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# THE IMPACT OF ARMED CONFLICT ON CIVIL SOCIETY – *R V CELLIERS* 1903 ORC 1

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## 1 Introduction

The Anglo-Boer War (1899-1902) holds pride of place in the dismal wars that marked the face of Africa in the course of the nineteenth century. This war raged with devastating consequences over large areas of South Africa, causing death and destruction. At the conclusion of hostilities both the Orange Free State and the South African Republic lost their independence while Great Britain established its supremacy on the South African sub-continent.<sup>1</sup>

This war with its concomitant scorched-earth policy and withdrawal of citizens as combatants brought the nation to a halt. The case of *R v Celliers*<sup>2</sup> illustrates the dramatic impact and consequences of the war on the Free State society and the administration of justice. In this paper conditions prevailing during the war will form the backdrop to the sombre events preceding the trial. The purpose of this discussion is to place the trial within its proper historical context. Varied responses to this post-war trial show to what extent the interpretation of conflict and understanding of events of opposing parties differed.

In this case Celliers received instructions from his commanding officer, Assistant Chief Commandant PR (Philip) Botha to execute Lieutenant CD Boyle, an officer of the Orange River Mounted Police, stationed at Dewetsdorp. Boyle was charged with the supervision of burghers who had turned their backs on the war and the transportation of the women and children of the actively-participating combatants to several camps. He held this position until November 1900 when Chief Commandant CR de Wet laid siege to this town, resulting in its surrender and his capture. This event signifies a chain of events that ultimately led to the death of Boyle, the dismissal of Botha and the two trials of Celliers on the same charge of murder.<sup>3</sup>

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1 Scholtz *Generaal Christiaan de Wet as Veldheer* (2003) 17; Giliomee *Die Afrikaners: 'n Biografie* (2004) xvi.

2 1903 ORC 1.

3 Free State Archives Repository (Bloemfontein: FAR), HG, 4/1/2/1/2, preliminary investigation, evidence: Tufnell 8.

## 2 Conditions prevailing in the Orange Free State at the time of Boyle's captivity

Conditions prevailing in the Republic may adequately be gauged from a Proclamation of August 1901 issued by Kitchener, and a letter in reply from State President MT Steyn. The Proclamation assumed that the Free State had already been annexed and that British forces had occupied the capital and most important towns as well as all the railway lines.<sup>4</sup>

The British forces managed to capture the majority of the burghers<sup>5</sup> who had survived the war. The remaining burghers had submitted themselves to the authority of the British government and lived peacefully in British-controlled camps and towns.<sup>6</sup>

In the light of the above, Kitchener stated that the members of the Republican forces had been depleted, and that they lacked military equipment and a well-organised command structure. According to this Proclamation, they were not in a position to show any worthwhile military resistance. Nevertheless they persisted in their attacks on smaller units of the British forces and continued to damage the property of the King. The Proclamation further indicated that all these efforts were an impediment to agriculture and the economy, and caused senseless bloodshed. This deprived the majority of the inhabitants of the Colony of peace which they so eagerly desired.<sup>7</sup>

In a letter, Steyn responded to this Proclamation, stating the case for the Republic. He conceded that the Republican forces had left the Cape at the surrender of General Prinsloo in July 1900. At that stage virtually the entire Republic had been in the hands of the British forces.<sup>8</sup>

This, according to Steyn's letter, had changed dramatically: The Republican forces had once more succeeded in overrunning parts of the Cape Colony and were able to move around without hindrance by the British forces. He conceded that Kitchener controlled the capital, the entire railway system and the neighbouring towns.<sup>9</sup>

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4 Proclamation of 7 August 1901. See also Van der Merwe *Marthinus Theunis Steyn, 'n Lewensbeskrywing* (Part 2) (1921) 25.

5 The Republican armed forces – all burghers were required to render military service.

6 Van der Merwe (n 4) 25.

7 *Idem* 25-26.

8 *Idem* 30.

9 Letter from Steyn to Kitchener: 15 August 1901 quoted by Van der Merwe (n 4) 30.

The remaining territory was in the hands of the Republican forces. Steyn further pointed out that his government had appointed magistrates responsible for law and order in those parts of the country and that Kitchener's jurisdiction was limited to the range of his heavy artillery. Steyn also declared that the vast majority of burghers still participated as combatants. He agreed that some of them were no longer complying with their duty to deliver military service and had laid down arms; some had even committed acts of high treason. According to him, the culprits were few in number and the majority of the prisoners of the British forces had in fact not been liable for military service.<sup>10</sup>

It is not clear which of these statements were true or false, neither is it the purpose of this paper to provide an answer. It is, however, necessary to refer to *obiter dicta* from various court decisions dealing with the validity of the annexation. In *Lemkuhl v Kock*<sup>11</sup> the Court stated that the only authority which it could recognise after the date of the Annexation Proclamation was that of the British Crown.<sup>12</sup> The result was that the Orange Free State ceased to exist after that date and was, for the purpose of litigation, "a body of men bound together in fighting for a common cause, and in any case exercising control over that part of the country where they happened to be carrying on operations. Their warfare was not illegal, and they enjoyed belligerent rights".<sup>13</sup>

A similar point of view was held in *Van Deventer v Hancke and Mossop*.<sup>14</sup> It was argued that the Treaty of Vereeniging annulled the annexation of the South African Republic. The Court responded as follows:

[S]crupulous care was taken by those who represented the British Government to refrain from any recognition of the South African Republic or its Government, while at the same time they fully recognised the position of certain leaders of a force entitled to all the privileges of belligerents ... and therefore entitled to enforce martial law ... in respect of the persons and property of its own members.<sup>15</sup>

It should be clear at this stage that there were two rival dispensations in the area between the Orange and the Vaal Rivers: the Government of the Orange Free State, which ceased to exercise control over some of its citizens with the conclusion of the Treaty of Vereeniging on 31 May 1902; and the Orange River

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10 *Idem* 30-31.

11 1903 ORC 73.

12 *Idem* 77. See also *Van Deventer v Hancke and Mossop* (1903 TS 401) 409 411 412.

13 *Lemkuhl v Kock* (1903 ORC 73) 77.

14 1903 TS 401.

15 *Idem* 411 412.

Colony which came into existence on 24 May 1900 and was headed by a lieutenant-governor as representative of the British Crown. Steyn headed a war government in the same area. The inhabitants therefore owed allegiance to two opposing masters. The one insisted that his subjects should no longer participate in the hostilities while the other demanded military service from its citizens to protect the state from its invaders. The result was a clear conflict of interests putting the inhabitants in a rather precarious position.

### **3 The detention and execution of Boyle**

To return to November 1900 and the events that followed the Battle of Dewetsdorp: De Wet succeeded in capturing the town and four hundred prisoners of war. One of them was Lieutenant Cecil Boyle. At that stage the Republic had no facilities to detain prisoners. Thus, with the exception of Boyle, all were released. Boyle was left in charge of Commandant De Vos who was a subordinate of Botha. It appears that Botha was responsible for his continued detention. There are a number of explanations for this but no formal evidence to this effect.<sup>16</sup>

Botha stated before the battle that he would reckon with Boyle should they succeed in capturing him. He thereafter referred to his prisoner as “a beast” who should be destroyed.<sup>17</sup> He also confided to one of his officers that he could not stand the sight of Boyle.<sup>18</sup> De Wet declared that the inhabitants of the district were extremely hostile towards Boyle, accusing him of making war on women and children. He confirmed his knowledge of the scorched-earth policy and, referring to Boyle, pointed out that some persons acted on orders, some beyond them. It seems further that De Wet was in possession of statements testifying to Boyle’s insensate cruelty.<sup>19</sup>

The opinion of Botha’s secretary<sup>20</sup> that “Boyle had a bad name ... owing to his supposed cruel treatment of women and children” was confirmed by Botha’s son<sup>21</sup> who opined that “Boyle was a dangerous character with regard to women and children”. Lategan,<sup>22</sup> Boyle’s warden, further stated that “Boyle had done a lot of wrong”.

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16 The National Archives (Kew: TNA) CO, 224/12, trial, evidence: De Wet 23 24.

17 TNA, CO, 224/12, trial, evidence: Moll 21.

18 FAR, HG, 4/1/2/1/2, preliminary trial, evidence: Van Reenen 32; TNA CO, 224/12, trial, evidence: Van Reenen 26.

19 TNA CO, 224/12, trial, evidence: De Wet 24 - 26.

20 FAR, HG, 4/1/2/1/2, preliminary trial 16.

Before proceeding, it is appropriate to do justice to the *audi et alteram partem*-rule and provide a brief portrait of Boyle. He was the son of General Boyle and attended school in Wellington.<sup>23</sup> A fellow officer describes him as “a man about 6 ft in height. Fair complexion. Fair hair inclined to red ... . He stammered rather badly”. He pointed out that his position entailed “many unpleasant duties, such as bringing in Boer families”.<sup>24</sup>

His personal file reveals a little more about Boyle the officer. His commanding officer wrote a confidential report:

Careful, smart and reliable officer. Thoroughly capable and hard worker. He is just the man required and has rendered me the greatest assistance in the district. His Indian experiences, together with his natural attitude for this class of work make him an ideal police officer ... . Fault ... [He has] a slight tendency to be too lenient with his men.

He concluded with the following words: “As an old police officer myself, I can fully appreciate his qualifications.”<sup>25</sup>

On 2 January 1900 Philip Botha carried out his threat to settle accounts with Boyle. He summoned Barend Celliers and instructed him to take Boyle some distance from his camp and to shoot and bury him. Celliers removed Boyle from the custody of Corporal Lategan who assumed that Boyle had been released. Along the way Celliers encountered a certain Smallberger who later became the sole witness to the subsequent events. Smallberger was also a victim of the war. Fortunately his evidence survived in the form of a sworn affidavit.<sup>26</sup>

Celliers and Smallberger took Boyle to a farm in the vicinity of Bethlehem where Boyle was informed of his pending execution. Boyle immediately requested to meet with Philip Botha. Celliers refused but gave him the opportunity to write a letter and to pray. Boyle wrote his letter and dropped to his knees. Celliers then stepped backwards and shot him in the back. He thereupon approached him and administered a shot in the head. The body was interred and the letter was later handed to Philip Botha.<sup>27</sup>

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21 He was one of his father's staff members. See FAR, HG 4/1/2/1/2. preliminary trial 29.

22 Lategan was Boyle's warden: *idem* 26.

23 FAR, PMP 23.

24 FAR, HG, 4/1/2/1/2, preparatory investigation, evidence: Tufnell 8.

25 FAR, PMP 23.

26 FAR, HG, 4/1/2/1/2, preparatory investigation 10 11 25 27.

27 FAR, HG 4/1/2/1/2, preparatory investigation, sworn statement: Smallberger 10-13; TNA CO, 224/12, trial: Celliers 28-29.

#### 4 Events subsequent to the execution

In January 1901 Steyn and De Wet summoned Commandant De Vos to whom they had entrusted Boyle in November 1900. At the meeting they enquired into his fate and were informed of the execution. Greatly disturbed, the State President and the Chief Commandant immediately summoned Celliers who confirmed De Vos's report.<sup>28</sup>

De Wet mentioned that all his officers with the exception of Philip Botha met at Doornberg on 25 January 1900 to hold a Council of War. In his book, *Die Stryd tussen Boer en Brit*, he failed to make any reference to the incident or a discussion of it at the meeting. According to him, the Council of War had on its agenda the expiry of the term of office of both the State President and the House of Assembly.<sup>29</sup>

This aspect is of great significance. The war rendered a presidential election or the election of representatives for the House of Assembly completely impossible. The Council therefore decided to propose Steyn as the presidential candidate to the burghers and gave them the opportunity to suggest an alternative. The candidate drawing the majority of votes would be sworn in as acting State President. Cecil John Rhodes and Steyn were nominated but no second could be found for Rhodes. As the only candidate Steyn took the oath of office as acting State President for the duration of the remainder of the war.<sup>30</sup>

Philip Botha in turn received a letter from the Secretary of State discharging him from office and replacing him by Commandant Hattingh. Botha's son testified that Botha had showed this letter to him and to another officer present. He (Philip Botha) denied that he had ever given such an instruction and that he had knowledge of the execution. The letter followed an inquiry into the incident. He was, however, not present at the enquiry and therefore proposed to take up the matter with De Wet. Shortly thereafter Philip Botha was killed and, according to De Wet, failed to report on the matter.<sup>31</sup>

The execution was again discussed at a Council of War held in July 1901. One of the items on the agenda was to decide the fate of Celliers. It appears that this Council was subsequently reconstituted as a military court before which

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28 *R v Celliers* (1903 ORC 1) 2 5; FAR, HG 4/1/2/1/2, preparatory investigation, evidence: De Vos 20; TNA CO 224/12, trial, evidence: De Wet 24 29; Van Schoor "'Dagboek' van Rocco de Villiers en bylaes, 3" 1975 *Christiaan de Wet-Annale* 19 (n 9).

29 Van Schoor *Die Stryd tussen Boer en Brit: Die Herinneringe van die Boere-Generaal CR de Wet* (1999) 203.

30 *Ibid.*

31 *R v Celliers* (1903 ORC 1) 2.

Boyle appeared on a charge of murder. The minutes of this meeting (and subsequent trial) did not survive. The trial that followed is therefore a reconstruction based on the trial proceedings that took place in 1903 in the Supreme Court of the Orange River Colony.<sup>32</sup>

Interestingly the following people served on the panel of presiding officers: OAI Davel,<sup>33</sup> PW de Vos,<sup>34</sup> CR de Wet,<sup>35</sup> CC Froneman,<sup>36</sup> FJWJ Hattingh,<sup>37</sup> FE Mentz,<sup>38</sup> A Ross<sup>39</sup> and JHB Wessels.<sup>40</sup> Moll,<sup>41</sup> Botha's former secretary, served as the secretary.

In the course of the proceedings Celliers pleaded not guilty to a charge of murder, explaining that the shooting was done in compliance with a command issued by Philip Botha. Smallberger, referred to above, was an important witness in the case of the state. Celliers was the only witness for the defence. De Vos also testified. This placed him in the rather complex position of being both a member of the Court and a state witness. The Court gave the following verdict after the defence closed its case:

This Krygsraad cannot find the prisoner guilty of the charge brought against him, as it appears from the evidence before the court that he carried out the orders of his superior officer.<sup>42</sup>

Davel later indicated that he had suggested that the Court deliver a verdict of guilty of culpable homicide.<sup>43</sup>

## **5 The end of the story**

### **5.1 Where is Boyle?**

Yet this is not the end of the story. The British authorities found themselves completely in the dark as to the fate of Boyle. In May 1902 no estate had been

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32 FAR, HG, 4/1/2/1/2, preparatory investigation, evidence: Smallberger, Wessels, Hattingh, De Vos & Davel 13 15 18 27. Also see Van Schoor (n 28) 19.

33 Commandant: Presidential Guard (FAR, HG, 4/1/2/1/2, preparatory investigation, evidence: Davel 27).

34 Commandant: Kroonstad (FAR, HG, 4/1/2/1/2, preliminary trial, evidence: De Vos 19 20).

35 Chief Commandant: Orange Free State (FAR, HG, 4/1/2/1/2, preparatory investigation, evidence: Wessels 15).

36 Commandant: Ladybrand (Van Schoor (n 29) 54 (n 8)).

37 Assistant Chief Commandant: Kroonstad and Heilbron (FAR, HG, 4/1/2/1/2, preparatory investigation, evidence: Hattingh 18).

38 Commandant: Heilbron (Malan 106).

39 Commandant: Vrede (Malan 121).

40 Commandant: Winburg (FAR, HG, 4/1/2/1/2, preparatory investigation, evidence: Wessels 14).

41 FAR, HG, 4/1/2/1/2, preparatory investigation, evidence: Moll 16.

42 *Idem* 17.

43 FAR, HG, 4/1/2/1/2, preparatory investigation, evidence: Davel 28.

registered for him, the reason being that he had never been declared dead. The Casualties Department reported that he had been taken prisoner and reportedly murdered.<sup>44</sup>

Boyle's brother and sister were aware of the fact that his life had been in danger. They placed an advertisement in the *Bloemfontein Post* in an attempt to determine his fate. Responses to it failed to provide any definite information. Celliers himself was wounded and taken prisoner. Two officers approached him for information on Boyle while he was recuperating in a hospital in Kroonstad. He confirmed the fate of Boyle and later pointed out his grave.<sup>45</sup> This resulted in his disqualification from the general amnesty provided for in terms of the Treaty of Vereeniging.

## **5 2 Preparatory examination**

In November 1902 a preparatory examination was conducted by Barker, Justice of the Peace for Kroonstad. Eleven witnesses<sup>46</sup> testified at the examination. Celliers confessed to the shooting of Boyle after Captain Palmer and Boyle's sister testified that they were present when Celliers pointed out the grave. The minutes reflect the following statement of Celliers:

All I have to say is that I feel myself not guilty of murder. I shot and buried Lt Boyle by orders of General P. Botha, and according to Military Law I was in duty bound to obey him. Personally I had no ill feeling towards Lt Boyle, and it grieved me that I was ordered to do it.<sup>47</sup>

This in turn resulted in the Attorney-General's instruction to prosecute Celliers again on a charge of murder.<sup>48</sup>

## **6 Proceedings in the newly established Supreme Court of the Orange River Colony**

The trial started in February 1903 before Justice Fawkes and a jury. Mr Barclay-Lloyd appeared for the Crown and Dr JBM Hertzog for Celliers.<sup>49</sup>

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44 FAR, CO, 169, 1418/02.

45 FAR, HG, 4/1/2/1/2, preparatory investigation, evidence: Palmer 3 4; TNA, CO, 224/12, trial: Palmer, Boyle 14-16 29.

46 CA Boyle, FJ Palmer, HR Tufnell, JB Wessels, TFD Moll, J Hattingh, PW de Vos, JH Lategan, OAI Davel, LPH Botha and FJ van Reenen. VAB, HG, 4/1/2/1/2, preparatory examination.

47 FAR, HG, 4/1/2/1/2, preparatory examination.

Interestingly Hertzog had served on the Bench of the Supreme Court of the Orange Free State. He was not invited to serve on the Bench of the newly-established Supreme Court of the Orange River Colony. Former Chief Justice Melius de Villiers and Dr Hertzog were replaced by Sir Andries Ferdinand Stockenstrom Maasdorp and AW Fawkes who served as Attorneys-General in the Cape Colony and Gibraltar respectively.<sup>50</sup>

Hertzog was schooled in the continental legal tradition. According to Verloren van Themaat, he found it difficult to adapt to the procedural system of the common-law tradition introduced in the newly established Colony. Arthur Barlow mentioned the following about Hertzog as an advocate:

He seemed to be pretty mixed up. He quoted from his favourite Latin authors and I doubt whether ... the judges could follow his old Latin. It seemed very clever and deep, but I could see that he was not impressing the Bench ... he was frightening me.<sup>51</sup>

Verloren van Themaat,<sup>52</sup> with reference to the above remark, states that after the war jurists trained at continental schools found themselves in an ever changing system of law. The *Celliers* case attests to this. Hertzog based his case mainly on Roman-Dutch authorities while the Crown quoted three precedents. The Court ignored all the authorities quoted by Hertzog and relied instead on one of the precedents quoted by the Crown.<sup>53</sup> Not only did the war influence the administration of justice for its duration, but it also had a marked influence after its termination.

## 6 1 The plea *in limine*

Celliers pleaded *autrefois acquit* on the charge of murder. He argued that he had been acquitted by a military court which was a competent court to try the matter. Thereupon a dispute arose regarding the competence of the military court. The defence argued that the Court had jurisdiction to deal with the matter

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48 FAR, HG, 4/1/2/1/2, letter, Attorney-General, 18 December 1902.

49 *R v Celliers* (1903 ORC 1) 1 2 3 6.

50 Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1979) 470; Le Roux, *Sir Hamilton John Goold-Adams se Rol in die Oranjerivierkolonie: 1901-1910* (1984) 9.

51 Verloren van Themaat "Generaal Hertzog as juris en sy rol in ons staatsregtelike ontwikkeling" in *Gedenkboek vir Generaal Hertzog* (1965) 136-137.

52 *Idem* 137.

53 Sien *R v Celliers* (1903 ORC) 1.

– the parties consented to its jurisdiction and, as a result of the hostilities, the military court was the only available court.<sup>54</sup>

The defence averred that the State President who had the power to promulgate legislation for the duration of hostilities, used this authority to extend the competence of military courts to all criminal matters. The Court rejected this argument on the basis that the defence failed to produce the Proclamation as evidence. Celliers thereafter pleaded not guilty and stated that his actions were in compliance with a command issued by his commanding officer.<sup>55</sup>

## 6 2 The trial

The evidence for the Crown dealt mainly with the capture of Boyle at Dewetsdorp, his departure from the encampment and his execution. The testimony of Botha's son that Celliers had once said that he was going to square accounts with Boyle and that his father denied any knowledge of Boyle's execution was vital to the Crown's case. The Crown also showed that not one of Philip Botha's staff was aware of any order to this effect.<sup>56</sup>

Hertzog collected evidence on the issue before the commencement of the trial. Evidence was led by the defence to show Philip Botha was hostile towards Boyle, that he was impulsive and would not necessarily wait for a command from his superiors. The Crown was faced with the problem that large sections of the evidence rested on hearsay. Barclay-Lloyd pointed this out to the Court but did not formally object to the fact. He later explained that such an objection would have prejudiced the case for the defence.<sup>57</sup>

Before continuing, it is necessary to deal with other matters concerning the evidence. Apart from Botha's son and Celliers himself no other witnesses could be found who could either remember or corroborate the command to execute Boyle. De Wet's testimony provides an insight into the procedures employed by the armed forces of the Orange Free State for the execution of a convicted felon. Usually the instructions were given in writing. Legislation further required the State President to ratify the sentence before the actual execution. De Wet went on to explain that the verdict had been kept secret to prevent a crowd of burghers descending upon him with pleas for clemency.<sup>58</sup>

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54 *R v Celliers* (1903 ORC 1) 2-3.

55 *R v Celliers* (1903 ORC 1) 3; TNA, CO, 224/12, report: Attorney-General, trial 8 13.

56 TNA, CO, 224/12, report: Attorney-General, trial, evidence: Botha 8 9 22 23.

57 TNA, CO, 224/12, report: Attorney-General 9-10.

58 TNA, CO, 224/12, trial, evidence: De Wet 24-26.

It is further important to note that there was no evidence that Boyle had stood trial for any offences committed.<sup>59</sup> The *Commando Act* of 1899 clearly stipulated that prisoners of war could not be executed unless a military court pronounced such a sentence. The Act required a court of twelve officers where the death penalty was considered.<sup>60</sup> The evidence for the Crown made it clear that Philip Botha's subordinate officers had no knowledge of any trial at which Boyle was condemned to death.<sup>61</sup> It may therefore be assumed that Botha had not followed the procedure stipulated in the Act and that his command had been illegal. The Crown did not refer to the stipulations of the Act. It also did not show that Celliers had any knowledge of the requirements or that he was aware that the command was illegal.

De Wet did not mention a similar command to that of Philip Botha once issued by him: At one stage during the war De Wet managed to capture Morgendal, an attorney who was spreading proclamations in which the Republican forces were called upon to lay down their arms. He and a fellow prisoner thereafter accompanied De Wet's forces in a small horse cart. A few days later Morgendal attempted to stall De Wet's escape while the British forces were converging on his camp. Frustrated with attempts to get the assistance of Morgendal to depart as quickly as possible, De Wet ordered one of his officers to shoot him. Without any further discussion the officer complied.<sup>62</sup>

Also interesting was Lategan's evidence. In response to a question by counsel for the defence he stated that he would also have obeyed the command to shoot Boyle if he had been entrusted with the task.<sup>63</sup> At the preparatory examination he answered a similar question as follows:

Had Gen Botha given me an order to shoot Boyle privately and told me not to tell anybody, and there were no witnesses I would have done it. Had the General told me to shoot myself I should require some reasons for it, but had I been ordered to shoot another man I would have obeyed orders without asking any questions.<sup>64</sup>

### 6 3 Addresses by counsel and judgment

In his address to the jury Barclay-Lloyd asked them to pay attention to the question whether Philip Botha had actually given the command and whether

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59 TNA, CO, 224/12, trial, evidence: Lategan, De Wet & Van Reenen 19 25 27.

60 S 59 of the *Krijgs- en Commandowet* 10 of 1899.

61 TNA, CO, 224/12, trial, evidence: Lategan, De Wet & Van Reenen 19 25 27.

62 De Wet *Met Genl. de Wet op Kommando* (1954) 74-77.

63 TNA, CO, 224/12, trial, evidence: Lategan 24-26.

64 FAR, HG, 4/1/2/1/2, preparatory investigation, evidence: Lategan 26.

such a command had been lawful. The defence argued that he did give the command and that Celliers had no other choice but to comply.<sup>65</sup>

The Court instructed the jury to ignore the evidence of Botha junior and attach more weight to the evidence of De Wet. The Court also pointed to the circumstantial nature of the evidence and that only Celliers's confession proved that he had been responsible for the execution. Thereafter the Court instructed the jury to decide whether Celliers or Philip Botha was responsible for the death of Boyle. In doing so they had to decide whether Celliers complied with Botha's instructions. The jury was reminded that Botha was Celliers's superior officer and that he had the power to give such a command. In considering this the jury was advised to have regard to the personality of Botha as revealed by the evidence. If the jury found that Botha had given the command they had to consider whether Celliers had knowledge of the fact that the command had been illegal. If not, they had to acquit him. The jury subsequently found the accused not guilty and acquitted him on the charge.<sup>66</sup>

## 7 Reaction to the judgement

Nine days after the trial the matter was raised in the House of Commons in London. During question time Sir James Ferguson, a cousin of Boyle, asked that a report of the proceedings be forwarded to him. He studied the report and returned it with a brief note in which he referred to the "unfortunate officer" and the "cold-blooded murder".<sup>67</sup>

It seems that Boyle's family was likewise not satisfied with the outcome of the trial. Mrs Boyle, the mother of the deceased, sought to sue the British Government for compensation. She accused the British military authorities of negligence and voiced her dissatisfaction at the outcome of the trial. Her letter contained the following remarks:

The acquittal of this man was most disgraceful and discreditable, and utterly at variance with the evidence. Had Celliers met with his just punishment, Mr. Boyle's family and I would have been completely satisfied, but in the case of the flagrant injustice of the verdict we think that we have a strong claim on the Government for compensation ...<sup>68</sup>

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65 TNA, CO, 224/12, report: Attorney-General 11-12.

66 *R v Celliers* (1903 ORC 1) 6. TNA, CO, 224/12, report: Attorney-General 12.

67 The Parliamentary Debates, Fourth Series Fourth Session of the Twenty-Seventh Parliament of the United Kingdom of Great Britain and Ireland, Vol CXVIII (1903); FAR, CO, Vol 160, 2619/03; TNA, CO, 224/12, letter: Ferguson, 9 June 1903.

68 FAR, CO, 211, 6566/03, letter: Boyle-Chamberlain, 18 July 1903.

The Colonial Office refrained from paying compensation offering a lack of funds as an excuse. The letter stated that the funds provided for the reconstruction of the Orange River Colony could not be diverted to comply with her request. The letter concluded with the following words:

In these circumstances Mr Chamberlain, while sympathizing with the loss which you have sustained in the death of your son, regrets that he is unable to meet your wishes.<sup>69</sup>

The judgement of Mr Justice Fawkes was also noted in Australia. Lieutenant George Witton, with reference to the Breaker Morant case,<sup>70</sup> ended a discussion in his book with the following remark:

These cases are sufficient to justify my belief that courts-martial (sic) and military tribunals should be speedily wiped out of existence. A trial by judge and jury, in an ordinary court, should never under any circumstances be departed from.<sup>71</sup>

Witton's words reveal a lack of objectivity and only emphasise the different responses to the outcome of the case.

As for Celliers, he lived to a ripe old age and never grew tired of telling his family that he owed his life to Hertzog, and to show his gratitude he remained a devoted supporter of his former counsel.<sup>72</sup>

## 8 Conclusion

The South African War was a long and vicious conflict where no quarter was asked nor given. The war cast its evil and murky shadows over both the civilians of the former Republic and the trial of Celliers.

The administration of justice had changed. The ordinary burgher actively engaged in warfare most likely experienced it during the hostilities as either non-existent or crude. The Supreme Court of the Orange Free State had gone into recess for three years. The Lieutenant-Governor, mercifully, established a special tribunal for awaiting trial prisoners in British hands. On the Republican

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69 FAR, CO, 211, 6566/03, letter: secretary: Chamberlain-Boyle, 13 August 1903.

70 For more information see Davey (ed) *Breaker Morant and the Bushveldt Carbineers* (1987) 1-238.

71 Witton, *Scapegoats for the Empire: The True Story of Breaker Morant's Bushveldt Carbineers* (2004) Ch XXI.

72 Delpont *Barend Cilliers (1866-1947)* (unpublished assignment 1966) 5. I would like to note my appreciation to Prof MCE van Schoor who made this document available. Parts of this document also appeared in the *Volkstyd*: Theron *Ondersoek na Lt Cecil Boyle se Teregstelling* (11 February 2002) 7.

side military courts lacked the functions of the civil courts. Moreover, military courts were a far cry from the calm dignified courts with adequately trained professional lawyers both on the Bench and at the Bar.

These military courts played an even greater role in view of the fact that the democratic institutions could no longer function properly. In the *Celliers* case the military court not only had to decide the fate of Celliers, but also had to deal with problems arising from the fact that the terms of office of both the State President and the House of Assembly had expired.

In October 1899 draconic legislative powers vested in the State President and from January 1901 in the acting State President. The luckless incumbent of that position was Marthinus Theunis Steyn. His war-time government was for the greater part of the war on the *qui vive* in order to avoid capture by the British forces. Nevertheless, members of the executive committee fell into hostile capture on at least two occasions. Naturally a well-ordered day-to-day government was out of the question. The same applied to criminal trials – no proper records were kept and Celliers' plea of *autrefois acquit* failed for that reason. A mere nine months had elapsed between the end of hostilities and the start of Celliers's trial. Yet no adequate documentation could be found to substantiate the plea.

When hostilities ceased the conquered nation also lost those key positions in the Government which were vital for power. The Republic forfeited the means to explain itself. The crime was committed and the culprit was tried while one regime still had power over its citizens – the culprit was tried again by its successor who had overpowered it in the war. Fortunately for Celliers justice was done by the new masters, but as far as the bereaved family of Boyle was concerned a ruthless killer had gone free.