
R v MALAN (1901): POLITICS, JUSTICE AND THE SOUTH AFRICAN WAR, 1899-1902

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1 Introduction¹

On 18 April 1901, in the midst of the South African War, Francois Stephanus Malan (1871-1941), a member of the Cape parliament and editor of *Ons Land* newspaper, was convicted in the Cape Supreme Court of the criminal libel of General John French and imprisoned for twelve months. The prosecutor, James Rose Innes (1855-1942), was a fellow member of parliament and the Attorney-General in the cabinet of Premier Sir Gordon Sprigg. He was one of the Cape Colony's most respected politicians and would become one of South Africa's greatest judges. That the trial left a lasting wound on Malan is clear from his published memoirs,² and the authorised biography written by Bettie Cloete, his daughter.³ Both these publications argue that his treatment in court was unfair and the prison sentence unreasonable. Together father and daughter created a perception that Rose Innes was a pawn in a politically motivated abuse of the Colony's legal system and that he was used to silence a troublesome critic of British imperial policy in South Africa and the methods used by the British army. By analysing the reasons for Malan's prosecution, as well as by examining the court proceedings, this article will argue that Malan's enduring anger and hurt, combined with the passage of time, distorted his memory of events, and that Rose Innes was unfairly accused of being part of a political trial to neutralise a critic of the British Empire.

2 FS Malan, *Ons Land* and the British Empire

Malan was born on 12 March 1871 in the Cape Colony, and grew up on a wine farm in the Paarl district. With the Cape fully integrated in the imperial economy, most Cape Afrikaners valued the security and financial prosperity the Empire brought and were loyal subjects of Queen Victoria. This loyalty was evident when the Afrikaner Bond was established in 1880 to further Afrikaner

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2 Serialised in *Die Huisgenoot* of May and Jun 1937. The chapter on the trial "Twaalf maande tronkstraf" appeared in the issue of 25 Jun 1937. A hallmark of Malan's memoir is the absence of any axe grinding. In the chapter on the trial he does not attack Rose Innes personally, but creates the perception that the Attorney-General was part of a travesty of justice.

3 Cloete *Die Lewe van Senator FS Malan (President van die Senaat)* (1946) 34.

interests. JH (Onze Jan) Hofmeyr, the leader of the Bond, called for a resurgence of Afrikaner self-esteem and not for a hatred of things English.⁴ Malan was raised both with a strong sense of ethnic-cultural identity,⁵ and as a loyal subject of Queen Victoria.⁶

After qualifying as a barrister at Cambridge University, Malan returned to the Cape Colony in July 1895. In November he was personally invited by Onze Jan, who became his mentor, to become editor of *Ons Land*, the most influential Dutch newspaper in the Colony, and the Bond's mouthpiece.⁷ Malan's appointment coincided with the shock of the Jameson Raid of 29 December 1895. His subsequent anti-Rhodes crusade transformed *Ons Land* from a "moderate elite-orientated organ into an activist militant, mobilising one, out to indoctrinate and incite Afrikaners at grass roots level into political activism and initiative".⁸ For the rank-and-file of the Bond, Malan reflected the feelings of the true Afrikaner, and *Ons Land* was seen, along with the Cape Afrikaner's Bible, "as their guide, philosopher and friend".⁹

Despite the Jameson Raid, Cape Afrikaners remained loyal to the Queen. Malan saw no contradiction between being a loyal subject of the Queen and supporting the continued independence of his fellow Afrikaners in the Boer republics.¹⁰ With these views, he saw his mission to be to prevent a war between the Boer republics and the Empire.¹¹ As a result he urged the Transvaal to be more accommodating in order to secure a peaceful settlement, writing that the Republic's independence could only be secured if it introduced reforms which would gain the support of the uitlanders.¹² Most Cape English-speakers, imperial officials and statesmen could not comprehend the ideal of pan-Afrikaner solidarity and loyalty to the British Empire living side by side.¹³ *Ons Land* earned Malan the reputation among English-speakers of being an

4 For the history of the Cape Afrikaner and the British Empire see Tamarkin *Cecil Rhodes and the Cape Afrikaners. The Imperial Colossus and the Colonial Parish Pump* (1996); Giliomee *The Afrikaners: Biography of a People* (2003); Davenport *The Afrikaner Bond. The History of a South African Political Party (1880-1911)* (1966).

5 Malan "Twee keerpunte in my lewe" *Die Huisgenoot* 7 May 1937; Malan *Korte Lewenskets van DG en EJ Malan* (1928) 54.

6 *Ons Land* 26 May 1896.

7 Malan (n 6).

8 Tamarkin (n 4) 252.

9 Schoeman *Only an Anguish to Live Here. Olive Schreiner and the Anglo-Boer War* (1992) 52.

10 *Ons Land* 26 May 1896, 15 Aug 1896 and 24 Sep 1896.

11 Cape Town Archives Repository (CTAR), Cape Town, FS Malan Collection (MC), Vol 19, Diary (4 Apr 1897) and Vol 83, Malan to Brummer (23 May 1897).

12 CTAR Cape Town, MC, Vol 19, Diary (13 Jan 1896); *Ons Land* 15 Feb 1896; Ingham *Jan Christian Smuts. The Conscience of a South African* (1986) 28.

13 Tamarkin (n 4) 300-304.

offensive racist.¹⁴ The Colonial Office began monitoring *Ons Land* in June 1896 and two years later Henry Lambert, a senior official, condemned Malan's Transvaal sympathies as "scarcely decent in a British newspaper".¹⁵ In April 1899 Alfred Milner, Cape Governor and High Commissioner since 1897, and an ardent imperialist, accused *Ons Land* of doing everything in its power to excite race-feeling between Afrikaners and English-speakers.¹⁶

3 Malan, the South African War and General John French

After the outbreak of the war in October 1899 some 6 000 Cape Afrikaners joined the invading republican forces, but the majority remained loyal to their monarch. The harsh implementation of martial law in the frontier districts, imprisonment and banishment without trial, and especially the public executions of Cape Afrikaner rebels evoked rage and hatred throughout Afrikaner society and left a legacy of ill-will that poisoned relations between the two white groups.¹⁷ *Ons Land* supported the Boer republics and condemned the policy of the Imperial Government which had led to a "bloody and unjust" war. The editor insisted on peace under conditions which would allow the Republics to retain their independence.¹⁸ Malan also vigorously protested against martial law, describing it as a reign of terror.¹⁹

Malan's forthright journalism made him a hero among Cape Afrikaners and in November 1900 he was nominated as the Bond's candidate in the Malmesbury parliamentary by-election. His position in Cape Town, a relatively small town with a predominately English-speaking community was, however, becoming difficult. By 1900 the city had become a vast military establishment with a frenzied pro-war atmosphere. Malan's editorials aroused great animosity among English-speaking loyalists who saw him as a traitor, abusing British freedom to encourage disloyalty amongst Cape Afrikaners, and the continuing resistance of the republics.²⁰ Katie Stuart, a leading member of the Guild of Loyal Women reflected a widespread hatred of Malan: "[T]here were two words that roused *all* her feeling; they were only little words, but they were of great

14 National Archives (NA), Kew, London, CO48/532, Proceedings of the Congress of the South African League, Port Elizabeth (11 Feb 1897 – 13 Feb 1897).

15 NA Kew, CO48/528, Private Secretary, Cape Town to Under Colonial Secretary, Cape Town, (9 Jun 1896); CO48/537, File 14229 "Political Situation in the Cape Colony", (25 Jun 1898).

16 NA Kew, CO48/542, Milner to Chamberlain (19 Apr 1899).

17 Galbraith "British war measures in the Cape Colony, 1900-1902: A study of miscalculations and mismanagement" 1983 *South African Historical J* 68-84.

18 *Ons Land* 24 Sep 1900.

19 *Ons Land* 21 and 24 Apr 1900.

20 *Cape Times* 22 Apr 1901; Barlow *The Clouded Face of Truth. A Review of the South African Newspaper Press Approaching Union* (DPhil, University of Bristol, 1988) 193.

portent. The words are ‘Ons Land’.²¹ On 3 April 1900, after a mass meeting in favour of the annexation of the republics, a group of loyalists physically attacked Malan, and he was “rather severely handled” before being rescued by the police.²² Encouraged by intelligence reports, Milner fervently believed that were it not for *Ons Land’s* disloyal and inflammatory reporting the “densely ignorant” Cape Afrikaners would be loyal.²³ As a result *Ons Land* was banned in the frontier districts which were under martial law.²⁴

Ironically, through editorial carelessness Malan created an opportunity for his enemies to deal with him. On 21 November 1900, the day before his leaving to start his election campaign, he received a letter from two Boer women in the Howick concentration camp via Joël Krige, an attorney and a correspondent of *Ons Land* in Caledon. They claimed that General French had shelled a Boer farmhouse with women and children in it:

At one farm General French caused five cannon to be pointed at a house into which several families had fled. A soldier said: ‘But General there are women, and children too in the house.’ Cursing, he said: ‘I don’t care. Shoot the —. Afrikanerdom must be swept off the earth.’ With the five cannon they shot the house to pieces, so that the shells drove the women and children out of the houses, and left them lying thus without looking if there was anyone there who still lived.²⁵

Distracted and impatient to start campaigning for the Malmesbury by-election, Malan decided to publish the letter without comment, arguing that if it was true the world had to know about it. If it was not true the British military could deny it. He instructed a sub-editor to publish the letter after the names had been deleted to protect the paper against a libel suit. This instruction was, however, misunderstood and French’s name appeared when the letter was published on 24 November. Malan had forgotten about it and did not even notice the letter in the newspaper as he was addressing a series of meetings. (He was elected unopposed to parliament on 1 Dec.)²⁶ On 27 November 1900 the editor of the *Cape Times* attacked the letter as evidence of *Ons Land’s* part in a plot to inflame Afrikaners and demanded stern action from the government. Milner needed no encouragement, writing to Colonial Secretary Joseph Chamberlain:

21 Schoeman (n 9) 87.

22 Schoeman (n 9) 82-84.

23 NA Kew, CO 48/548, Milner to Chamberlain (28 Nov 1900) with an extract from an Intelligence Department report.

24 CTAR Cape Town, MC, Vol 40, Notice announcing martial law regulations in the Molteno District, (5 Jun 1900).

25 Quoted from the Crown’s charge sheet: a verbatim account of Malan’s trial appeared in the *Cape Times* 19 Apr 1900.

26 Malan (n 2).

It is obvious that with such articles constantly presented to the ignorant country Boers – who read no English and have no opportunity of hearing the other side of the case – they must become rebels at heart and very likely in deed. A man reading and believing such stuff would be a cur indeed if he did not take the first opportunity to rebel.²⁷

Milner furthermore vented his anger and bitterness on Sir Gordon Sprigg, the Cape Premier:

[F]irst and foremost the pro-Boer Press, especially the Dutch Press, which has worked up the Dutch population to fever pitch by reports of cruelties practised by the British in the conduct of the war, reports which for the most part are deliberate falsehoods without any foundation whatever, ... the prevention of seditious meetings and the circulation of inflammatory literature ... would undoubtedly have a deterrent effect.²⁸

The High Commissioner's paranoia was fuelled by a Volkskongress at Worcester on 6 December 1900 which had been organised by Malan to protest against the war, and was attended by between 9 000 and 10 000 people.²⁹ At the congress, resolutions were passed for the termination of the war and the restoration of republican independence.³⁰ Milner was, however, given to understand that the motive for the congress was far more sinister. HP van Eyk, a spy in the service of the British, reported that *Ons Land's* editor as a member of the Congress Vigilance Committee was part of a secret conclave and that its claims of constitutional protest were only a cover for its attempts to cooperate with the remaining commandos in the Orange River Colony.³¹

The final straw for Milner was the fresh outbreak of rebellion among Cape Afrikaners after the invasion of the Cape Colony on 16 December 1900 by generals JBM Hertzog and PH Kritzinger. Between 20 December and 17 January martial law was extended to the whole colony, outside Cape Town, Simonstown, Port Elizabeth, East London, Wynberg and the Transkei. Milner had no doubt whatever that the invasion was arranged with the extreme section of the Bond.³² Chamberlain supported Milner and ordered the arrest of anyone spreading sedition.³³ In reality the invasion had nothing to do with the Worcester Congress and had been planned in June 1900.³⁴ On the contrary, at

27 NA Kew, CO 48/548, File 41027 "Peoples Congress Worcester", Milner to Chamberlain (28 Nov 1900).

28 NA Kew, CO 48/548, Milner to Sir Gordon Sprigg (1 Dec 1900).

29 Snyman *Die Afrikaner in Kaapland, 1899-1902* [1979 42 (2) *Archives Yearbook*] 42-52.

30 *Ons Land* 11, 15 and 18 Dec 1900.

31 NA Kew, CO48/548, Milner to Chamberlain (7 Dec 1900).

32 NA Kew, CO 48/548, Milner to Chamberlain (17 Dec 1900).

33 NA Kew, CO 48/548, Comment of Chamberlain on file 41026 "Unrest in Cape Colony" (19 Dec 1900).

34 *Ons Land* 30 Aug 1908.

Worcester Malan urged Cape Afrikaners to make use only of constitutional means to oppose the war?³⁵

On 28 December 1900 an official investigation was launched against Malan when Special Constable Richard Thomas of the Cape Town police was sent to the *Ons Land* offices to purchase a copy of the 24 November issue.³⁶ Malan, returning from a short vacation, was arrested on 7 January 1901 and released on £500 bail. A day later, buckling under the continued pressure of Milner and the British army, Sprigg conceded to Sir General Frederick Forestier-Walker, the officer in control of the general lines of communication and the defence of the Cape frontiers, that the conclusion of the war might be hastened by the suppression of *Ons Land*. The next day the newspaper was informed that its circulation was prohibited in all districts under martial law. As the newspaper had few subscribers in the remaining districts it was decided to suspend circulation for the duration of the war.³⁷

On 11 January 1901 Malan appeared, with advocate JT Molteno as his legal council, before magistrate CW Broers for a preliminary hearing in the Cape Magistrate's Court. After evidence was led that he was *Ons Land*'s editor and responsible for the placing of the letter, he was committed to trial. He was charged in terms of the Libel Act, Cape Act 46 of 1882, with the "false, wicked, malicious, scandalous and defamatory libel" of French, and that he attempted to "unlawfully and wickedly seduce and encourage the subjects of her late Majesty Queen Victoria to resist and oppose her government".³⁸ Although Malan could have pointed out that the inclusion of French's name was an editorial error by his sub-editor, he did not use this as a defence. Not only would this have reflected badly on his editorial abilities, but it would also have left JA Vosloo, editor of *Het Oosten* in Somerset East and JE de Jongh of the *Worcester Advertiser*, in the lurch as they had also been charged with libel after reproducing the *Ons Land* letter in their respective newspapers. Moreover, Malan had no desire to back down as he saw the sedition charge as proof that his trial was politically motivated. He felt that it was added for the purpose 'of giving the charge as dark a complexion as possible' especially as the charge was made under an obscure Dutch ordinance of the States of Holland and

35 *Ons Land* 18 Dec 1900.

36 CTAR Cape Town, 1/CT 6/390 Criminal Records No 207 for 1901, Sworn Statement by Constable Thomas.

37 *Ons Land* 10 and 16 Jan 1901.

38 *Cape Times* 19 Apr 1901; CTAR Cape Town, MC, Vol 15, Official Charge Sheet (28 Mar 1901).

West-Friesland of 1754.³⁹ His suspicion that the charges were politically motivated must have been bolstered by arraignment of Albert Cartwright, editor of the anti-imperial *The South African News* on the charges of criminal and seditious libel.⁴⁰

That Malan wanted his day in court is understandable, but his decision to defend himself is less so. Although he had been a member of the Cape Bar for a few months in 1895 it had been an unhappy experience as he was insecure about his own legal abilities. He may have been concerned that Molteno had a reputation amongst loyalists of being a traitor for defending Cape rebels charged with treason.⁴¹ This could possibly alienate a jury. Malan's preparation notes for the trial make it clear that he wanted to avoid any taint of sedition, and to portray himself as an editor doing his duty in difficult times. Another possible reason was that although conviction in terms of the Libel Act could incur a prison sentence of two years, Malan expected no more than a fine, a maximum of £500 in terms of the Act, if convicted. His friends and advisers assured him of this and promised to help carry the costs.⁴² Whatever the reason for the decision to dispense with Molteno's services, Malan was determined to put up a good defence and he made an in-depth study of libel laws and legal precedents.⁴³ He had, however, the unenviable task of facing as prosecutor James Rose Innes KC, a brilliant member of the Cape Bar and the Attorney-General in the Sprigg cabinet. Prosecutions for criminal and seditious libel were undertaken on behalf of the Crown. In such cases the Attorney-General, a law officer and a cabinet minister, could personally conduct prosecutions.

4 Attorney-General James Rose Innes

Rose Innes, a passionate liberal, was born in Uitenhage in 1855. His father was a magistrate and eventual under-secretary for Native Affairs.⁴⁴ Through part-time studies at the University of the Cape of Good Hope he obtained an LLB In 1878 he was called to the Bar of the Cape Supreme Court where he quickly became the leading member:

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- 39 Malan (n 2); CTAR Cape Town, MC, Vol 15, Malan's notes to address the jury (nd).
 40 On 4 February 1901 *The South African News* published a claim that General HH Kitchener had given a secret order that captured Boers had to be shot. Maxwell-Mahon & Davey sv "Albert Cartwright" in *Dictionary of South African Biography (DSAB)* Vol 5 (1987) 116.
 41 Immelman sv "Sir James Tennant Molteno" in *DSAB* Vol 2 (1983) 481-482.
 42 Cloete (n 3) 154.
 43 His notes for his address to the jury covered twenty eight sheets of stationary. CTAR Cape Town, MC, Vol 15 (nd).
 44 Rose Innes *James Rose Innes. Chief Justice of South Africa, 1914-1927. Autobiography* (edited with an introduction by Tindall) (1949) 3.

He was most industrious and meticulously prepared each of his cases, however insignificant a case might be. He was a fluent speaker, never tedious in his presentation of cases, and both quick-thinking and quick-witted. His extremely honest and fair presentation of factual data and his exposition and application of legal principles gained for him the confidence of his colleagues. His premises were accepted, no proof being required of him.⁴⁵

In 1884 he was elected to the Cape parliament and six years later became Attorney-General in CJ Rhodes's first cabinet. As a minister he was shocked by Rhodes's political misuse of his wealth, and refused shares the premier offered him in his British South African Company. In 1893 he left the cabinet in protest over a railway contract awarded without a tender. His integrity made him one of the most respected politicians in the Colony.

In the years leading to the outbreak of the South African War, Rose Innes was sympathetic to the position of the Uitlanders in the Transvaal, believing that their grievances were authentic, and that if they were not redressed, war would result. Despite this he was appalled by the Jameson Raid and by Rhodes's part in it. From 1896 he operated as a political independent, keeping his distance from the Rhodes-aligned and pro-imperial Progressive Party. He was anguished by the outbreak of war in October 1899. In June 1900 Rose Innes was offered the Attorney-Generalship in the Progressive Party government of Sir Gordon Sprigg. He accepted the portfolio after considerable hesitation on the grounds that it was his duty in a time of crisis⁴⁶ but he did so with the stipulation "that no outside influence of any kind whatever should be allowed to affect the cabinet – in other words there was to be no wire-pulling whether from Rhodesia or anywhere else".⁴⁷

The war was an unhappy period for Rose Innes. His closest friends, John X Merriman and JW Sauer, were leading members of the anti-war movement and became alienated. He was unhappy with the suspension of parliament and valiantly opposed the excesses of martial law. To Milner he made it clear that the desire to extend martial law to Cape Town was only a cover to suppress *Ons Land* and *The South African News*.⁴⁸ Rose Innes's criticism of the application of martial law led to Lord Kitchener, commander of the British forces, accusing him of retailing unsubstantiated allegations against the military as fact. Milner also felt that Rose Innes was "unrealistically tender toward

45 Anonymous *sv* "James Rose Innes" in *DSAB* Vol 2 (1983), 329-330. For more information on Rose Innes's judicial career see Kahn *Law, Life and Laughter: Legal Anecdotes and Portraits* (1991) 96-101.

46 That Sprigg was Rose Innes's uncle by marriage was possibly another factor.

47 Vanstone *Sir Gordon Sprigg: A Political Biography* (DPhil, Queen's University, 1974) 387-388.

48 Wright (ed) *Sir James Rose Innes Selected Correspondence (1884-1902)* (1972) 271.

individual liberties when stern measures were necessary”,⁴⁹ but respected the Attorney-General’s integrity:

He is steeped in the old doctrine that you must always give way to the Dutch. But he has an essentially *honest mind*. The “lie in the soul” can effect no lodgement in his clear intellect and absolutely sincere nature ...⁵⁰

The public perception of Rose Innes as a honourable politician is summarised as follows by the historian Harrison Wright:

Innes was no ordinary politician. His qualities of intellect and character were exceptional. Contemporaries acknowledged him as a man of pre-eminent fairness, honesty, and sense of justice. His moral purpose was transparent; his integrity was unquestioned; his powers of analysis and debate and his capacity for work were impressive; he was calm and moderate in his habits, in his speech, and in his judgments. Political opponents expressed their admiration for him as enthusiastically as did his friends.⁵¹

Malan’s suspicion that the libel law could be used for political reasons was not baseless. During the Napoleonic wars and the post-war Regency period in England, a period marked by internal turmoil, libel laws were used with great effect to silence critics of the ruling establishment by prosecuting and imprisoning newspaper editors.⁵² Rose Innes was, however, not the type of person to abuse the law to suppress a dissenting voice. In terms of the Cape Colony’s law, *Ons Land* had defamed French and Rose Innes as Attorney-General had no choice but to prosecute Malan.⁵³ Despite his later protestations, Malan knew the letter was libellous otherwise he would not have ordered the removal of the general’s name. For this reason he did not plead justification in his trial. In terms of the Libel Act a defendant had to file a plea of justification if the defence was that the matters charged were true and published for the public benefit. The plea had to be in writing and had to set out the particular fact or facts why it was for the public benefit, and had to be given to the Crown a reasonable time before the trial. If such a plea was not lodged the court would only determine whether the statement was libelous, and not whether it was true or false.⁵⁴ Malan could not plead justification as the authors

49 Galbraith (n 17) 79-80.

50 Headlam (ed) *The Milner Papers. South Africa 1899-1905* Vol 2 (1933) 121.

51 Wright (n 48) i.

52 For the use of libel laws to silence critics of the Regent and the government in England see Wilson *The Laughter of Triumph: William Hone and the Fight for a Free Press* (2005) and Roe *Fiery Heart: The First Life of Leigh Hunt* (2005).

53 Rose Innes in his posthumously published autobiography (n 44), did not mention the Malan trial. This omission did not signify guilt or shame, but rather the book’s impersonal nature.

54 See Gardiner & Lansdown *South African Criminal Law and Procedure* (1946) 1494 for a historical survey of the Libel Act.

of the letter were not eyewitnesses to the alleged shelling; their accusation was based on hearsay.

Without a justification plea, Malan's task compiling a defence was difficult. To assist him in his preparation he attempted to get hold of the authors of the letter, Mrs CH Bester in the Pietermaritzburg Refugee Camp and Mrs JC Kriegler of the Howick Refugee Camp in the Colony of Natal. The military authorities ignored his request to transport the women to Cape Town, while the office of the Cape Attorney-General was only prepared to assist Malan if his defense was that of justification. Malan's attorneys, the firm Sauer & Standen, argued that he required the women to prove the genuineness and *bona fides* of the letter and that it was published without malice or evil intent and for the public benefit. The Attorney-General's office pointed out that their testimony could not be relevant in the absence of a defence of justification. The offer was, however, made that if Malan could show how the women, without a defence of justification, could make any statement which would be legally admissible as evidence, the Crown would expedite their presence at the trial.⁵⁵ In his memoirs Malan claimed that he first had to interview the women to determine his defence, while he also considered it unfair to give information to the prosecution on his line of defense. It can only be assumed that Malan had forgotten that without a plea of justification the women had no role to play in the trial.

5 The trial: *R v Malan*⁵⁶

The trial started on 18 April 1901 in the Cape Supreme Court with Mr Justice Sydney Twentyman Jones (1849-1913), Judge President of the Eastern Districts Court in Grahamstown, presiding. He was, like Malan, a Cambridge University graduate and was noted for his good nature and courtesy.⁵⁷ Jones's first duty was to deal with a request for an adjournment. Malan's argument was that even without a plea of justification the women had to testify as to the genuine nature of the letter and whether his publishing of the letter was "fair comment" on the actions of British troops. If it was "fair comment", according to Malan, the publication of the letter was no crime. They could furthermore put him in communication with the other witnesses. Rose Innes had no objection to

55 CTAR Cape Town, MC, Vol 15, Office of the Attorney-General to Malan (3 Apr 1901 and 6 Apr 1901); Sauer & Standen to Office of the Attorney-General (3 Apr 1901).

56 The decision of the trial was not reported in the Cape Law Reports and the official record of the trial is missing, but the *Cape Times* published a verbatim account of the trial.

57 *Diemont sv "Sydney Twentyman Jones"* in *DSAB* Vol 5 (1987) 391; Randall *Bench and Bar of the Eastern Cape* (nd) 13, 15.

the postponement of the seditious libel charge, but as Malan was not pleading justification the trial for criminal libel had to proceed. The Judge concurred, pointing out that Malan could have obtained the necessary military pass to visit the women, or have sent an agent to the camps to communicate with them. With regard to his argument that the women could contribute on whether their letter was “fair comment” Judge Jones made it clear that the section on French was not comment, but a distinct statement of fact. As Malan could not indicate what defence the women would support he refused the postponement request, and the trial for criminal libel proceeded. The trial for seditious libel was, however, postponed.

In his memoirs Malan claims that during jury selection Rose Innes challenged any one with an Afrikaans surname. The *Cape Times*’ report of the trial reflects that the Attorney-General challenged three of the originally called jurors, and Malan one, but does not provide the names of these jurors or the reasons for these challenges. All the jurors, W Castleman, W Garden, AD Scott, L Harris, H Brookson, H Reid, J Hopman, G Green and WN Asphalt, had English surnames, but this does not have to signify a packed jury as insinuated by Malan.

Rose Innes opened the case for the Crown by defining defamatory libel. He then read the offending passage which, according to the Crown, accused French of being “a man of brutal, inhuman and dishonourable character, that he disregarded the ordinary rules of civilised warfare and his obligation and duty as a soldier and that he knowingly caused defenceless women and children to be fired upon, and took no steps to succour those of them that might have been wounded”. Rose Innes then proceeded to call witnesses to provide the necessary proof that Malan was *Ons Land*’s editor and in control of the newspaper when the letter was published. The last witness for the Crown was Lieutenant EG Garwood of the British army’s Intelligence Department to verify that General French was the only officer of that name serving in the army.

Malan, refusing to testify as under oath he could be made to expose the sub-editor’s error, called three witnesses. The first was NG Theunissen of Caledon who had received the letter from his cousin in the Transvaal, and could vouch that she was a trustworthy person. Malan then called Krige who testified that he knew the husband of the letter writer, and that he had forwarded the letter affirming that it was written by a trustworthy person. Through his questioning Malan conveyed the message that he only published the letter after Krige, an

attorney, had concluded that the letter was not defamatory, and that there would be no harm in its publication. Rose Innes, in his cross-examination of Krige, however, immediately pointed out that the Caledon attorney was fortunate not to be prosecuted for libel himself. He then skillfully used Malan's own witness to convey to the jury *Ons Land's* substantial influence amongst Afrikaners in the Caledon district. Malan's last witness was EJ Edwards, managing editor of the *Cape Times*, which had published a translated version of the letter, to ask him whether he had determined if the statement was true before publication. Rose Innes and the Judge, however, pointed out that the two publications could not be compared. They concurred with Edwards that he had published the letter to show what the enemies of the Queen were publishing, thus as a specimen of fabrication.

In his closing statement Rose Innes argued that the case had been won by default as Malan provided no evidence which could be a valid defence in law. He did not show that the statement was true, or privileged.⁵⁸ It was found that Malan's reliance on Krige's recommendation to publish the letter only proved that Krige was also guilty of libel. He rejected as ridiculous Malan's claim that the *Cape Times* also had to be prosecuted as its publication of the letter was an antidote to a falsehood. Moreover, by refusing to take the stand Malan could not be cross-examined on the general tenor of *Ons Land*. Therefore the only point that remained for the jury was to ask whether or not the letter was defamatory. After re-reading the offending paragraph, Rose Innes asked the jury to place themselves in General French's place.⁵⁹ He again dismissed the absence of the letter writers as irrelevant since Malan provided no defence of justification. Anticipating Malan's statement to the jury that worse libels had been published in Britain without any prosecutions he pointed out that in peaceful Britain libellous statements would do little harm:

[B]ut what would be the effect of bringing these things here and circulating them widely within the sound of the cannon and the rifle? In these country districts many people sympathised, and naturally sympathised; as many of the Afrikaner people had their relatives on the other side, and when they read that their relatives' wives and children had their homes burnt and were deliberately fired upon, the influence would tend to sap their loyalty and drive them into rebellion.⁶⁰

His last point was that the case had nothing to do with press freedom, of which he was a great defender. An editor had a public duty, but there were times

58 The Libel Act defined privileged communication as the *bona fide* discharge of a public duty or official duty: See Gardiner & Lansdown (n 54) 1495.

59 *The South African News* 20 Apr 1901.

60 *Cape Times* 19 Apr 1901.

when a line had to be drawn, and when it had been crossed the editor had to take the consequences.

Rose Innes's closing statement was a *tour de force* and Malan was shaken. He opened his address to the jury with a statement that his already difficult position was made even more difficult in having against him as prosecutor the Attorney-General, "a man known and respected in Cape Town, where every word he said was listened to".⁶¹ Malan then proceeded to read his meticulously prepared speech, claiming that it was in public interest to publish the letter. That it was the duty of all newspapers to publish information on the war, for by exposing things that happen in war the nation was secured from outrages. The letter made it clear what the enemy was thinking and was thus facilitating the removal of all causes prolonging hostilities. It was published on the back page without comment except to point out that it was written by the wife of a man fighting against the Empire so that readers could make allowance for her prejudice. Under these circumstances he did not consider it necessary to prove the truth of the statements. He furthermore asked the jury why it should be criminal for *Ons Land* to publish allegations while worse things had been published in England and in South Africa; many Reuter's telegrams were exposed as false, while no steps were taken against the authors or editors. Malan also made it clear that personally he had no malice and no spite, and that he did not publish the letter with any bad intention. His main defence was, however, that the jury could not convict him as he had not had the opportunity to contact the letter writers: "Are you gentleman of the jury going to find me guilty without me having had an opportunity of fully defending myself?"⁶²

In his memoirs Malan claimed that he had made such an impression on the jury, that Rose Innes addressed the jurors a second time.⁶³ In fact the Attorney-General had not done so, while Judge Jones's summary for the jury exposed the shortcomings of Malan's argument. He did so in a dispassionate manner by urging the jury not to view the trial as a political one. All they had to consider was whether the charge fell within the limits of the law. The judge indicated that he believed that the statement in the letter could be defamatory. If a person published words which were capable of bearing a malicious meaning he could not merely say that he never intended people to read them in any malicious sense. A publication of a libel was malicious in every case if it did not fall within

61 *Cape Times* 19 Apr 1901.

62 *Ibid.*

63 Malan (n 2).

certain exceptions. The first was that the publication was true; the second that the published matter was honestly believed to be true. The jury, however, did not have to consider the question whether the words were true as Malan had not pleaded justification. With regard to the second, Malan himself had stated that he had had no opportunity to make inquiries, but that he had simply published the letter. With regard to whether it was a fair criticism, which was defined as the publication of comments on any persons who submit themselves to public criticism, provided that such comments were fair, the statement in the letter was not comment at all, but simply allegations of fact.

The whole matter simply resolved into the question whether Malan had published that which could bring French into contempt, hatred or ridicule. If the jury concluded that the letter had this tendency and was published maliciously, he was guilty of libel. The jury then retired and returned within fifteen minutes with a guilty verdict.⁶⁴

Sentencing was postponed as Judge Jones first wanted to deal with the libel trials of Vosloo and De Jong. The next day Malan was accompanied to court by his father and the secretary of *Ons Land's* publishing company. The latter brought a cheque book to pay the expected fine. After the prompt trials of the two other editors, the Court rejected their defence that since the letter appeared in *Ons Land* without immediate repercussions there was no need to verify its reliability. Judge Jones sentenced the three editors together, making it clear that a fine was not sufficient punishment:

I regret, for more reasons than one, that these sentences should have to be imposed. Chiefly for this reason, that I knew during the present time, in a country like this, when feeling is running high, and where all of us know there is a certain amount of strong sentiment, which is a natural sentiment, because it is excited by relationship, kinship, or simply by race – it is for this reason I regret I have to impose the sentence I am about to impose ... The sentence must be such as will have a deterrent effect.⁶⁵

Malan received twelve months imprisonment while the other two editors were sentenced to six months each. Rose Innes, who thought that Malan's sentence was more severe than expected, although not undeserved,⁶⁶ dropped the charges of seditious libel. (Malan's memoirs omit mentioning this and create the impression that he was also convicted on this charge.) A shocked Malan had only a few minutes to send a message to his wife before he was taken to

64 *The South African News* 19 Apr 1901.

65 *The South African News* 20 Apr 1901.

66 Wright (n 48) 280.

prison in a “Black Maria”. By one o’clock in the afternoon he was convict G4979 in the Roeland Street prison. Malan’s surprise at his sentence is evident in the letter he wrote to his wife to make arrangements for her to cope with his enforced absence.⁶⁷ Two weeks after the trial had ended the British military brought the two women who had made the accusation to Cape Town and presented Malan with a bill for £36 for their transport and accommodation. He was outraged and refused to pay.⁶⁸

The English-language newspapers were jubilant at Malan’s imprisonment. The *Cape Times* of 20 April 1901, going as far as to write that in the light of the shameful letter’s influence upon ignorant and prejudiced readers in the country districts, Malan could congratulate himself on his light sentence. The Colonial Office also believed that Malan had got off too easily, and expressed frustration that there had been no conviction for seditious libel.⁶⁹ In contrast, Rose Innes was severely criticised by opponents of the war for his harshness towards Malan. PA Molteno, Rose Innes’s friend from his early days at the Cape Bar, accused him of being carried away by race feeling, of having lost his judgment and of conducting a vindictive mode of prosecution.⁷⁰

6 Justice or politics?

The trial and prison was a traumatic experience for Malan, but with time he became a leading conciliator between Afrikaners and English-speaking South Africans, and a supporter of South Africa’s position as a Dominion member of the British Empire. He was a cabinet minister between 1910 and 1924, as well as acting Premier on more than one occasion. Despite his support for Louis Botha and Jan Smuts’s forgive and forget policy with regard to the war and his ability to work closely with former bitter enemies such as Dr LS Jameson,⁷¹ he could never make peace with the way Rose Innes had treated him during his trial. His anger was understandable when his behaviour before and during the war is taken into account. Despite all his efforts to prevent a war and to keep the Cape Afrikaners loyal to their sovereign, and his use of constitutional means to protest against the war, he had become one of the most reviled persons in Cape Town. He was physically assaulted by loyalists, spied on by

67 CTAR Cape Town, MC, Vol 84, Malan to Johanna Malan (20 Apr 1901).

68 Malan “In die Gevangenis – Kaapstad” *Die Huisgenoot* 2 Jul 1937.

69 NA Kew, CO48/552, Comments by Colonial Office officials on the telegram of Governor Walter Hely-Hutchinson to Chamberlain (20 Apr 1901).

70 Solomon (ed) *Selections from the Correspondence of Percy Alport Molteno 1892-1914* (1981) 180.

71 For Malan’s career as a conciliator see Mouton “Free, United South Africa under the Union Jack”: F.S. Malan, South Africanism and the British Empire” 2006 *Historia* 29-48.

the British army, tried and convicted in a court by English-speakers, treated as a common criminal in prison, and while incarcerated his wife was intimidated by regular searches of his home by British soldiers. Malan's hurt and resentment, combined with the passage of time, distorted his memories of the trial.

In contrast to the perception created by Malan's memoirs, Rose Innes was a person of the highest integrity, fair-mindedness, strong liberal principles and political independence. He would never have stooped to be part of a kangaroo court. For Rose Innes, battling the excesses of martial law in an atmosphere of fear that the Colony was rushing towards a great explosion, *Ons Land's* libel of French was irresponsible and criminal. He accepted that an editor had a public duty, but felt that that press freedom had limitations and Malan, De Jongh, Vosloo and Cartwright⁷² had to accept the consequences of their irresponsible actions. Secure in the law Rose Innes did not need the vengeful loyalists, the *Cape Times*, Chamberlain, the British army or Milner⁷³ to instruct him to initiate legal proceedings against Malan. He was strictly within the law with regard to his objection to the postponement of the criminal libel trial – Malan did not plead justification and could not show how the authors of the letter would be part of his defence. With regard to the seditious libel charge, for which their evidence could be of relevance, he agreed to postpone the trial. Viewing Malan's imprisonment on the criminal libel charge as enough punishment, Rose Innes dropped the seditious libel charge. Malan's prison term was, moreover, not unreasonable. The sentence was not the result of Judge Jones playing to the gallery of baying loyalists demanding severe punishment as it was not in his nature to acquiesce to prevailing norms and fashion. This was evident in *R v Hart* (1892). Hart was charged with causing the death of a black man by flogging and torture. When the jury returned a verdict of not guilty Jones pronounced the verdict a disgrace to the community and declined to thank the jurors for their services.⁷⁴ Jones's stance that in a time of war Malan deserved more than a fine was not out of proportion. That the sentence was seen as too lenient was evident in the frustrated reaction of the Colonial Office. Ultimately Rose Innes and the Cape legal system were not at fault. It was Malan's own editorial carelessness that delivered him, and two fellow editors, into the hands of his enemies.

72 Cartwright received twelve months imprisonment for the libel of Kitchener.

73 In the correspondence between Milner and Rose Innes the only reference to the libel trial was a comment by the Attorney-General that he did not think that Malan would plead justification. Wright (n 48) 280.

74 Diemont (n 57) 391.