson & others 1913 NPD 289.

The different circumstances in the case of Moodley v Licensing Officer Pietermaritzburg & another<sup>96</sup> were that this involved an application to the Court to set aside the decision of the City Council confirming the refusal of its Licensing Officer of a restaurant licence. The Council's decision was based on exactly the same reasons as those stated by the Licensing Officer<sup>97</sup>. Dove Wilson JP said that

"... while the section gives the Council a discretion to say whether a person is a desirable licensee or not, it is well settled in our law that the grant of a discretion gives no power to discriminate on racial or class grounds, and to say that one class is desirable and another not, unless the power so to discriminate has been expressly given by the Legislature ; and it is sufficient to say that there is nothing of the kind here"<sup>98</sup>.

A highly controversial case came before the Natal Court during the course of 1916, namely, Malcomess & Co Ltd v Durban Licensing Board<sup>99</sup>. The Town Council of Durban (sitting as a Board of Appeal) had refused to grant renewals of three licenses and it was as a result of this that the case came before the Supreme Court. The basis of the Licensing Officer's refusal was that a large number of shares in the business were held by persons resident in Germany. The Town Council duly found that 30 000 shares of the company were held by alien enemy subjects resident in Germany. Further, other shares were held by

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96. 1928 NPD 278.

97. Cf Chetty v Town Council, Pietermaritzburg 1926 NPD 39 and Naidoo v Pietermaritzburg Corporation 1917 NPD 453.

98. 1928 NPD 278 at 287.

99. 1916 NPD 260 ; also reported in The Times of Natal, 10 July 1916.

someone interred in a prisoner-of-war camp. For these reasons, the Town Council refused to uphold the appeal. Dove Wilson JP found that

"the Dealers Act leaves it to the discretion of the Licensing Officer to issue or refuse a licence without indicating the limits within which it may be exercised and ... if there be indication in the Act of the ground upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view to indicating the particular grooves in which the discretion should run. If it is intended by the Legislature that a discretion should be exercised, what is meant is a judicial discretion regulated according to the known rules of law, and not the mere whim or caprice of the person to whom it is entrusted ... Now we cannot regard it as by itself a substantial reason for the refusal of a licence to a company to trade within the Union that some of its shareholders partake of a character which in the eye of the law, is no bar to dealing commercially with British subjects ; nor can we think that it was ever intended by the Legislature that the discretion should be exercised by each individual licensing authority according to its view of what the law should be, instead of according to the law as it is, with all the uncertainty and confusion which such a state of affairs must inevitably lead to"<sup>100</sup>.

Dove Wilson JP consequently came to the conclusion that a licence should be granted.

The matter came before the Court again in the following year<sup>101</sup>. Counsel for the appellants sought to differentiate this appeal from that of the previous year on three grounds : (i) different facts ; (ii) a decision relied upon in the previous year had been overturned

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100. At 275f.

101. 1917 NPJ 275.

by the House of Lords<sup>102</sup>, and (iii) the discretion exercised by the Licensing Officer under the Dealers Act was not judicial but administrative. Dove Wilson JP refuted this last claim because he said "the right of appeal to [this Court] is expressly given by the amending statute of 1909 ... It is clear that the right of appeal thus expressly given must enable the Court to consider the matter on wider grounds than would entitle it to issue a mandamus ..."103. Once again, as previously, he sustained the appeal.

The outcome of the previous decision evoked considerable comment in the Press. An editorial in The Natal Mercury<sup>104</sup> commented that

"... we should be glad if means were taken to obtain the decision of the highest Court in the land upon a matter with regard to which a good deal of public sensation has been aroused. We say so, without desiring in the least to impugn the reading of the law contained in Mr Dove Wilson's learned judgment ... But the letter of the law is one thing and public policy is another. The province of the Supreme Court is to interpret the law as they conceive it to stand, apart from other considerations. If the law be as laid down by the Court, the practical course for those of us who think that in this instance the law does not harmonise with public policy is to aim at bringing about a change of the law in the constitutional manner by legislation"<sup>105</sup>.

A later report <sup>106</sup> conveyed the news that the Durban Chamber of

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102. Continental Tyre & Rubber Co v The Daimler Co 31 TLR 159 overruled in [1916] 2 AC 307.

103. 1917 NPD 275 at 281 and 284.

104. 10 August 1917.

105. Ibid.

106. 23 August 1917.

Commerce was prepared to bear the entire expense of further appeal, and noted that "they are to be commended for their patriotic motive and their public spirit". A few days later<sup>107</sup>, the newspaper reported that leave to appeal had been refused. This provoked further editorial comment<sup>108</sup> that "the Legislature has not kept pace with the changes that have occurred under the war conditions ... the result justifies the view of those of us who felt that the prudent course was to have accepted Mr Dove Wilson's exposition of the law as authoritative, and to have devoted attention to the steps necessary for bringing the law into harmony with public sentiment and public policy". These comments clearly show the esteem in which the judicial pronouncements of Dove Wilson JP were held, and there is no doubt that he had pronounced correctly on the law. The root cause of the subsequent uproar in the Press was occasioned by South Africa's state of war with Germany<sup>109</sup>.

It will have been noticed that several of the public law cases which have been referred to involved litigants who were not White. It will thus be convenient at this stage to consider Dove Wilson JP's attitude towards litigants of colour<sup>110</sup>. I begin by referring to the case of Makabeni v Smith<sup>111</sup> where he commented that "all that is meant by Act 7 of 1910 is that although there are well recognised property rights

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107. 26 October 1917.

108. 27 October 1917.

109. The decision in the 1916 appeal was subsequently followed in the case of Khamissa Hoosen v Alfred Division Licensing Board 1918 NPD 21.

110. For criminal cases see Chapter 3.

111. 1917 NPD 148.

connected with or, arising out of their marriages, native women and girls are not for that or any other reason to be regarded and treated as mere property or chattels ; but the Code itself recognises and makes regulations as to lobolo for women and girls given in marriage as a property right connected with their marriages which does not involve their treatment as mere property or chattels in the sense of the section"<sup>112</sup>. This reveals Dove Wilson JP's determination to interpret the Act so as to secure the best possible advantage for those appearing before him - as he did with all litigants. There are several other illustrations of his impartiality, and although the case to which I now refer was based on contract, it is of sufficient merit to warrant its inclusion here. The respondent in Minister of Railways v Moodley<sup>113</sup> had sued the respondent for breach of contract. He alleged that, being carriers, they had failed to grant him, a passenger, the reasonable and usual accommodation and right to have bedding to which he was entitled :

"I do not think that the duty to afford reasonable accommodation for the purposes of carrying a passenger from one point to another includes the supplying of bedding for his greater comfort during the journey ... That I think is a promise on the part of the SAR to anybody taking a ticket that it will give him the additional right to obtain bedding for the unbroken journey on tender of payment of 2s6d. The regulation contains no reservation in respect of any particular colour or class, and the evidence establishes that it has been the custom in the past to supply persons of colour with bedding, and is so again now ...

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112. At 151. Cf Sinkwa v Konigkramer 1914 NPD 321 where Dove Wilson JP stipulated (at 323) that the Native Code "... in cases between native and white men in the Ordinary Courts ... can be held to apply".

113. 1912 NPD 86.

instructions were given to the person in charge of the bedding not to issue it to coloured persons. But there was no notice to the public, nor to the plaintiff before he had fulfilled the conditions and accepted the promise"<sup>114</sup>.

The consequence was that the appeal was dismissed. In Naidoo v Mayor & Councillors, Pietermaritzburg<sup>115</sup> Dove Wilson JP decreed that "discrimination as to class, colour or race, by a municipality is unreasonable and ultra vires unless expressly sanctioned ..."<sup>116</sup>.

A recurring issue faced by the Natal Court (but which was also spread throughout the country) was immigration by Asians<sup>117</sup>. Most Asians in Natal had arrived via the system of indentured labour, originally to work the cane fields of Natal from 1860. Until 1913, continued immigration in Natal was governed by the Natal Immigration Act 30 of 1903. However in 1913 Parliament enacted the Immigration Regulation Act to apply throughout the Union. Section 4(1)(a) of this latter Act provided that "any person or class of persons deemed by the Minister on economic grounds or on account of standard or habits of life to be unsuited to the requirements of the Union or any particular Province thereof" should be a prohibited immigrant. A particularly tragic situation arose in Nathalia v Principal Immigration Restriction Officer<sup>118</sup> where the official had declared a boy to be a prohibited

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114. At 89 and 91.

115. 1917 NPD 463.

116. At 466. Cf Harbottle v Receiver of Revenue 1926 NPD 49.

117. For a definitive account of the role of the Appellate Division see Hugh Corder : Judges at Work (1984) Chapter 7.

118. 1911 NPD 552.

immigrant notwithstanding the production of strong evidence in support of the contention that he was the son of an Indian who had been living in Natal for about fifteen years. Dove Wilson JP commented that

"... the reasons which he gives for finding the evidence insufficient are themselves entirely insufficient ... If I thought that he had not considered that evidence, then I think that we should have to interfere and send the case back to him ; and there is something in the information before us which at any rate gives colour to the suggestion that he has not himself exercised his discretion in the matter ... I come ... to the conclusion that we are powerless to interfere, and I only add that I do so with regret, because I think that ordinary justice, and good feeling, would have dictated permission for this lad to land"<sup>119</sup>.

A further provision of the Act came under examination in Mahdo Singh v Natal Indian Traders Ltd<sup>120</sup>. Section 59 offered two immunities to indentured Indians, one being immunity from being sued for a debt contracted during the period of indenture, and the other being immunity from imprisonment for debt whilst under indenture. Here the appellant had been ordered under section 54 of the Magistrates' Courts Act to enter appearance to answer a claim of £24 16s 9d. Additionally, the magistrate had made an order that the defendant go to prison for 30 days hard labour suspended for fourteen days. On his reading of section 59, Dove Wilson JP found that "the proceedings were incompetent ab initio ... I think upon these grounds the appeal ought to be sustained"<sup>121</sup>.

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119. At 556 and 558. Cf Muniammah v Kullu 1917 NPD 352.

120. 1912 NPD 575.

121. At 579.

A noticeable characteristic of these decisions was the tendency of the Court to follow its own decisions<sup>122</sup>. An interesting case was that of V Govindsamy v Indian Immigration Trust Board<sup>123</sup>. The Indian Immigration Law 25 of 1891 (section 50) levied a medical fee on certain employers, depending upon the number of Indian immigration male employees. This group was defined (in section 118) to include all Indians introduced from India, and "those descendants of such Indians as may be resident in Natal". Dove Wilson JP commented that he was "unable to see anything either in the subject matter or the context to prevent the definition in section 118 having full force and effect in the application of section 50 ; and as it has not been seriously contested - and I do not think it successfully could be - that the liability under section 50 exists quoad Indians who having been indentured have become free, I think the appeal should be dismissed"<sup>124</sup>. It should be noted that the appellant employed some colonial-born descendants of indentured Indians, together with "free" Indians, who had served their period of indenture, but had remained. The case went on appeal, and Solomon JA delivered judgment<sup>125</sup>. He upheld the appeal, but only in part, using the canon of construction that, where it appears from the context that the Legislature did not intend an extended meaning of a phrase, the ordinary sense should be

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122. Cf Essopjee v Immigration Appeal Board, Durban 1914 NPD 438 which followed the earlier decision of Ahmed Hosen v Immigration Appeal Board 1914 NPD 275.

123. 1918 NPD 122.

124. At 128.

125. 1918 AD 633 : Juta AJA, Innes CJ and de Villiers AJA concurred, but Maasdorp JA dissented.

adopted. Consequently, he excluded colonial-born employees from the effect of the definition clause but not "free" Indians<sup>126</sup>.

In another matter which went on appeal, the Court in In re Seedat<sup>127</sup> had found that a notice of General Smuts was intra vires<sup>128</sup>, and here the Natal Court contradicted a judgment of the Cape Provincial Division<sup>129</sup>. The Appellate Division ruled on the matter in the case of R v Padsha<sup>130</sup>. The majority (Solomon, de Villiers and Juta JJA) followed the reasoning of the Natal Court, whereas the minority (Innes CJ and Kotze JA) found the view of the Cape Provincial Division more compelling (ie. that the notice was ultra vires)<sup>131</sup>. In his analysis of this decision, Hugh Corder commented that "the outcome of the majority decision ... was to uphold the validity ... which gave judicial sanction to the conclusions of the more racially aware and prejudiced courts of Natal ..."<sup>132</sup>. In Goolam Rassool v Rex<sup>133</sup>, the Natal Court followed its own decision of Mahomed & Yussef v Immigration Officer<sup>134</sup> and that of R v Padsha (supra). The argument of counsel for the appellant was that a child of three could not be affected by the provisions of the Immigrants Regulation Act 22 of 1913, because he was doli incapax and he was not of an age at which he could be expected to submit himself, with any chance of success to the

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126. Corder op cit 176.

127. 1914 NPD 198.

128. He deemed "every Asiatic person to be unsuited on economic grounds" to the requirements of the Union and every province.

129. Mahomed v Immigration Appeal Board 1917 CPD 171.

130. 1923 AD 281.

131. Corder op cit 179f.

132. Op cit 180.

133. 1923 NPD 96.

134. 1921 NPD 337.

tests to which persons of maturer age may be subjected by the officials who have control of the entry of immigrants. Dove Wilson JP then commented that

"... a child is none the less an Asiatic within the sense of the Minister's notice because he happens to be under the age of seven ; nor is he any the less so because he happens to be doli incapax, for it involves no crime ; and the futility of asking him to submit himself to the tests which the officials may require under the Act, cannot affect his status . . . The appeal must therefore be dismissed"<sup>135</sup>.

This was then taken on appeal to the Appellate Division<sup>136</sup>. As in Padsha (supra), the Appellate Division was not unanimous, but the majority overruled the Full Bench of the Natal Provincial Division and upheld the appeal<sup>137</sup>. The view which was taken was that a child of three was incapable of volition and conscious action and was therefore not guilty of a contravention of the Act. The dissenting judges<sup>138</sup> preferred the view of Dove Wilson JP in the Court a quo<sup>139</sup>.

What conclusions can be drawn from the above cases concerning Indian immigration? First, the evidence seems to show that Dove Wilson JP was more often than not sympathetic towards Indian litigants. There were occasions however when he stuck to the letter of the law and inevitably produced what seemed to be an inequitable result. Of the

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135. 1923 NPD 96 at 98.

136. 1924 AD 44.

137. Solomon JA delivered the leading judgment and Kotze JA and Innes CJ concurred.

138. De Villiers and Wessels JJA.

139. Corder op cit 181f.

two cases which were taken on appeal to which I have referred, the majority of the Appellate Division supported Dove Wilson JP on one of them. I cannot concur with Corder's conclusion after the Padsha decision that the Court in Natal was more "racially aware and prejudiced"<sup>140</sup>. The Court was certainly racially aware to the extent of its realisation that all litigants, no matter what their colour, should be treated substantially the same. I believe that it is inaccurate to classify Dove Wilson JP's Court as a racially prejudiced one. It might have been more accurate to say that the Natal Court could have been bolder in its interpretation of the relevant statutes.

Commercial litigation between 1910 and 1930 was no less prolific than it is today. There were several questions on contract which were resolved by Dove Wilson JP, and it is to those that I turn now. Titshall v Cole<sup>141</sup> concerned a contract which was partly in writing and partly verbal. Dove Wilson JP commented that "as it stands, the averment that the contract was partly in writing and partly verbal conveys to my mind that there was nothing in the nature of a contract either wholly in writing or wholly verbal ; but if it was partly in writing and partly verbal, that, coupled with part performance, will constitute a good enough contract"<sup>142</sup>. This case is a typical example of the common contract cases which came before Dove

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140. Cf n 136 above.

141. 1913 NPD 161.

142. At 167. As to breach of warranty cf Peabody & Co v Deane 1913 NPD 37.

Wilson JP<sup>143</sup>. There was also a fairly regular parade of cases which were based on gambling transactions, starting with Yenka Reddy v Naidoo<sup>144</sup>. It is worth referring to Hitchins v Union Government<sup>145</sup> for Dove Wilson JP's sound advice on the implied terms of a contract :

"The question whether a term as to which a written contract is silent is to be implied, depends upon the presumed intention of the parties, to be ascertained from the nature of the transaction, the terms of the document, and the surrounding circumstances. It is not enough that it would be reasonable to make the implication ; it ought not to be made unless on considering the whole matter in a reasonable manner it is clear that the parties must have intended that the suggested stipulation should be a term of the contract ; it must be a necessary implication ... It can only be implied if it is necessary in the business sense to give efficacy to the contract ... It cannot be introduced merely because it would render the carrying out of the contract more convenient, and might have been included if the parties had thought about it ... It is always a dangerous matter to introduce into a contract by implication what it does not contain in express words, and it should only be done by the Courts under pressure of conditions which compel the introduction of such terms for the purpose of giving business efficacy to the bargain between the parties ; and should not be done when the contract works perfectly well without them ..."<sup>146</sup>

A succession of cases provide evidence of Dove Wilson JP's understanding of the question of damages on contract and their common refrain is the sound legal principle on which they are based.

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143. Cf Wattle Extract Company v Bosse 1915 NPD 528 where the dispute was whether there had been acceptance of an offer.

144. 1916 NPD 210. Cf Pillay v Yeanamoothoo 1917 NPD 156, Whittet v O'Connor 1918 NPD 376 and Biljoen v Petersen 1922 NPD 63.

145. 1925 NPD 281.

146. At 287f.

In Hodges v Standard Bank of SA Ltd<sup>147</sup>, after referring to the practice in the Transvaal, Dove Wilson JP noted that

"this [Natal] Court ... recognised that it was bound by previous decisions which did allow place to the doctrine of nominal damages ; and, therefore, I do not think that we can go to the length of saying that the rule is that nominal damages will not be awarded where no actual damage has been proved. But it does not follow that where no actual damage has been suffered we will interfere with the judgment of the magistrate because he has not awarded nominal damages"<sup>148</sup>.

On breach of contract, he warned in Amod Bayat v Doherty<sup>149</sup> that "it is not every breach of contract by one party which will entitle the other contracting party to cancel the contract. The breach must be one which affords reasonable grounds for the conclusion that it was the intention of the person making it to repudiate the contract"<sup>150</sup>. Tatham J delivered the main judgment in Mayne v Wattle Extract Co Ltd<sup>151</sup>, but Dove Wilson JP supplied a concurring judgment in which he agreed that on the terms of the particular contract the purchasers were in breach. Thus for him

"... the only question is whether that breach entitled the seller merely to such damage, if any, as he could qualify, or to treat the contract as at an end. Whether he was entitled to take the latter course depends on whether time was of the essence of the contract ; and if it was the question of damage is irrelevant ... The fact that the contract is a mercantile one as a general rule supports the view that time is of

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147. 1916 NPD 91.

148. At 93.

149. 1919 NPD 44.

150. At 47. On the question of damages Dove Wilson JP adopted the view of Bristowe J in Cooper v Kohn's Produce Agency Ltd 1917 TPD 186.

151. 1920 NPD 89.

the essence [however] to apply the doctrine to a case like the present, where goods are bought by a merchant for the purpose of his business, would ... be highly dangerous, and might be productive of the greatest confusion"<sup>152</sup>.

Returning to the question of damages in West v Hanreck<sup>153</sup> he commented that

"it is no doubt competent for the Court to give damages for prospective loss notwithstanding that it is not certain that it may ever be incurred ... all that can be deduced from the cases is simply this, that the Court must consider all the contingencies and the reasonable probability in the circumstances of pecuniary loss resulting and assess such amount as appears to it to be fair, if it thinks there is sufficient probability of loss resulting to warrant it, and a mere difficulty in the way of assessing the amount will not absolve the Court from the task of arriving at an estimate"<sup>154</sup>.

An intriguing situation arose in Oellermann v Natal Indian Traders Ltd<sup>155</sup> where the sellers of certain mealies had failed to deliver. The purchaser then allowed the matter to remain in abeyance for some three months before demanding delivery. The defendants then denied liability under the contract, with the result that the plaintiff had to buy in the open market. The plaintiff thereupon instituted an action for a breach of contract and damages to be assessed at the difference between 9s 10d and 21s per mind of mealies. Dove Wilson JP thought that the magistrate had come to the wrong conclusion, saying that

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152. At 94 and 96.

153. 1928 NPD 484.

154. At 489.

155. 1913 NPD 337.

"the buyer, upon the failure of the sellers to implement their contract by giving delivery as agreed on, was then entitled to go into the open market and to buy against them ; and he is only entitled to claim as damages the surplus, if any, which he has had to pay over the price agreed upon in the market at the time when the delivery under the original contract was due ; he is not entitled to wait until the price has risen, and so increase the damages against the sellers"<sup>156</sup>.

There were a number of occasions when Dove Wilson JP had to pronounce judgment in cases involving landlords and their tenants. For the most part in these cases, Dove Wilson JP did not break new ground and he often relied on past authority. In Reddy v Johnson<sup>157</sup> a landlord, on becoming aware that his tenant who was in arrears, was removing the invecta et illata, prevented the tenant from doing so by force without any application to the Court for an attachment or interdict.

Naturally, Dove Wilson JP censured this action :

"The main ground of appeal is that the landlord is entitled to protect his lien by force ; so long as the goods are on the premises it is said that he can prevent their removal by force and so protect his lien. I am unable to find in the authorities any support for this contention ... the landlord's hypothec does not take effect until a judicial order is obtained"<sup>158</sup>.

There was no alteration of this stance subsequently<sup>159</sup>.

In addition to these cases, Dove Wilson JP heard matters dealing with

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156. At 340.

157. 1923 NPD 190.

158. At 191. Cf Ex parte Thomas 1924 NPD 303.

159. Cf Tshabalala v Van der Merwe 1926 NPD 75.

the criminal responsibility between principal and agent<sup>160</sup>, on the doctrine of the undisclosed principal<sup>161</sup> and the authority of a company employee acting as an agent<sup>162</sup>.

Insolvencies were as common during the period 1910 - 1930 as they are today. One of the most important cases which came before Dove Wilson JP, was that of In re the SS Mangoro<sup>163</sup>. The judgment in this case reveals a number of important things. First, it provides sound evidence of Dove Wilson JP's pre-eminent ability to sift through a maze of facts and isolate the kernel (as was done by him early in the judgment). Once he had done this, he logically discussed each of the issues as fully as was required, by referring to the necessary authority (and by distinguishing authority to the contrary)<sup>164</sup>. It will also be noted that he did not delve into issues which were not absolutely relevant to the case. What followed was a coherent, logically ordered judgment which was precise and consequently easy to read. A final point is that Dove Wilson JP was delivering the judgment of the Court - which indicates that the judgment was the product of fruitful discussion between the Judge President and his brethren. At the heart of the case was the relative right of

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160. Cf Rex v English 1916 NPD 227.

161. Cf Dawson v IM & JF van Rooyen 1914 NPD 481; General Iron & Hardware Co Ltd v Estate Molyneux & CA Oldham 1911 NPD 193.

162. Cf Alexander v African Investment & Credit Co 1917 NPD 133 ; Natal Land & Finance Corporation Ltd v Van Tonder 1923 NPD 286 ; Hatton v Union Share Agency 1926 NPD 159 and Ravene Plantations Ltd v Estate H Abrey & others 1927 NPD 174.

163. 1913 NPD 67.

164. Cf Chapter 5.

preference (if any) of certain creditors over the proceeds of the sale of the SS Mangoro. The aforementioned was a French vessel, registered at Le Havre, which was sold in Durban under judicial attachment issued under a judgment obtained by one of the creditors. The sum realised, some £4 574 14s 8d, was placed in the hands of trustees for the benefit of the creditors. It was further agreed that a sum of £966 was to be set aside and paid by the trustees in satisfaction of wages to the Captain and the crew, and also to provide provisions for the crew. Having recited the facts, Dove Wilson JP went on to say that

"the claims may broadly be classified as in respect of (1) necessary repairs to the ship and the supply of materials for those repairs, and of materials and requisites necessary for the protection of the vessel and her preservation from loss or damage ; (2) necessaries for the sustenance of the master and crew; (3) wages due to the master and the crew over and above those already provided for out of the fund ; (4) disbursements for any of the above purposes and for sums owing to Government in respect of light dues etc ; (5) a bond over the ship, which it is admitted was duly registered and passed in due form of law in France to create a first charge over the vessel prior to its departure therefrom, and previous to any of the other debts being incurred"<sup>165</sup>.

Having so isolated the various claims, he considered the first claim and came

"... to the opinion that by the Common Law of Natal, he who furnishes labour or material, or money for the supply of either, for the necessary repair or preservation of a vessel has over that vessel a privileged tacit hypothec; ... all the privileges of creditors have this common, that the least of them gives preference

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165. 1913 NPD 67 at 78.

before creditors who are only such in writing, or by mortgage, and others who have no manner of privilege. It remains in this connection to consider what may be said to be 'necessary'. There is little authority on this question, in the books or in the reports, in South Africa ... in England [necessaries] extends to such repairs and things provided for the ship by the order of the master which the owner as a prudent man would have ordered if present at the time ..."166.

In respect of the third claim outlined by him he came to the conclusion

"that the master and seamen of the Mangoro have under the Roman-Dutch law a tacit hypothec on the vessel - there is no question here of the cargo - for their wages, and that they are entitled to preference. But as there is no authority for saying that their hypothec is privileged, their claims must be ranked after the claims which we have preferred for necessities"167.

Then with regard to the claims of the master and seamen, Dove Wilson JP found that no claim as to wages could be treated as preferent subsequent to 4 January 1912. Further,

"as to the claims of the crew we see no reason why the amount of their passage money home, which they were entitled to as part of their remuneration, should not be on the same footing as wages, and as they had earned it whenever they left home, it is not affected by subsequent sale of the vessel. The claim of the Master is on a somewhat different footing. His claim will be preferent only in so far as the disbursements were in payment of wages - which is not clear - and only in so far as the wages had accrued prior to 4 January 1912. His preferent right to the amount of his passage money home to France is

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166. At 81f.

167. At 91.

clear. His claim will accordingly have to be adjusted on these principles"<sup>168</sup>.

A different position pertained in the case of Garlick & Co v Anderson<sup>169</sup>, where the presiding judge was Broome J. One of the issues in the case was whether there had been an act of insolvency. Dove Wilson JP agreed with Broome J, but not without hesitation, "because the petition alleges what in my opinion is an act of insolvency, namely, the publication of notice in the 'Gazette' of an intention to apply for surrender"<sup>170</sup>. He went on to say that "unfortunately the petitioning creditor has made the mistake of supposing that the publication of notice is equivalent to the presentation of the petition ; and as I agree that in the administration of the insolvency law there should be the strictest regard to its terms, I am prepared, although as I say with some hesitation to agree"<sup>171</sup>. This concurring judgment provides further evidence of Dove Wilson JP's insistence that the correct procedure should always be followed<sup>172</sup>.

Dove Wilson JP's talent in mastering the facts of a complicated case are well revealed in a dictum in Hyslop v Bennett<sup>173</sup> where the central issue was the allotment of shares in the formation of a new company (which also extinguished the agreement between two of the parties as

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168. At 92f.

169. 1915 NPD 209.

170. At 212.

171. At 213.

172. Cf Ex parte Kozinsky 1924 NPD 243 where Dove Wilson JP could see no ground for rehabilitating an insolvent partnership estate.

173. 1914 NPD 249.

to the profits of the sale of properties to the company). His forthright manner and persistence in getting to the heart of the matter (without wastage of time) can be seen in his opening words :

"This case has occupied a very considerable time and involved some questions perhaps of some difficulty. It has necessitated the taking of a considerable volume of evidence and the consideration of a large amount of detail ; but after careful consideration I think we are agreed that the taking of time to consider judgment would not in any way result in modifying the opinion which we have formed, and that it is better on the whole to proceed to judgment at once when the facts and arguments of counsel are fresh in our memory"<sup>174</sup>.

Archibold & Co v Roe<sup>175</sup> highlighted a situation which was not infrequent. It was conceded that the defendants had acquired the right to dismiss the plaintiff on account of intoxication on 15 July. He was not however dismissed until the morning of the 19th. The magistrate in the Court a quo found that his retention in the service of the defendants from the 15th to the 19th in the surrounding circumstances amounted to a condonation of the misconduct or a waiver by the defendants of the right of dismissal which they had acquired on the 15th<sup>176</sup>. Dove Wilson JP found that "the magistrate has treated the case as if it were one in which the defendants had made up their minds to retain the services of the plaintiff indefinitely to suit their own convenience, but that is not so. On these grounds I think

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174. At 250. Cf Van Heerden v Smithfield Cold Storage Co Ltd 1923 NPD 141 ; Foss v Woolridge & Co Ltd 1916 NPD 100 and Brown v Natal Cambrian Collieries Ltd 1916 NPD 137.

175. 1918 NPD 455. Cf Steiger v Union Government 1919 NPD 75 and Dixon v Shave 1929 NPD 245.

176. 1918 NPD 455 at 457.

that the magistrate was wrong in the conclusion to which he came"<sup>177</sup>. Most of the subsequent cases on this aspect of the law were all dealt with in the same fashion by Dove Wilson JP ; it was a fairly common occurrence for him to dispute the reasoning followed in the Court a quo<sup>178</sup>.

Before turning to procedural and evidence cases, I will first refer to those cases which highlight the relationship between attorney/counsel and client. These cases all reveal Dove Wilson JP's attitude to the legal practitioners of his day. He quite rightly expected the same high standards of conduct which pertained in his native Scotland and which are now common to the profession worldwide. An early example was Armitage Trustees v Allison<sup>179</sup>, where the plaintiffs based their action on two grounds : (1) the breach by the defendant of his professional duty as an attorney and (ii) by reason of the fiduciary relation of client and attorney existing between the plaintiffs and the defendant, the purchase of certain mortgage bonds by the plaintiff could not stand. Dove Wilson JP found that "in the circumstances we cannot doubt that the investment of trust funds on the security of property of this kind was a most inadvisable and injudicious proceeding. It was a speculation, and a risky one at the best"<sup>180</sup>. In regard to the first part of the action, he concluded that the "... defendant was guilty of imprudence rather than negligence. There is no

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177. At 459.

178. Cf Wilson & others v Mayor & Councillors of the Borough of Durban 1920 NPD 5, also reported in The Times of Natal, 5 February 1920.

179. 1911 NPD 88.

180. At 95.

avermment that he made any misrepresentation as to anything, or that he was guilty of fraud"<sup>181</sup>. In regard to the second part of the action he said that

"we think that the defendant failed in his duty, imposed on him by his fiduciary relation towards the plaintiffs to see that they had competent independent advice ; and that in consequence the transaction, so far as his interest in the bonds is concerned, cannot stand. In fairness to the defendant we think that he did make a full disclosure of all the material facts concerning the investment to the trustees"<sup>182</sup>.

A far more serious matter commanded attention in Incorporated Law Society of Natal v Bester<sup>183</sup> when Dove Wilson JP said that

"this is an unfortunate case. I may say, generally, that the evidence reflects a very undesirable state of affairs. It is true that Bester was not acting in his capacity as solicitor, but I do not think that that precludes us from taking action if he is a solicitor, and the impropriety of his action is such as to make us consider it unworthy of one who aspires to fulfil the duties of that honourable profession. Here he has been guilty of the very serious impropriety of using the property of his principal to liquidate his own debts, and of neglecting his principal's interests, if not his own, in keeping no record of his transactions, and of refusing to account. I think we cannot do less than mark our sense of that by suspending him from practice for a period of one year"<sup>184</sup>.

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181. At 101.

182. At 107f. Incorporated Law Society (Natal) v JJ & FM Hillier 1913 NPD 237.

183. 1913 NPD 333.

184. At 333 and 335. An illustration of a candidate being readmitted is that of In re Gallwey 1914 NPD 163.

The case of Incorporated Law Society v Leisegang<sup>185</sup> elaborated what he had said previously :

"It is unnecessary, of course, to emphasize the strictness of the duty which is cast upon attorneys when money is committed to their possession in trust for the purposes of their clients. A violation of that duty is a very serious offence, and the least I think we can do in the circumstances is to strike the respondent off the roll, with liberty to apply for re-instatement, but no sooner than twelve months from this date"<sup>186</sup>.

There were, of course, other situations which applied more particularly to counsel. An article of some interest entitled "A matter of Partnership - Lawyers in dispute" appeared in The Times of Natal<sup>187</sup> :

"A case was set down for hearing by the Full Bench of the Supreme Court in which Mr Dacre Shaw, the solicitor, brings an action against Mr FS Tatham KC, with whom the plaintiff was at one time in partnership ... The Judge President threw out the suggestion that, in order to obviate a great deal of unpleasantness which might eventuate in a small community, like Maritzburg, the parties should consider the advisability of referring the dispute to the arbitration of some eminent counsel in one of the other Provinces.

The counsel engaged in the case (JS Wylie and R Hathorn) held a consultation, and announced to the Court that they had agreed to refer the matter to arbitration<sup>188</sup>. Mr Justice Dove Wilson : 'I am glad to hear it'".

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185. 1924 NPD 252.

186. At 253.

187. 20 February 1914. For biographical details cf Spiller op cit 127 and 129.

188. Some arbitration cases heard by Dove Wilson JP include : Reynolds Bros Ltd v Colonial Government 1911 NPD 31 and 1911 NPD 48 ; Dickinson v Estate Fisher 1914 NPD 166 ; Collins v Brown 1923 NPD 450 ; Fino v SAR & H 1927 NPD 369.

This case illustrates Dove Wilson JP's concern that the Supreme Court should be held in the highest esteem by the citizens of the town which it served. It also underlines his strong leadership of the Court.

In the case of Marwick v Dube <sup>189</sup>, Dove Wilson JP found it necessary to rebuke counsel, and this found its way into a report in The Natal Mercury :

"The Judge President rebuked Mr Renaud with regard to his cross-examination of witness, and said that counsel had no right to carry on a conversation with a witness, or because he failed to obtain the replies he wanted, inform a witness that he intended to rebut such-and-such evidence. His Lordship said that this kind of procedure had continually come before his notice. Such was altogether wrong and quite outside the rules pertaining to the cross-examination of witnesses. Of course, it did not matter so much where a case was being heard before a Bench, but it might have considerable influence upon a jury. In any case such practice was distinctly wrong"<sup>190</sup>.

The same newspaper reported the situation<sup>191</sup> where counsel asked for an adjournment on the ground that counsel on the other side was engaged in the Native High Court. Dove Wilson JP said that the Court ought not to have its work dislocated because counsel were busy elsewhere. There were plenty of people nowadays specialising at the Bar who could take an appeal like this<sup>192</sup>.

The cases which I now consider show that Dove Wilson JP scrupulously

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189. Cf 42.

190. 16 August 1917.

191. Reported as Nulliah v Moonsamy 1923 NPD 49.

192. The Natal Mercury, 9 February 1923. Cf The Times of Natal, 8 February 1912.

applied the various equitable rules of evidence. They also show that he was fully aware of the latest developments in the field.

I refer first to Insolvent Estate McWilliam v Bank of Africa Ltd<sup>193</sup> in which the issue was whether evidence taken upon commission for the defendant could be put in upon the application of the plaintiff, while the plaintiff was leading his case. Dove Wilson JP was of the opinion that it could be because he was not satisfied "that there can be any prejudice involved to anybody ..."194. In Mpanza v Rex 195, Dove Wilson JP endorsed the general rule as to the admissibility of evidence :

"A fact is relevant to the fact in issue if either by itself or taken in connection with other facts it proves or renders probable the past, present or future existence or non-existence of the fact in issue ; and facts relevant to the fact in issue may be proved, provided that the Court may exclude evidence of facts, which though relevant to the issue, appear to it to be too remote to be material under all the circumstances of the case"196.

With regard to traps, Dove Wilson JP said the following in Benest v Rex<sup>197</sup> where Carter J gave judgment (Tatham J concurring) :

"I come to the same conclusion. I must, however, entirely dissent from any suggestion that the evidence of native traps ought not to be submitted

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193. 1911 NPD 251.

194. At 253.

195. 1915 NPD 197.

196. At 202. Cf Lutchman v Rex 1915 NPD 205 and Meyer v Intestate Estate Rudolph 1919 NPD 92.

197. 1918 NPD 344.

to the strictest scrutiny before being accepted, or that it should be accepted where there is not substantial corroboration. Any such suggestion appears to me to be contrary to all decisions, and I should be sorry to be taken as in any way countenancing it"<sup>198</sup>.

During his time as Judge President, Dove Wilson JP pronounced on some particularly notorious questions of evidence. Thus, in Hansen v Rex<sup>199</sup>, he found that he could come to no other conclusion "... than that the magistrate took evidence which was incompetent, in respect that it was taken in the absence of the accused, and not at a place authorised by the Magistrates' Court Act, and it can make no difference that he was, as I do not doubt, actuated by the best intentions in doing so ..."200. Perhaps his opinion of the magistrate was rather too generous in the circumstances of the case<sup>201</sup>. In Johannesse v Chief Constable, Pietermaritzburg<sup>202</sup> the evidence in question was : "I know accused and have known him a long time. I know him well. I have drunk with him. Some time ago he used to supply me with liquor. I am a Zulu and not entitled to liquor"<sup>203</sup>. Dove Wilson JP, in discussing the issue said that this was

"... evidence of prior offences similar to, but unconnected with that libelled in the present case ... facts similar to, but not part of the same transaction as the main fact, are not in general admissible to prove the occurrence of the main fact.

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198. At 348. Cf Sutherland v Chief Constable, Pietermaritzburg 1923 NPD 125.

199. 1924 NPD 318.

200. At 321.

201. On corroboration cf Du Plessis v Levy 1925 NPD 249 and Franks v Rex 1924 NPD 329.

202. 1926 NPD 53.

203. At 54.

Evidence of such facts may be admissible to show, if it be necessary, knowledge of the nature of the main fact, or the intent with which it was done, after evidence aliunde to establish the main fact has been led. But in the present case ... it cannot be said that the evidence in question could possibly serve any such purpose"<sup>204</sup>.

Finally, an incredible situation arose in a case which was reported in The Times of Natal. Proper authentication of the finger-prints of an accused were not available and the accused was asked, in Court, to consent to his fingerprints being taken there and then. He declined, but was eventually compelled to submit to his finger-prints being taken. It was on this evidence that the man was convicted. Dove Wilson JP (Broome and Carter JJ concurring) held that the evidence had been most improperly obtained, and set aside the conviction<sup>205</sup>.

The Judge President expressed himself on a number of opportunities on the question of wasteful litigation. In The Times of Natal he had intimated that if the particular case were not settled by counsel it would have to go back to the magistrate, because the Court did not know on what grounds the magistrate had come to his decision. Dove Wilson JP said that "this was one of those cases, involving a lot of little items, which should never have come into Court"<sup>206</sup>. He had expressed a similar opinion in the earlier part of the hearings in the

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204. Ibid.

205. 20 February 1914.

206. 5 February 1912. Cf Woodhouse v Jacobson 1918 NPD 161 and Whittaker v Hine 1912 NPD 72.

Mangoro case<sup>207</sup> when he had said that " I don't think there can possibly be room for any more" - this was after thirteen appearances in the case<sup>208</sup>. Counsel (Burne KC<sup>209</sup>) had then suggested that the matter should stand down for a fortnight, whereupon Dove Wilson JP replied that "that would be just another fortnight wasted". He suggested that what was needed was a "seafaring man who has a good knowledge of the law" to give advice. This necessitated further consultation between counsel<sup>210</sup> and the matter was eventually postponed<sup>211</sup>.

On the question of costs, Dove Wilson JP expressed himself forcefully and frequently. On one occasion he pronounced on the issue of fees to counsel<sup>212</sup>. In Wakefield v Graham<sup>213</sup>, Dove Wilson JP asserted that "costs are always in the discretion of the Court"<sup>214</sup>. This latter case is a prime example of Dove Wilson JP's leadership of the Court - in favour of a more satisfactory order as to costs.

Dove Wilson JP was always insistent that the correct procedures should

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207. Cf 67ff.

208. The Natal Mercury, 6 February 1913.

209. Cf Spiller op cit 117f.

210. The Natal Mercury, 6 February 1913.

211. But not before Dove Wilson JP said : "This might bring it on before us next year (laughter)". For a dictum on the "piling up of costs" cf Naran v Rajoo 1921 NPD 39.

212. Reynolds Bros Ltd v Colonial Government 1911 NPD 31 at 34. Cf Longworth v Henwood 1911 NPD 420. On the issue of solicitor's fees cf The Times of Natal, 3 June 1914 in an article headed "Judgment Reduced".

213. 1911 NPD 144.

214. At 146. Cf Hay v Poynton 1911 NPD 336 ; Smith & Potts Ltd v Dixon 1916 NPD 159 and Burman & others v Davis 1921 NPD 23.

be followed<sup>215</sup>. In Umlilwan v Beningfield<sup>216</sup>, he found that the appellant was "... mistaken in the form of his summons ..."<sup>217</sup>. However, in Salter v Longworth<sup>218</sup> he had warned that "... it is advisable in all cases to avoid too much procedure, and where the same end can be obtained by notice, to give that notice and proceed in that way"<sup>219</sup>. On another occasion the clerk of the Court was at fault, and Dove Wilson JP said that "the history of the case discloses a series of what can only be characterised as lamentable blunders"<sup>220</sup>. He concluded that "the whole of this unfortunate series of mistakes were due to this clerk, and on the evidence I can see nothing to justify the view that they were ever anything else than mere mistakes"<sup>221</sup>. In Liquidators Union Share Agency v Malcolm<sup>222</sup> he said that "[it has been] consistently held that negligence, pure and simple, for which no excuse which the Court can account is offered, is not a ground upon which the Court will condone a departure from the rules"<sup>223</sup>.

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215. In Goetz v Cohen 1923 NPD 303, he said : "I hope this will bring home to practitioners the necessity of complying with the procedure laid down by the Act"(at 305).

216. 1911 NPD 320.

217. At 323. In Jadwat NO v SAR & H 1923 NPD 433 the rules were not complied with.

218. 1911 NPD 201.

219. At 202.

220. McGregor v Weinbaum & Co 1913 NPD 9 at 11. Cf King v Dales 1915 NPD 230 where he said "this case is in an unfortunate tangle and we come to the conclusion that the best course will be to send it back to the magistrate for proper findings and to reconsider generally" (at 236).

221. McGregor v Weinbaum & Co 1913 NPD 9 at 18.

222. 1927 NPD 324.

223. At 326. Cf Heenan v Gidhari 1924 NPD 55 and Bhayla v Nunnerly & Co Ltd 1926 NPD 441.

The subject for discussion in Gagniere & Co v Stonier & Holland<sup>224</sup> was whether provisional sentence should be granted. Seven bills of exchange had been drawn by the plaintiffs on the defendants and accepted by the defendants. Dove Wilson JP found that he could not grant provisional sentence because only six of the seven bore a special endorsement in favour of the Standard Bank. Provisional sentence was granted in the case of Brown v Natal Cambrian Collieries Ltd<sup>225</sup>, the basis being certain debentures<sup>226</sup>. These two cases show that Dove Wilson JP only granted provisional sentence if the facts fell within the rules for granting this type of remedy.

The question which required adjudication in Trustee Insolvent Estate Kuhn v Kuhn & Kuhn<sup>227</sup> was whether an interdict once granted was an interlocutory or final judgment<sup>228</sup>. The interdict in this case was an interim one in respect of certain movables in an insolvent estate. Dove Wilson JP admitted that "it is by no means an easy thing to lay down a precise definition which will fit all possible cases ..."229. He then said that "I ... think that this order, although in form it may be interlocutory, is one which speaks the final word on the particular points in respect of which it is made, and that it is appealable as a final order without the necessity of obtaining

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224. 1914 NPD 186.

225. 1916 NPD 137.

226. Cf the reasoning given in Liquidators Union Share Agency v Spain 1927 NPD 348 for granting provisional sentence.

227. 1915 NPD 79.

228. Cf The Times of Natal, 28 February 1916 where a discharge of an interdict was applied for - outside the terms of the summons - and therefore an amendment had to be applied for.

229. 1915 NPD 79 at 82.

leave"<sup>230</sup>. The issue in Hattingh v Booth<sup>231</sup> was whether a sentence upon a summons for provisional sentence was to be regarded as interlocutory. Dove Wilson JP found that it was not final "and whether it be called a judgment or an order, which seems to be immaterial, it is interlocutory in its nature"<sup>232</sup>.

Having negotiated this minefield, Dove Wilson JP in Durban Corporation v SAR & H<sup>233</sup> had to resolve the issue of whether a mandamus could be issued against the Crown itself. He set out the matter by saying that

"this is a petition directed against the Crown, as the SAR & H, which is the way in which the Crown may now be sued in respect of the Railway Department, in place of the Minister of the Department who was the nominal defendant under section 3 of Act 1 of 1910. But, it does not follow, because either by Act 1 of 1910 or 15 of 1910 (Natal), execution is forbidden as against the Crown, that therefore application may be made to this Court for a peremptory or mandatory order upon the Crown to satisfy a debt by payment. I think, therefore, that even if it were clear that there is no other remedy open to the Corporation than that of asking the Court to issue a mandamus to compel payment we should have to refuse it. But I may say, further, that I am by no means satisfied that it has not got a remedy by way of action, and, indeed, the respondent has not contended otherwise"<sup>234</sup>.

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230. At 83. Cf Douglas v Macnamara 1918 NPD 201 where Dove Wilson JP said that the refusal of the magistrate to grant absolution at the end of the plaintiff's case was an interlocutory order.

231. 1928 NPD 339.

232. At 341.

233. 1917 NPD 199.

234. At 201 and 203. Cf Smithers v Amin & others 1924 NPD 220 where Dove Wilson JP said that there was no necessity for proceeding by way of mandamus if proceedings by way of review were competent.

Having set something of a precedent in the aforementioned case, Dove Wilson JP had to differentiate between an incola and a peregrinus in Mowat v Swindell<sup>235</sup> which was an application for the confirmation of a writ of arrest of the respondent tamquam suspectus de fuga.

Respondent's counsel attempted to argue that the requisite Rule of Court (Order 8) applied only to an incola and not a peregrinus. Dove Wilson JP disposed of this point partly by referring to Cape authority<sup>236</sup>, but he also referred to Taylor Brothers Ltd v Blackhurst (II)<sup>237</sup> where he had said that

"... a mere intention to depart is not enough unless there is reason to believe that the object is to defeat or delay the plaintiff's claim. I do not say that it is necessary that there should be direct proof of an intention so to defeat the claim ; it is sufficient if there are circumstances from which that intention is the proper inference ... It is nearly always impossible to prove what is in the mind of a man by direct evidence, but he must submit to the reasonable inference to be drawn from his own actions ... It is ... clear I think that the departure must not be for a temporary purpose merely"<sup>238</sup>.

In Innes-Grant v Kelsey<sup>239</sup> Dove Wilson JP tried to come to grips with the meaning of "incidental" in the Magistrates' Court Act<sup>240</sup> :

"Now, giving the word 'incidental' its ordinary meaning, it cannot be said, I think that a claim in reconviction is not incidental to its relative claim in convention. Although it may be a

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235. 1928 NPD 309.

236. Solomon v Wolff 15 SC 152.

237. 1917 NPD 69.

238. At 75 and 77

239. 1924 NPD 268.

240. The analogous section of the Magistrates' Court Act 32 of 1944 (as amended) is section 28(1)(c).

different action, its existence as a claim in reconvention depends upon the institution of the claim in convention ; it is dependent on and collateral with it. If so, its relation to the claim in convention may fairly and properly, I think, be described as 'incidental'. It may be that the word is capable of other meanings, but, as the subsection is in my opinion capable of the construction which I have given it, I think it must be given the construction which is consistent with the common law"<sup>241</sup>.

Dove Wilson JP had conceded that the matter was not free from difficulty, and tried to resolve his remaining doubts by resorting to the rule of construction that an Act of Parliament must be construed so as not to conflict with the common law unless the abrogation of the common law is an inevitable inference from the language which is used<sup>242</sup>. Another part of the same section of the Act<sup>243</sup> was more successfully interpreted in Pelunsky v Isaacson<sup>244</sup>. This concerned the provision where the Act gives jurisdiction over a defendant whether or not he resides, carries on business, or is employed within the Union, if the cause of action arose wholly within the district. Dove Wilson JP concluded that the words "cause of action" meant "... every fact which had to be proved to entitle the plaintiff to succeed, and every fact which the defendant would have a right to traverse"<sup>245</sup>.

An interesting personal comment was made in the case of Harris v

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241. 1924 NPD 268 at 270f. Dove Wilson JP came to this conclusion having interpreted Salkinder v Van Zyl & Buisinne 1922 CPD 59.

242. For a full discussion of this issue see Jones & Buckle (Vol 1) 42f.

243. Section 28 (1)(d).

244. 1923 NPD 33.

245. At 34f.

Harris<sup>246</sup> as reported : "In giving judgment, his Lordship said that he did not, personally, approve of the practice of applying for and obtaining particulars as it tended to encourage slovenly pleadings. All the facts relied upon ought to be pleaded, and must be sufficiently clear to enable the other side not only to plead but to prepare its case". This leads me to emphasize an earlier observation, namely, that Dove Wilson JP was anxious to ensure that the time of the Court was not wasted. He was equally concerned that the burden of the litigant with regard to costs should not be exaggerated more than absolutely necessary.

What conclusions can be drawn from this survey of civil cases? First, there is the evident fact that Dove Wilson JP was at ease in dealing with most types of cases. To all the cases he heard he brought to bear the same qualities : an incisive intellect, a keen grasp of legal principles, a willingness to uphold the audi alteram partem rule, and the ability to formulate a coherent judgment be it prepared or delivered extempore. In doing so, he provided the hitherto vacillating Court in Natal with a strong backbone. The Court was confident of its legal heritage but unafraid to take up a new direction. He was honest in admitting when he was dealing with a particularly difficult matter, but would still direct his efforts to achieve a judgment which was as correct as he could make it. There were judgments which were overturned on appeal and there were decisions which were not ; the important point was that neither

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246. The Natal Mercury, 11 September 1929.

predominated. This indicates that he was at least as successful as the best judges in the other provincial divisions. Perhaps what can be most admired is the manner in which the judgments were delivered : clearly and logically.

In the forthcoming chapter I look at the criminal cases so as to evaluate whether the skills manifested in civil cases were equally apparent there. In doing so, I shall also be assessing Dove Wilson JP's contribution to the Special Treason Court.

## Chapter Three

### Criminal Cases

The case law during the period 1910 - 1930 reveals a preponderance of civil cases over criminal cases. This can partially be explained by the fact that most criminal cases were heard by the Criminal Sessions (either in Pietermaritzburg or Durban) rather than by the Full Bench. Those cases which were heard by the Full Bench were frequently published in the law reports. The task of hearing criminal cases was more evenly spread amongst the various judges of the Division with the exception of Carter J, who heard criminal cases more often than his brethren because he was far less useful as a civil judge. Dove Wilson JP consistently heard criminal cases both in Pietermaritzburg and Durban. He had had considerable experience in prosecuting and defending criminal cases during his practise at the Bar in Scotland.

In the first part of this chapter, I intend to refer to reported cases as well as to cases referred to in the main Natal newspapers. My aim in referring to these cases is threefold : (1) to provide evidence of Dove Wilson JP's judicial ability, reasoning ability and leadership of the Court, (2) to refer where appropriate to certain deficiencies, and (3) to give examples of the type of cases which came before the Court for adjudication. In the second part of this chapter, I will be referring quite extensively to the Special Treason Court of which Dove

Wilson JP was the President. This appointment provides proof of the high esteem in which Natal's Judge President was held. The very nature of the formation of this Court indicated that it would be required to adjudicate on particularly controversial areas of the common law such as treason and sedition. Some of these cases went to the Appellate Division on questions of law and I shall also be referring to these.

## 1. Natal

The type of cases which were reported may conveniently be divided into those based on statute and those based on the common law. In regard to the former, I refer first to those cases involving convictions for liquor. I do so not only because these frequently came before Dove Wilson JP but also because of the judicial wisdom which emanated from them. One of the earliest cases was Bosse v Rex<sup>1</sup> where the appellant was the servant of the authorised licence-holder who had express authority to conduct the business. He had handed to a servant boy of 14 years certain bottles of liquor. The consequence of this act was a charge and conviction under section 48 of the Children's Protection Act 25 of 1913. Dove Wilson JP expressed the view (it having been argued so by the appellant) that the word "delivered ... was not a word of any technical meaning, but it was to be construed in its ordinary and popular sense, and so construed it covered the case of liquor being handed over to a messenger for delivery to the messenger's employer"<sup>2</sup>. He nevertheless allowed the appeal because he was of the opinion that the holder of the licence should have been charged and not the barman<sup>3</sup>.

The facts in Dunsterville v Rex<sup>4</sup> were different because the appellant was charged there under Act 1 of 1914. Dove Wilson JP described the provisions of this Act as being such which "interfere with the

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1. 1915 NPD 642.

2. At 645.

3. Cf also Knight v Durban Corporation 1911 NPD 305.

4. 1916 NPD 1.

statutory right of licence holders to sell liquor upon their premises, and it creates a special offence which may be followed by a very severe penalty"<sup>5</sup>. He went on to say that "where wilfulness is an essential element of the offence which is created by the statute it is necessary that that essential element shall be set out in the summons or charge ; otherwise no offence against the Act is set out at all"<sup>6</sup>. The Attorney-General had argued that section 9 of the Act put the case in another position, namely, that the failure to include the word "wilfully" was a mere defect in form and therefore a technical irregularity. Dove Wilson JP rejected this view and allowed the appeal. This case shows that he construed the provisions of Acts carrying penal provisions very strictly and took pains to protect the accused from ill-considered prosecution<sup>7</sup>.

As to the interpretation of penal statutes, I refer to Elliott v Rex<sup>8</sup>, as this affords a good example of the usual attitude adopted by Dove Wilson JP. He stated that he did not think that "I am entitled to add to the plain and unambiguous terms of the statute ... we must give them effect according to their literal sense, whatever the consequences may be ..." <sup>9</sup>. Applying these words to the terms of the case with which he was concerned, he was of the opinion that

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5. At 5.

6. Ibid.

7. On the question of selling liquor on Sundays cf Lloyd v Rex 1920 NPD 19 and Driman v Rex 1920 NPD 102 (which interpreted section 6 of Act 36 of 1899) and White v Eshowe Local Board 1917 NPD 293.

8. 1921 NPD 68.

9. At 69.

"... it is neither absurd or extravagant to think that the Legislature intended that any person convicted of an offence such as this should, if at the time of the conviction he holds any licence, be subject to the penalty of suspension of that licence ; although he may not have held it at the time of the offence. And that, in my opinion, is the only meaning which can be extracted from the plain words of the statute"<sup>10</sup>.

The case of Rex v Steel, Murray & Co<sup>11</sup> shows that Dove Wilson JP had the interests of the unsuspecting public at heart<sup>12</sup>. The respondents had been charged with contravening section 37 of Act 35 of 1896 in that not being duly licenced apothecaries, chemists or druggists, they had sold to a customer two pounds of arsenite of soda. The magistrate had acquitted them of the charge. The central issue was that certain substances had been exempted from the ambit of the Act in terms of its second schedule. On this point, Dove Wilson JP said that

"the difficulty in the present case, I think, is this : that if we hold that this article is exempted under Schedule B we would have in effect to hold that arsenite of soda, which is one of the preparations of arsenic defined as a poison by the Act, could fairly be described as a general article of commerce containing that poison, when in fact it consists of practically nothing but that poison. It seems to me that it is simply arsenic in a form which renders it easy of use for purposes which require solution in water"<sup>13</sup>.

The greater proportion of criminal cases consisted of charges under the common law and it is to those that I now turn. Some highly pertinent comments were made in the case of Mudaly v Rex<sup>14</sup> where Dove

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10. Ibid.

11. 1911 NPD 152.

12. On the interpretation of mining acts cf Saw v Rex 1915 NPD 357 and Padyachi v Rex 1919 NPD 145.

13. 1911 NPD 152 at 155f.

14. 1911 NPD 362.

Wilson JP said that

"this case illustrates the difficulty which a Court of Appeal has in dealing with matters of fact decided in the Court below. It is now settled beyond doubt that no Magistrate's Court is final as to questions of fact, and that it is the duty of the Court of Appeal to satisfy itself that the decision upon fact of the Court below is correct"<sup>15</sup>.

The appellant was charged with the crime of assault committed upon an Indian woman. Dove Wilson JP commented that "... it may be said at the outset that there is no satisfactory evidence of any motive on the part of the accused ... it is hardly necessary to point out that it is not essential that the Crown should prove any motive provided there is other evidence of the assault"<sup>16</sup>. After a consideration of the report of the case in the Court a quo, he reached the following conclusions :

"I am not prepared to say what decision I should have given on the facts if the case had been tried before me in the first instance ; but I am equally not prepared to say that anything has been shown in this appeal, which would convince me that the magistrate, who had the witness to the assault before him, was wrong in accepting them as credible. Appeal fails"<sup>17</sup>.

Several assault cases were published in the newspapers as well. In one such case, Cecil Harris (a storekeeper) was charged with having assaulted a "Native" with intent to murder him<sup>18</sup>. In addition, he was charged with hunting within the Umfolosi game preserve. The jury found the accused guilty of firing in the direction of the appellant

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15. At 363.

16. Ibid.

17. At 364.

18. The Natal Mercury, 16 August 1923.

with the intention of frightening him and the other guards. After hearing the verdict of the jury, it was reported that Dove Wilson JP, addressing the accused, said that

"... the jury had found him guilty of assault in that he fired the rifle, and that was an eminently reasonable verdict to have arrived at, and one with which he entirely concurred. Accused was engaged in a shocking excursion, which he knew he had no right to take part in, and he interfered with the guards, who were doing their duty under difficult circumstances, and doing it exceptionally well"<sup>19</sup>.

The Attorney-General then asked whether the sentence of a fine of £40 or six months' imprisonment covered both charges. To this the "Judge President replied in the affirmative and added he hoped this was a sufficient lesson to Harris to set a better example to the neighbourhood where White men were few, and not let Natives find him acting like this again, for it was exceptionally bad for the prestige of the White man when the accused set the Natives an example like this"<sup>20</sup>. Aside from showing Dove Wilson JP's attitude toward the crime of assault generally, this case very strongly supports the conclusions I reached in the previous chapter regarding his attitude to Black litigants<sup>21</sup>. The fine imposed (with the option of a prison sentence) is an accurate illustration of the seriousness with which Dove Wilson JP viewed an assault by a White on a Black : his views would have been the same had the reverse situation applied.

Similar views were expressed by Dove Wilson JP in the case which was

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19. Ibid.

20. Ibid.

21. Cf 52, 55ff.

reported a day later under the headline "A Knotty Point"<sup>22</sup>. The accused was charged with the offence of assault with intent to commit rape upon a "Native girl". In his summing up, Dove Wilson JP described the offence as "very serious" and furthermore

"expressed regret that such a case as that of an attack by a White man upon a Native woman was not regarded in as serious a light as it should be. It was not only an offence against the Native woman and the Native community but against all White women. Apart from that, it is an offence against the White community because it lowers their prestige in the eyes of the Natives, and it is one which I am sorry to think in South Africa is not regarded in as serious a light as it should be"<sup>23</sup>.

The matter was not finalised at this time due to a serious procedural defect<sup>24</sup>, but a week later Dove Wilson JP sentenced the accused to six months' imprisonment with hard labour "remarking that he might consider himself fortunate that the jury had taken a lenient view of the case"<sup>25</sup>. In his charge to the jury the previous week, he had "pointed out to the jury that if they were convinced in their own mind of the man's guilt and thought the circumstances were not sufficiently serious to warrant a conviction for assault with intent to commit rape, it was competent for them to bring in a verdict of indecent assault, or to find Korsten guilty of indecent assault"<sup>26</sup>. Implied in this comment is Dove Wilson JP's view that the jury should have been harsher in its attitude toward the crime committed.

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22. The Natal Mercury, 17 August 1923.

23. Ibid.

24. CF I05.

25. The Natal Mercury, 22 August 1923.

26. The Natal Mercury, 17 August 1923.

There were many occasions when the subject of a particular case was fraud. The case of Akbar v Rex<sup>27</sup> is a good starting point, because as Dove Wilson JP stated :

"There can be no question on the authorities that the essentials of the crime of falsity or fraud as recognised by the Roman-Dutch law are : (1) a wilful perversion of the truth with intent to defraud, and (2) prejudice, actual or potential, resulting therefrom. It is not necessary that prejudice should actually have resulted if the perversion set out is one intended and calculated in the ordinary course to prejudice some person or persons"<sup>28</sup>.

In a case reported in The Times of Natal<sup>29</sup>, the accused was charged with theft and falsity on two counts. The subject of the fraud was certain bark which he had stolen from his employer. After the evidence had been led, it was beyond question that the accused was guilty of the fraud. In mitigation he claimed that he was under the influence of liquor when he committed the theft. The jury, after consideration, found the accused guilty, but recommended mercy. The case was complicated by the accused's two previous convictions for fraud and cattle theft. The former had been for forging his brother's signature on a cheque. When he sentenced the guilty man, Dove Wilson JP commented that "you have unfortunately a bad record"<sup>30</sup>. The matter was also complicated by the accused having a wife and child. In sentencing him, Dove Wilson JP said that "the kindest thing to do would be to place him where his craving for liquor could not be indulged in"<sup>31</sup>. This case reveals that he was not unsympathetic to

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27. 1915 NPD 497.

28. At 499.

29. 17 June 1920.

30. Ibid.

31. Ibid.

the accused's claim that he had been under the influence of alcohol when committing the fraud. He hoped that restricting the length of the sentence to one year<sup>32</sup> would reduce the accused's dependence on alcohol. It would also ensure that the community's sense of outrage at the crime would be satisfied. Further, Dove Wilson JP wished to prevent undue hardship to the accused's wife and child<sup>33</sup>.

A more serious case of fraud occurred where the accused had since 1914 been in prison for varying periods and was now charged with fraud "in its lowest form"<sup>34</sup> : imposition on women (bigamy). Dove Wilson JP took into account that "it was true the woman he had imposed upon in the present case seemed to have been very foolish and did not take heed of the very plain and specific warning she had got. This only showed that [the accused], by his acts, had got a very strong hold upon her"<sup>35</sup>. In view of his past convictions for the same crime, the Judge President imposed a sentence of imprisonment for four years with hard labour but warned that "... if you are convicted again of fraud you run a very serious risk of an indeterminate sentence"<sup>36</sup>. This case and the previous one both show that Dove Wilson JP placed a priority on the protection of women. In the latter case, he imposed a stiff sentence for what he regarded as an extremely serious fraud.

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32. The sentence meted out was one year with hard labour.

33. In Howard v Rex 1917 NPD 192, Dove Wilson JP dismissed the appeal of someone convicted of crimen iniuria. Cf Rex v Ismail Nera 1922 NPD 153 where the accused had tried to force his acquaintance on a girl of 18. Dove Wilson JP did not think that under "modern" conditions this was a ground for a criminal prosecution eo nomine.

34. The Natal Mercury, 16 August 1923.

35. Ibid.

36. Ibid.

When he adjudicated theft actions, Dove Wilson JP was always conscious of ensuring that there was no conflicting evidence and that, when a sentence was arrived at, it was an equitable one<sup>37</sup>. A case in point is Rex v Stevens<sup>38</sup> where the accused, who was 16 years of age, had been convicted of theft and sentenced by the Court a quo to a period of detention in an industrial school. Dove Wilson JP confirmed the conviction and sentence on a technical point, namely that "the enquiry into these matters is not a criminal trial, there is no conviction, and therefore the order is not a sentence ; accordingly it is not subject to review"<sup>39</sup>.

In Rex v Nel<sup>40</sup>, Dove Wilson JP clearly articulated the question of the innocence of an accused :

"... The Court will not say that there is a fair presumption of innocence if there is any evidence tending to show guilt. Our law renders it necessary that the Court should consider before the trial whether or not there is a fair presumption of innocence ; it must consider the question of innocence or guilt. There is some evidence from which guilt may be inferred. That being so, I do not express any view on the merits ; but as it is there, I must regard it as sufficient to preclude me from saying that innocence may be fairly presumed"<sup>41</sup>.

This case clearly falls within the ambit of evidence in criminal cases, and it is to that that I now turn. The most important perception which arises from Rex v Nel (supra) is of Dove Wilson JP's

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37. Cf Petzer v Rex 1924 NPD 100 and McAillister v Rex 1924 NPD 258. On stock theft (also not uncommon) cf Rex v Balishi & another 1925 NPD 331 and The Natal Witness, 18 and 20 September 1928.

38. 1920 NPD 270.

39. At 271. Cf De Vos v Rex 1919 NPD 398, where the accused was found guilty of attempted theft.

40. 1911 NPD 210.

41. At 212 and 214.

confident handling of the issue of the onus of proof, a matter which many judges find particularly contentious. On the general rule as to the admissibility of evidence, he stated that

"the general rule as to the admissibility of evidence may be taken to be that a fact is relevant to the fact in issue if either by itself or taken in connection with other facts, it proves or renders probable the past, present or future existence or non-existence of the fact in issue ; and facts relevant to the fact in issue may be proved, provided that the Court may exclude evidence of facts, which though relevant to the issue, appear to it to be too remote to be material under all the circumstances of the case"<sup>42</sup>.

Dove Wilson JP dispensed some extremely valuable advice on the question of admissions and confessions in criminal cases. In Narasimman & others v Rex<sup>43</sup>, the magistrate in the Court a quo had convicted the appellants mainly in respect of confessions or statements made by them. Dove Wilson JP stipulated that "it is unnecessary in order to constitute an admission that it should be by word of mouth"<sup>44</sup>. He also warned that

"... a statement in the presence of an accused person ought not to be admitted as evidence against such accused, unless it is accompanied by evidence which would justify the view that such statement was made upon an occasion when the accused had an opportunity of answering, and might reasonably be expected to answer it, and which would justify the inference from his omitting to deny or question it, or from his language or demeanour that he did not dissent from the truth of it"<sup>45</sup>.

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42. Mpanza v Rex 1915 NPD 197 at 202.

43. 1914 NPD 458.

44. At 462.

45. Ibid.

He was of the opinion

"... that although the practice of persons in authority questioning persons under arrest, or inviting statements by them, as to the circumstances of the offence with which they are charged, without duly cautioning them is very objectionable, it will not per se render the statements inadmissible, provided it is established as here, that they were voluntary"<sup>46</sup>.

Dove Wilson JP occasionally expressed his dissatisfaction with the quality of the evidence given. In Umsholes v Eksteen<sup>47</sup> he said that "while ... the evidence is very unsatisfactory, and has been led in a most perfunctory manner, I cannot say that there is not enough in the evidence to say that there was not desertion ... The evidence has been elicited in a most unsatisfactory manner"<sup>48</sup>. This comment aligns itself with the recurring theme to be found in Dove Wilson JP's judgments : that the correct procedure should always be followed and that the time of the Court should not be wasted.

I refer now to Sikes v Rex<sup>49</sup> first because of the type of offence committed, and second because of Dove Wilson JP's clear pronouncement on similar fact evidence. Here the accused had been charged on five counts of gross indecency with males, and had been convicted on four. During the course of the trial, evidence was led of the commission by the accused of another similar offence, in addition to and unconnected with those charged. Dove Wilson JP emphatically asserted that that

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46. At 463. Cf Rex v Bantu Zonde 1927 NPD 131.

47. 1914 NPD 345 (also reported in The Times of Natal, 11 August 1914).

48. At 347.

49. 1925 NPD 39.

evidence was inadmissible because it

"was to the prejudice of the accused ... It is impossible to say that the evidence wrongly admitted in this case was not such as might naturally affect the mind of the trial Court prejudicially to the accused. It was, indeed, eminently calculated to do so. That being so, it is immaterial that there may be evidence otherwise to justify the conviction ... It is also immaterial that no objection to the admission of the evidence was taken in the trial Court. It is the duty of the judge or magistrate to see that a prisoner is not convicted except on legal evidence, and to exclude evidence which is inadmissible, although no objection is taken to its admission"<sup>50</sup>.

In coming to this conclusion, he did so with "regret" but "it will have served some good purpose if it impresses on magistrates and prosecutors the necessity for the exercise of the greatest vigilance in preventing the admission of evidence of this kind"<sup>51</sup>.

There were other occasions when Dove Wilson JP found it necessary to rebuke officials in the Court a quo. He set aside a conviction for contempt of court in Brigjee v Rex<sup>52</sup> because

"... the only disobedience or want of respect of which the accused was guilty consisted in his failure to comply with the request of a policeman to attend the Court. How by any stretch of imagination that can be called contempt of court I am at a loss to understand"<sup>53</sup>.

And in Baytopp v Rex<sup>54</sup>, he said that

"... I think it is irregular, in the first place, for the magistrate to interlard the record of the evidence with expressions of his opinion as to the manner in which

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50. At 40f.

51. At 41.

52. 1913 NPD 503.

53. Ibid.

54. 1912 NPD 28.

the witness is giving his evidence, or as to its trustworthiness. I think the proper place for him to express his views on these matters is in his reasons for judgment, but although this may be an irregularity I do not think it is such an irregularity as to entitle us ... to quash the conviction"<sup>55</sup>.

An amazing situation arose in a case reported in The Natal Mercury<sup>56</sup> a few years later. The accused had been convicted of treating a magistrate disrespectfully in contravention of section 219 of Law 19 of 1891. When the magistrate of Pinetown was walking in the Court buildings, the accused had apparently failed to accord him the recognition of "Inkosi". He tried the case himself, found the accused guilty and sentenced him to a fine of 30 shillings or 30 days. The newspaper reported that

"his Lordship said that no evidence had been taken, and consequently the provisions of section 286 of the Criminal Procedure Act had been disregarded. Further, the presiding magistrate was himself the complainant in the charge, and, after referring to various decisions on the point, his Lordship said there had been a gross irregularity in both the respects mentioned, and the conviction and sentence were accordingly set aside"<sup>57</sup>.

Generally with regard to the evidence given in criminal cases, it may be said that Dove Wilson JP applied the same exacting criteria as in civil cases<sup>58</sup>. Also, as in civil cases, he disliked the time of the Court being wasted. This is illustrated by an unreported case of attempted fraud where considerable difficulty had been experienced with the accused's answers to the questions put to him. Eventually

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55. At 29.

56. 21 October 1927.

57. Ibid.

58. On the quality of evidence in incest cases cf Rex v Abbanah 1912 NPD 560 and Lutchman v Rex 1915 NPD 205.

Dove Wilson JP suggested that

"I think you had better spend the evening with your client ... and see if you can so draw him out that we may get a connected consecutive story from him in the morning, because we do not want to get a garbled, strange story out of him that nobody can follow or understand. Get some logical, consecutive story from him, because, if we go on like this we shall be at it until the end of next week. I hope we shall be able to get an intelligible statement"<sup>59</sup>.

Earlier in the same month, it was reported that the Judge President had "summed up at great length"<sup>60</sup> in an arson case. It was reported that

"he thought they could congratulate themselves that they were coming to the end of this long and wearisome trial - the longest in which he thought he had ever sat. Evidence had been led with such care, and the jury had been addressed in such fullness, and in such detail as to the evidence, that it left very little which he need add. He thought they could congratulate themselves that the case had been so ably placed before them by the Attorney-General and counsel for the defence and he thought he could refer fittingly to the very acute, deep and searching address of Mr Britter. Counsel had commented on the evidence so fully that he did not remember any feature of the case in which it would occur to him to press upon them that it had not been dealt with by counsel on either side. 'Still', said his Lordship, 'the law places upon me the duty of summing-up upon the evidence, and I shall do so as shortly as I can. It is a case for you entirely to decide, irrespective of any views I may have formed, in the course of the hearing'"<sup>61</sup>.

Finally, on the question of evidence, Dove Wilson JP always insisted that the proper steps should be followed whenever traps were set - as in the appeal of the licensee of the "Polo Tavern"<sup>62</sup>. In this case he

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59. The Natal Mercury, 30 June 1927.

60. The Natal Mercury, 24 June 1927.

61. Ibid.

62. The Times of Natal, 2 May 1918.

stipulated that "one of the elements of all trapping cases was whether or not the police had allowed the traps to be out of observation for any considerable time"<sup>63</sup>. In the same case whilst the defendant's evidence in the lower Court was being recited, the defendant had said that "I belong to the Church of England. I was last in Church about six months ago. I touch my Bible more than once a year." The Judge President was astounded to hear this : "Who asked these questions? Not the Court?"<sup>64</sup>. It then transpired that the magistrate always asked a few questions of this sort - whereupon Dove Wilson JP was intrigued to know : "But would it have made any difference if the appellant had happened to be a Roman Catholic?"<sup>65</sup>. Counsel for the respondent then assured him that it would not happen again. Dove Wilson JP concluded that "... it certainly seems to me that these questions are highly improper"<sup>66</sup>. This case clearly articulates the abuses which litigants suffered at the hands of court officials in the lower Courts : it was the Judge President's task to be vigilant and condemn such actions. If sufficiently serious, there was always the possibility that a sentence could be overturned.

It would be appropriate at this stage to consider some aspects of criminal procedure which received attention by Dove Wilson JP. In Epelman v Chief Constable, Pietermaritzburg<sup>67</sup> it was contended for the appellant that she could competently be convicted of one of the charges and not of both, in accordance with the rule that charges are

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63. Ibid.

64. Ibid.

65. Ibid.

66. Ibid.

67. 1918 NPD 294.

not to be multiplied out of what is in reality one and the same offence. Dove Wilson JP concluded however that "... the two counts charge separate and distinct offences for which different punishments are provided by the Act"<sup>68</sup>. And in Rex v Dayasingh and Subjoo<sup>69</sup> he relied on the same principle<sup>70</sup> saying that "there should have been only one charge, and therefore only one conviction"<sup>71</sup>. Then in Rex v Fisher<sup>72</sup>, Dove Wilson JP said that

"it seems to me that where objection is taken to the summing up of the judge, the proper method is for counsel to note the statements of the judge to which he takes exception, and when he is moving for arrest of judgment, in order that the matter may be brought on appeal, to state to the judge the exception which he wishes to make good ; and the judge - I think the judge can invariably be trusted - will tell him exactly what his charge to the jury was"<sup>73</sup>.

Finally, in Osman v Rex<sup>74</sup> Dove Wilson JP commented that "the present case is a salient example of the necessity of prosecutors following the safe and proper course of couching their charge in the words of the statute creating the offence, because, in the particulars set out in the charge, the prosecutor has omitted to set out anything from which one of the essentials of the offence as created by the statute can be inferred"<sup>75</sup>.

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68. At 299.

69. 1920 NPD 236.

70. As laid down in Gardiner & Lansdown (Vol I).

71. 1920 NPD 236 at 237.

72. 1911 NPD 393.

73. At 395. Tremearne v Rex 1917 NPD 117 is authority for the proposition that an appeal could not be proceeded with by an executrix testamentary after the death of the accused.

74. 1929 NPD 129.

75. At 130.

A highly unusual point was brought to Dove Wilson JP's notice in a case reported in The Natal Mercury<sup>76</sup>. It shows that he was able to cope with the situation because he admitted that "I have never known a case similar to the one happening"<sup>77</sup>. More importantly, however, this case shows that Dove Wilson JP could be unsympathetic and cold towards litigants wanting an extraordinary remedy. Apparently, during its deliberation, the jury had requested to see the Registrar. He duly went to see the jury and held some communication with it. An application was now made to Court to discharge the accused in respect that this communication between the Registrar and the jury must be regarded as likely to be prejudicial to the accused. Dove Wilson JP's reply to this was reported as follows :

"The Court was certainly not in a position to grant any such request. No authority had been quoted to him in support of the proposition that the judge of the Trial Court had the right to disregard a verdict delivered by the jury in the case on the ground that some irregularity attached to the proceedings of the jury while it was secluded for the purpose of deliberation. The accused complained of certain proceedings being tainted with irregularity. These proceedings were a matter over which the judge had no control. The irregularity was the result of no decision come to by the Court, and indeed the Court had no opportunity of knowing anything whatever about the irregularity until it was too late. He proposed therefore to give effect to [counsel's] alternative application and direct a special entry to be made ... It would then be for the Court of Appeal to consider the effect of section 208, and the prejudice, if any, resulting from the facts set out in the special entry and resulting verdict in the case"<sup>78</sup>.

An editorial appeared in The Natal Mercury<sup>79</sup> which reported the Judge

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76. 17 August 1923.

77. Ibid.

78. 22 August 1923.

79. 8 June 1927.

President's view of an aspect of criminal procedure :

"A very pointed comment upon our criminal procedure was made by the Judge President during the proceedings of the Circuit Court on Monday. A witness under cross-examination acknowledged that certain statements he now made had not been included in his evidence at the preliminary examination, and explained that was because he had not then been examined upon those points. This induced the Judge President to describe 'preliminary examinations as more nuisance than they are worth', and to add, 'The time wasted over little points is enormous. It is a great pity that this system of preliminary examinations obtains in this country at all'. We hope the Judge President will follow this up by a more detailed criticism, for most of those who have acquaintance with the procedure in the lower Courts in cases which it is not proposed to try summarily, are in agreement that it could be amended to advantage"<sup>80</sup>.

This editorial reinforces what I have already said about Dove Wilson JP's insistence that the correct procedure ought always to be followed<sup>81</sup>. Further it also reveals his ideal that the time of the Court should not be wasted with trivialities which delayed its work. The case shows that Dove Wilson JP was unafraid to recommend that the Court take a new direction, even though this went against past practice. His aim was a streamlined procedure wherever possible. This should not be taken as indicating an undue haste to be done with a matter - on the contrary. He did not see the necessity for drawing out proceedings when these could be despatched in a shorter time but with equal attention to all the various matters requiring the

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80. Ibid.

81. Cf the report in The Natal Mercury, 9 December 1920 where "the Judge President said the point was that the defendant did not plead in time. It was a question whether he was not now barred from raising a defence. The Judge President said the point raised was not all plain sailing and suggested that the matter should stand over for full argument".

attention of the Court.

Finally, in concluding the first part of this chapter, I refer to Dove Wilson JP's policy towards sentencing<sup>82</sup>. In Rex v Dayasingh & Subjoo<sup>83</sup> he said that "the magistrate was wrong in adding one day to the sentence which he thought proper in the circumstances merely for the purpose of making it subject to automatic review and that day will be deleted from the sentence"<sup>84</sup>. In an unreported case the accused had pleaded guilty to fraud and a character witness gave evidence that he had been of "exemplary character until very recently"<sup>85</sup>. Dove Wilson JP was reported as saying the following on the matter :

"His Lordship said the offence he was charged with was a very serious one, but he would take into consideration the fact that he had served his country and would like to give effect to [the witness's] words on his behalf. At the same time the prisoner showed in his action that the offence was premeditated. A sentence of six months imprisonment with hard labour was imposed, his Lordship remarking that this was a very lenient sentence, and warning the prisoner upon his release to refrain from the practices to which he had pleaded guilty on this occasion. One previous conviction in 1913 was recorded"<sup>86</sup>.

This case shows that Dove Wilson JP was not in favour of imposing severe sentences unless the severity of the crime actually merited it or if there were no mitigating circumstances. He very seldom imposed merely a bare sentence too : his prison sentences were often awarded with hard labour as well. This clearly shows that he appreciated the effect which a prison sentence could have on a man who was otherwise

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82. Cf 101.

83. Cf 104.

84. 1920 NPD 236 at 237.

85. The Natal Witness, 16 September 1920.

86. Ibid.

accustomed to being occupied<sup>87</sup>. Further, there is no evidence of any differentiation between Blacks and Whites when it came to sentencing. Then it should also be noted that Dove Wilson JP would not often interfere with a sentence imposed in the Court a quo : in Richardson v Rex<sup>88</sup>, he found that the only ground urged for interference with the sentence of the magistrate had not been substantiated.

In the case of Rex v Dukanini<sup>89</sup>, the accused had been convicted of cattle stealing and for this he was sentenced to be imprisoned for six months with hard labour and was furthermore to receive a whipping of ten lashes with the "cat"<sup>90</sup>. Dove Wilson JP said the following about the sentence :

"I have never witnessed the punishment inflicted myself, and am not in a position to speak from knowledge ; but it certainly seems to me that there is a tendency to inflict lashes without a due appreciation of the severity of the punishment. But, apart from the number of lashes, I think that this is not a case for lashes at all ... The sentence must be reduced by eliminating that portion of it which inflicts lashes"<sup>91</sup>.

Another case was that of Rex v Mfihlo<sup>92</sup> where the accused was convicted of an aggravated assault upon an elderly Dutch farmer : he was sentenced to three months imprisonment and, in addition, to fifteen lashes with the "cat". Dove Wilson JP said that " ... as regards the sentence of fifteen lashes with the cat we think that, in view of what we have already said in regard to lashes, and having

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87. Cf 110.

88. 1925 NPD 146.

89. 1922 NPD 1.

90. Spiller op cit 77.

91. 1922 NPD 1 at 2.

92. 1922 NPD 32.

regard also to the seriousness of the case, that the sentence should be altered to one of ten lashes"<sup>93</sup>.

Finally, I refer to Rex v Maloo Singh<sup>94</sup> which came on appeal. The prisoner here had been sentenced to six months' imprisonment with hard labour, during three weeks of which he was to be subjected to solitary confinement and spare diet. The review judge referred the matter on appeal to the Court on whether it was competent for the Court to impose solitary confinement and spare diet in the case of a sentence which exceeded three months. Dove Wilson JP could find "nothing in regulation 435 to render the sentence in the present case incompetent"<sup>95</sup>. He said that

"it remains, however, to be noticed that regulation 433(5) of the Prisons Regulations provides that the Court in passing sentence of dietary punishment should so far as possible indicate what intervals on full diet there should be. That course has not been taken by the magistrate, and I think we ought to send the case back to him in order that he may as far as possible indicate what these intervals should be"<sup>96</sup>.

This case shows that where a sentence was governed by statute, Dove Wilson JP was guided by his conviction that there should be no uncertainty about the precise sentence.

## 2. The Special Treason Court

The major event of 1922 in the progress of South Africa's history was

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93. At 33.

94. 1922 NPD 5.

95. At 6.

96. Ibid.

undoubtedly the miners' revolt, which occurred after years of simmering discontent. This had the effect of both bringing the economy to its knees and also confronting the Government of General Smuts. The Government intervened on the side of the employers and set out to crush the revolt. This was followed by the trial of the rebel leaders :

"It is understood that the Special Court for the trial of the more serious cases arising out of the revolt in Johannesburg will consist of Sir J Dove Wilson (Judge President, Natal), and Justice Stratford and Justice de Waal. The Court will open on 11 July at Johannesburg ..."<sup>97</sup>.

The first case heard by the Judge President upon his arrival was that against Rasmus Peter Erasmus, one of the principal leaders of the revolt<sup>98</sup>. The Natal Witness commented that the Judge President "in pronouncing judgment, delivered a most impressive address lasting three hours"<sup>99</sup>. Prior to sentence being passed, accused's counsel<sup>100</sup> applied for leave to reserve a question for the Appellate Division<sup>101</sup>. He also argued in mitigation, saying that his client had already been in prison for four months. In the judgment itself, Dove Wilson JP commented on each of the five counts set out in the charge. He also expressed the opinion "... that if you want to hit a man very

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97. The Natal Witness, 7 July 1922. Whilst Dove Wilson JP was in Johannesburg, Carter J was Acting Judge President from 17 July 1922, and was succeeded by Hathorn J on 10 November 1922.

98. Many problems were caused by the fact that only certain named offences could be tried by the Special Court, for example : treason, sedition, murder, and assault with intent to murder. This factor led to certain questions of law being reserved for the Appellate Division in the case of R v Jolly & others 1923 AD 176.

99. 25 July 1922.

100. Tielman Roos.

101. Reported as 1923 AD 73.

hard, give him imprisonment without hard labour. He feels it more because he has nothing to do"<sup>102</sup>. Now it is obvious that he made this point because he was considering very carefully the various options open to him in sentencing the accused. He also conferred with his brethren on the Bench. His words to the accused were :

"Erasmus, you have been found guilty of the crime of high treason. Unfortunately in this country, there appears to be some tendency to underrate the seriousness of this crime, but there is no more serious crime known to law. Until recently, the only punishment for the crime of treason was death. Latterly, however, a more merciful view of such crimes has been taken, and it has been made competent for the Court to award another sentence. But it does not follow that the Court can treat this as a trivial crime, and seriousness of it becomes evident when one remembers the great numbers of people who have lost their lives owing to the action taken by you and others of your opinion, and a very much larger number who have had to experience loss and injury. Some of them may have to drag out a maimed existence for the rest of their lives owing to the action taken by you ... in all the circumstances we feel that in the due exercise of our duty towards the community we cannot inflict on you a lesser sentence than that which we are about to impose. You will recognise that in all the circumstances it is a lenient one. The sentence which we now pass is one of imprisonment with hard labour for a period of ten years"<sup>103</sup>.

This judgment clearly indicates Dove Wilson JP's values in relation to sentencing and the crime committed, and it underlines his steadfastness in refusing to compromise over what is generally regarded as an extremely serious crime. It must also be recalled that these trials were a response to a highly-charged and emotive political climate, which placed tremendous strains on the judges who were concerned with maintaining an impartial stance.

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102. 25 July 1922.

103. Ibid. Cf the editorial in support of the judgment in The Natal Witness, 27 July 1922.

These characteristics were further in evidence in the trial of Carel Christian Stassen, where, after summing up the evidence, Dove Wilson JP's words succeeded in "thrilling" the crowded Court<sup>104</sup>. He had come to the conclusion that "the accused when he shot these two unfortunate Natives was in no danger himself"<sup>105</sup>. He then said that

"on [the accused's] own showing he was not in danger as would justify the use of a firearm. In these circumstances we are unfortunately forced to the conclusion that we cannot find any other verdict than that of murder. There is no room, by the exercise of any ingenuity, to find any other verdict than this, and that is the verdict of the Court"<sup>106</sup>.

In a different case<sup>107</sup>, Dove Wilson JP referred to "the excellent behaviour of the Natives, in spite of the unprovoked attack on them during the trouble ..." Nevertheless, "the Court felt that it was entitled to find that the degree of the crime disclosed by the evidence did not amount to murder, but only culpable homicide"<sup>108</sup>. In the final result, the sentences imposed ranged from three years with hard labour to two-and-a-half years without hard labour.

At about this time too, an editorial appeared in The Natal Witness in response to news of the call for public meetings of protest against the sentences. The editorial commented that

"no person who has perused any of the cases before the Treason Court could call in question the fairness of the trials and the justice of the verdicts ... There are the facts, there is the law. If things have been said and done before which have made high treason something either

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104. The Natal Witness, 11 August 1922.

105. Ibid.

106. Ibid.

107. Reported in The Natal Witness, 12 August 1922.

108. Ibid.

to be laughed at or honoured, according to the point of view, those things shall not be said or done by the Court presided over by Natal's Judge President. For which, in the name of every loyalist, we give him thanks"<sup>109</sup>.

This editorial emphasizes a further difficulty to be faced by Dove Wilson JP's Court : the undoubted fact that there had been State meddling in past specially-constituted Courts<sup>110</sup>.

Another of the trials which was fully reported in The Natal Witness was that of "Taffy" Long who had been accused of murdering the grocer of Fordsburg<sup>111</sup>. What is noticeable in this case report is the frequency with which the judges put questions to the accused. One of the issues which arose was the supposed resemblance between the accused and a certain Percy Fisher, who had apparently taken his life. A witness, the Chief of the Criminal Investigation Department, categorically denied that there was any resemblance at all. Examples of the kind of questions put to the witness by Dove Wilson JP are : "You say that [accused's] hair is darker now than at the time of his arrest? ... Are you sure of that? ... How would you describe the prisoner at the time of his arrest? ... How did Fisher compare with the accused in regard to height? ..." <sup>112</sup> These questions show how Dove Wilson JP was able to pin a witness down into being quite specific when answering<sup>113</sup>.

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109. 14 August 1922.

110. Cf Corder op cit Chapter 4.

111. 13 September 1922.

112. Ibid.

113. Note that in this case the Court was unable to reach a unanimous decision. Statute precluded the Court from giving a majority verdict and therefore no verdict was given. The Crown had to then decide on what course should be pursued. (The Natal Witness, 16 September 1922). The matter was eventually heard by other judges (The Natal Witness, 19 September 1922).

Although Dove Wilson JP found that he had little choice but to convict many of the accused who appeared before him, there were occasions, for example in the case involving Morris James Green, where he eventually acquitted the accused. The basis for the acquittal was that

"there was only one overt act before the Court to establish the connection of the accused with the crime of treason, and it was necessary that there should be two witnesses. Upon that ground the Court must hold that the case for the Crown had not been made out, and that the accused was therefore entitled to be acquitted"<sup>114</sup>.

Once the accused had been acquitted, he was permitted to address the judges on behalf of the prisoners being held at the Johannesburg Fort. He requested that something be done to speed up the trials or alternatively that the Attorney-General reduce the heavy bails which had been granted. Dove Wilson JP replied that "... I have nothing to do with the question of bail. Nobody is more anxious than we are that the trials should be expedited, and for that reason another Court has now been set up"<sup>115</sup>. This last comment is of course symptomatic of Dove Wilson JP's overall concern that the work of the Court should not be held up by unnecessary delays<sup>116</sup>.

In another of the cases, an accused was in command of a body of men who had ambushed a party of some thirty policemen, killing four and wounding eight, as well as killing fifteen horses. Dove Wilson JP said that

"in such circumstances the accused may think himself extremely lucky that he does not stand now under the

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114. The Natal Witness, 18 September 1922.

115. Ibid.

116. CF 106f.

charge of murder, and how anyone who has been concerned especially in the capacity of a leader in any such murderous attack as that can expect the Court to treat this case lightly I am at a loss to understand. If attacks of this nature are to be in any way condoned, then civilised Government in the country would be impossible ... The sentence is seven years' imprisonment with hard labour"<sup>117</sup>.

This case shows that Dove Wilson JP would not tolerate any lowering of the high standards set by the judiciary in its dealing with a particular crime. He therefore found the inciters of a shooting guilty of murder because "there was no question but that they were equally guilty," and they were sentenced to death<sup>118</sup>. In a related matter, prior to sentencing the accused, the Judge President had found them guilty of sedition but took into account that they were young men and had already been in custody for some seven months. They were sentenced to fifteen months' imprisonment<sup>119</sup>.

The so-called Brakpan Murder Trials took up a considerable amount of the Court's time. The first day of the trial was 28 November 1922, there were eight accused, and sentence was eventually passed on 8 December 1922. John Garnsworthy had led a commando to coerce people engaged in essential services of additional dangers which they now ran if they continued (in the extraordinary circumstances of the

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117. The Natal Witness, 20 September 1922. Cf the case against Alfred Church, reported on 28 September 1922 when the Court took into account the fact that he had treated his captives "with generosity" and further that he "was not robust in health". He was sentenced to two years with hard labour. Then there was the case against Sybrand van Wyk (aged 57) : he was sentenced to twelve months with hard labour - on account of "age and apparent frailty" (21 October 1922).

118. The Natal Witness, 13 October 1922.

119. The Natal Witness, 30 October 1922.

revolution) : he regarded them as "scabs". The Brakpan mine had been captured and eight defenders were killed "some in circumstances of great brutality"<sup>120</sup>. During his consideration of the evidence, Dove Wilson JP considered that the charge of individual responsibility by Garnsworthy had not been made out. It was his opinion that "all of [the accused] were combined together in an illegal operation, the furtherance of which they knew would probably involve the death of those who resisted their operation"<sup>121</sup>. He went on to say that

"the law on the matter was quite clear ... where persons were combined in an illegal undertaking each one was liable for anything done by any other of the body in furtherance of their object if what was known was, or should have been known, of the probable result of the operations. If, on the other hand, what was done was something which could not be regarded as naturally and reasonably as an accompaniment of the object of the combination, then the law did not regard all that were not responsible as liable, but if what had been done was just what anybody engaged in illegal combination would know would be the obvious probable result, then all were responsible"<sup>122</sup>.

During the course of the judgment, Dove Wilson JP intimated that the accused could well have been charged with treason or sedition, rather than with murder which carried a mandatory death sentence. Once he had set out the relevant law, each accused was given the opportunity to address the Court. Dove Wilson JP then continued as follows:

"The appeals which have been made for mercy will be forwarded to the proper quarter, but as I have already said our hands are tied ... I would only say this, however, that this most lamentable trial will have served some good purpose if it serves to instil into

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120. The Natal Witness, 7 December 1922

121. The Natal Witness, 8 December 1922.

122. Ibid.

the minds of men and women that no matter how just they may think their cause, indeed no matter how just it may be - we are not concerned here whether it is just or unjust - but however just it may be, if they combine in a movement to enforce their cause at the expense of the lives of quite innocent third parties they must realise that they do so at the risk, if they are proved to have taken part, of having their own lives declared forfeited by law"<sup>123</sup>.

The Judge President's statement reveals the extent of the single-minded purpose which he had set for himself and the Court. However, more importantly, it also reveals a disturbing clinical detachment.

On the day following the pronouncement of the death sentence in the preceding case, the second trial on the "Brakpan Horrors" began - this time involving ten accused. Counsel for the defence<sup>124</sup> requested that the judges recuse themselves in view of the circumstances of the previous case. The Judge President's reply to this reveals the extent of the burden which was placed on him :

"[Counsel] has asked us to recuse ourselves on the ground that in a previous case we have expressed definite decisions upon matters of fact which he has told us are involved in the present case. While I may say that personally we should have welcomed a relief from trying the case now before us, in our opinion there is no legal ground upon which we can recuse ourselves, and there are grounds which make it incumbent upon us to undertake the duty of hearing this case ... I need hardly say that any decision we have given has been entirely upon the evidence brought before us in the course of the case, and has been influenced in no respect whatever by anything heard outside the conduct of the case. Speaking for myself, I have never heard anything about the case except what was disclosed

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123. Ibid. Cf the front-page report on the same day under the headline "Hope of commutation".

124. Mr LO Miller.

in the Court"<sup>125</sup>.

This comment is testimony to his absolute impartiality - he made sure that he never put himself in the position of having to consider recusing himself.

A comment which appeared in The Natal Witness two days later reflects on Dove Wilson JP's relationship with the Bar<sup>126</sup>. The preceding day he had remarked to the effect that it was unfair to counsel that they should be expected single-handed to undertake the defence in such an exceedingly serious case. When CF Stallard KC subsequently came forward, Dove Wilson JP said :

"I would like to take this opportunity also of saying that I was surprised and shocked to find that there was an impression abroad that the remarks I made upon this subject yesterday conveyed some reflection upon the Bar of Johannesburg. I need hardly say that nothing was further from my mind, and I must still express my surprise that anything of the kind has been read into anything that I said.

In the first place, it is the last thing that I should have thought of, seeing that I was in the position of asking a favour from the Bar. But in any event I thought I had made it plain, that knowing as I did that the Bar in Johannesburg has the same traditions and the same high sense of duty as the Bar elsewhere, I thought that the matter had only to be mentioned in order that it should be put right ...

I can only say again that I regret very much if anything I said has been taken by any member of the Bar as in any way a reflection. On the contrary, it was an expression of trust in the Bar, and an expression of opinion that I had only to mention the matter and the Bar would at once come forward, and the matter would be put right. It has turned out that I was perfectly right in thinking so"<sup>127</sup>.

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125. The Natal Witness, 9 December 1922.

126. The Natal Witness, 11 December 1922.

127. Ibid.

As in the previous cases, Dove Wilson JP and his colleagues reviewed the evidence with the same degree of thoroughness. Eventually, three of the ten accused were sentenced to death. As to their crime, Dove Wilson JP said that "those who took part in the attack must have been fully aware that the probable and almost inevitable consequences would be the death of one or more of the defenders"<sup>128</sup>. Perhaps the most important comment to come out of the case was that regarding the quality of the witnesses :

"It will be observed that in dealing with the cases of the three accused we have been in no way influenced by any evidence given by anyone who might be regarded as giving King's evidence. Throughout this trial and the last one, the evidence given by such men has been wholly untrustworthy... The Crown has been unfortunate in its choice of what I may call informer evidence, and indeed the evidence leaves no doubt in our mind that several of the men whose evidence may be regarded as King's evidence would much more appropriately have occupied the positions in the dock than many of the men we have been forced on the evidence to sentence to death"<sup>129</sup>.

This comment gives yet another accurate indication of the many difficulties which were faced by Dove Wilson JP in these "treason" trials. He concluded the case (the last which he was to hear)<sup>130</sup> as follows :

"In the case of all three of you, we recognise that you were in no position of leadership, and it may well be that you were led away and engaged in an

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128. But note that a report appeared in The Natal Witness on 25 December 1922, saying that the death sentence on the Brakpan murders had been commuted.

129. The Natal Witness, 11 December 1922.

130. The same newspaper carried the news that this case was the last sitting of the Court as constituted. In February 1923, its functions were assumed by the Magistrate's Court.

industrial fight in which you thought your cause was the right one. We do not, in such circumstances, apart from the terrible brutalities which accompanied this attack regard your offences as serious, though they are as coming within the category of sordid murder for the purpose of getting revenge. This consideration we will bring to the notice of the Governor-General without delay. We do so in the hope that His Royal Highness may be pleased not to carry out the extreme sentence, though your offences must be recognised by all law-abiding citizens as most serious"<sup>131</sup>.

A major editorial in The Natal Witness evaluated the work done by the  
Treason Court :

"... We feel that it is impossible not to pay a tribute, and a very high and sincere one, to the judges of the Special Court, and especially its President, Sir John Dove Wilson. Their work has been exacting to the very last degree, indeed, few judges could possibly have had in the whole of their careers tasks allotted to them more responsible and distasteful. We were going to add more dangerous as well - for it has been commonly printed about that the judges would be subjected to personal violence sooner or later. We are glad that no such thing happened, and that the work of the Special Court has passed off without any untoward incidents. No doubt one reason for this has been the obvious fairness and patience with which all concerned have discharged their duties. Despite foolish assertions to the contrary, no men could have had fairer trials ... The judges of the Special Court have sternly vindicated the law, and in many a homily they have impressed on guilty persons that no conditions of industrial or political chaos justify the taking of human life"<sup>132</sup>.

It can be seen then that Dove Wilson JP most certainly had the general support of the Natal populace for his work in Johannesburg.

It will be of some value to refer briefly to one or two cases which

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131. The Natal Witness, 21 December 1922. The Governor-General duly did so (reported on 25 December 1922).

132. 22 December 1922.

were taken to the Appellate Division. In the case of R v Erasmus<sup>133</sup>, the Appellate Division<sup>134</sup> held that the accused had been properly convicted of high treason - and this decision is still one of the principal cases on high treason. Then there was the case of R v Viljoen & others<sup>135</sup> where the same judges<sup>136</sup> found that the Special Court's requirement that "hostile intent" be present for both high treason and sedition, was wrong. They nevertheless confirmed the conviction on the general principle that the greater crime includes the less<sup>137</sup>. Hugh Corder commented that the "somewhat unsatisfactory treatment of the legal questions ... raises questions about the judicial capacity for understanding the situation, motives, and actions of the strikers"<sup>138</sup>. Although this was about the Appellate Division, by implication the same comment would have been made about the judges of the Treason Court. An evaluation of the cases which I have referred to, does not, in my opinion, reveal substantial evidence that the Court did not have any understanding of the political reasons behind the strikes. On the contrary, the Court was well aware of the political climate which gave rise to the trials, but it did not allow itself to be influenced by this. Its brief was to try the accused according to the well-established principles of the Roman-Dutch common law : that it did so with considerable success is not in question. It

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133. 1923 AD 73.

134. Innes CJ and Kotze JA delivered judgment. Solomon, de Villiers and Juta JJA all concurred.

135. 1923 AD 90.

136. Cf n 134 above.

137. For a more comprehensive analysis and criticism cf Corder op cit 80 ff.

138. Corder op cit 82.

is also clear from the reported cases that Dove Wilson JP played a leading role in providing the Court with a focus and exercised the same qualities of leadership which had by 1922 become so well known in Natal.

In conclusion it can be said that Dove Wilson JP was generally successful as a criminal judge. He obviously revelled in the stimulus of the trial case, and this can be seen both in the Natal cases and those heard in Johannesburg. His considerable intellect was revealed in his perceptive questions to witnesses and the accused. The Bar was also given the opportunity to exercise its legal skills. Many of the qualities to be found in criminal cases were also present in civil cases. This emphasises the considerable debt which the Natal Provincial Division owes its first Judge President.

## Chapter Four

### Reasoning ability and leadership of the Court

In this chapter, my aim is to focus on the reasoning and leadership ability of Dove Wilson JP. This will supplement the passing references I have made, in the previous chapters, to Dove Wilson JP's reasoning ability and leadership of the Court in Natal.

#### 1. Reasoning Ability

A significant feature was Dove Wilson JP's remarkable ability in delivering extempore judgments. Frank Broome commented that "Dove Wilson was a fluent and eloquent speaker ... [and] delivered many extempore judgments which were a joy to listen to ..."1. Dove Wilson JP's experience at the Bar in Scotland had been a fertile environment in which to nurture his ability to "think on his feet", although this was also aided by a retentive memory which enabled him not only to remember the evidence of witnesses and the arguments of counsel but also to evaluate them. There was no lapse in quality whether the judgment was delivered after due consideration and prepared in written form or whether it was delivered "off the cuff".

In order to demonstrate Dove Wilson JP's ability to deliver his

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1. Broome op cit 115.

judgments extempore, I refer to two cases. In McRitchie v SAR & H<sup>2</sup> it can be seen that Dove Wilson JP's charge to the jury was delivered immediately after hearing counsel's arguments. The judgment was delivered in the first person and this can be seen in the repeated use of phrases such as "It is as I have said ..." and "If therefore gentlemen ..."3. An additional indication is that throughout the judgment Dove Wilson JP was conscious that he was delivering a charge to a jury that perhaps did not have retentive memories like him, for he constantly referred back to what he had said earlier in his charge4. Once he had referred to the opposing duties of the two adversaries in the case in respect of negligence, he stated that "it is as I have said the proximate cause which you must have regard to"5. He also adopted an informal tone during the proceedings and said that "no doubt some of you gentlemen are motorists - I am one - and from that point of view I should like the law to be otherwise"6. What was also noticeable was Dove Wilson JP's ability to follow up a particular observation with some further comment which flowed logically from that one. In each case the law was stated and then applied to the facts. Following this, the course which was available to the jury was set out carefully. A characteristic of this particular extempore judgment is the very simple language in which the complicated issues were set out. This is not a criticism, because

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2. Cf 38ff.

3. 1918 NPD 311 at 315-324. In his funeral tribute, Mr Justice AAR Hathorn remarked tht "[Dove Wilson JP's] charges to juries were models of what such charges should be" (The Natal Witness, 28 April 1935).

4. At 316, 322 and 323.

5. At 316.

6. At 317.

at no stage is it apparent that the case has been oversimplified and important considerations omitted. A possible criticism is that there was almost a complete absence of reference to the various cases raised by counsel.

The case of Hooper v Moore & Varty<sup>7</sup> was also delivered extempore and this can be seen when Dove Wilson JP said :

"... I can only judge Mrs Moore by her actions, and from the care which she has taken to conceal the arrangement with Hooper to which she assented, and to deny that she assented when taxed with doing so, I can only infer that she fully appreciated its importance as a factor in determining whether the interdict should be granted or not, and, indeed, even if it be conceded that she was not capable of appreciating it for herself, it is difficult to see how she could have been under any misapprehension after her interviews ... As regards Varty, I have felt greater difficulty. He gave his evidence with the utmost candour and frankness, and there is no suggestion in his case of any motive of self-interest. But I am bound to say that if his conduct is tried by any test of what a discreet and prudent man would be expected to do in the circumstances, it must, in my opinion, be found to be wholly wanting"<sup>8</sup>.

The value of these extempore judgments was Dove Wilson JP's consistent ability to make himself unequivocally clear on particular issues. He was also able to lighten the mood of the particular case with a humorous comment<sup>9</sup> because of the immediacy of his words.

The question which then needs to be considered is whether or not a negative inference can be drawn from Dove Wilson JP's frequent

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7. 1921 NPD 96.

8. At 105f.

9. Cf (1935) SA Law Times 89 ; The Natal Witness, 29 April 1930 and The Natal Mercury, 30 April 1930.

delivery of extempore judgments? Did this indicate a tendency to decide cases too suddenly without giving due consideration to all the possible issues? There is no evidence in the cases that a particular issue or contentious point would have benefited from further consideration. The obvious advantage of these judgments was that they prevented a heavy backlog of cases occurring due to Dove Wilson JP's need to take time to prepare written judgments. He was no less thorough in his dealings with issues when he gave an extempore judgment.

A second feature was Dove Wilson JP's ability to deal effectively with complex facts in cases. He was able to discard the chaff in order to get to the kernel of the case. A particularly vivid example of this is In re the SS Mangoro<sup>10</sup>, where he succeeded in satisfying a variety of creditors in an insolvency case. He began his judgment by indicating that "the claims may broadly be classified as in respect of ..."11. He then enumerated the five different claims and dealt with them so that they followed each other in a logical manner. The effect was that Dove Wilson JP gave a coherent judgment in which both counsel were taken through their arguments. He also dismissed or accepted submissions made by them on their clients' behalf<sup>12</sup>.

Another case which illustrates Dove Wilson JP's ability to deal with complicated facts is Compagnie des Messageries Maritimes v The

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10. Cf 67ff.

11. 1913 NPD 67 at 78.

12. Cf 67ff. Another difficult case was Monhaupt v Minister of Finance 1918 NPD 47. See especially 50 and 52.

Agricultural Co-Operative Union Ltd & Fred Cohen, Goldman & Co Ltd<sup>13</sup>.

The owners of a ship had decided to let her by charter party for a term of six months. This provided inter alia that the ship was let without complement of officers, seamen, engineers and firemen, and that the charterers should provide and pay for all provisions and wages of the captain, officers, engineers, firemen and crew. The charterers took possession of the ship, appointed the captain, officers, and crew, and sent the ship to Madagascar, where she collided with and damaged another vessel at the port of Diego Suarez. The action was for recovery of damages brought against the owners of the chartered ship. After he had considered the various clauses of the agreement, Dove Wilson JP observed that

"so far there is a very clear presumption that there was here a demise of the vessel which divested the owners, and invested the charterers with the whole possession and control of the vessel and of its complement of officers and crew.

It is said that there are other provisions of the charter party which must lead one to a different conclusion, but I have been quite unable to discover anything which so far as the officers and crew are concerned can be said to point to the charterers being merely in the position of selectors of the servants of the owners ; and if there was anything it would have to be very clear and distinct. So far as there are other conditions in the charter party which can be said to have any materiality whatever as affecting the question of whether there was a demise of the ship or not, they are conditions which were also in the charter party ..."<sup>14</sup>.

A third feature of Dove Wilson JP's reasoning ability was the method he employed to distinguish authority contrary to his view of the

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13. 1922 NPD 84.

14. At 93f.

case. The main significance of this feature is Dove Wilson JP's independence and mode of reasoning and expression. The judges of the preceding decades had appeared to be overwhelmed by the citation of authority from more prominent Courts (particularly those of the Cape and Transvaal) and had often adopted this authority without question. An early indication of Dove Wilson JP's approach was In re Dawad Mahomed<sup>15</sup>, where he interpreted the provisions of Acts 30 of 1903 and 3 of 1906. The conclusion which he came to was that "in the circumstances, seeing that neither of the Acts make it obligatory on the Immigration Officer to issue any certificate of domicile to persons who are merely residents of Natal, whether originally immigrants or not, I do not think the applicant has the right to demand"<sup>16</sup>. Once he had taken this line of reasoning, he concluded that "the case of Green<sup>17</sup> cited for the applicant, does not, in my opinion, apply"<sup>18</sup>. Earlier he had said that were such a certificate of domicile granted it would be " ...prima facie evidence merely of the fact of the domicile ; but it is not to be a conclusive answer to an allegation that nevertheless the person holding it is a prohibited immigrant"<sup>19</sup>.

Sometimes, as in Garlick & Co v Anderson<sup>20</sup>, Dove Wilson JP merely said that "I do not agree with the decision in In re Ballance<sup>21</sup> that notice

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15. 1912 NPD 117.

16. At 121.

17. 1909 NLR 227.

18. 1912 NPD 117 at 122.

19. At 120.

20. 1915 NPD 209.

21. 13 NLR 53.

of such publication is not an act of insolvency"<sup>22</sup>. On the other hand, in Burman & others v Davis<sup>23</sup>, Dove Wilson JP gave a fuller explanation of his reasons for distinguishing the authority cited :

"I am aware that in the case of Durban Corporation v Whittaker<sup>24</sup> the appellant succeeded in the Court of Appeal on a point which was there taken for the first time, and was given his costs both there and in the Court below. But in Whittaker's case there was nothing to show that the costs of appeal were incurred because the point had not been taken in the Court below. In the present case everything goes to show that if the point had been taken in the Court below there would have been no appeal"<sup>25</sup>.

In Union Share Agency & Investment Ltd v Madsen<sup>26</sup>, Dove Wilson JP boldly distinguished a decision of the Natal Court : "I am aware there is a reported decision of this Court, Sparks & Young Ltd v Bennett<sup>27</sup>, which is to the contrary effect. But no reasons appear to have been given, and no authority was cited, and in this circumstance I am not prepared to follow it"<sup>28</sup>.

The fourth aspect of Dove Wilson JP's reasoning ability to which I refer is the logical ordering of his judgments. In Natal Mill &

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22. 1915 NPD 209 at 212. Cf Bosse v Rex 1915 NPD 642 and Yenka Reddy v Naidoo 1916 NPD 210.

23. 1921 NPD 23.

24. 1919 AD 195.

25. 1921 NPD 23 at 28. Cf Dominican Convent v South Shepstone Local Board 1923 NPD 391. But in McKenzie v Union Government 1917 NPD 306 Dove Wilson JP merely said that "[the cases] which were relied on for plaintiff as showing liability for the mere giving of an order are clearly distinguishable ..." (at 316). Likewise in Trystam v Knight 1922 NPD 186 at 188.

26. 1927 NPD 439.

27. 1922 NPD 357.

28. 1927 NPD 439 at 445. For a fuller treatment of Dove Wilson JP's use of legal sources see Chapter 5.

Elevator Co Ltd v Durban Corporation<sup>29</sup> there was a written contract in which the defendant agreed to purchase from the plaintiffs meal, whole mealies, and second quality flour, at a fixed price. The plaintiffs in turn agreed to deliver these articles during a period of six months from August 1920, in such quantities and at such times as the defendant should direct. The defendant had the right to increase or decrease the stipulated quantities by 20%. Furthermore, the articles had to conform in quality to samples supplied by the plaintiffs. In December 1920, when 80% of the meal and whole mealies had been purchased, the defendant intimated to the plaintiffs that it intended to purchase no more of either articles. The plaintiffs tendered delivery of the remaining 20% and sued for the purchase price. Dove Wilson JP began his judgment by saying that "I propose to deal with the claim in so far as it is concerned with mealie meal and mealies first ..."30. Once he had done so, he said that

"I come now to the claim as based upon the flour, and as to that there are two considerations ... Now there is no room for question upon the evidence that in the trade the word 'flour' has a special significance ; it means the product of only one cereal, namely, wheat ; and it would be a misuse of the word for trade purposes to use it without qualification to denote a mixture of the flours of different cereals, notwithstanding that one of them may be wheat ... It follows that the supply of this mixture of wheat flour and flour of maize was not a satisfaction of the contractual obligation of the plaintiffs which was to supply flour [and] the defendants on discovering the true nature of the so-called Star flour were entitled to reject what they had on hand and had not used, and to refuse to take any more"31.

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29. 1922 NPD 205.

30. At 209.

31. At 211 and 216.

In Smart & others v SAR & H<sup>32</sup>, Dove Wilson JP began by saying that "this is an action, or rather four actions, which have been consolidated by consent, at the instance of the widows and of the children of Arthur Smart and Charles King respectively, for damages alleged to be due in respect of the deaths of Smart and King, which were admittedly caused by their being run into, while driving in a motor car, by a passenger railway train belonging to defendants, on a level crossing at Clairwood, near Durban, at about 9.30 p.m., on 29th December 1926"<sup>33</sup>. Once he had outlined the facts, he proceeded with his judgment :

"The first question is whether there was negligence on the part of the defendants, because if not the action must fail. The duty of those in charge of trains approaching unprotected level crossings has often been laid down by the Courts [he outlined the cases] ... For these reasons I think that negligence on the part of the defendants, by failing to give adequate warning of the approach of the train by sufficient lighting, has been made out.

I come now to the question whether the servants of defendants kept a sufficient look-out, and whether they gave adequate warning of the approach of the train by whistling, which I think will best be dealt with together ... That there was negligence on the part of the defendants to keep a proper lookout, and to give adequate warning by whistling, I think, is clear"<sup>34</sup>.

The balance of the judgment was spent in discussing the implications of the speed at which the train was running. Dove Wilson JP also referred extensively to the judgment of Innes CJ in Lee's case<sup>35</sup>. He said that

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32. 1928 NPD 129.

33. At 131.

34. At 132 and 140.

35. 1927 AD 202.

"the difference between Lee's and Mancho's<sup>36</sup> and the present case on the one hand, and such cases as Worthington's<sup>37</sup> and Jordaan's<sup>38</sup>, is that in the latter class of case while the engine driver was negligent at an earlier, he was free of negligence at the final, stage of the incident, and although waking up to the imminence of the danger too late to stop his train in time he was yet able to give a danger warning by whistling, which, had he regarded it, would have enabled the driver of the road vehicle to stop short of the line. The only negligence, therefore, existing at the final stage of the incident was that of the driver of the road vehicle. On the whole therefore, even if negligence be imputable to the driver of the car, in my opinion the accident would be due to the joint negligence of himself and the defendant's servants ; and in accordance with Lee's case this affords the defendants no answer to the case of the plaintiffs, to whom the culpa of the car driver cannot be imputed"<sup>39</sup>.

Having evaluated the positive aspects of Dove Wilson JP's reasoning ability, I consider next what are, in my opinion, certain shortcomings. In this connection it is prudent to refer to an aspect of his personal life which also has a bearing. Neither Dove Wilson JP's wife or daughter ever attended the Court when he was presiding and when he returned home after the Court had risen, he was not in the habit of discussing the day's events. He believed that the law and his home life should be kept distinctly separate<sup>40</sup>. To a certain extent this dichotomy is reflected in some of his judgments which tend to be over-clinical and rather cold (even over-legalistic). Dove Wilson JP could also be unsympathetic, particularly in criminal cases, and this is perhaps because of his experience as a prosecutor in Scotland.

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36. 1928 AD 89.

37. 1905 TH 149.

38. 1909 TS 465.

39. 1928 NPD 129 at 147f.

40. Miss S Dove Wilson.

A further possible criticism which follows from this was Dove Wilson JP's propensity to decide in favour of the Crown too readily. Thus in the case of Elliott v Rex<sup>41</sup>, Dove Wilson JP decided in favour of the Crown when interpreting a liquor statute :

"But, to my mind, it is neither absurd nor extravagant to think that the Legislature intended that any person convicted of an offence such as this should, if at the time of the conviction he holds any licence, be subject to the penalty of suspension of that licence ; although he may not have held it at the time of the offence. And that, in my opinion, is the only meaning which can be extracted from the plain words of the statute"<sup>42</sup>.

On one occasion a procedural irregularity was brought before Dove Wilson JP<sup>43</sup>. Application was made to the Court to discharge an accused because certain communications between the Registrar and the jury were alleged to be prejudicial to the accused. Dove Wilson JP's reply was that "the Court was not in a position to grant any such request"<sup>44</sup>. This approach was unsympathetic and can also be seen in some of the treason cases heard by him in Johannesburg<sup>45</sup>. In R v Jolly & others<sup>46</sup> for example, the Appellate Division indicated that some of his sentences were too harsh<sup>47</sup>. Thus while there were many positive aspects of Dove Wilson JP's reasoning ability, these must be tempered by certain disturbing deficiencies.

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41. 1921 NPD 68.

42. At 70.

43. Cf 105.

44. The Natal Mercury, 22 August 1923.

45. Cf 116f.

46. 1923 AD 176 at 182f.

47. Corder op cit 82.

## 2. Leadership of the Court

As Judge President of Natal, Dove Wilson JP was given the immense task of attempting to raise the status of the Court from the depths to which it had sunk in the eyes of the legal fraternity in South Africa. Prior to his appointment as Judge President, Dove Wilson J had played a prominent and constructive role on the Natal Bench<sup>48</sup>. After he assumed the Judge Presidency, he generally revealed himself to be a vigorous and forceful leader of the Court. A concrete illustration of this is the high proportion of trials presided over by Dove Wilson JP. I first refer to the thirteen reported cases of February 1913. Dove Wilson JP sat in nine of these and delivered the principal judgment in seven of them. In October 1919 when nineteen cases were reported, fourteen of these were heard by Dove Wilson JP. During June 1924, ten of the eleven cases reported were heard by the Judge President. During the corresponding period two years later (with the same number of reported cases), Dove Wilson JP was only present in two reported cases. Finally, in April 1928, Dove Wilson JP delivered the principal judgment in only six of the seventeen reported cases, although he concurred in three others.

This brief survey shows that certainly during the decade from 1910 - 1920, Dove Wilson JP was the major presence on the Natal Bench. He showed that he intended to be firmly at the helm of Natal's legal affairs. By adopting such a prominent position he was able to play

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48.Cf Michelle Crabtree The contribution of Judge Dove Wilson to the Natal Supreme Court 1904-1910 (unpublished research project) 19, 26, 35, 45.

the leading part in focusing the direction which the Court was to take. There were however also more tangible reasons, for the puisne judges in 1910 were Broome, Carter and Hathorn JJJ, the latter two being very recently appointed judges themselves<sup>49</sup>. The Bench was an inexperienced one in terms of its judicial expertise and general legal training. It was Broome J himself who admitted that "I have never been vain enough to imagine that my legal attainments approached the standard required of a judge of anything like high calibre"<sup>50</sup>. It can thus be seen that if there was to be any hope of the Natal Court redeeming itself, firm leadership would be needed to provide the example which could be followed with confidence by the puisne judges.

Dove Wilson JP enhanced his judicial status by regularly accepting appointment as an Acting Additional Judge of Appeal<sup>51</sup>, and also by his appointment as Judge President of the Special Treason Court in 1922<sup>52</sup>. In regard to the first series of appointments, there were not very many reported cases where Dove Wilson AAJA appeared. In the first, Greenwood Park Brick Co Ltd v Sir JL Hulett & Sons Ltd<sup>53</sup>, Dove Wilson AAJA was the first to deliver judgment in a case coming on appeal from the Natal Provincial Division<sup>54</sup>. In his short judgment he said that "there are several grounds of review stated in this appeal, but I do not think it necessary to consider more than a few of them,

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49. Cf 13 - 22.

50. Broome op cit 23. Cf 14.

51. Cf 8.

52. Cf 7 and 109ff.

53. 1911 AD 107.

54. Dove Wilson AJP and Broome J, Hathorn J dissenting.

and only one of them, in my opinion, is important"<sup>55</sup>. Lord de Villiers CJ in concluding the case considered that "after reading the correspondence ... I consider that there is every reason for holding that the construction placed upon the contract by the Provincial Division is correct"<sup>56</sup>. There were of course cases where Dove Wilson AAJA concurred<sup>57</sup> and others where he concurred and elaborated on a particular issue<sup>58</sup>. On two occasions Dove Wilson AAJA was praised by Lord de Villiers CJ. In Tedder & another v Greig & another<sup>59</sup> the Chief Justice said that "I am of the opinion that this appeal should be dismissed, and I agree so entirely with the reasons given by the learned Judge President in the Court below that I do not wish to add much to what he said"<sup>60</sup>. In Mink v Vryheid (Natal) Railway Coal & Iron Co Ltd<sup>61</sup>, he said that "the reasoning of the learned Judge President on this point appears to me to be quite conclusive, and I do not wish to add anything to it"<sup>62</sup>.

Aside from his judicial work, Dove Wilson JP was a prominent figure in

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55. 1911 AD 107 at 108.

56. At 118.

57. Cf New Rietfontein Estate Gold Mines Ltd v Misnum 1912 AD 704 ; Chon Ki v Pretoria Municipality 1912 AD 712 ; Union Government v Scales 1913 AD 333 ; Rex v Vries 1913 AD 338 ; Salzmann v Holmes 1914 AD 152 ; Hauman v Nortje 1914 AD 293 ; Breslin v Hichens 1914 AD 312 ; Minister of Finance v Barberton Municipal Council 1914 AD 335 ; Marais v Pretoria Municipality 1917 AD 568 ; Dabner v SAR & H 1918 AD 583 ; Bon Accord Irrigation Board v Braine 1923 AD 480 ; Grobler v Schmilg & Freedman 1923 AD 496.

58. Cf Union Government v De Kock NO 1918 AD 22 ; Union Government v Matthee NO 1917 AD 688 ; Union Government v Hill 1914 AD 195 ; Van Heerden v Coetzee & others 1914 AD 167 ; De Wet v Hollow 1914 AD 157 ; Breytenbach v Frankel & another 1913 AD 390 ; National Bank of SA Ltd v Cohen's Trustee 1911 AD 235.

59. 1912 AD 73.

60. At 89.

61. 1912 AD 265.

62. At 279.

the Natal social community, and from time to time he made public speeches of sufficient importance to merit their publication in the local newspapers<sup>63</sup>. Perhaps the most notable during his twenty year career was that reported as "Bench, Bar and Medicine - South African Medical Congress opened by Sir JC Dove Wilson" in 1925<sup>64</sup>. He opened as follows :

"... I must confess that it was only with great hesitation and, indeed, trepidation, that I accepted your kind request to [address you] - perhaps it is fitting - I as a representative of the Supreme Court of this country - should say something of the way in which the Courts and the medical profession may be said to walk hand in hand in the fulfillment of a high and onerous duty to society, and indicate briefly how enormously the just administration of the law depends on the learning and skill of the members of your great and honourable profession ... We, on the Bench and at the Bar, are of course responsible for the administration of the law ; but whether that administration is to result in justice depends to an extent to which, I think, is not generally realised by the public, sometimes, perhaps, not even by your profession, on the guidance we have received from the testimony of medical men"<sup>65</sup>.

During the course of this important address to the Congress, Dove Wilson JP discussed the following areas of concern between medicine and law : criminal law (this was significantly the first topic which he considered), the standard of conduct expected of doctors, civil cases (including the situation where doctors were sued for damages), and the duty of disclosure of a doctor. In relation to the last topic, he made a number of interesting observations. He said that

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63. Cf The Natal Witness, 29 April 1930.

64. The Natal Mercury, 7 July 1925.

65. Ibid.

"a doctor is bound to disclose what he has learned in his professional capacity when called upon to do so in a Court of law. It is however, sometimes said ... that information obtained from patients in a consulting room relative to their ailments must be held to be inviolably secret. Well, sir, it is not for me to apologize for the law ; I must administer it as I find it. But I would venture to suggest that there is no sound ethical ground for any quarrel with the law in this respect ... When the interest of the patient conflicts with the interest of the community, or can be served only at the expense of a denial of justice, any advantage which may accrue to the patient from secrecy is altogether outweighed by the public interest, and the public interest must prevail, and that view is taken not only by the Courts ... For every reason therefore, and not merely because he is legally bound to do so, a doctor who has to divulge in a Court of law knowledge gained by him in his professional capacity, may rest assured that 'it can never be imputed to him as any indiscretion whatever'"<sup>66</sup>.

Whilst the nature of the talk brought prestige not only to Dove Wilson JP but to the Natal Court as a whole, one may also find within it some of the shortcomings which have already been referred to<sup>67</sup>, notably in the statement that "it is not for me to apologize for the law. I must administer it as I find it"<sup>68</sup>.

Within this broader context, I propose now to examine the way in which Dove Wilson JP exercised his leadership of the Court in Natal. In the earlier years of his Judge Presidency, Dove Wilson JP was reticent in adopting new directions. For example, in Reynolds Brothers Ltd v Colonial Government<sup>69</sup> he said that

"speaking for myself, I have never been able to understand why, because a litigant chooses to be

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66. Ibid.

67. Cf 105, 116.

68. The Natal Mercury, 7 July 1925.

69. 1911 NPD 31.

represented by KC, he should, if successful, saddle his opponent with more than the regular fee for senior counsel. I think that the standard fee for a senior counsel should be the same, whether KC or not. That is my personal view, but I am aware that that has not been the practice followed in this Court. I am not prepared at the present juncture to depart from established usage"<sup>70</sup>.

Similarly, in Pietermaritzburg Corporation v GA and AS Nathan<sup>71</sup>, he said that

"I have felt some difficulty on the question of costs in the Magistrate's Court, but as my brethren are agreed I am not prepared to dissent. At the same time I understand it has not been the practice in appeals of this kind to allow costs in the Magistrate's Court. I do not wish that anything I may say be taken as an encouragement to alter that practice, but under the special circumstances of this case I am not prepared to dissent from the order which is proposed"<sup>72</sup>.

In the above cases, one would have expected Dove Wilson JP to be firm in taking up a new view in accordance with his own experience. A possible explanation is that he was feeling his way into his new role of Judge President at this stage. There are advantages in not trying to change everything from the very beginning. Rapid change could lead to uncertainty and an unsettled Court, which was what Dove Wilson JP was trying to remedy<sup>73</sup>. The previous decade had been a particularly unsettling one for the Court and it was now time to move on to a more

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70. At 34.

71. 1911 NPD 130.

72. At 132. Cf Ebrahim v Licensing Board (Ladysmith) 1911 NPD 148.

73. Cf In re Intestate Estate AF Blaikie 1911 NPD 133 : "But although I think that is the proper procedure to have followed, and to be followed in the future, I am prepared to deal with the application as it has been argued on both sides and is fully before us" (at 133).

settled era.

However, from an early stage in his Judge Presidency, Dove Wilson JP gave indications of his independent views - in future he would steer the Court in new directions. In Wakefield v Graham<sup>74</sup> he stated the following :

"There is no doubt that there has been a practice in this Court when exceptions have been taken, to make the costs of the successful party costs in cause ; but I myself have never been able to see upon what principle it can be said that that should be a hard and fast rule ; and further, I do not see why, because there has been a practice of this kind, the Court which thinks it is a bad practice should consider itself precluded from departing from it. It is not a question of legal principle, because costs are always in the discretion of the Court ; and I do not know on what principle the exercise of that discretion only in one way can be defended ; and the fact that the Court in the past has always exercised its discretion in that way, if it has done so, does not, I think, make it binding upon this Court for all time to exercise its discretion similarly. Therefore I am prepared to say that for the future the question of costs upon exceptions must depend on the particular circumstances of each case, the Court exercising an unfettered discretion ; and it must not be assumed for the future that the only order which will be made on exceptions is that the costs of the successful party will be costs in the cause. The Court will determine upon a consideration of all the circumstances, and decide accordingly"<sup>75</sup>.

By the early 1920's, Dove Wilson JP had sufficient experience and motivation to adopt a bolder approach to legal changes, as indicated in Ramsay v Licensing Board, Inanda<sup>76</sup> : "We have been referred to the case of Goveia & another v Cape Licensing Court<sup>77</sup>, and all I wish to

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74. 1911 NPD 144.

75. At 146. Cf Adam v Dada 1913 NPD 31.

76. 1923 NPD 58.

77. 1919 CPD 304.

say - not having had time really to consider it - is that if there is anything in the decision in that case contrary to what I have first stated, we must, with all respect, take our own view"<sup>78</sup>. In Umlaw v Umlaw<sup>79</sup>, he noted that "appellant relies on certain decisions of this Court, which, on reconsideration, I am bound to say I think go too far, and cannot be accepted as ruling the present appeal ..."<sup>80</sup>.

It is appropriate to consider Dove Wilson JP's attitude to the judgments given by his brethren. In the case of Estate Nathan v Grix<sup>81</sup>, he read the principal judgment of the Court and Hathorn J subsequently disagreed with him. Dove Wilson JP replied that "I should like to say that so far as I formed part of the Court, my brother is in error in saying what the Court intended with regard to the £9 15s, because the matter had never entered my mind. By consent, the £9 15s lodged with the Master can be paid out as indicated at the Bar. The judgment as read will be amended by deleting the last two paragraphs thereof"<sup>82</sup>. This comment not only indicates that Dove Wilson JP preferred that the Court should present a unified argument (through prior discussion), but it also indicates that he could be abrupt when he thought that he was being criticized.

Dove Wilson JP generally appeared to be reluctant to dissent from

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78. 1923 CPD 58 at 61.

79. 1924 NPD 323.

80. At 324.

81. 1911 NPD 262.

82. At 268.

judgments given by his brethren. In Greig v Tedder I<sup>83</sup> the judgment was delivered by Broome J. Dove Wilson JP said that

"I agree, but I do so only out of deference to the decisions, and what I am informed has been the practice, of this Court. Personally, I am inclined to object to the system of briefing in toto. I know no useful purpose which it serves ... I take leave to doubt the propriety of the Court countenancing any such practice. It results, in effect, in allowing charges which have been fixed as sufficient to be augmented in an indirect manner. I do not think that ought to be encouraged"<sup>84</sup>.

Chief Constable, Durban v Johnson & others<sup>85</sup> concerned the interpretation of a statute<sup>86</sup>, and here Dove Wilson JP said that "I am bound to say, with all deference, that I can see no ground for that limitation ; but, of course, I must accept it ; and as the acceptance of it involves the removal of the foundation of the view which I personally hold, and leaves, in my opinion, the judgment which has been prepared the only possible one, I content myself with saying that I concur"<sup>87</sup>.

In Driman v Umfolosi Licensing Board & another<sup>88</sup>, Dove Wilson JP observed that "I have had the advantage of reading and considering the judgment which has been delivered, with which I wholly agree. If necessary, I might have come to the same conclusion upon a further

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83. 1912 NPD 20.

84. At 22. Cf Alamaloo v SA Sugar Refineries Ltd (1912 NPD 567) where Dove Wilson JP disagreed with Broome and Carter JJ but said that "as however my brethren are agreed I content myself with indicating the doubt which I feel" (at 574). Cf also In re Estate HY Foley 1920 NPD 172.

85. 1924 NPD 49.

86. Tatham J gave judgment and Carter J concurred.

87. At 52.

88. 1925 NPD 77.

ground [but] I content myself with expressing my concurrence"<sup>89</sup>.

Although particularly concerned that the time of the Court should not be wasted<sup>90</sup>, he concluded that

"the application will be refused. At the same time I wish to make it clear that I must not be taken as either assenting to or dissenting from the views which have been stated by my brother Tatham. I confess that in the short time at my disposal since the close of this debate, I have certainly not been able to come to the conclusion that these matters are so free from difficulty or so little open to doubt, as they appear to my brother ; and had it been necessary to decide them I certainly should not have been in a position to do so today"<sup>91</sup>.

There were nonetheless occasions when Dove Wilson JP could not agree with the majority view. In Union Government v Verrapah<sup>92</sup> he said that "I regret that I am not in agreement with my brethren ..." <sup>93</sup> and in Pillay v Chief Constable, Pietermaritzburg<sup>94</sup> he said that "I regret that I am unable to come to the same conclusion as my brother Carter"<sup>95</sup>. In Caney v Estate Johnsson & others<sup>96</sup> he observed that

"I have had the advantage of considering the judgment prepared by my brother Matthews, and I would have contented myself with saying that I agreed with it, but for the importance of the matter and the fact that there is a difference of opinion on the Bench. As it is I shall state the reasons for my conclusions as briefly as possible. It is unnecessary to recapitulate the facts which have already been stated"<sup>97</sup>.

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89. At 88. Cf Nxaba v Nxaba 1926 NPD 29 at 33 : "Although I have done so not without hesitation, I have come to the same conclusion".

90. Cf 79, 85, 114 and also Addison Bros Ltd v Addison & Co 1924 NPD 208.

91. 1925 NPD 77 at 95.

92. 1918 NPD 182.

93. At 183.

94. 1923 NPD 120.

95. At 122.

96. 1928 NPD 13.

97. At 22.

What emerges from this analysis of Dove Wilson JP's leadership of the Natal Court is that he did reveal important qualities of leadership. He was at all times well-informed and alert to the major issues involved in legal disputes. He held strong views on legal principles and practices, and these were presented in a persuasive and able manner. He was generally highly active in the work of the Court, and shouldered the burden of delivering the Courts' judgments with alacrity. At the same time, especially the first decade of his Judge Presidency revealed a marked degree of caution, in dealing with legal principles and practices which he opposed, and judgments of his brother judges of which he disapproved. This caution may have been a weakness, bordering on timidity. Yet it may also have been a sign of strength, in the sense of his sensitivity to the long-held view of those around him, and his pragmatism in accepting the necessity for gradual change.

## Chapter 5

### Legal Authorities

When Dove Wilson JP arrived in South Africa he brought with him his considerable experience of the law of Scotland and of England. To a certain degree this legal environment influenced his approach to the authorities. My aim in this chapter is to evaluate his use of authority in the Natal Provincial Division. Among the important questions which will be asked, include whether he was able to adjust to his new, different, environment ; what effort he made to acquaint himself with the Roman-Dutch authorities<sup>1</sup> ; and his attitude to the decisions of the other provincial divisions, headed by the Appellate Division<sup>2</sup>.

#### 1. Roman-Dutch authorities

It is highly unlikely that Dove Wilson JP would have had any exposure to Roman-Dutch law in Scotland, but he probably was exposed to Roman law whilst a student at the University of Edinburgh - his father was the Professor of Scots and Roman laws at the University of Aberdeen<sup>3</sup>. He was equipped to translate certain of the old authorities, because he had studied Latin but not Dutch at university<sup>4</sup>. It appears likely

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1. Cf Spiller *op cit* 42-47. For the most part, previous English-trained judges had made no attempt to acquaint themselves with the Roman-Dutch law.
  2. The Appellate Division itself had been formed in 1910.
  3. Cf (1908) 15 Scots Law Times (News) 149ff.
  4. Ms.U.1.,f.170 (Aberdeen University Library).

that Dove Wilson JP referred to the translations which were available and to cases where the texts had been analysed. In Anderson v Hesom<sup>5</sup> Dove Wilson JP said that "there is no doubt on the authorities ..."<sup>6</sup> and referred to Van Leeuwen as translated by Kotze<sup>7</sup> and to Voet 23.2.46.

In the case of In re the SS Mangoro<sup>8</sup> he referred to a wide spectrum of the old authorities. Neither of the parties disputed the assumption that "the matter falls to be determined by the lex fori"<sup>9</sup>, but Dove Wilson JP nevertheless referred to Voet 20.4.12. as authority for the proposition. On the question of necessary repairs to the ship, he referred to Grotius 2.48.13., Groenewegen, Van der Keessel (Thesis CCCCXVII) and Van der Linden 4.3.3<sup>10</sup>. In addition to these better-known authorities, he also referred to the work of Willem Schorer<sup>11</sup>. As to what was "necessary" he said that "there is little authority on this question, in the books or in the reports, in South Africa"<sup>12</sup>. He referred again to Schorer and then to the cases of United Building Society v Smookler's Trustees<sup>13</sup> and Reid & others v Clozier & Cloete<sup>14</sup>. When discussing the claims to preference in respect of wages, he said that "no Roman-Dutch law authority was

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5. 1913 NPD 63.

6. At 66.

7. Vol I p44 and Vol II p196.

8. 1913 NPD 67.

9. At 79.

10. Ibid.

11. He edited and annotated Grotius' Inleiding. Cf Hahlo & Kahn The South African Legal System and its Background (1968) 561.

12. 1913 NPD 67 and 82.

13. 1906 TS 627.

14. 2 Searle 183.

relied on by counsel for either master or crew, the case being argued by them on the provisions of the English law"<sup>15</sup>. Once he had referred to the arguments of counsel, he said that "... we think there is authority in the Roman-Dutch law"<sup>16</sup> and quoted from Grotius 2.48.19., 3.20.42., 3.29.71., and 4.13.13. In addition, he quoted from Van der Linden<sup>17</sup> and Van der Keesse<sup>18</sup>. In conclusion he said that "it seems to me that these passages are merely particular applications of the rule laid down earlier by Matthaëus De auctionibus 1.19.58. ... In adopting this construction we are fortified by finding that apparently it is in this sense that Voet has interpreted the passage from Grotius"<sup>19</sup>. Finally, he also referred to Pothier's Traité du Contrat de Louage<sup>20</sup>.

It can be seen then that Dove Wilson JP made a wide survey of both important and lesser authorities. During the first decade of his Judge Presidency, the above case was the only one reported in which he undertook such a survey. Even so, it is not nearly as thorough as the analyses conducted by his distinguished predecessor, Sir Henry Connor<sup>21</sup>. In Coll v Murray<sup>22</sup> a less thorough survey was made, although the most important authorities were consulted, beginning with Justinian's Novel 108. The other authorities consulted in connection with fideicommissum residui were Voet 36.1.54., Grotius 2.20.13., and

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15. 1913 NPD 67 at 87.

16. At 88.

17. Juta's translation, p 441.

18. 1.717.694.

19. 1913 NPD 67 at 90.

20. At 91.

21. Cf Spiller op cit 32 and 35.

22. 1917 NPD 222.

Van Leeuwen (Censura Forensis) 1.3.7.15.<sup>23</sup>.

A survey of cases in which the old authorities were consulted reveals that Voet was always referred to, without exception<sup>24</sup>. Following Voet closely were Van Leeuwen and Grotius<sup>25</sup>. In Tshabalala v Van der Merwe<sup>26</sup>, Dove Wilson JP referred to the judgment of Shippard J in Hunt v Eastern Province Boating Co<sup>27</sup> where the learned judge "adds that the result of the authorities seems to indicate that what is reasonable notice must, by Roman-Dutch law as by English law, depend, in the absence of custom, on the circumstances of each case"<sup>28</sup>. Dove Wilson JP also referred to Grotius 3.19.8., Voet 19.2.18., Van Leeuwen 4.21.6. and to Censura Forensis 22.6.<sup>29</sup>. After he had completed this survey, he said that "... I have been unable to find in the institutional writers, so far as I have been able to consult them, any authority for the proposition that twelve months' notice is necessary in the case of yearly tenancies, or for any proposition other than that the notice must be reasonable in the circumstances"<sup>30</sup>. Two observations follow in response to this, the first being that Dove Wilson JP had experienced difficulty in obtaining access to a wide spectrum of authorities. When the authorities were available, he was

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23. At 227. Cf Dingley v Cornforth 1917 NPD 386 where Dove Wilson JP referred to Van Leeuwen : Censura Forensis 1.4.19.19.

24. Cf Steiger v Union Government 1919 NPD 75 (4.1.26); Rudolph v The Executors Estate Rudolph 1918 NPD 425 (36.1.9., 39.5.16., 39.5.43.); Tshabalala v Van der Merwe 1926 NPD 75 (19.2.18.); Henley's Trustee v Henley 1926 NPD 119 (24.1.1); Petterson v Yates & others 1928 NPD 453 (16.1.10., 16.1.9.); Spencer v Minister of the Interior 1929 NPD 175 (25.3.11.)

25. Cf Franks v Rex 1924 NPD 329; Tshabalala supra and Spencer supra.

26. Cf n 24 above.

27. 3 EDC 12 at 25.

28. 1926 NPD 75 at 79.

29. Ibid.

30. Ibid.

initially fettered by his lack of expertise in the languages in which they were written. His last exposure to Latin had been at university in 1882<sup>31</sup>.

There is every indication that Dove Wilson JP did make an effort to improve his level of competency with the old authorities. This is particularly noticeable towards the end of his tenure, in the case of Pettersen v Yates & others<sup>32</sup> where he made a scholarly comparison between Faber and Voet :

"Voet 16.1.10. quotes Antonius Faber with approval ... This latter proposition is a direct authority in the circumstances of the present case. It is true that in McAlister v Raw & Co<sup>33</sup> Connor CJ indicates that the passage from Faber quoted by Voet in support of his last proposition does not go so far as Voet indicates. But Voet, whose authority, to say the least, is as great as that of Faber, has stated the law as he thought it was stated by Faber, and whether it was so stated by Faber or not, it is at least the law which is approved by Voet.

... I think it is clear from the terms of Voet 16.1.11. that the benefit of the Senatusconsultum Velleianum ceases if the woman receives consideration for the intercession. As he says, the benefit ceases if she has accepted a reward for her intercession, whatever it be, great or small"<sup>34</sup>.

In Spencer v Minister of the Interior<sup>35</sup>, Dove Wilson JP concluded that "it seems to me that it is unnecessary to consider whether the common law establishes any priority in which persons liable to contribute

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31. Ms.U.1., f.170 (Aberdeen University Library).

32. Cf n 24 above.

33. 6 NLR 10.

34. 1928 NPD 458f.

35. Cf n 24 above.

must be called on to do so ; which appears to be not free from doubt, for Voet 25.3.11. seems to think it does not, whereas Van Leeuwen, Censura Forensis 1.10.1-4., speaks of collaterals being liable after descendants"<sup>36</sup>.

This survey of cases shows that Dove Wilson JP was not nearly the Roman-Dutch scholar that Connor CJ was - but then his grounding in Latin was distant and in Dutch was non-existent. This was unlike his successor, Richard Feetham, of whom Broome spoke of as being "... as at-home in Greek and Latin as he is in English"<sup>37</sup>. In the eyes of Mr Justice AAR Hathorn it was this factor (ie Dove Wilson JP's lack of familiarity with the authorities) which prevented him from being classed as a great judge : "He was a good judge and a great judge in the making. If he had had the studious temperament he would have been a great judge"<sup>38</sup>. On balance though, he did at least make the effort to do so, and with some success.

## 2. Scots Law

Having originally come to Natal from a busy practice in Scotland it could be expected that Dove Wilson JP would refer frequently to judgments of the Scots' Court. The evidence from the cases paints the reverse picture, showing rather that he was extremely reticent in referring to the law in Scotland at all, especially in the second decade of his Judge Presidency. There would have been geographical

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36. 1929 NPD 175 at 177.

37. Op cit 116.

38. The Natal Witness, 25 April 1935.

reasons for this fall-off in reference especially after 1914, as it would have been difficult to keep up-to-date with developments in a country so far away. A more persuasive line of reasoning would be that he was no longer working regularly with Scots law on a daily basis.

The most extensive reference to Scots Law was made in Armitage Trustees v Allison<sup>39</sup> when Dove Wilson JP considered the nature and scope of the ordinary duty of an attorney :

"There is a dearth of authority in the reports of the South African Courts, but we do not apprehend that there is any substantial or material difference between the law on this matter obtaining in England and Scotland, and the law of Holland, and that law appears to us to be concisely stated in the Scottish case of Rae v Meek<sup>40</sup>. [He then referred to the judgments of Lord Mure and Lord Shand]. We have thought it right to quote these passages in extenso rather than to summarize them, as they seem to us applicable practically in terms to the present case, in the aspect of it with which we are at present dealing, and because the probability is that the reports of the Court of Session in Scotland are not easily accessible in South Africa"<sup>41</sup>.

It can be seen that Dove Wilson JP would only have recourse to Scots law if there was a dearth of relevant South African cases. In Hay v Poynton<sup>42</sup> he said that "I am fortified in the view which I have taken by finding that that is the rule in all the other provinces of South Africa and, so far as I recollect, it is also the rule which obtains in England and in Scotland"<sup>43</sup>.

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39. 1911 NPD 88. Cf West v Nourse & another 1924 NPD 418 at 436.

40. 15 Rettie 1033.

41. 1911 NPD 88 at 96 and 99.

42. 1911 NPD 336.

43. At 343. Cf Cato v Cato 1914 NPD 442 at 452.

In The Rand Indent Ltd v The Masters & owners "The Motherland"<sup>44</sup> Dove Wilson JP explicitly stated that he had lost touch with developments in his native Scotland :

"We have been referred to a passage in my judgment in Morgan & Ramsay v Cornelius & Hollis<sup>45</sup>, which is at variance with this view, where I indicated that in my opinion, amendment should not be permitted so as to subject to the adjudication of the Court any larger sum or other fund than that concluded for in the original summons. But I was there only hazarding a personal opinion, not necessary to the determination of the case, and based on the practice of Scotland, formerly well known to me, which it correctly reflects. But this limitation of the power of amendment in Scotland is expressly created by statute, and I do not think we are similarly restricted here"<sup>46</sup>.

Finally, in Friedman v Friedman's Executors<sup>47</sup>, he referred to a Scots textbook : Husband and Wife "by the Scottish writer, Mr Walton"<sup>48</sup>. He also said that "in England and Scotland, so far as I have been able to gather from the authorities, the law as to the validity of the marriage so far as regards the competence of the parties to contract it, has developed on much the same lines"<sup>49</sup>.

### 3. English authorities

Dove Wilson JP frequently referred to English authorities throughout his Judge Presidency, although he did not exclude South African authorities. In the past the trend had been to refer almost exclusively to English law, to the detriment of South African law.

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44. 1919 NPD 121.

45. 31 NLR 235.

46. 1919 NPD 121 at 123.

47. 1922 NPD 258.

48. At 264.

49. Ibid.

This was partly due to the predominantly English composition of the White people living in Natal. However Dove Wilson JP saw the English law as a valuable comparative system which could assist the growth and development of Roman-Dutch law.

I begin by referring to those cases where Dove Wilson JP consulted only English authorities. In Moodley v Minister of Railways<sup>50</sup> the plaintiff in the Court a quo had sued the South African Railways for breach of contract. Dove Wilson JP refused to uphold the first ground of the appeal on the basis of Pounder v North Eastern Railway Co<sup>51</sup>. In support of his view of the nature of the offer, he referred to Denton v The Great Northern Railway Co<sup>52</sup> and Carlill v The Carbolic Smoke Ball Co<sup>53</sup>. In Gurney & Moore v Union Government<sup>54</sup>, which concerned the sale of goods, Dove Wilson JP concluded that "in these circumstances it is not doubtful I think, that the transit was at an end and that the railway authorities were holding the goods as warehousemen for the consignee; and if authority is necessary for that proposition I find it in two English cases ... Wentworth v Outhwaite<sup>55</sup> and Smith v Hudson<sup>56</sup><sup>57</sup>. As to negligence by an omission, Dove Wilson JP in Gxagxa

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50. 1912 NPD 86.

51. [1892] 1QB 385.

52. 5 Ellis & Blackburn 860.

53. [1893] 1QB 256. Cf CIR v Thompson & Co 1912 NPD 592; Peters v Randles Brother & Hudson 1912 NPD 607; United Tobacco Companies v Standard Tobacco 1912 NPD 661.

54. 1913 NPD 320.

55. 12 LJ Ex 172.

56. 34 LJ QB 145.

57. 1913 NPD 320 at 324. Cf McDonald v Milne 1913 NPD 519 where he relied heavily on Forget v Ostigny 1895 AC 318. During 1914, English authority was referred to to the exclusion of all else in Flanagan v Flanagan (1914 NPD 27), Rama Narotam v Natha Dullabh (1914 NPD 82) and Cato v Cato supra (n 43 above).

v Nupen<sup>58</sup> adopted the view of "Baron Alderson in the case of Blyth v Birmingham Water Works<sup>59</sup>"<sup>60</sup>. He adopted the view of Smith v London & SW Railway<sup>61</sup> in Frenkel & Co v Cadle<sup>62</sup> as it was "high authority"<sup>63</sup>.

In Burgers v Knight<sup>64</sup> Dove Wilson JP remarked that "the authorities in the South African Courts are few and meagre of detail, as reported, but there is a large body of authority in the English decisions on which we would be entitled to infer the permanent incapacity of the defendant; and Van Zyl says that the English law upon this subject is copied from the Roman Law ...<sup>65</sup>". Rouhier v Master & Owners SS Mesnafos<sup>66</sup> involved an action for the refund of freight said to have been overpaid in respect of a cargo of bones carried by the defendant's ship from Madagascar to Durban. During the course of his judgment, Dove Wilson JP said that

"although the contract bears expressly that it is to be governed by the law of the flag of the ship, whatever that may be, it is expressed almost entirely in the English language, and takes the form of an ordinary British bill of lading. I do not think that we are interpreting this contract, which may be governed by a foreign law, by the law of England. We are merely construing English words according to their ordinary and natural meaning ; and this particular condition, if authority indeed is needed, has received an inter-

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58. 1915 NPD 298.

59. 11 Ex 781 and 25 LJ Ex 212.

60. 1915 NPD 298 at 305.

61. 6 LR CP Cases 14.

62. 1915 NPD 173. Cf Cadle v Magistrate, Greytown 1918 NPD 189.

63. At 185. Cf Martens v Provincial Administration, Natal 1915 NPD 50.

64. 1916 NPD 399.

65. At 401. He referred to : M v M (1906) 22 TLR 719, Joseph v Joseph (1909) 25 TLR 439, P v P or O (1909) 25 TLR 633, F v P or F (1911) 27 TLR 429, and D v D or P (1913) 29 TLR 765.

66. 1917 NPD 428.

pretation by the English Courts with which I am entirely in agreement : Baron Bramwell in the case of Jessel v Bath & others<sup>67</sup>"<sup>68</sup>.

From time to time, Dove Wilson JP would consult an English decision before looking further afield. In Platt v CIR<sup>69</sup>, for example, he adopted "the language used in Ex parte County Council of Kent and Council of Dover<sup>70</sup>"<sup>71</sup>. In Paul v Youley<sup>72</sup> he said that "... I agree with the decisions which have been given by the Court of Appeal in England ..."<sup>73</sup>. In Hansen v Rex<sup>74</sup> he remarked that "I may add that I am fortified in the view I have taken by the remarks of the Judges in the English case of ..."<sup>75</sup>. Dove Wilson JP also showed considerable esteem for the utterances of Sir George Jessel MR<sup>76</sup> and when he referred to them, he would usually quote from them extensively. When there were cases on evidence<sup>77</sup> and insurance<sup>78</sup> (where the law was substantially the same as that in England), he had no hesitation in referring to English authority. In the case of Master, Supreme Court

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67. (1866) 2 LR Ex 267.

68. 1917 NPD 428 at 432.

69. 1919 NPD 234. Cf Shaik Abdool v Juma Musjid Trust 1929 NPD 75.

70. [1891] 1 QB 729.

71. 1919 NPD 234 at 245.

72. 1920 NPD 191.

73. At 193.

74. 1924 NPD 318.

75. At 321. Cf V Govindsamy v Indian Immigration Trust Board 1918 NPD 122; Norton v Union Government 1920 NPD 267; W Dunn & Co v Assonan Steamship Co 1921 NPD 33; Compagnie des Messageries Maritimes v The Agricultural Co-Operative Union Ltd & Fred Cohen, Goldman & Co Ltd 1922 NPD 84; Ex parte Smith & Co Ltd 1919 NPD 49.

76. Cf City & Suburban Gold Mining & Estate Co Ltd v CIR 1923 NPD 177 at 180; SAR & H v Wood & Sons 1920 NPD 199 at 202.

77. Cf Moothoosamy v Murugan 1919 NPD 401; Meyer v Intestate Estate Rudolph 1919 NPD 92; Mpanza v Rex 1915 NPD 197.

78. Cf May v London & Lancashire Life Association Ltd 1917 NPD 406 and Moodley v Rex 1927 NPD 395.

v Hutchison's Estate<sup>79</sup>, Dove Wilson JP referred to no less than twelve English cases<sup>80</sup>.

A noticeable characteristic of this preoccupation with English law was its presence particularly during the decade from 1910 to 1920. After 1920 there was a marked decline, and, by 1929, there were only two reported cases in which Dove Wilson JP referred solely to English precedent<sup>81</sup>.

The cases already presented in this section can be somewhat misleading, because they give the impression that Dove Wilson JP never referred to any South African cases. This is a false impression because there are many cases where he referred to both English and South African cases. In Viljoen v de Jager<sup>82</sup>, he referred to three English cases<sup>83</sup> and a case from the Transvaal Supreme Court<sup>84</sup>. Similar proportions were maintained by Dove Wilson JP in Dickinson v Estate Fisher<sup>85</sup>. The reverse occurred in Naidoo v Mayor & Councillors, Pietermaritzburg<sup>86</sup> where five South African cases were cited<sup>87</sup> but only one English case<sup>88</sup>.

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79. 1918 NPD 87.

80. At 92ff.

81. Cf Ex parte Smith & Co Ltd supra (n 75 above) and Shaik Abdool v Juma Musjid Trust supra (n 69 above).

82. 1912 NPD 581.

83. Rex v Hardy (1794) 24 State Trials 27; Attorney-General v Braint 15 LJ Ex 265; Marks v Beyfus 25 QBD 494.

84. Tranter v Attorney-General and another 1907 TS 415.

85. 1914 NPD 166 at 168 and 169.

86. 1917 NPD 463.

87. Williams & Adendorff v Johannesburg Municipality 1915 TPD 106; Rex v Plaatjes 1910 EDL 63; Bana v Grahamstown Municipality 1910 EDL 346; Hajee Habib v Pietersburg Municipality 1905 TS 63; Moses v Boksburg Municipality 1912 TPD 659.

88. Simpson v Westminster Palace Hotel Co 8 HLC 712.

There were several instances where English cases were referred to as approved in South African ones<sup>89</sup>. I refer to Crowe v CIR<sup>90</sup> where Dove Wilson JP said that "... I am unable to distinguish this case from the case of CIR v George Forest Timber Co Ltd<sup>91</sup> ... as was said by Lord Cairns in Partington v Attorney-General<sup>92</sup>, in a passage quoted by De Villiers JA in the George Forest case ..."<sup>93</sup>. Yet in Archibold & Co v Roe<sup>94</sup>, Dove Wilson JP quoted from the judgment of Federal Storage Company v Angehern & Peil<sup>95</sup> which approved the same case in the Transvaal Supreme Court<sup>96</sup>. In Union Government v Foxon<sup>97</sup> Dove Wilson JP referred to both English and South African cases<sup>98</sup>.

Dove Wilson JP did not however always follow the relevant rule of English law. In Rossler v Vos<sup>99</sup> he said that

"it is true that in England a clause of forfeiture of this kind has been treated as a penalty and governed by the general law applicable to penal clauses in an agreement which binds a defaulting party to pay a stipulated sum if he commits a breach of the agreement ; but, as Mr Mackeurtan says, and I think rightly, that is not the

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89. Cf Mobarak Ally v Pathon 1915 NPD 363; Houston v Caine 1917 NPD 50; Dalys Ltd v Israel & Son 1919 NPD 360; Commander v Collector of Customs 1920 NPD 35; Mayne v Wattle Extract Co Ltd 1920 NPD 89; Hitchins v Union Government 1925 NPD 281.

90. 1929 NPD 226.

91. 1924 AD 516.

92. 21 LT 370 at 375.

93. 1929 NPD 226 at 231.

94. 1918 NPD 455.

95. As reported in 1910 TS 1355.

96. 1908 TS 761.

97. 1925 NPD 47.

98. Ahearn v Bellmann [1879] 4 LR Ex 201 and Cardinal & Co's Trustees v Mitter 3 Searle 45. Cf Natal Land & Finance Corporation Ltd v Van Tonder 1923 NPD 286; Landers' Tutors v Estate Landers & others 1923 NPD 385; Fino v SAR & H 1927 NPD 369; Castelijm v Sim & others 1929 NPD 253.

99. 1925 NPD 266.

law of South Africa"<sup>100</sup>.

Once he had reached this conclusion, Dove Wilson JP then referred only to South African cases. His approach did not differ when he referred to English and Natal cases<sup>101</sup>. There were a considerable number of cases which began to reflect the catholic nature of Dove Wilson JP's use of authority : he often consulted English, South African and Natal cases<sup>102</sup>.

Aside from English case law, Dove Wilson JP also frequently referred to English textbooks, particularly during the first decade<sup>103</sup>. After 1920, Dove Wilson JP made increasing use of South African textbooks and reference to standard English works went into decline. This state of affairs mirrored the tendency to refer to less English cases during the same period.

#### 4. South African Law

Although Dove Wilson JP did refer to English decisions, this was minimal when compared with South African cases. Where possible, he referred to Natal cases. He did refer continually to decisions in the Cape and Transvaal Provincial Divisions and there was an increasing reference to the Appellate Division.

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100. At 271.

101. Cf Mudaly v Rex 1911 NPD 362 and Momple v Momple 1927 NPD 374.

102. Cf Foss v Woolridge & Co Ltd 1916 NPD 100; Natal Fertilisers Ltd v Van Dam & others 1922 NPD 157; Johannesse v Chief Constable, Pietermaritzburg 1926 NPD 53.

103. Cf Appendix A.

To begin with it will be beneficial to look at those cases where Dove Wilson JP referred only to past decisions of the Natal Provincial Division, and its predecessor, the Natal Supreme Court. A number of trends are noticeable. The first, which was especially prominent, was the tendency to follow past Natal cases out of a sense of duty. This is illustrated by Pietermaritzburg Corporation v SAB<sup>104</sup> where Dove Wilson JP said that "I refer to the case of SAB v Pietermaritzburg Corporation<sup>105</sup>. That is a decision of this Court which we are bound to follow ..."106. In Umsholes v Eksteen<sup>107</sup> he said that "I think we are concluded by the decision in the case of Rex v Maharaj<sup>108</sup>"109. This type of reasoning is identifiable throughout the Judge Presidency of Dove Wilson JP, although after 1920 there was a steady decrease, to be replaced by the refusal to follow certain Natal decisions. Finally, I refer to Inyati Collieries Ltd & others v Elleson<sup>110</sup>, where Dove Wilson JP said that "... as indicated in the course of the argument, we consider ourselves bound by the decision in Bramage and Young v Hands and Licensing Board, Lower Umfolosi<sup>111</sup>, in which the previous cases in this Court which decided that objectors were not parties, and, consequently, had no right to appear in this Court, were held to be binding on us"112.

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104. 1911 NPD 218.

105. 31 NLR 285.

106. 1911 NPD 218 at 219.

107. 1914 NPD 345.

108. 30 NLR 202.

109. 1914 NPD 345.

110. 1921 NPD 72.

111. 1919 NPD 335.

112. 1921 NPD 72 at 73. Cf In re Pletts 1918 NPD 205 and Bramage & Young v Hands & Licensing Board, Umfolosi supra (n 111 above).

A second ascertainable trend was Dove Wilson JP's tendency to follow his own decisions. In Grundy v Schram<sup>113</sup> he said that "as regards the third exception it will be allowed having regard to the terms of Rule 11 of Order 18 and to the decision in Wakefield's case<sup>114</sup>"<sup>115</sup>. In Meseni Mbata v AM Muller<sup>116</sup> he said that "I do not think there has been any failure of substantial justice in that respect, but, at the same time, I would repeat what I said in the case of Nomoya v Ekstein<sup>117</sup>..."<sup>118</sup>. Finally, in Brown v Brown<sup>119</sup>, he said that "the common law is clear and was laid down in this Court in Reeves v Bowker<sup>120</sup>"<sup>121</sup>.

A third trend was that of referring to cases in which Dove Wilson JP's predecessors had delivered the judgment. Concerning his most recent predecessor, Sir Henry Bale<sup>122</sup>, he said in Mahomed Goolam v Pietermaritzburg Town Council<sup>123</sup> that "I do not think that we need to go beyond the opinion expressed by the Chief Justice in Koovarjee's<sup>124</sup> case ..."125. He expressed a similar opinion in Lloyd v Rex<sup>126</sup> when

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113. 1916 NPD 12.

114. 1911 NPD 144.

115. 1916 NPD 12 at 14. Cf Verachia v Klip River Licensing Board 1916 NPD 294.

116. 1918 NPD 135.

117. 1914 NPD 350.

118. 1918 NPD 135 at 137.

119. 1920 NPD 248.

120. 1919 NPD 258.

121. 1920 NPD 248 at 250. Cf Rawat v Licensing Board, Pietermaritzburg 1917 NPD 458; Shaik Amod v Immigrants' Appeal Board 1919 NPD 85; Young v Inspector of Police, Durban 1919 NPD 97; Jadwat NO v SAR & H 1923 NPD 433; Heenan v Gidhari 1924 NPD 55; ZuLuland Cotton Fields Ltd v Ndumu Ltd 1926 NPD 85.

122. Generally cf Spittler op cit 39ff.

123. 1911 NPD 501.

124. 27 NLR 255.

125. 1911 NPD 501 at 502.

126. 1920 NPD 19.

he said that "it is apparent from the cases to which we have been referred that it is now taken for the first time, although it may be conjectured that in one, at any rate, of the cases, Drew v Rex<sup>127</sup>, it was in the mind of the late Chief Justice, although it was not necessary to decide it"<sup>128</sup>. Dove Wilson JP approved the judgment of Sir Henry Gallwey<sup>129</sup> in the case of Newmarch v Rohrs<sup>130</sup>. Generally, however, Dove Wilson JP confined his reference to Natal Chief Justices to Sir Henry Connor<sup>131</sup>, who was highly regarded not only in Natal but throughout South Africa. In Sokela v Cadle<sup>132</sup> Dove Wilson JP said that "in my opinion this case is ruled by the decision in Willis v Gepu<sup>133</sup> in which the judgment of Connor CJ may be applied in terms to the present case"<sup>134</sup>. In Newcastle Colliery Company v Newcastle Corporation<sup>135</sup> he said that "in the Clairmont Brick Co case<sup>136</sup> we have the opinion of Connor CJ that a railway similar to this is, prima facie at any rate, immovable property"<sup>137</sup>. Then in Narsi Nagar v Pietermaritzburg<sup>138</sup> he stated that "the words of the late Sir Henry Connor ... are in point"<sup>139</sup>. And, in Muniammah v Kullu<sup>140</sup>, he said that

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127. 24 NLR 397.

128. 1920 NPD 19 at 20.

129. Generally cf Spiller op cit 37f.

130. 1914 NPD 430.

131. Generally cf Spiller op cit 31f.

132. 1914 NPD 541.

133. 5 NLR 203.

134. 1914 NPD 541 at 543.

135. 1916 NPD 245.

136. 6 NLR 158.

137. 1916 NPD 245 at 253.

138. 1917 NPD 23.

139. At 27.

140. 1917 NPD 352.

"the doubt expressed by Connor CJ in Protector of Immigrants v Millar<sup>141</sup>, as to whether in such circumstances he could thereafter be regarded as within the Coolie law as an Indian immigrant is, in my opinion, justified ; and I agree that it would be as if he had never left India ..."<sup>142</sup>.

Finally, in Ex parte Kozinsky<sup>143</sup>, Dove Wilson JP commented that "I fail to gather from any of the cases which have been referred to what the legal or practical result of such rehabilitation is ; and the reasoning of Connor CJ in the case of SA Loan, Mortgage and Mercantile Agency Ltd v Birkett<sup>144</sup>, appears to me to be left untouched and to be unanswerable"<sup>145</sup>.

The above cases indicate that Dove Wilson JP was unrestrained in his application of cases in which Connor CJ had delivered judgment. The only exception was in Longworth v Henwood<sup>146</sup> where Dove Wilson JP referred to the case of Cole v Houston<sup>147</sup>. He commented that "the decision as reported is simply this : 'Connor CJ considered that the rule was a salutary one, and that the Master's ruling on the taxation should be sustained'. That is a very bare and unsatisfactory report, but it suggests to my mind that had the Chief Justice considered that the rule was not a salutary one he would not have considered himself bound by it"<sup>148</sup>.

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141. 1875 NLR 37.

142. 1917 NPD 352 at 359.

143. 1924 NPD 243.

144. 6 NLR 77.

145. 1924 NPD 243 at 244.

146. 1911 NPD 420.

147. 8 NLR 244.

148. 1911 NPD 420 at 421.

On a limited number of occasions, Dove Wilson JP distinguished or declined to follow the past decisions of the Natal Court. In Garlick & Co v Anderson<sup>149</sup> he said that "I do not agree with the decision in In re Ballance<sup>150</sup> that notice of such publication is not an act of insolvency ..."<sup>151</sup>. Eight years later, in Dominican Convent v South Shepstone Local Board<sup>152</sup> he considered that

"on the question of the extent to which the buildings can be said to be for church or school purposes, I am bound to say that I have felt some hesitation in accepting the decision in Usherwood's case<sup>153</sup> as conclusive, looking to the difference of the wording of the section then under consideration. In my opinion there is much to be said for the view that buildings which are necessary to the carrying on of the school in the sense of housing the staff who have to provide the education, and the pupils who are there to be educated, with the necessary accommodation for their sleeping and feeding, fall within the category of buildings which are used for school purposes ; especially where, but for its existence as a boarding school, there would be no school at all, either for boarders or day scholars"<sup>154</sup>.

Finally, in Union Share Agency & Investment Ltd v Madsen<sup>155</sup>, Dove Wilson JP submitted reasons why he was not prepared to follow a Natal case when he concluded that "I am aware there is a reported decision of this Court, Sparks & Young Ltd v Bennett<sup>156</sup>, which is to the contrary effect. But no reasons appear to have been given, and no authority was cited, and in these circumstances I am not prepared to follow it"<sup>157</sup>.

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149. 1915 NPD 209.

150. 13 NLR 53.

151. 1915 NPD 209 at 212.

152. 1923 NPD 391.

153. 5 NLR 336.

154. 1923 NPD 391 at 395.

155. 1927 NPD 439.

156. 1922 NPD 357.

157. 1927 NPD 439 at 445.

I next consider the use of Natal decisions in conjunction with other South African cases. In some cases a wide variety of authorities were canvassed, as in Hunt, Leuchars & Hepburn Ltd In re Jeansson<sup>158</sup> : Marcus' Executor v Mackie, Dunn & Co<sup>159</sup>; Fick v Bierman<sup>160</sup>; Natal Bank v Natorp<sup>161</sup>; Derbyshire v Vear<sup>162</sup>; Van Niekerk v Van Noorden<sup>163</sup> and In re Grandin<sup>164</sup>. Dove Wilson JP continued to support the judgments of Connor CJ. This can be seen in the case of Union Government v Diedricks<sup>165</sup> where he said that

"I am unable to distinguish this case from Col.Treas v Coetzer<sup>166</sup> and I would refer in particular to the statement of the late Sir Henry Connor at 42 ... The principle of that case has been affirmed in subsequent decisions in Natal, and is supported by De Villiers v Cape Divisional Council<sup>167</sup> and Binda v Colonial Government<sup>168</sup>. I therefore think the exception falls to be upheld"<sup>169</sup>.

However, there were also times when, in the face of other authority, Dove Wilson JP did not follow the dicta of Connor CJ. Such a case was Henley's Trustee v Henley<sup>170</sup> :

"The amount claimed being a gift from husband to wife, the only defence which has been urged to the recovery of the money from the wife by the trustee in the husband's insolvency is that although a husband may revoke gifts to his wife, the power of doing so does

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158. 1911 NPD 493.

159. 11 EDC 29.

160. 2 Juta 26.

161. 1908 TS 1016.

162. 8 NLR 139 (Connor CJ).

163. 17 SC 63.

164. 15 NLR 61.

165. 1915 NPD 458.

166. 1872 NLR 40.

167. 1875 Buchanan.

168. 5 Juta 284.

169. 1915 NPD 458 at 461f. Cf Gagniere & Co v Stonier & Holland 1914 NPD 186 at 187f.

170. Cf n 24 above.

not pass to his trustee in insolvency. That contention is based upon some dicta of Sir Henry Connor in the case of William's Estate v Williams<sup>171</sup>. But in my opinion the law is too well settled to permit of argument. A long series of decisions, of which Van der Byl's Assignees v Van der Byl<sup>172</sup> and Van Niekerk's Trustee v Van Niekerk<sup>173</sup> may be taken as types, and the law as stated by Voet 24.1.1. et seq have put it beyond a doubt that gifts by one spouse to another stante matrimonio are void ... That, I think, is a general statement of the law which must be applied to this case, and if there is anything in the case of William's Estate v Williams supra to the contrary, it must be disregarded"<sup>174</sup>.

In Ex parte Cumming<sup>175</sup> the main judgment was delivered by Tatham J.<sup>176</sup> Dove Wilson JP replied that

"I regret that I entertain too much doubt on the matter to feel warranted in concurring. By the common law as judicially interpreted in Natal - I refer to the decisions of Connor CJ in Shepstone v Neil<sup>177</sup> and Button v Archbell's Trustees<sup>178</sup> - it would appear that no such thing as natural guardianship, either in the father or the mother, was recognised, and so far at any rate as the mother is concerned, that view has ever since consistently been given effect to. Elsewhere in South Africa, however, and certainly in the Cape and Transvaal, a contrary view of the common law has prevailed. See Van Rooyen v Werner<sup>179</sup>; In re Brown<sup>180</sup>; and Master v Castellain<sup>181</sup> ... In these circumstances it seems to me that there is much to be said for the view that the law on the matter must now be taken to be the same throughout South Africa and to be as stated by De Villiers CJ in the case of Van Rooyen supra (due to the Administration of Estates Act 24 of 1913). But, as my brethren are agreed to the contrary, it is unnecessary for me to express a definite view on the point ; and, having

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171. 7 NLR 93.  
172. 5 CSC 170.  
173. 17 CSC 470.  
174. 1926 NPD 119 at 126f.  
175. 1923 NPD 405.  
176. Carter J concurred.  
177. 1869 NLR 9.  
178. 1868 NLR 318.  
179. 9 CSC 425.  
180. 11 CSC 207.  
181. 1911 TPD 763.

regard to the limited time for consideration which has been at my disposal, I prefer not to do so, but to content myself with saying that I feel too much doubt, as at present advised, to concur in their decision"<sup>182</sup>.

The above case is evidence of Dove Wilson JP's esteem for the work of De Villiers CJ in the Cape<sup>183</sup>. This can also be seen in Walker v Walker<sup>184</sup> where he quoted the words of Lord de Villiers in the case of Van Breda<sup>185</sup> as followed in Strydom v Strydom's Trustees<sup>186</sup> "and recently in our Court in the case of Executors of Leathern v Edwards & others<sup>187</sup>"<sup>188</sup>. In Yenka Reddy v Naidoo<sup>189</sup> he expressed his esteem for the Court of Innes CJ when he said that "the case seems to me to approximate closely to the case of Meyer v Legge<sup>190</sup>, which has not been referred to in the argument ... It has been argued that the present case is indistinguishable from the case of Wilson v O'Halloran<sup>191</sup> ... I think the case is quite distinguishable from the present one"<sup>192</sup>.

The cases which I have referred to show that Dove Wilson JP cited authorities from other provinces often in conjunction with decisions from Natal. Illustrations have been provided of instances where Natal cases were followed or set aside in favour of enlightened views from

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182. 1923 NPD 405 at 409.

183. Cf 167, 172.

184. 1916 NPD 23.

185. 7 CSC 360.

186. 11 CSC 425.

187. 1915 NPD 404.

188. 1916 NPD 23 at 29.

189. 1916 NPD 210.

190. 1909 TS 226.

191. 20 NLR 155.

192. 1916 NPD 210 at 214 and 216. Cf Whittet v O'Connor 1918 NPD 376 and Clerk v Registrar of Deeds 1922 NPD 10.

elsewhere. Frequently, however, no Natal cases were referred to by Dove Wilson JP.

It remains now to consider more closely the South African cases (other than those from Natal) referred to by Dove Wilson JP. Some indication has already been given of his high regard for Lord de Villiers, the Chief Justice<sup>193</sup>. In referring to Cape cases, Dove Wilson JP canvassed not only the reports of the Cape Supreme Court, but also the reports of The Cape Times<sup>194</sup>. As an example of the latter I refer to Berry v Berry<sup>195</sup> where Dove Wilson JP could not find Natal authority. He therefore said that "so far as I know, the only case reported anywhere is the one referred to by counsel, Robbins v Robbins<sup>196</sup>. But that case has the very high authority of the late Chief Justice, Lord de Villiers"<sup>197</sup>. It should not be implied from this that Dove Wilson JP always followed cases in which Lord de Villiers had presided. In Marshall v Marshall's Executors & Hill<sup>198</sup> he said that "but for the last clause of the provision there might be more ground for the argument that the rule laid down in Censura Forensis and referred to by De Villiers CJ in Human v Human's Executors<sup>199</sup> and in the case of Wannenburg v Le Roux<sup>200</sup> is applicable here ..."201.

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193. Cf 166, 172.

194. Cf Vawda & Co v Vawda & Sons 1914 NPD 50; Taylor Bros Ltd v Blackhurst (II) 1917 NPD 69; Fernando v Naidoo 1918 NPD 340.

195. 1924 NPD 161.

196. 20 CTR 2.

197. 1924 NPD 161 at 162.

198. 1914 NPD 548.

199. 10 SC 176.

200. 12 SC 383.

201. 1914 NPD 548 at 553. Cf Henrichs v Chief Constable, Pietermaritzburg 1916 NPD 65.

From time to time Dove Wilson JP also referred to earlier reports of the Cape Supreme Court. In Lujoko v Symmonds<sup>202</sup> for example, he referred to a case reported in Buchanan's Reports<sup>203</sup>. He cited a case reported by Juta in Hellet v SAR & H<sup>204</sup> and one reported by Searle in Innes-Grant v Kelsey<sup>205</sup>. On a few occasions, Dove Wilson JP only referred to cases from the Cape Supreme Court, for example in Gifford NO v Owen, Hopley, Arnold & Fagaza<sup>206</sup>, where he referred to three decisions<sup>207</sup>.

After Union Dove Wilson JP still referred to cases from the Cape Provincial Division. In Farrer, F & FA v Rex<sup>208</sup> he said that "the point is one which I do not remember being taken in this Court before; but I am of the opinion that the practice which the authorities show is followed in the Cape [in Rex v Roodtt<sup>209</sup>] ... is a convenient one, and one which we ought to follow"<sup>210</sup>. In Smith & another v Bird & others<sup>211</sup> he said that "... the case of Van Deventer & others v The Master & another<sup>212</sup> is direct authority, which I accept, for allowing

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202. 1911 NPD 326.

203. 1876 Buch 51. Cf Handley & others v Handley & others 1919 NPD 154; Poynton & others v Stranack & others 1919 NPD 263; McIntosh & Co v English, Scottish & Australian Bank Ltd 1921 NPD 87.

204. 1927 NPD 65. Cf Alagerysamy v Kvalsvig 1912 NPD 25; Steiger v Union Government supra (n 24 above); Chaimowitz v Balgowan Trading Co 1927 NPD 36; Ex parte Trustees MH Adam 1927 NPD 314.

205. 1924 NPD 268.

206. 1916 NPD 197.

207. Cf also McGregor v Weinbaum & Co 1913 NPD 9; Sparks & Burford v Durban Corporation 1916 NPD 439; Natal Cambrian Collieries v Durban Collieries 1925 NPD 27; Strachan v Nel 1929 NPD 273; Rex v Sheik Abdool 1920 NPD 110; Hooper v Moore & Varty 1921 NPD 96.

208. 1914 NPD 521.

209. 1912 CPD 606 at 613.

210. 1914 NPD 521 at 524.

211. 1924 NPD 381.

212. 1914 CPD 9.

the exception [he quoted from the judgment of Maasdorp JP]"<sup>213</sup>.

Dove Wilson JP also referred fairly frequently to the decisions of the Eastern Districts Court. In Dingley v Cornforth<sup>214</sup> he said that "I think the sale must be regarded as a sale ad corpus or en bloc (Voet 18.1.7.). This passage is explained by Kotze J in Dicks<sup>215</sup>"<sup>216</sup>. Similarly, in Swart v Swart<sup>217</sup>, he said that "that is the order which was made in the case of Gerike v Gerike<sup>218</sup>, and we think that that is the order which should be made in the present case ...<sup>219</sup>.

Almost as popular as the dicta of De Villiers CJ were those of Innes CJ of the Transvaal Supreme Court<sup>220</sup>. In the case of Pillay v Yeanamoothoo<sup>221</sup> Dove Wilson JP said that

"In the case of Affhauser v MacLeod<sup>222</sup> Innes CJ

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213. 1924 NPD 381 at 383. Cf Tremearne v Rex 1917 NPD 117; Howard v Rex 1917 NPD 192; Jones & Greene v Rex 1919 NPD 266; Rex v Stevens 1920 NPD 270; Muller v ChenneTs 1923 NPD 69; Hayes v Field 1923 NPD 311; Ex parte Thomas 1924 NPD 303; Liquidators Union Share Agency v Spain 1927 NPD 348; Padayachee & others v Parak & Sons 1927 NPD 393.

214. Cf n 23 above.

215. 23 EDC 178 at 183.

216. 1917 NPD 386 at 389.

217. 1924 NPD 104.

218. 14 EDC 113.

219. 1924 NPD 104 at 106. Cf Dunsterville v Rex 1916 NPD 1; Epselman v Chief Constable, Pietermaritzburg 1918 NPD 294; Estate Reeves v Bowker & others supra (n 120 above); African Theatres Trust Ltd v Estate McCubbin 1919 NPD 277; Rex v Dayasingh & Subjoo 1920 NPD 236; McIntosh & Co v English, Scottish & Australian Bank supra (n 203 above); Trystam v Knight 1922 NPD 186; Tshabalala v Van der Merwe supra (n 24 above); Rampersad v Goberdun 1929 NPD 32.

220. Cf 173.

221. 1917 NPD 156.

222. 1909 TS 827.

carefully guarded himself from holding that our law draws any distinction between cases in which the contract has been partially performed and cases where it has not ; and he added, 'There seems to me much authority the other way to the effect that no person can invoke the assistance of the Court to reclaim money, which on his own showing, has been paid for a turpis causa, to which he was a party'"<sup>223</sup>.

In Peters v Peters<sup>224</sup>, Dove Wilson JP said that " in so far as the plaintiff claims restitution of conjugal rights, I think we must follow the case of Smit v Smit<sup>225</sup>, where Innes CJ said ..."<sup>226</sup>. Finally, in Texas Co (SA) Ltd v Webb & Tomlinson<sup>227</sup>, he said that "the principles of construction applicable to the interpretation of a document like this are clearly set out in Glenn Bros v Commercial General Agency Co Ltd<sup>228</sup> by the Chief Justice ..."<sup>229</sup>. Aside from the cases which I have referred to, there were several other instances where Dove Wilson JP referred to cases from the Transvaal prior to Union<sup>230</sup>.

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223. 1917 NPD 156 at 158. Dove Wilson JP referred to the case of Dodd v Hadley 1905 TS 439 on several occasions : cf Yenka Reddy v Naïdoo supra (n 189 above); Whittet v O'Connor supra (n 191 above);  
Biljoen v Petersen 1922 NPD 63.
224. 1924 NPD 223.
225. 1909 TS 1067.
226. 1924 NPD 223 at 224. Cf Rex v Van der Merwe 1927 NPD 446 at 446f.
227. 1927 NPD 24.
228. 1905 TS 740.
229. 1927 NPD 24 at 25.
230. Cf Umzana v Schroenn 1911 NPD 356; Adam & others v Dada & others 1912 NPD 109; In re the SS Mangoro 1913 supra (n 8 above); Nicholson v Sparks & Young Ltd 1913 NPD 506; Rex v Cox 1914 NPD 340; Trustee Insolvent Estate Kuhn v Kuhn & Kuhn 1915 NPD 79; Dunsterville v Rex supra (n 219 above); Howard v Rex supra (n 212 above); Douglas v Macnamara 1918 NPD 201; Patel v Rex 1919 NPD 39; Trystam v Knight supra (n 218 above); Clerk v Registrar of Deeds supra (n 191 above); Smart & others v SAR & H 1928 NPD 361; Sulaman & Co v Vahed 1928 NPD 492.

Dove Wilson JP occasionally referred only to cases from the Transvaal Provincial Division. In Du Plessis v Levy<sup>231</sup> he said that "the effect of the authorities is, I think well summed up in the case of Mackay v Ballot<sup>232</sup> ..."233. He also referred specifically to the judgment of Mason J<sup>234</sup> on occasion, for example, in Petzer v Rex<sup>235</sup>. Then in Rex v Balishi & another<sup>236</sup> he said that on a particular issue ... we should be guided by the decision in Rex v Van Heerden<sup>237</sup> (Mason J)"238. In Driman v Rex<sup>239</sup> Dove Wilson JP quoted from the judgment of Wessels J<sup>240</sup>. Aside from these specific examples, Dove Wilson JP also referred to many Transvaal cases in conjunction with other judgments<sup>241</sup>. It was extremely rare for Dove Wilson JP to refer to

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231. 1925 NPD 249.

232. 1921 TPD 430.

233. 1925 NPD 249 at 252. Cf Robinson v Durban Corporation 1916 NPD 436; Rex v Maloo Singh 1922 NPD 5; Goolam v Rex 1924 NPD 246; Graf & Co v Bassa 1925 NPD 1; Solomon v Robinson & Co Ltd 1927 NPD 125; Ismail v Rex 1927 NPD 14; Rex v Bantu Zonde 1927 NPD 131; Motala & others v SAR & H 1928 NPD 361.

234. Cf 19.

235. 1924 NPD 100 at 102.

236. 1925 NPD 331.

237. 1920 TPD 195.

238. 1925 NPD 331 at 333f. But cf Gabuza v Union Government 1916 NPD 320 where Dove Wilson JP said that the case of Van Rhyndeep Gold Mining Co Ltd v the Director of Native Labour (1915 WLD 94 - Mason J) "does not appear to me to support the proposition in aid of which it was cited" (at 326).

239. 1920 NPD 102.

240. In Rex v Menear 1911 TPD 506.

241. Cf Howard v Rex supra (in 212 above); Rudolph v The Executors Estate Rudolph (in 24 above); Amod Bayat v Doherty 1919 NPD 44; The Rand Indent Ltd v The Master & owners SV Motherland supra (in 44 above); Jones & Greene v Rex supra (in 212 above); Rex v Stevens supra (in 212 above); Sikes v Rex 1925 NPD 39; Hallet v SAR & H supra (in 204 above); Padayachee & others v Parak & Sons supra (in 212 above); Hattingh v Booth 1928 NPD 339.

judgments from Griqualand<sup>242</sup> or from the Orange Free State<sup>243</sup>.

It remains now to consider the impact of the Appellate Division on the judgments of Dove Wilson JP. The first case in which he cited such authority was Drew & Deacon v Pietermaritzburg Town Council<sup>244</sup> :

"... I think it must be taken that the Town Council had knowledge of the decision of the Appellate Division which, in the case of the Town Council of Pietermaritzburg v SAB Ltd<sup>245</sup>, was obtained at their own instance. It seems to me that I cannot come to any other conclusion than that the Town Council disregarded the decision of the Appellate Division that market value is the true criterion of value, and if they adopt an obviously different criterion they cannot bring themselves within the decision merely by calling it market value"<sup>246</sup>.

In line with his respect for De Villiers CJ of the Cape he began to refer to the judgments of the same judge in the Appellate Division. This can be seen in Trustee Insolvent Estate Kuhn v Kuhn & Kuhn<sup>247</sup> where he had to decide whether an order was interlocutory or final<sup>248</sup>. He resolved this dilemma as follows :

"It is by no means an easy thing to lay down any precise definition which will fit all possible cases, but I think that the test to be applied is that suggested by De Villiers CJ in the case of Steytler v Fitzgerald<sup>249</sup> :

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242. Cf Rex v Balishi & another supra (n 236 above).

243. Cf Harmsworth v Smith 1928 NPD 174; Ex parte Bretherton 1928 NPD 316; Kruger v Wartski 1928 NPD 475.

244. 1913 NPD 184.

245. 1911 NPD 501.

246. 1913 NPD 184 at 190f.

247. Cf n 230 above.

248. Cf 81.

249. 1911 AD 295. Cf Douglas v Macnamara supra (n 229 above)

'The test would be simplified and would not be less sound if put in this way : Whether on the particular point in respect of which the order is made the final word has been spoken in the suit, or whether in the ordinary course of the same suit, the final word has still to be spoken'"<sup>250</sup>.

Likewise, when Innes CJ became Chief Justice on Lord de Villiers' death, Dove Wilson JP referred specifically to his judgments. In Rex v Clarke<sup>251</sup> he said that "to these circumstances the words of Innes CJ in the recent case of Hulley v Cox<sup>252</sup> are applicable almost in terms ..."<sup>253</sup>. Similarly, in Rex v Msindo<sup>254</sup>, he referred to what "... has been pointed out by the present Chief Justice in Ntuli v Ntuli<sup>255</sup>..."<sup>256</sup>.

At other times Dove Wilson JP would not refer to a specific judgment but say, as he did in Maydon v Union Government<sup>257</sup>, that "the law on that point has been more than once clearly and definitely laid down in Union Government v Buur<sup>258</sup> and Forde's case<sup>259</sup>..."<sup>260</sup>. In Caro v

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250. 1915 NPD 79 at 82.

251. 1924 NPD 343.

252. 1923 AD 234 at 243.

253. 1924 NPD 343 at 345.

254. 1927 NPD 71.

255. 1921 AD 276 at 281.

256. 1927 NPD 71 at 72. Cf Handley & others v Handley & others supra (n 202 above); Sikes v Rex supra (n 240 above); Dry v Durban Corporation 1929 NPD 209.

257. 1916 NPD 497.

258. 1914 AD 291.

259. 1913 AD 482.

260. 1916 NPD 497 at 501.

CIR<sup>261</sup> he said that "... the parties are agreed, and we see no reason to differ, that this case is governed by the decision in Hamilton v CIR<sup>262</sup>"<sup>263</sup>. Then in Smart & others v SAR & H<sup>264</sup> he said that "it is well settled (Hulley v Cox<sup>265</sup>) that the compensation to which the plaintiffs are entitled is only for the material loss caused to them by the accident, and not for mental suffering or distress, or to improve their material prospects"<sup>266</sup>.

Dove Wilson JP also cited obiter dicta of Appellate Division judges. In In re Estate JW MacKenzie ex parte Executors<sup>267</sup> he said that "any difficulty in the question is, I think, set at rest by the opinions of the judges of the Appellate Court in the case of Estate Reid & another v Goodwin<sup>268</sup>..."<sup>269</sup>. In Pillay v Licensing Officer, Umkomaas and another<sup>270</sup> he stated that "the cases which define the limits within which the Court can interfere are Union Government v Fakir<sup>271</sup> [and] Narainsamy v Principal Immigration Officer<sup>272</sup>..."<sup>273</sup>. On one occasion, in Lucas v Wilkinson & others<sup>274</sup>, Dove Wilson JP referred to a case from the Appellate Division not yet reported<sup>275</sup> to support what

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261. 1922 NPD 223.

262. 1921 AD 1.

263. 1922 NPD 223 at 225.

264. Cf n 230 above.

265. 1923 AD 234. Cf Trevor-Smith v Walters 1928 NPD 351.

266. 1928 NPD 361 at 362.

267. 1924 NPD 58.

268. 1920 AD 367. He quoted from the judgments of Innes CJ and Maasdorp JA.

269. 1924 NPD 58 at 60.

270. 1930 NPD 111.

271. 1923 AD 466.

272. 1923 AD 673.

273. 1930 NPD 111 at 116.

274. 1926 NPD 10.

275. Fernandez v SAR & H.

he had said<sup>276</sup>.

Dove Wilson JP did not follow Appellate Division authority unless it was in point. In Burman & others v Davis<sup>277</sup> he said that

"I am aware that in the case of Durban Corporation v Whittaker<sup>278</sup> the appellant succeeded in the Court of Appeal on a point which was there taken for the first time and was given his costs both there and in the Court below. But in Whittaker's case there was nothing to show that the costs of appeal were incurred because the point had not been taken in the Court below. In the present case everything goes to show that if the point had been taken in the Court below there would have been no appeal"<sup>279</sup>.

In referring to Dove Wilson JP's attitude to cases from the Appellate Division I have tried to show the varying ways in which he cited such authority<sup>280</sup>. In conclusion, I consider his growing use of South African textbooks. It has already been seen that he drew considerably on legal scholarship from overseas, primarily England. The reasons for this were that these were well established and extensively used

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276. 1926 NPD 10 at 20.

277. 1921 NPD 23.

278. 1919 AD 195.

279. 1921 NPD 23 at 28. Cf Union & Rhodesia Wholesale Ltd (Liquidators of) v Norrish Co-operative Service Ltd (Liquidators of) and others 1924 NPD 169.

280. Cf Bakus v Ladysmith Corporation 1914 NPD 469; Royston v Dennis 1915 NPD 74; Pretorius v Eksteen 1916 NPD 148; Omar v Ixopo Licensing Board 1916 NPD 550; Coll v Murray NO 1917 NPD 222; Vickers v Union Government 1917 NPD 235; Meyer v Galbraith 1920 NPD 256; Administrator of Natal & others v Durban Corporation 1922 NPD 128; Natal Mill & Elevator Co Ltd v Durban Corporation 1922 NPD 205; Reddy v Johnson 1923 NPD 190; Dhanpaul v Rex 1924 NPD 95; Cartledge v Plowman NO 1924 NPD 87; Cordy & others v Watt & others 1925 NPD 42; Harbottle v Receiver of Revenue 1926 NPD 49; Standard Bank of SA v Estate CJ Van Rooyen 1927 NPD 300; Peer v Ladysmith Town Council 1927 NPD 429; In re Estate Shaw 1928 NPD 214; Ex parte Windsor 1928 NPD 319; Ferreira v Bruyns Hill Cash Store 1928 NPD 336; Robertson v SA Medical Council 1929 NPD 81.

already and that there was a dearth of South African textbooks, particularly in the earlier years of his Judge Presidency. When textbooks became available he referred to them in the course of his judgments<sup>281</sup>.

The criticism usually levelled at Dove Wilson JP's predecessors is that they maintained too fiercely the independence of the Natal Court, and very often excluded authority from the other colonies. Dove Wilson JP showed a balanced approach, referring to Natal cases when he could, but often not to the exclusion of other cases. He was equally unbiased in his approach to English and South African cases generally. Indeed his survey of South African law was both generous and far-reaching, and showed an intelligent grasp of contemporary developments in the law. An earlier tendency to refer perhaps too frequently to English case law was replaced over a comparatively short period of time by a more selective approach. A possible criticism is that Dove Wilson JP sometimes did not refer to sufficient authority, usually because he was inclined to pursue his own view too vigorously. But the overall impression remains of a judge whose handling of legal sources was careful, thorough and catholic.

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281. Cf Appendix B.

## Conclusion

In the preceding chapters of this thesis, my aim has been to evaluate different facets of the judicial career of John Carnegie Dove Wilson. This has also encompassed his work as an Acting Additional Judge of Appeal<sup>1</sup> and as Judge President of the Special Treason Court of 1922<sup>2</sup>. I shall now assess the extent of his legacy to South African law and, more specifically, the legal process in Natal. In realistic terms, Dove Wilson JP did not bequeath a legacy which equals that left by figures like Lord de Villiers and Sir James Rose Innes. But then it must be remembered that Dove Wilson JP remained Judge President until his retirement, unlike De Villiers and Rose-Innes who became Chief Justices of South Africa<sup>3</sup>. The evaluation thus has to be guided by the parameters of his position. It must also be realised that the area of influence of the Judge Presidents after Union was not as extensive as that of the Chief Justices prior to Union.

Dove Wilson JP's judgments, delivered during his Judge Presidency, have played a small but significant role in the development of South African law. Certain of his judgments were cited by later judges as correct and authoritative statements of South African law. Thus, in Bydewell v Chapman NO<sup>4</sup>, Van den Heever JA approved the statement of the law by Dove Wilson JP in Ex parte Trustees Adam<sup>5</sup>. Likewise,

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1. Cf 135f.
  2. Cf 109ff.
  3. Generally see Corder op cit.
  4. 1953 (3) SA 514 (A).
  5. 1927 NPD 314.

Broodryk v Smuts NO<sup>6</sup> approved Dove Wilson JP in Steiger v Union Government<sup>7</sup>. Other judgments have remained standing authorities of the law, as revealed in current South African legal texts. Boberg in his casebook on persons<sup>8</sup> referred to the case of Baddeley v Clarke<sup>9</sup> in detail, and quoted both the facts and the judgments of Tatham J and Dove Wilson JP<sup>10</sup>. Hahlo<sup>11</sup> quoted from Schnaar v Jansen<sup>12</sup> : "As Dove Wilson JP remarked ... where the man sought to repudiate the contract of engagement because he found his fiancée's family unsatisfactory, 'if a man engages himself to a woman without having satisfied himself as to her relatives he takes the risk of their being unsatisfactory'"<sup>13</sup>. Burchell and Hunt<sup>14</sup> in their section on the crime of conspiracy quoted the case of R v Harris<sup>15</sup> as the leading case : "R v Harris has gone unchallenged in South Africa and the correctness of the decision could be doubted only if objective agreement was sufficient, which does not appear to be the case in our law"<sup>16</sup>. Baxter<sup>17</sup> referred as follows to Dove Wilson JP's judgment in In re Daya Ratanjee<sup>18</sup> : "In South Africa there were some outspoken judicial protests, most notably by Dove Wilson JP, in the Natal case of In re Daya Ratanjee ..." <sup>19</sup>. Finally, Silberberg discussed the case of Cato

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6. 1942 TPD 47.

7. 1919 NPD 75.

8. PQR Boberg The law of persons and the family (1977).

9. 1923 NPD 306.

10. Boberg op cit 575f.

11. HR Hahlo The South African law of Husband and Wife (1985).

12. 1924 NPD 218.

13. Hahlo op cit 51.

14. EM Burchell & PMA Hunt South African Criminal Law and Procedure (Vol I)(1983).

15. 1927 NPD 330.

16. Burchell & Hunt op cit 486.

17. LG Baxter Administrative Law (1984).

18. 1913 NPD 467.

19. Baxter op cit 194.

v Alion & Helps<sup>20</sup> in some detail in his section on "other potential limited real rights"<sup>21</sup>. There are also judgments, such as Executor, Estate Komen v De Heer<sup>22</sup>, which are still referred to but which date from Dove Wilson's time as puisne judge<sup>23</sup>.

However, in order to give credibility to this impression, it should be stated that there were also times when judgments of Dove Wilson JP were not followed. Thus the Appellate Division<sup>24</sup> expressly disapproved the judgment of Dove Wilson JP in Dyer v Dickson<sup>25</sup>. Hoffmann and Zeffertt<sup>26</sup> referred to the cases from the Appellate Division as "... curb[ing] the baroque extravagances of the earlier law"<sup>27</sup>. Hunt<sup>28</sup> was critical of Dove Wilson JP on several occasions. When he discussed the procedural aspects of compounding, the learned author commented that "the indictment in R v Cadle<sup>29</sup> was very clumsily worded ... Whether a Court would today take so lenient a view of such a defective indictment is doubtful. Certainly the indictment in Cadle's case is not a model to follow"<sup>30</sup>. This is surprising in view of Dove Wilson JP's normal insistence that the correct procedure be followed<sup>31</sup>. Finally, on the issue of inducing an engagement and

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20. 1922 NPD 469.

21. H Silberberg & J Schoeman The Law of Property (1983) 70.

22. 1907 NLR 583.

23. Cf Spiller op cit 97.

24. R v Van Schaalkwyk 1938 AD 543.

25. 1925 NPD 304.

26. LH Hoffmann & DT Zeffertt The South African Law of Evidence (1981).

27. Op cit 220.

28. PMA Hunt South African Criminal Law & Procedure (Vol II)(1982).

29. 1914 NPD 356.

30. Hunt op cit 177.

31. Cf 79f.

intercourse by fraud, Hunt referred to R v Howard<sup>32</sup> and concluded that "...[the accused] was convicted of crimen iniuria by the Natal Court, a decision which Melius de Villiers<sup>33</sup> described as having carried 'the principle of crimen iniuria to an extravagant and perhaps unjustifiable length'"<sup>34</sup>.

In an earlier chapter<sup>35</sup> I deferred seeking an explanation as to why Dove Wilson JP was not promoted to the Appellate Division on a permanent basis. Several possible reasons have now emerged. In 1911 the Appellate Division consisted of Lord de Villiers CJ, and Rose-Innes, Solomon, Maasdorp and JAJ de Villiers JJA<sup>36</sup>. Vacancies in the period 1910 - 1930 when they arose were filled as follows : on the death of Lord de Villiers, Innes JA became Chief Justice, and Henry Juta (formerly Judge President of the Cape Provincial Division) was appointed to the Appellate Division<sup>37</sup>. Then when Maasdorp JA retired in 1922, Kotze was appointed Judge of Appeal<sup>38</sup>. The retirement of Juta JA the following year was followed by the appointment of Wessels JA<sup>39</sup>. When Kotze JA retired and Solomon JA was elevated to the Chief Justiceship in 1927, Curlewis JA and Stratford JA<sup>40</sup> were appointed<sup>41</sup>. The common denominator of all these appointments to the Appellate

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32. 1917 NPD 192.

33. 1917 SALJ 318.

34. Hunt op cit 542.

35. Cf 8f.

36. Corder op cit Chapter 2.

37. Op cit 27.

38. Ibid.

39. Ibid.

40. He, like Dove Wilson JP, had served on the Special Treason Court in 1922.

41. Corder op cit 28.

Division was that the men appointed were all born in South Africa, though most of them had some of their university education overseas<sup>42</sup>. Most of them nevertheless completed their secondary education in South Africa (many of them at the South African College, Cape Town)<sup>43</sup>. Further they had all practised at the Bar in South Africa prior to their appointment as judges<sup>44</sup>. Indeed most of them had practised at the Cape Bar, although two amongst them (Stratford and Curlewis JJA) had practised at the Transvaal Bar and one (JAJ de Villiers JA) at the Johannesburg Bar<sup>45</sup>. Thus a possible reason for Dove Wilson JP not being appointed an appeal judge was that his birth, education and practice at the Bar had all been in Scotland rather than in South Africa.

Another consideration would have been that he was not the Roman-Dutch law exponent that the other appellate judges were<sup>46</sup>. Furthermore, while Dove Wilson JP might have accepted promotion in 1922 had the position been offered to him, in 1927 when he was close to retirement he would not have considered accepting. It will be recalled that he did not sit again as an Acting Additional Judge of Appeal after 1923 - perhaps when he realised that he was not going to be offered the vacancy created by the two retirements in 1922 and 1923 respectively. Although his daughter does not ever recall him expressing disappointment at not being made an appeal judge, she does remember

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42. Op cit 25ff.

43. Ibid.

44. Ibid.

45. Ibid.

46. Notably De Villiers CJ and Rose-Innes, Maasdorp and Kotze JJA.

her mother hinting that this was indeed the case<sup>47</sup>.

So far I have considered the value of the work done by Dove Wilson JP in the wider sense, in relation to his legacy to South Africa and possible reasons for the absence of promotion to the Appellate Division. It remains now to evaluate the value of his work in the Natal Provincial Division. It has already been established that the Natal Court of the preceding era was weak and even ineffectual. In 1900 when moves had begun towards a more unified "South African law" (reflected in the establishment of the South African Law Journal), Natal remained insulated to a certain extent from this progress because of a parochial regard for the decisions of her own Court, a tendency to rely heavily on English law (with no major contribution to Roman-Dutch scholarship since the time of Sir Henry Connor), and the failure to find judicial figures who were better than mediocre. This led to the other colonies disregarding the judgments of the Natal Court. The appointment of John Carnegie Dove Wilson as third puisne judge in 1904 had evoked an enthusiastic response from those in Natal<sup>48</sup>. Between this time and Union he showed that he was the most able judge in the Colony. His appointment as Judge President from 1911 brought with it the expectation that he would lead the Natal Court out of its depressed state.

Dove Wilson JP's academic education, extensive practice at the Bar in

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47. Miss S Dove Wilson.

48. Cf (1905) 4 Natal Law Quarterly 1.

Edinburgh and period as puisne judge in Natal ensured that he was well-qualified for the office of Judge President. In the early days of the Natal Provincial Division, Dove Wilson JP played a very prominent role in pronouncing the judgments of the Court and in seeking consensus wherever possible from the other judges<sup>49</sup>. At the same time, (especially during the first decade of his term of office), he was reluctant to depart from the established practice of the Natal Court. In time he acquired sufficient experience and initiative to overrule past Natal cases when he felt that these were not in accordance with new legal developments and were based on archaic practices. He was amenable to consulting cases from other provinces and, where there was binding Appellate Division authority, he duly applied this. On many occasions, he openly expressed his admiration for the judicial officers of the Appellate Division, particularly Lord Henry de Villiers and Sir James Rose-Innes. He was able to distance himself from the hitherto prominent practice of actively using English legal principles, and he was a firm believer in a unified legal system<sup>50</sup>.

Dove Wilson JP had several distinct advantages over his judicial brethren in that he possessed certain abilities which aided the expeditious completion of his work. First, he possessed a retentive and incisive mind which enabled him both to memorise and evaluate evidence whilst he was hearing it. Second, following on from this, he pronounced extempore judgments, thereby reducing the time he might

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49. Cf Chapter 1.

50. (1915) 32 SALJ 205 at 207.

have spent considering the evidence before finally pronouncing judgment. One of his main concerns was that the time of the Court should not be wasted, although there was never any overt indication that a particular case would have benefitted from further deliberation. However, it would be an oversimplification to claim that the majority of judgments delivered by Dove Wilson JP were pronounced extempore, because there are several judgments which were delivered after being written down, particularly when the cases in question were concerned with complicated questions of law. Generally, Dove Wilson JP was fastidious in his scrutiny of evidence presented by counsel, whether this supported or opposed their respective clients. This can also be observed in his concern that the correct procedures should be followed, whether these were in respect of the papers preparing the matter for trial or in the trial proper.

As to the atmosphere prevailing in Dove Wilson JP's Court, Broome offered the following comparison with his successor, Richard Feetham :

"[Feetham] was not like Dove Wilson, a genial extrovert. While Dove Wilson maintained the dignity of the Court by sheer personality, Feetham did so with icy and rather terrifying efficiency ... In another respect, too, I would put [Dove Wilson] at the top, namely in his ability to preside. His dignity was superb. No one ever dreamed of taking a liberty with him, but his touch was light. Never did he have to use the heavy hand"<sup>51</sup>.

Broome had also commented that "... Dove Wilson delivered many

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51. Op cit 115 and 111.

extempore judgments which were a joy to listen to while the relatively few which Feetham delivered were halting and sometimes almost painful to hear"<sup>52</sup>.

Certain failings in Dove Wilson JP's judicial performance have also emerged. Occasionally in criminal cases he allowed his experience as a criminal prosecutor in Edinburgh to impinge on his impartiality towards the defendant. His handling of litigants and legal disputes was sometimes accompanied by a degree of over-detachment and a lack of sympathy<sup>53</sup>. A final possible criticism was his inability at times to supplement his own more individual views with those from the institutional writers, despite his knowledge of Latin<sup>54</sup>.

Nevertheless, on balance, it is clear that Dove Wilson JP provided the Natal Court with important qualities of leadership, scholarship and ability. Unfortunately the view which had become etched in the minds of legal practitioners elsewhere in South Africa was that decisions from Natal could not be relied upon to reflect, accurately, legal developments. It was to be some time before this attitude was superceded by a more responsive attitude to the mostly learned and impartial judgments of Dove Wilson JP.

In their section on the requirements of an able judiciary, Hahlo and

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52. *Op cit* 115.

53. *Cf* 105, 116.

54. In the session 1881-2 Dove Wilson studied Junior Greek and Junior Latin and in that of 1882-3 Senior Greek and Senior Latin - although "his grades were undistinguished" (Ms U.1.,f.170 Aberdeen University Library).

Kahn referred to Robert Traver's thoughts on judgeship :

"Judges, like people, may be divided roughly into four classes : judges with neither head nor heart - they are to be avoided at all costs ; judges with head but no heart - they are almost as bad ; then judges with heart but no head - risky but better than the first two ; and finally, those rare judges who possess both a head and a heart"<sup>55</sup>.

In my submission, Dove Wilson JP possessed a large measure of "head" and a fair measure of "heart". The Court of the future under Richard Feetham was therefore assured of a steady foundation and a respectable tradition on which to build.

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55. Op cit 40.

## APPENDIX A

### English textbooks

1. Benjamin : Sale (in Peabody & Co v Deane 1913 NPD 37).
2. Best : Evidence (in Mpanza v Rex 1915 NPD 197).
3. Bevan : Negligence in Law (in Harmsworth v Smith 1928 NPD 174).
4. Bowstead : Agency (in Ravene Plantations Ltd v Estate H Abrey & others 1927 NPD 174).
5. Brooms : Legal Maxims (in Estate Whittaker v Union Government 1915 NPD 580).
6. Clarke : Extradition (in Buchman v Rex 1914 NPD 114).
7. Dicey : Conflict of Laws (in Estate Seedat v Rex 1916 NPD 535).
8. Foote : Private International Jurisprudence (in Estate Cassim v Cassim 1915 NPD 14).
9. Hall : International Law (in Mahomed & minor son v Immigrants Appeal Board 1918 NPD 7).
10. Halsbury : Laws of England (in Dalys Ltd v Israel & Son 1919 NPD 360).
11. Jarman : Wills (in Cato v Cato 1914 NPD 442).
12. Macnamara : Law of Carriers (in Gurney & Moore v Union Government 1913 NPD 320).
13. Maxwell : Interpretation of Statutes (in Padyachi v Rex 1919 NPD 145).

14. Odgers : Libel and Slander (in Solomon v Robinson & Co 1927 NPD 125).
15. Odgers : Pleadings (in Moothoosamy v Murugan 1919 NPD 402).
16. Phipson : Law of Evidence (in Meyer v Intestate Estate Rudolph 1919 NPD 92).
17. Redman : Arbitration and Awards (in Martens v Le Roux 1917 NPD 411).
18. Renton : Encyclopedia of the Laws of England (in Mahomed supra).
19. Roscoe : Nisi Prius Evidence (in Mahomed v Estate Biddlecomb 1920 NPD 243).
20. Russell : Awards (in Martens v Le Roux supra).
21. Scrutton : Charter Parties and Bills of Lading (in The Rand Indent Ltd v Masters & owners SV Motherland 1919 NPD 121).
22. Stephens : Digest of the Criminal Law (in De Vos v Rex 1919 NPD 398).
23. Stephens : Digest of the Law of Evidence (in Mpanza v Rex supra).
24. Stephens : History of Criminal Law (in Akbar v Rex 1915 NPD 497).
25. Story : Agency (in In re Estate King 1911 NPD 505).
26. Story : Conflict of Laws (in In re the SS Mangoro 1913 NPD 67).
27. Theobald : Wills (in Landers' Tutors v Estate Landers & others 1923 NPD 385).

28. Williams : Bankruptcy Practice (in Foss v Woolridge & Co  
1916 NPD 100).
29. Wills : Circumstantial Evidence (in Mpanza v Rex  
supra).
30. Woodfall : Landlord and Tenant (in Odendaal & others v  
Elandslaagte Collieries Ltd 1914 NPD 424).

## APPENDIX B

### South African textbooks

1. De Villiers : Law of Injuries (in Howard v Rex 1917 NPD 192).
2. Gardiner & Lansdown : Criminal Law and Procedure (in Rex v Sheik Abdool 1920 NPD 110).
3. Jutta : Wills (in In re Estate GD Lalla 1922 NPD 18).
4. Maasdorp : Institutes (in Mahomed v Estate Biddlecomb 1920 NPD 243).
5. MacKeurtan : Sale (in Rosslor v Vos 1925 NPD 266).
6. Van Zyl : Practice (in Burgers v Knight 1916 NPD 399).
7. Wille : Landlord and tenant (in Reddy v Johnson 1923 NPD 190).

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#### (b) Natal

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The Natal Mercury (1911; 1913; 1915; 1917; 1918; 1919; 1921;  
1923; 1925; 1927; 1929; 1930)

The Natal Witness (1910; 1922; 1924; 1926; 1928; 1930; 1935)

The Times of Natal (1912; 1914; 1916; 1918; 1920)

### 3. Articles

4 Natal Law Quarterly (1905)

NUC Magazine Commemoration Number (1909 - 1930)

NUC Magazine Commemoration Number (1949)

12 Scots Law Times (News)(1904)

15 Scots Law Times (News)(1908)

18 Scots Law Times (News)(1911)

43 Scots Law Times (News)(1935)

- 30 South African Law Journal (1913)
- 31 South African Law Journal (1914)
- 32 South African Law Journal (1915)
- 35 South African Law Journal (1918)
- 43 South African Law Journal (1926)
- 44 South African Law Journal (1927)
- South African Law Times (1935)

#### 4. Books and Theses

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| Baxter LG                              | <u>Administrative Law</u> (1984)   |
| Boberg PQR                             | <u>The Law of Delict (Vol 1 : Aquilian Liability)</u> (1984)   |
| Boberg PQR                             | <u>The Law of Persons and the family</u> (1977)  |
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TABLE OF CASES

Adam v Dada 1913 NPD 31	140
Adam Ex parte Trustees 1927 NPD 314	168,177
Adam & others v Dada & others 1912 NPD 109	170
Addison Bros Ltd v Addison & Co 1924 NPD 208	143
Administrator of Natal & others v Durban Corporation 1922 NPD 128	175
Affhauser v MacLeod 1909 TS 827	169
African Theatres Trust Ltd v Estate McCubbin 1919 NPD 277	169
Ahearn v Bellman [1879] 4 LR Ex 201	157
Ahmed Hoosen v Immigrants Appeal Board 1914 NPD 275	59
Akbar v Rex 1915 NPD 497	95
Akoon v Rex 1926 NPD 306	26
Alagerysamy v Kvalsig 1912 NPD 25	168
Alamaloo v SA Sugar Refineries Ltd 1912 NPD 567	142
Alexander v African Investment & Credit co 1917 NPD 133	67
Amod Bayat v Doherty 1919 NPD 44	64,171
Amod Jeewa Estate v Kharwa 1911 NPD 371	20
Anderson v Hesom 1913 NPD 63	43,146
Archibold & Co v Roe 1918 NPD 455	71,157
Armitage Trustees v Allison 1911 NPD 88	72,151
Attorney-General v Braint 15 LJ Ex 265	156
Baddeley v Clarke 1923 NPD 306	178
Bakus v Ladysmith Corporation 1914 NPD 469	175

Ballance In re 13 NLR 53	128,163
Bana v Grahamstown Municipality 1910 EDL 346	156
Baytopp v Rex 1912 NPD 28	100
Beetar v SAR & H 1920 NPD 14	18
Benest v Rex 1918 NPD 344	76
Berry v Berry 1924 NPD 161	167
Bhayla v Nunnerly & Co Ltd 1926 NPD 441	80
Biljoen v Petersen 1922 NPD 63	63,170
Binda v Colonial Government 5 Juta 284	164
Blaikie AF In re Intestate Estate 1911 NPD 133	139
Blyth v Birmingham Water Works 11 Ex 781 ; 25 LJ Ex 212	154
Bon Accord Irrigation Board v Braine 1923 AD 480	136
Bosse v Rex 1915 NPD 642	89,129
Bramage & Young v Hands & Licensing Board, Lower Umfolozi 1919 NPD 335	159
Breslin v Hichens 1914 AD 312	136
Bretherton Ex parte 1928 NPD 316	172
Breytenbach v Frankel & another 1913 AD 390	136
Brigjee v Rex 1913 NPD 503	100
Broodryk v Smuts NO 1942 TPD 47	178
Brown v Brown 1920 NPD 248	160
Brown In re 11 CSC 207	165
Brown v Natal Cambrian Collieries Ltd 1916 NPD 137	71,81
Burgers v Knight 1916 NPD 399	44,154
Burnman & others v Davis 1921 NPD 23	79,129,175
Button v Archbell's Trustees 1868 NLR 318	165
Bydowell v Chapman NO 1953(3) SA 514(A)	177

Caney v Estate Johnsson & others 1928 NPD 13	143
Cardinal & Co's Trustees v Miller 3 Searle 45	157
Carlill v The Carbolic Smoke Ball Co [1893] 1QB 256	153
Caro v CIR 1922 NPD 223	173
Carter v Driemeyer 1913 NPD 1	33
Cartledge v Plowman NO 1924 NPD 87	175
Castelijn v Sim & others 1929 NPD 253	48,157
Cato v Alion & Helps 1922 NPD 469	179
Cato v Cato 1914 NPD 442	151,153
Chabot v Master & owners SS Umgeni 1914 NPD 140	36
Chadwick v Atkinson's Trustees 1922 NPD 359	25
Chaimowitz v Balgowan Trading Co 1927 NPD 36	168
Chetty v Town Council, Pietermaritzburg 1926 NPD 39	52
Chief Constable, Durban v Johnson & others 1924 NPD 49	142
Chon Ki v Pretoria Municipality 1912 AD 712	136
City & Suburban Gold Mining & Estate Co Ltd v CIR 1923 NPD 177	48,155
Clairmont Brick Co In re 6 NLR 158	161
Clerk v Registrar of Deeds 1922 NPD 10	166,170
Coll v Murray 1917 NPD 222	147,175
Collins v Brown 1923 NPD 450	74
Colonial Treasurer v Coetzer 1872 NLR 40	164
Commander v Collector of Customs 1920 NPD 35	47,48,157
CIR v George Forest Timber Co Ltd 1924 AD 516	157
CIR v Thompson & Co 1912 NPD 592	153
Compagnie des Messageries Maritimes v The Agricultural Co-operative Union Ltd & Fried Cohen, Goldman & Co Ltd 1922 NPD 84	127,155

Continental Tyre & Rubber Co v The Daimler Co 31 TLR 159; [1916] 2 AC 307	54
Cooper v Kohn's Produce Agency Ltd 1917 TPD 186	64
Cordy & others v Watts & others 1925 NPD 42	175
County Council of Kent and Council of Dover Ex parte [1891] 1 QB 729	155
Crowe v CIR 1929 NPD 226	157
Cumming Ex parte 1923 NPD 405	165
D v D or P (1913) 29 TLR 765	154
Dabner v SAR & H 1918 AD 583	136
Dalys Ltd v Israel & Son 1919 NPD 360	157
Dastazoir v Inspector of Police, Durban 1926 NPD 175	26
Dawad Mahomed In re 1912 NPD 117	128
Dawson v IM & JF Van Rooyen 1914 NPD 481	67
Daya Ratanjee In re 1913 NPD 467	178
Denton v The Great Northern Railway Co 5 Ellis & Blackburn 860	153
Derbyshire v Year 8 NLR 139	164
De Villiers v Cape Divisional Council 1875 Buch	164
De Vos v Rex 1919 NPD 398	97
De Wet v Hollow 1914 AD 157	136
Dhanpaul v Rex 1924 NPD 95	175
Dickinson v Estate Fisher 1914 NPD 166	74,156
Dicks v Dicks 23 EDC 178	169
Dickson v Fraser 1911 NPD 403	15
Dingley v Cornforth 1917 NPD 386	148,169
Dixon v Shave 1929 NPD 245	71

Dodd v Hadley 1905 TS 439	170
Dominican Convent v South Shepstone Local Board 1923 NPD 391	129,163
Douglas v Macnamara 1918 NPD 201	82,170,172
Drew v Rex 24 NLR 397	161
Drew & Deacon v Pietermaritzburg Town Council 1913 NPD 184	172
Driman v Rex 1920 NPD 102	90,171
Driman v Umfolosi Licensing Board & another 1925 NPD 77	142
Dry v Durban Corporation 1929 NPD 209	173
Dunn W & Co v Assonan Steamship Co 1921 NPD 33	155
Dunsterville v Rex 1916 NPD 1	89,169,170
Du Plessis v Levy 1925 NPD 249	77,171
Durban Corporation v SAR & H 1917 NPD 199	82
Durban Corporation v Trustees, Durban Light Infantry 1918 NPD 81	23
Durban Corporation v Whittaker 1919 AD 195	129,175
Dyer v Dickson 1925 NPD 304	179
Ebrahim v Estcourt Division Licensing Board & Robinson & others 1913 NPD 289	51
Ebrahim v Licensing Board (Ladysmith) 1911 NPD 148	139
Elliott v Rex 1921 NPD 68	90,133
Epselman v Chief Constable, Pietermaritzburg 1918 NPD 294	103,169
Essopjee v Immigrants Appeal Board, Durban 1914 NPD 438	59
Estcourt Corporation v Chadwick 1925 NPD 239	33

F v P or F (1911) 27 TLR 429	154
Farrer, F & FA v Rex 1914 NPD 521	168
Federal Storage Co v Angehern & Peil 1910 TS 1355; 1908 TS 761	157
Fernandez v SAR & H	174
Fernando v Naidoo 1918 NPD 340	167
Ferreira v Bruyns Hill Cash Store 1928 NPD 336	175
Fick v Bierman 2 Juta 26	164
Fino v SAR & H 1927 NPD 369	157
Flanagan v Flanagan 1914 NPD 27	153
Foley HY In re Estate 1920 NPD 172	142
Forbes v Rex 1911 NPD 202	14
Forde v Union Government 1913 AD 325	173
Forget v Ostigny 1895 AC 318	153
Foss v Woolridge & Co Ltd 1916 NPD 100	71,158
Foxon v Foxon 1914 NPD 9	44
Franks v Rex 1924 NPD 329	77,148
Frenkel & Co v Cadle 1915 NPD 173	36,154
Friedman v Friedman's Executors 1922 NPD 258	44,152
Gabuza v Union Government 1916 NPD 320	171
Gagniere & Co v Stonier & Holland 1914 NPD 186	81,164
Gallwey In re 1914 NPD 163	73
Garlick & Co v Anderson 1915 NPD 209	70,128,163
General Iron & Hardware Co v Estate Molyneux 1911 NPD 427	14

General Iron & Hardware Co Ltd v Estate	
Molyneux & CA Oldham 1911 NPD 193	67
Gerike v Gerike 14 EDC 113	169
Gifford NO v Owen, Hopley, Arnold & Fagaza 1916 NPD 197	35,168
Glenn Bros v Commercial General Agency Co Ltd	
1905 TS 740	170
Goetz v Cohen 1923 NPD 303	80
Goga v Ladysmith Licensing Board 1912 NPD 642	51
Goolam v Rex 1924 NPD 246	171
Goolam Rassool v Rex 1923 NPD 96	60
1918 AD 633	59
1924 AD 44	61
Goveia & another v Cape Licensing Court 1919 CPD 304	140
Govindsamy V v Indian Immigrants Trust Board 1918 NPD 122	59,155
Graf & Co v Bassa 1925 NPD 1	171
Grandin In re 15 NLR 61	164
Green In re 1909 NLR 227	128
Greenwood Park Brick Co Ltd v Sir JL Hulett & Sons Ltd	
1911 AD 107	135
Greig v Tedder I 1912 NPD 20	142
Grobler v Schmilg & Freedman 1923 AD 496	136
Grundy v Schram 1915 NPD 555	18,160
Gurney & Moore v Union Government 1913 NPD 320	153
Gxagxa v Nupen 1915 NPD 298	154
Haffajee's trustee v Haffajee 1911 NPD 489	14
Hajee Habib v Pietersburg Municipality 1905 TS 63	156

Hamilton v CIR 1921 AD 1	174
Handley & others v Handley & others 1919 NPD 154	168,173
Hansen v Rex 1924 NPD 318	77,155
Harbottle v Receiver of Revenue 1926 NPD 49	57,175
Harmsworth v Smith 1928 NPD 174	38,172
Harvey v Harvey 1923 NPD 281	25
Haslett & Co v Kelso 1912 NPD 42	15,21
Hattingh v Booth 1928 NPD 339	82,171
Hatton v Union Share Agency 1926 NPD 159	67
Hauman v Nortje 1914 AD 293	136
Hay v Poynton 1911 NPD 336	14,79,151
Hayes v Field 1923 NPD 311	169
Heenan v Gidhari 1924 NPD 55	80 160
Hellet v SAR & H 1927 NPD 65	168,171
Henley's Trustee v Henley 1926 NPD 119	148,164
Henrichs v Chief Constable, Pietermaritzburg 1916 NPD 65	167
Hitchins v Union Government 1925 NPD 281	63,157
Hodges v Standard Bank of SA Ltd 1916 NPD 91	64
Hooper v Moore & Varty 1921 NPD 96	42,125,168
Hoosian v Pietermaritzburg Corporation 1915 NPD 433	49
Houston v Caine 1917 NPD 50	157
Howard v Rex 1917 NPD 192	96,169,170,171
Hulett & Sons Ltd In re 1912 NPD 555	21
Hulley v Cox 1923 AD 234	173,174
Human v Human's Executors 10 SC 176	167
Hunt v Eastern Province Boating Co 3 EDC 12	148

Hunt, Leuchars & Hepburn Ltd In re Jeansson	
1911 NPD 493	164
Hyslop v Bennett 1914 NPD 249	70
Incorporated Law Society of Natal v Bester 1913 NPD 333	73
Incorporated Law Society of Natal v JJ & FM Hillier 1913 NPD 237	73
Incorporated Law Society of Natal v Leisegang 1924 NPD 252	74
Innes-Grant v Kelsey 1924 NPD 268	83,168
Inspector of Nuisances, Durban, v Vogel 1911 NPD 397	45
Inyati Collieries Ltd & others v Elleson 1921 NPD 72	159
Ismail v Rex 1927 NPD 14	171
Jadwat NO v SAR & H 1923 NPD 433	80,160
Jeewa Hassim & Co v Licensing Board, Alexandra 1911 NPD 473	14
Jessel v Bath & others (1866) 2 LR Ex 267	155
Johannesse v Chief Constable, Pietermaritzburg 1926 NPD 53	77,158
Jones & Greene v Rex 1919 NPD 266	169,171
Jordaan v CSAR 1909 TS 465	132
Joseph v Joseph (1909) 25 TLR 439	154
Katzenstein v Duvenhage 1929 NPD 294	38
Khamissa Hoosen v Alfred Division Licensing Board 1918 NPD 21	55

King v Dales 1915 NPD 230	80
Knight v Durban Corporation 1911 NPD 305	89
Komen, Executor Estate v De Heer 1907 NLR 583	119
Koovarjee v Koovarjee 27 NLR 255	160
Kozinsky Ex parte 1924 NPD 243	70,162
Kruger v Wartski 1928 NPD 475	172
Kuhn Trustee Insolvent Estate v Kuhn & Kuhn 1915 NPD 79	81,170,172
Landers' Tutors v Estate Landers & others 1923 NPD 385	157
Leathern v Tredoux 1911 NPD 409	18
Leathern Executors of v Edwards & others 1915 NPD 404	166
Lee v Lee 1927 AD 202	131,132
Licensing Board, Durban v Arnold 1911 NPD 27	50
Lloyd v Rex 1920 NPD 19	90,161
Lockhat AM Ltd v Bodasing 1927 NPD 460	26
Longworth v Henwood 1911 NPD 420	79,162
Lucas v Wilkinson & others 1926 NPD 10	174
Lujoko v Symmonds 1911 NPD 326	168
Lutchman v Rex 1915 NPD 205	76,101
M v M (1906) 22 TLR 719	154
MacKay v Ballot 1921 TPD 430	171
MacKenzie In re Estate JW ex parte Executors 1924 NPD 58	174
Mahdo Singh v Natal Indian Traders Ltd 1912 NPD 575	58



McIntosh & Co v English, Scottish & Australian Bank Ltd 1921 NPD 87	168,169
McKenzie v Union Government 1917 NPD 306	129
McRitchie v SAR & H 1918 NPD 312	38,124
McWilliam Insolvent Estate v Bank of Africa Ltd 1911 NPD 251	76
Meischke v Jorissen 1922 NPD 144	20
Meseni Mbata v AM Muller 1918 NPD 135	160
Meyer v Galbraith 1920 NPD 256	175
Meyer v Intestate Estate Rudolph 1919 NPD 92	76,155
Meyer v Legge 1909 TS 226	166
Minister of Finance v Barberton Municipal Council 1914 AD 335	136
Minister of Railways v Moodley 1912 NPD 86	56
Mink v Vryheid (Natal) Railway Coal & Iron Co Ltd 1912 AD 265	136
Mobarak Ally v Pathon 1915 NPD 363	157
Molyneux v Estate Molyneux & others 1913 NPD 386	31
Momple v Momple 1927 NPD 374	158
Monhaupt v Minister of Finance 1918 NPD 47	126
Moodley v Licensing Officer, Pietermaritzburg & another 1928 NPD 278	52
Moodley v Minister of Railways 1912 NPD 86	153
Moodley v Rex 1927 NPD 395	155
Moothoosamy v Murugan 1919 NPD 401	155
Morgan & Ramsay v Cornelius & Hollis 31 NLR 235	152
Moses v Boksburg Municipality 1912 TPD 659	156
Motala & others v SAR & H 1928 NPD 361	171

Mowat v Swindell 1928 NPD 309	83
Mpanza v Rex 1915 NPD 197	76,98,155
Mudaly v Rex 1911 NPD 362	91,158
Muller v Chennels 1923 NPD 69	169
Mungal v Shaik Mahomed 1918 NPD 57	23
Muniammah v Kullu 1917 NPD 352	58,161
Naidoo v Mayor & Councillors, Pietermaritzburg 1917 NPD 463	52,57,156
Naran v Rajoo 1921 NPD 39	79
Narainsamy v Principal Immigration Officer 1923 AD 673	174
Narasimman & others v Rex 1914 NPD 458	98
Narsi Nagar v Pietermaritzburg Town Council 1917 NPD 23	161
Natal Bank v Natorp 1908 TS 1016	164
Natal Cambrian Collieries v Durban Collieries 1925 NPD 27	168
Natal Fertilizers Ltd v Van Dam & others 1922 NPD 157	20,158
Natal Land & Finance Corporation Ltd v Van Tonder 1923 NPD 286	67,157
Natal Mill & Elevator Co Ltd v Durban Corporation 1922 NPD 205	130,175
Nathalia v Principal Immigration Officer 1911 NPD 552	57
Nathan Estate v Grix 1911 NPD 262	141
National Bank of SA Ltd v Cohen's Trustee 1911 AD 235	136
Nduzulwana v Estate Pattison 1911 NPD 180	20

Newcastle Colliery Company v Newcastle Corporation	
1916 NPD 245	161
Newmarch v Rohrs 1914 NPD 430	161
New Rietfontein Estate Gold Mines Ltd v Misnum 1912	
AD 704	136
Nicholson v Sparks & Young Ltd 1913 NPD 506	170
Nomoya v Ekstein 1914 NPD 350	160
Norton v Union Government 1920 NPD 267	155
Ntuli v Ntuli 1921 AD 276	173
Nulliah v Moonsamy 1923 NPD 49	75
Nxaba v Nxaba 1926 NPD 29	143
Oellermann v Natal Indian Traders Ltd 1913 NPD 337	65
Omar v Ixopo Licensing Board 1916 NPD 550	175
Osman v Rex 1929 NPD 129	104
P v P or O (1909) 25 TLR 638	154
Padayachee & others v Parak & Sons 1927 NPD 393	169,171
Padyachi v Rex 1919 NPD 145	91
Partington v Attorney-General 21 LT 370	157
Patel v Rex 1919 NPD 39	170
Paul v Youley 1920 NPD 191	155
Peabody & Co v Deane 1913 NPD 37	62
Peer v Ladysmith Town Council 1927 NPD 429	175
Pelunsky v Isaacson 1923 NPD 33	84
Peters v Peters 1924 NPD 223	170
Peters v Randles Brother & Hudson 1912 NPD 607	153
Pettersen v Yates & others 1928 NPD 453	148,149

Petzer v Rex 1924 NPD 100	97,171
Pietermaritzburg Corporation v GA & AS Nathan 1911 NPD 130	14,139
Pietermaritzburg Corporation v SAB 1911 NPD 218	159
Pillay v Chief Constable, Pietermaritzburg 1923 NPD 120	143
Pillay v Licensing Officer, Umkomaas & another 1930 NPD 111	18,174
Pillay v Yeanamoothoo 1917 NPD 156	63,169
Platt v CIR 1919 NPD 234	24,47,155
Poynton & others v Stranack & others 1919 NPD 263	168
Pretorius v Eksteen 1916 NPD 148	175
Protector of Immigrants v Millar 1875 NLR 37	162
Raath Estate & another v Estate Belis & others 1922 NPD 323	25
Rae v Meek 15 Rettie 1033	151
Rama Narotam v Nath Dullabh 1914 NPD 227	153
Rampersad v Goberdun 1929 NPD 32	169
Rampersad v Stone 1930 NPD 90	26
Ramsay v Licensing Board, Inanda 1923 NPD 58	140
Rand Indent Ltd The v The Masters & owners "The Motherland" 1919 NPD 121	151,171
Ravene Plantations Ltd v Estate H Abrey & others 1927 NPD 174	67
Rawat v Licensing Board, Pietermaritzburg 1917 NPD 458	51,160
Reddy v Johnson 1923 NPD 190	66,175

Reeves v Bowker 1919 NPD 258	160,169
Reid Estate & another v Goodwin 1920 AD 367	174
Reid & others v Clozier & Cloete 2 Searle 183	146
Rex v Abbanah 1912 NPD 560	101
Rex v Balishi & another 1925 NPD 331	97,171,172
Rex v Bantu Zonde 1927 NPD 131	99,171
Rex v Cadle 1914 NPD 356	179
Rex v Clarke 1924 NPD 343	173
Rex v Cox 1914 NPD 340	170
Rex v Dayasingh & Subjoo 1920 NPD 236	104,107,169
Rex v Dukanini 1922 NPD 1	108
Rex v English 1916 NPD 227	67
Rex v Erasmus 1923 AD 73	121
Rex v Fisher 1911 NPD 393	104
Rex v Hardy (1794) 24 State Trials 27	156
Rex v Harris 1927 NPD 330	178
Rex v Howard 1917 NPD 192	180
Rex v Ismail Nera 1922 NPD 153	96
Rex v Johnson Moses 1922 NPD 380	25
Rex v Jolly & others 1923 AD 176	110,133
Rex v Korsten 1927 NPD 12	26
Rex v Maharaj 30 NLR 202	159
Rex v Maloo Singh 1922 NPD 5	108,171
Rex v Menear 1911 TPD 506	171
Rex v Mfihlo 1922 NPD 32	108
Rex v Msindo 1927 NPD 71	173
Rex v Mtanga & Mdonswa 1919 NPD 341	24
Rex v Nel 1911 NPD 210	97

Rex v Padsha 1923 AD 281	60,61,62
Rex v Plaatjes 1910 EDL 63	156
Rex v Roodt 1912 CPD 606	168
Rex v Sheik Abdool 1920 NPD 110	168
Rex v Steel, Murray & Co 1911 NPD 152	91
Rex v Stevens 1920 NPD 270	97,169,171
Rex v Vallabh 1911 NPD 9	14
Rex v Van der Merwe 1927 NPD 446	170
Rex v Van Heerden 1920 TPD 195	171
Rex v Van Schalkwyk 1938 AD 543	179
Rex v Viljoen & others 1923 AD 90	121
Rex v Vries 1913 AD 338	136
Rex v Wallace 1927 NPD 10	18
Reynolds Bros v Colonial Government 1911 NPD 31	138
1911 NPD 48	74,79
Richardson v Rex 1925 NPD 146	108
Robbins v Robbins 20 CTR 2	167
Robertson v SA Medical Council 1929 NPD 81	175
Robinson v Durban Corporation 1916 NPD 436	50,171
Rossler v Vos 1925 NPD 266	157
Rouhier v Master & owners SS Mesnafos 1917 NPD 428	154
Royston v Dennis 1915 NPD 74	175
Rudolph v The Executors Estate Rudolph 1918 NPD 425	148,171
Salkinder v Van Zyl & Buisinne 1922 CPD 59	84
Salter v Longworth 1911 NPD 201	80
Salzmann v Holmes 1914 AD 152	136
Saw v Rex 1915 NPD 357	46,91

Schnaar v Jansen 1924 NPD 218	44,178
Seedat Estate v Rex 1916 NPD 535	32
Seedat In re 1914 NPD 198	60
Shaik Abdool v Juma Musjid Trust 1929 NPD 75	155,156
Shaik Amod v Immigrants' Appeal Board 1919 NPD 85	160
Shanks v Shanks 1926 NPD 512	26
Shaw In re Estate 1928 NPD 214	175
Shepstone v Neil 1869 NLR 9	165
Sikes v Rex 1925 NPD 39	99,171,173
Simpson v Westminster Palace Hotel Co 8 HLC 712	156
Sinkwa v Konigkramer 1914 NPD 321	56
Smart & others v SAR & H 1928 NPD 129	131
1928 NPD 361	170,174
Smit v Smit 1909 TS 1067	170
Smith v Hudson 34 LJ QB 145	153
Smith v London & SW Railway 6 LR CP Cases 14	154
Smith & another v Bird & others 1924 NPD 381	30,168
Smith & Co Ltd Ex parte 1919 NPD 49	155,156
Smith & Potts Ltd v Dixon 1916 NPD 159	79
Smithers v Amin & others 1924 NPD 220	82
Sokela v Cadle 1914 NPD 541	161
Solomon v Robinson & Co Ltd 1927 NPD 125	171
Solomon v Wolff 15 SC 152	83
SAB v Pietermaritzburg Corporation 31 NLR 285	159
South African & General Investment & Trust Co Ltd v Smith 1913 NPD 142	34
SA Loan, Mortgage & Mercantile Agency Ltd v Birkett 6 NLR 77	162

SAR & H v Wood & Sons 1920 NPD 199	47,155
Sparks & Burford v Durban Corporation 1916 NPD 439	168
Sparks & Young Ltd v Bennett 1922 NPD 357	129,163
Spencer v Minister of the Interior 1929 NPD 175	148,149
Standard Bank of SA v Estate CJ Van Rooyen 1927 NPD 300	175
Steiger v Union Government 1919 NPD 75	71,148,168,178
Steytler v Fitzgerald 1911 AD 295	172
Strachan v Nel 1929 NPD 273	168
Strydom v Strydom's Trustees 11 CSC 425	166
Sulaman & Co v Vahed 1928 NPD 492	170
Sunckar & Behayi v Chief Magistrate, Pietermaritzburg 1916 NPD 452	50
Sutherland v Chief Constable, Pietermaritzburg 1923 NPD 125	77
Swart v Swart 1924 NPD 104	169
Symons & Moses v Davies 1911 NPD 69	14
Taylor Bros Ltd v Blackhurst (II) 1917 NPD 69	83,167
Tedder & another v Greig & another 1912 AD 73	136
Texas Co (SA) Ltd v Webb & Tomlinson 1927 NPD 24	170
Thomas Ex parte 1924 NPD 303	66,169
Titshall v Cole 1913 NPD 161	62
Tongo v Mission Press 1926 NPD 320	26
Town Council of Pietermaritzburg v SAB Ltd 1911 NPD 501	172
Tranter v Attorney-General & another 1907 TS 415	156
Tremearne v Rex 1917 NPD 117	104,169

Trevor-Smith v Walters 1928 NPD 351	37,174
Trystam v Knight 1922 NPD 186	129,169,170
Tshabalala v Van der Merwe 1926 NPD 75	66,148,169
Umlaw v Umlaw 1924 NPD 323	141
Umlilwan v Beningfield 1911 NPD 320	80
Umsholes v Eksteen 1914 NPD 345	99,159
Umzana v Schroenn 1911 NPD 356	170
Union Government v Buur 1914 AD 291	173
Union Government v De Kock NO 1918 AD 22	136
Union Government v Diedricks 1915 NPD 458	35,164
Union Government v Fakir 1923 AD 466	174
Union Government v Foxon 1925 NPD 47	157
Union Government v Hill 1914 AD 195	136
Union Government v Lee 1927 NPD 202	42
Union Government v Matthee NO 1917 AD 688	136
Union Government v Mudaly 1912 NPD 52	46
Union Government v Scales 1913 AD 333	136
Union Government v Verrapah 1918 NPD 182	143
Union & Rhodesia Wholesale Ltd (Liquidators of) v Norrish Co-operative Service Ltd (Liquidators of) & others 1924 NPD 169	175
Union Share Agency & Investment Ltd v Madsen 1927 NPD 439	129,163
Union Share Agency v Malcolm 1927 NPD 324	80
Union Share Agency v Spain 1927 NPD 348	81,169
United Building Society v Smookler's Trustees 1906 TS 627	146

United Tobacco Companies v Standard Tobacco	
1912 NPD 661	153
Van Breda v Master of Supreme Court	7 CSC 360 166
Van der Byl's Assignees v Van der Byl	5 CSC 170 165
Van Deventer & others v The Master & another	1914 CPD 9 168
Van Heerden v Coetzee & others	1914 AD 167 136
Van Heerden v Smithfield Cold Storage Co Ltd	1923 NPD 141 71
Van Niekerk v Van Noorden	17 SC 63 164
Van Niekerk's Trustee v Van Niekerk	17 CSC 470 165
Van Rhyndeep Gold Mining Co Ltd v the Director of Native Labour	1915 WLD 94 171
Van Rooyen Ex parte	1926 NPD 408 26
Van Rooyen v Werner	9 CSC 425 165
Vawda & Co v Vawda & Sons	1914 NPD 50 167
Verachia v Klip River Licensing Board	1916 NPD 294 160
Vickers v Union Government	1917 NPD 235 175
Viljoen v De Jager	1912 NPD 581 156
Wakefield v Graham	1911 NPD 144 79,140,160
Walker v Walker	1916 NPD 23 166
Wannenburg v Le Roux	12 SC 383 167
Wattle Extract Co v Bosse	1915 NPD 528 63
Wentworth v Outhwaite	12 LJ Ex 172 153
West v Hanreck	1928 NPD 484 65
West v Nourse & another	1924 NPD 418 151

Westermeyer v Rex 1911 NPD 197	14
White v Eshowe Local Board 1917 NPD 293	90
Whittaker v Hine 1912 NPD 72	35,78
Whittaker Estate v Union Government 1915 NPD 580	35
Whittet v O'Connor 1918 NPD 376	63,166,170
Williams & Adendorff v Johannesburg Municipality 1915 TPD 106	156
Williams's Estate v Williams 7 NLR 93	165
Willis v Gepu 5 NLR 203	161
Wilson v O'Halloran 20 NLR 155	166
Wilson & others v Mayor & Councillors of the Borough of Durban 1920 NPD 5	72
Windsor Ex parte 1928 NPD 319	26,175
Woodhouse v Jacobson 1918 NPD 161	78
Worthington & others v CSAR 1905 TH 149	132
Yenka Reddy v Naidoo 1916 NPD 210	47,63,129,166,170
Young v Inspector of Police, Durban 1919 NPD 97	160
Zululand Cotton Fields Ltd v Nduma Ltd 1926 NPD 85	160