

## *Deceit in the Transvaal?* *The Case of Burrows v Rhodes and Jameson*

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*In 1899, important legal principle and issues of political and historical significance came together in the English High Court. Cecil Rhodes and Leander Starr Jameson were sued in deceit for allegedly inducing a soldier's participation in the infamous Jameson Raid into the Transvaal Republic. In the reported demurrer, the Court rejected the defendants' plea that the claim arose ex turpi causa, thereby establishing an important exception to the illegality defence. This article seeks to provide an historical analysis of this much cited case. Despite frequent assumptions to the contrary, the action eventually went to trial and received considerable publicity. In addition to demonstrating that the largely unsubstantiated allegations of a former mercenary unfairly tarnished the reputations of Rhodes and Jameson, these contemporary reports also give us insight into public opinion in the months leading up to the Second Boer War.*

### I INTRODUCTION

While all legal disputes necessarily occur in an historical context, comparatively few are of interest to both historians and lawyers alike. *Burrows v Rhodes and Jameson* is one of these few.<sup>1</sup> It arose out of the Jameson Raid, an event that divided contemporary public opinion, dashed much of Cecil Rhodes's political ambitions and irreversibly changed the geopolitics of southern Africa. In this legal action, Sampson Burrows, a member of the armed force that took part in the Raid, sued its organisers in deceit, claiming they fraudulently induced his participation in the illegal venture.

The reported demurrer has become “celebrated”,<sup>2</sup> being important authority for the proposition that the maxim *ex turpi causa non oritur actio*<sup>3</sup> — also known as the illegality defence — does not apply when the illegal action was committed innocently.<sup>4</sup> It has been cited recently by the House

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1 *Burrows v Rhodes* [1899] 1 QB 816 (QB).

2 *Strongman (1945) Ltd v Sincock* [1955] 2 QB 525 (CA) at 535.

3 “No right of action arises from a shameful cause”.

4 See Stephen Todd *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) at [21.7] for a general treatment on the illegality defence.

of Lords,<sup>5</sup> the English Court of Appeal,<sup>6</sup> the English High Court,<sup>7</sup> the High Court of Australia<sup>8</sup> and the New Zealand High Court.<sup>9</sup> It has also featured in academic commentary from the time it was decided to the modern day.<sup>10</sup>

Given that the case continues to be read by the legal community and relied on for propositions of law, a fuller understanding of its historical context and potential future developments is desirable.<sup>11</sup> This article seeks to aid in that understanding.

An historical examination of the case produces one clear conclusion: the reported demurrer has unfairly tarnished the reputations of Cecil Rhodes and, to a lesser extent, Leander Starr Jameson, the two defendants in the case. As simply a decision on a preliminary point of law, the serious allegations of fraud made by Burrows were assumed to be correct by the Court. The law reports leave the case there; the allegations were never rebutted.

Many are content to assume that the action was in all likelihood settled by the defendants.<sup>12</sup> Such an assumption is incorrect. A trial did occur and it received considerable attention from contemporary newspapers. From a study of this trial, it becomes apparent that no allegations of fraud were made against Rhodes directly and those that were made against Jameson were rejected by the jury. It is hoped that this article will provide some counterweight to the largely unfounded allegations made by the plaintiff. It is concluded that while the Jameson Raid may form the foundation of many legitimate criticisms of Rhodes and Jameson, it cannot be asserted that they defrauded their own troops.

In addition to defending the reputations of Rhodes and Jameson, the article will show that the contemporary reaction to this case — and possibly even the result at trial — reflects the historical context in which it occurred.<sup>13</sup>

5 *Stone & Rolls Ltd v Moore Stephens* (a firm) [2009] UKHL 39, [2009] 1 AC 1391 at [27] and [219]. See also *Gardner v Moore* [1984] AC 548 (HL) at 558.

6 *Les Laboratoires Servier v Apotex Inc* [2012] EWCA Civ 593, [2013] Bus LR 80 at [42]; *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472, [2011] 1 CLC 80 at [47]; *Chunis v Camden and Islington Health Authority* [1998] QB 978 (CA) at 987E; and *Pitts v Hunt* [1991] 1 QB 24 (CA) at 39B.

7 See, for example, *Les Laboratoires Servier v Apotex Inc* [2011] EWHC 730 (Pat), [2011] RPC 20 at [49]–[51]; *Griffin v UHY Hacker Young & Partners* (a firm) [2010] EWHC 146 (Ch), [2010] PNLR at [54]; *Safeway Stores Ltd v Twigger* [2010] EWHC 11 (Comm), [2010] 2 BCLC 106 at [24], [27], [82] and [90]; *Marlwood Commercial Inc v Kozeny* [2006] EWHC 872 (Comm) at [157]; and *Niru Battery Manufacturing Co v Milestone Trading Ltd* (No 2) [2003] EWHC 1032 (Comm), [2003] 2 All ER (Comm) 365 at [42].

8 *Magill v Magill* [2006] HCA 51, (2006) 226 CLR 551 at [92]; and *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* [1998] HCA 78, (1998) 196 CLR 53 at [62]. See also *Hunter Area Health Service v Presland* [2005] NSWCA 33, (2005) 63 NSWLR 22 at [59].

9 *Clayton v Currie* [2012] NZHC 1475 at [64]–[66].

10 See, for example, Joseph P Cotton “A Development of the Jameson Raid” (1899) 13 Harv L Rev 215; Abraham Acker “Contracts of Indemnity—Public Policy” (1936) 1 UTJL 378; Glanville Williams “The Legal Effect of Illegal Contracts” (1942) 8 CLJ 51; and CA Hopkins “Ex Turpi Causa and Mental Disorder” (1998) 57 CLJ 444.

11 Similar research has been undertaken with regards to The Mayor, Aldermen and Burgesses of the Borough of Bradford v Pickles [1895] AC 587 (HL); Michael Taggart *Private Property and Abuse of Rights in Victorian England: The Story of Edward Pickles and the Bradford Water Supply* (Oxford University Press, Oxford, 2002); *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72 (SC); and David V Williams *A Simple Nullity? The Wi Parata case in New Zealand law and history* (Auckland University Press, Auckland, 2011).

12 LJ Crator “The Jameson Raid and England’s Anti-Mercenary Laws” (2005) 13(4) South African Military History Journal.

13 See generally Iain R Smith *The Origins of the South African War, 1899–1902* (Longman, New York, 1996).

This context was characterised by mounting tension between Britain and the Transvaal government, which, within five months, culminated in war.

## II WHAT WAS THE JAMESON RAID?

In late December 1895, a force of approximately 600 men entered the South African Republic with the intention of overthrowing Paul Kruger's Transvaal government.<sup>14</sup> Despite British interests in this cause, the force itself was not one commanded by London. It was the private force of the British South Africa Company and Cecil Rhodes was "one of the main movers" behind its actions.<sup>15</sup>

### The Background to the Raid

Following decades of conflict between the Boers and the British throughout the 19th century, by the time of the Raid there were four distinct territories within modern-day South Africa: the two British colonies of Cape Colony and Natal, and the two Boer republics of the Orange Free State and the South African Republic (usually referred to as the Transvaal Republic).

The uneasy balance between these states was upset in a "dramatic and, as it turned out, irreversible fashion" by the discovery of large gold deposits in the Transvaal Republic in 1886.<sup>16</sup> This event caused tens of thousands of foreigners to descend on the Republic, most of whom had British citizenship. This large group of workers became known by the Afrikaner term for foreigners: Uitlanders.

A number of problems developed. First, it slowly became obvious that while the Transvaal gold deposits were the largest in the world, they would require deep-level mining, which would significantly increase costs.<sup>17</sup> To protect profitability, a fully cooperative government was required. Paul Kruger, President of the Transvaal, failed to be as accommodating as was desired. Secondly, Germany began to involve itself in Transvaal affairs and to "act as a champion of the Kruger regime".<sup>18</sup> Finally, it became clear that the Uitlanders would be unable to create change from within owing to the limited rights granted to them.<sup>19</sup>

This situation was considered both politically and economically undesirable for Cecil Rhodes, Prime Minister of Cape Colony and diamond millionaire responsible for much of British colonisation in southern Africa.<sup>20</sup>

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14 Alan Cousins "The Jameson Raid: Politicians, Plots and Scapegoats in South Africa" (2006) 90 *Historian* 20 at 22.

15 At 21.

16 Denis Judd and Keith Surridge *The Boer War* (John Murray, London, 2002) at 32.

17 At 33.

18 At 35.

19 Cousins, above n 14, at 20.

20 At 21. See generally Robert Rotberg *The Founder: Cecil Rhodes and the Pursuit of Power* (Oxford University Press, Oxford, 1988); and Brian Roberts *Cecil Rhodes: Flawed Colossus* (WW Norton & Company, London, 1987).

Rhodes was also a director of the British South Africa Company, formed in 1889 to colonise the large area north of the Transvaal.<sup>21</sup> At some point in the months, or possibly years, before the Raid occurred, Rhodes became convinced that “for British interests to thrive throughout the whole of South Africa, and for his commercial and political ambitions to flourish with them, the South African Republic would have to be destroyed”.<sup>22</sup> Rhodes was far from alone in his views, with both mining capitalists and British imperialists hoping to create an economic and political union of southern Africa.<sup>23</sup>

## The Raid

The plans for the *coup d'état* were made by Rhodes, Jameson, a number of mining magnates and Frank Rhodes (brother of Cecil and a leading member of the Johannesburg Reform Committee, a group of wealthy Uitlanders who sought reform in the Transvaal).<sup>24</sup> Jameson had been the British South Africa Company's Administrator for many years<sup>25</sup> and knew Rhodes well from their time developing diamond mines in Kimberley.<sup>26</sup> The plan was to create a local rebellion — initiated by the Reform Committee — that would then be supported by a small group of Company troops led by Jameson from Bechuanaland into the Transvaal. While some consider the original plans to have been well laid and relatively realistic,<sup>27</sup> others consider much of it to be “amateur and rather Boy's Own stuff”.<sup>28</sup>

Regardless of the viability of the plan, Rhodes and the other leaders had good reason to feel confident that they would receive support from the British government, at least unofficially. There had been discussion among Imperial officials of the overthrow of the Transvaal Government from as early as 1893.<sup>29</sup> There is also compelling evidence that the Colonial Secretary, Joseph Chamberlain, knew of the planned uprising.<sup>30</sup> He manifested his support by allowing the Company to take control of a strip of land running along the eastern border of the Bechuanaland Protectorate.<sup>31</sup> This was clearly to be used in action against the neighbouring Transvaal.<sup>32</sup> There also appears to have been much British public sympathy for a change of government in the Transvaal, which was seen as “a Helot system of administration, organized for the exclusive advantage of a privileged minority”.<sup>33</sup>

21 Cousins, above n 14, at 21.

22 Judd and Surrige, above n 16, at 36.

23 G Blainey “Lost Causes of the Jameson Raid” (1965) 18 *The Economic History Review* 350 at 350.

24 Rotberg, above n 20, at 516. See also Stuart Cloete *African Portraits* (Collins, London, 1946) at 293.

25 “The Jameson Raid Litigation” *The Morning Post* (London, England, 11 May 1899) at 3.

26 Cousins, above n 14, at 21.

27 Judd and Surrige, above n 16, at 37.

28 Cousins, above n 14, at 22.

29 John S Galbraith “The British South Africa Company and the Jameson Raid” (1970) 10 *Journal of British Studies* 145 at 145.

30 At 145.

31 Judd and Surrige, above n 16, at 38.

32 Cousins, above n 14, at 23.

33 “The extraordinary state of things in the Transvaal” *The Times* (London, England, 16 December 1895) at 9.

The plan was put into effect during December 1895. Jameson's troops were in two divisions, both stationed on the Bechuanaland strip. The main force was stationed at Pitsani (in modern day Botswana) and under Jameson's direct command.<sup>34</sup> The second division was at Mafeking (approximately 50 kilometres south of Pitsani and in modern day South Africa).<sup>35</sup>

The invasion was a "humiliating flop"<sup>36</sup> and it "earned the pejorative sobriquet 'Raid'"<sup>37</sup> There were a "host of exuberant miscalculations",<sup>38</sup> the most important of which was Jameson's decision to enter the Transvaal on 29 December 1895, despite being informed that the local uprising would not occur.<sup>39</sup> Rhodes had received some indication that Jameson's impatience would lead to a premature departure but did not send a categorical order to Jameson not to initiate the Raid.<sup>40</sup>

After addressing his troops, Jameson led them into the Transvaal. Almost as soon as they crossed the border, small parties of Boers began to track their movements.<sup>41</sup> On 1 January 1896, when the raiders were 21 miles from Johannesburg, the Boers began to close in and attack. After another day of troop movements and fighting, Jameson's forces collapsed at Doornkop — 14 miles from Johannesburg — when the Boers took advantage of Jameson's rush into a narrow valley.<sup>42</sup> The raiders surrendered and were immediately imprisoned in Pretoria.<sup>43</sup> On 9 January, they were joined by many of the complicit members of the Reform Committee.<sup>44</sup> The raiders were soon released into British custody, while Rhodes managed to secure the release of many of the officers and complicit Uitlanders with substantial payments to the Transvaal government.<sup>45</sup>

## Consequences

The consequences of the Raid were significant, both for southern African geopolitics<sup>46</sup> and for the leaders themselves. Only the latter will be discussed here. Rhodes was forced to resign as Prime Minister of the Cape as his alliance with the Afrikaner Bond party crumbled.<sup>47</sup> In the end he was also forced to resign his directorship of the Company.<sup>48</sup> As for Jameson, in July 1896 he was brought before a special jury in London and sentenced to 15

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34 Cloete, above n 24, at 293.

35 At 293.

36 Judd and Surridge, above n 16, at 39.

37 Rotberg, above n 20, at 517.

38 At 522.

39 Smith, above n 13, at 92; Cloete, above n 23, at 302; and Cousins, above n 14, at 22.

40 Smith, above n 13, at 92.

41 Cloete, above n 24, at 303.

42 Rotberg, above n 20, at 545; and Cloete, above n 24, at 306.

43 Rotberg, above n 20, at 545.

44 At 546.

45 Smith, above n 13, at 95; and Rotberg, above n 20, at 547.

46 It is seen as a vital precursor to the South African War: Judd and Surridge, above n 16, at 36.

47 At 39.

48 Rotberg, above n 20, at 547.

months' imprisonment for his involvement in the illegal venture.<sup>49</sup>

Nevertheless, despite these repercussions, it seems that the two protagonists retained sympathy among large sections of the British public.<sup>50</sup> It has even been said that Jameson "was greeted as a popular hero when he arrived in England".<sup>51</sup> This support did not seem to diminish even after the official inquiries of 1896–1897, which clearly established the culpability of both individuals.<sup>52</sup> There is, however, evidence that "liberal opinion was outraged at the aggression",<sup>53</sup> and some claim that public opinion became divided.<sup>54</sup> Additionally, the Select Committee report "criticised Rhodes in fairly severe terms".<sup>55</sup> Despite such censure, both leaders of the Raid retained their public careers. Rhodes "retrieved much of his reputation and lost none of his wealth"<sup>56</sup> in the following years and Jameson went on to a successful career in Cape politics, being Prime Minister from 1904–1910.<sup>57</sup> Nevertheless, as the decades have passed and views on colonisation changed, the reputations of these two imperialists continue to be lumbered with this "treacherous conspiracy".<sup>58</sup>

### III BURROWS'S ACTION AND ITS DEFENCE

The case of *Burrows v Rhodes and Jameson* concerns an action by one of the men who took part in the Raid under the command of Jameson. He lost a leg in the Raid and claimed damages on the basis that he was induced to take part by fraudulent misrepresentations.

The first reports of this civil action appear in newspapers on 11 February 1899.<sup>59</sup> These record an application that was made for a day to be fixed to hear arguments on a preliminary point of law. The point to be argued in the demurrer was whether a person who was *particeps criminis*, having himself taken part jointly in a criminal action, could bring a civil claim on the basis of that action. On 7 March 1899, a hearing took place in a Divisional Court of the Queen's Bench Division before Grantham and Kennedy JJ.<sup>60</sup>

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49 At 547.

50 At 548.

51 Smith, above n 13, at 96.

52 At 95–96.

53 Judd and Surridge, above n 16, at 39.

54 Cousins, above n 14, at 22.

55 At 25.

56 Rotberg, above n 20, at 550.

57 Smith, above n 13, at 96.

58 Rotberg, above n 20, at 550.

59 "Law Intelligence" *The Morning Post* (London, England, 11 February 1899) at 7; and "The Law Courts" *The Standard* (London, England, 11 February 1899) at 4.

60 "Action against Mr Cecil Rhodes and Dr Jameson" *The North-Eastern Daily Gazette* (Middlesbrough, England, 7 March 1899) at 3.

## The Statement of Claim

The statement of claim was reproduced in the official law report and, naturally, it outlined the allegations made by the plaintiff. In September 1895, Burrows needed to renew his engagement in the armed forces of the Company as his one-year term was coming to an end.<sup>61</sup> He claimed that the defendants, having already planned the Raid, fraudulently represented to him that his detachment was “about to be employed in active service ... of a lawful nature”.<sup>62</sup>

The second set of fraudulent misrepresentations allegedly occurred on 29 December 1895. This was the day the Raid began, but this fact is not clear from the statement of claim. Burrows was part of the force stationed at Pitsani under the command of Jameson. The plaintiff claimed that the following representations were made to him by the defendants in order to induce his participation in the invasion:<sup>63</sup>

- (a) The invasion was required for the protection of women and children in Johannesburg;
- (b) A body of Cape Mounted Rifles, “forces of Her Majesty”, would join and assist them; and
- (c) The invasion “had the sanction and support of Her Majesty’s Government”.

It was alleged that the representations were made fraudulently.<sup>64</sup>

Burrows took part in the Raid and was wounded at Doornkop, the place where the forces were finally defeated. It was alleged that he lost a leg and subsequently had to undergo seven surgical operations after suffering much hardship in Pretoria.<sup>65</sup> He also claimed to have been “rendered liable to severe punishment in England for offences against the laws of England, and was brought to England as a prisoner”.<sup>66</sup> He claimed £3,000 for the loss of his leg, loss of earning and “loss of kit”.<sup>67</sup>

## The Defendants’ Response

Arthur Cohen QC and Lord Robert Cecil responded on behalf of the defendants by submitting that the statement of claim disclosed no cause of action. The basis of this demurrer was the Foreign Enlistment Act 1870 and

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61 *Burrows*, above n 1, at 817.

62 At 817.

63 At 817–818.

64 Although it is not explicitly stated that the cause of action was deceit, this is almost certainly the case: *Strongman (1945) Ltd*, above n 2, at 536.

65 *Burrows*, above n 1, at 818.

66 At 818.

67 At 818.

the principle of *ex turpi causa non oritur actio*. Section 11 of the Foreign Enlistment Act 1870 states:<sup>68</sup>

If any person within the limits of Her Majesty's dominions, and without the license of Her Majesty,— Prepares or fits out any naval or military expedition to proceed against the dominions of *any friendly state*, the following consequences shall ensue:

(1) Every person engaged in such preparation or fitting out, or assisting therein, or *employed in any capacity in such expedition*, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment.

The defendants argued that both the plaintiff and the defendants were in breach of this provision by planning and engaging in the Raid and that, therefore, the plaintiff had “no right of action”.<sup>69</sup> The basis of this submission was the well-known case of *Holman v Johnson*.<sup>70</sup> In that case, Lord Mansfield said:<sup>71</sup>

No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted.

Counsel submitted that the plaintiff could not recover his losses from the defendants because he based his cause of action upon an illegal act, namely, the taking part in a military expedition against a friendly state.

In response to these arguments, Mr Lawson Walton QC submitted that “there was no violation of the Foreign Enlistment Act by the plaintiff” as he was an “innocent participator”.<sup>72</sup> It was also argued that the action should not be barred even if he was in breach of the Act because such a breach occurred innocently.<sup>73</sup>

68 Foreign Enlistment Act 1870 (UK), s 11 (emphasis added). This Act was brought in “to prevent in future the kind of non-governmental military support for warring parties with whom Britain was at peace that had created so many problems during and after the American Civil War”: SP MacKenzie “The Foreign Enlistment Act and the Spanish Civil War, 1936–1939” (1999) 10 *Twentieth Century British History* 52 at 54. It is still in force today.

69 At 819.

70 *Holman v Johnson* (1775) 1 Cowp 341, 98 ER 1120 (KB).

71 At 343.

72 “Summary of News” *The Sheffield & Rotherham Independent* (Sheffield, England, 8 March 1899) at 5; and Burrows, above n 1, at 820–821.

73 At 820–821.

## IV THE JUDGMENTS OF THE COURT

On the 20th of March, the Court delivered its judgments.

### Justice Grantham

Grantham J clearly took great offence at the submissions put forward on behalf of Rhodes and Jameson. After outlining the defence, he said: “[a] grosser perversion of English justice it is impossible to imagine, and I should indeed be sorry if, under any circumstances, it could be proved to be English law”.<sup>74</sup>

Grantham J did not consider Burrows’s claim to be based on illegality. The central reason for this was that the plaintiff had “not been tried, much less convicted” of any offence.<sup>75</sup> He did note, however, the inconsistency in Burrows’s statement of claim when he sought damages for being made to incur liability for “severe punishment in England for offences against the English law”.<sup>76</sup> This part of the statement of claim was simply struck out. With that small inconsistency resolved, Grantham J seemed to have no hesitation in dismissing the demurrer.

### Justice Kennedy

Kennedy J’s judgment is the more frequently cited of the two and is referred to by Denning LJ as “celebrated”.<sup>77</sup>

Kennedy J differed substantially to Grantham J in his approach to the issue. The plaintiff’s claim that he was liable to severe punishment in England was taken as “an admission that the plaintiff’s participation in the expedition constituted a criminal offence”.<sup>78</sup> Consequently, while Grantham J based his decision on the absence of illegality, Kennedy J accepted that an illegal action had occurred and that the maxim *prima facie* applied. Nevertheless, he created an exception to the general rule.

Kennedy J declared that the principle in *Holman v Johnson* is limited to situations in which the act is “manifestly unlawful, or the doer of it knows it to be unlawful”.<sup>79</sup> He thought that this point was uncontroversial when it came to private wrongs,<sup>80</sup> and the question raised in the case was whether it should be extended to criminal offences. Kennedy J considered that it should be:<sup>81</sup>

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74 *Burrows*, above n 1, at 823.

75 At 823.

76 At 827.

77 *Strongman (1945) Ltd*, above n 2, at 535.

78 *Burrows*, above n 1, at 827.

79 At 828.

80 At 828–829.

81 At 830.

I am unable to accept the defendants' proposition, where the act, though a criminal offence — *malum prohibitum* — is, upon the state of facts which the doer by the fraudulent misrepresentation of the person against whom he claims indemnity has been induced to believe to be the true state of facts, neither criminal nor immoral.

Therefore, even though Kennedy J assumed that Burrows was in breach of the Foreign Enlistment Act 1870, this situation was an exception to the general rule on actions arising *ex turpi causa*. He could see “no ground of public policy” on which the plaintiff's action should be denied.<sup>82</sup>

### Contemporary Reaction to the Judgments

This demurrer was well reported in newspapers at the time. For example, articles can be found from London,<sup>83</sup> Middlesbrough,<sup>84</sup> York,<sup>85</sup> Sheffield,<sup>86</sup> Bristol,<sup>87</sup> Cardiff,<sup>88</sup> Belfast,<sup>89</sup> Dublin,<sup>90</sup> Dundee<sup>91</sup> and Glasgow.<sup>92</sup> It also received international comment, with mention being made in newspapers from Los Angeles<sup>93</sup>, Chicago<sup>94</sup> and New Zealand.<sup>95</sup>

While the judgment of Kennedy J is the one most cited in subsequent cases, it is that of Grantham J that received by far and away the most attention at the time. This is clear from the explicit reference to his judgment in a number of articles (in preference to that of Kennedy J's)<sup>96</sup> and also by the summary of reasons given for the decision. For example, the *Manchester Times* reported that, “[i]f Burrows had been convicted under the Foreign Enlistment Act, there would be something in [the defendants'] contention.”<sup>97</sup> This may have altered the result based on Grantham J's reasoning, but not that of Kennedy J.

The reasons for this preference for Grantham J's judgment are likely to be threefold: he gave his judgment first, he was clearly more appalled by the actions of the defendants (giving a more emotive speech) and he was a Member of Parliament prior to being appointed to the Queens Bench

82 At 831.

83 For example, see “Sequel to the Jameson Raid” *Daily News* (London, England, 21 March 1899) at 10; and “The Law Courts” *The Standard* (London, England, 8 March 1899) at 6.

84 *The North-Eastern Daily Gazette* (7 March 1899), above n 60, at 3.

85 “Actions against Mr Cecil Rhodes and Dr Jameson” *The Yorkshire Herald* (York, England, 21 March 1899) at 5.

86 *The Sheffield & Rotherham Independent* (8 March 1899), above n 72, at 5.

87 “The Jameson Raid” *The Bristol Mercury and Daily Post* (Bristol, England, 12 April 1899) at 7.

88 “Echo of the Jameson Raid” *Western Mail* (Cardiff, Wales, 8 March 1899) at 5.

89 “Action Against Mr Rhodes and Dr Jameson” *The Belfast News-Letter* (Belfast, Ireland, 8 March 1899) at 5.

90 “Sequel to the Jameson Raid” *Freeman's Journal and Daily Commercial Advertiser* (Dublin, Ireland, 12 April 1899) at 2.

91 “The Jameson Raid Lawsuit” *The Dundee Courier & Argus* (Dundee, Scotland, 21 March 1899) at 4.

92 “The Action by a Jameson Raid Trooper” *Glasgow Herald* (Glasgow, Scotland, 21 March 1899) at 7.

93 “Dirty Rhodes” *Los Angeles Times* (Los Angeles, United States of America, 3 April 1899) at 1.

94 “Judges' Decisions Involving Nice Legal Points” *Chicago Daily Tribune* (Chicago, United States of America, 30 December 1899) at 13.

95 “Rhodes and the Raiders” *Auckland Star* (Auckland, New Zealand, 24 June 1899) at 1.

96 For example, see *Daily News* (21 March 1899), above n 83, at 10.

97 “The Weekly Times” *Manchester Times* (Manchester, England, 14 April 1899) at 4.

Division in 1886.<sup>98</sup> In one report of the case, it was noted that he was “an extreme Tory member of Parliament, and [was] a bit of a fire-eater off the bench”.<sup>99</sup>

The tone of these contemporary reports is generally extremely critical of the defendants, particularly Cecil Rhodes. In the *Los Angeles Times*, the attempt to get the action struck out was described as showing “an amazingly mean-spirited attitude”.<sup>100</sup> Similar criticism was also made in the *Glasgow Herald*.<sup>101</sup>

One of the more colourful reports of these events is found in the *Manchester Times*.<sup>102</sup> It was said that if Burrows was successful at trial, “the outlook for Mr Rhodes and Dr. Jameson will not be of the most cheerful kind”.<sup>103</sup> Most significantly for the purposes of the argument soon to be developed, the newspaper maintained that, “[t]he defendants admit that they misled the plaintiff as to the real character of the expedition”.<sup>104</sup> This was, quite simply, inaccurate reporting. It is indicative, however, of the natural tendency to read *assuming* the facts are correct as *admitting* the facts are correct.

This negative reaction was surely to be expected. It is difficult to overcome the bad taste left in one’s mouth after reading the submissions made by counsel for the defendants. Given this, one wonders why the defendants took this demurrer instead of going straight to trial or simply settling the action. The answer may be found in the fact that counsel for the defendants was Arthur Cohen QC, one of the great barristers of his time. The following has been said of him:<sup>105</sup>

... for the argument of a question of law before an appellate tribunal he had few equals. In all probability, up to the time of his death, no advocate had so often addressed the House of Lords and the judicial committee.

At the risk of entering the realm of pure speculation, one can readily imagine a situation in which Cohen saw the possibility of a novel defence and told Rhodes and Jameson that he could make the dispute disappear quickly. The defendants, neither of whom had legal training, may have been unaware of what this defence entailed or how it could be perceived.

Interestingly, even though leave to appeal was granted immediately

98 JB Atlay and Robert Stevens “Grantham, Sir William (1835–1911)” in *Oxford Dictionary of National Biography* (Oxford University Press, Oxford, 2004).

99 *Los Angeles Times* (3 April 1899), above n 93, at 1.

100 At 1.

101 “Thursday, May 11” *Glasgow Herald* (Glasgow, Scotland, 11 May 1899) at 6.

102 *Manchester Times* (14 April 1899), above n 97, at 4.

103 At 4.

104 At 4.

105 FD MacKinnon and PWJ Bartip “Cohen, Arthur (1829–1914)” in *Oxford Dictionary of National Biography* (Oxford University Press, Oxford, 2004).

after the first instance judgment was given,<sup>106</sup> the defendants declined to pursue it. When it came before the Court of Appeal on 11 April 1899, counsel for Burrows told the Court that the appellants had written to him stating that they no longer wished to proceed with the appeal.<sup>107</sup> At some point in the weeks between these two events, either Arthur Cohen QC changed his assessment of the likelihood of success or the defendants rejected his advice, believing the reputational damage of appealing would be too great.

A date for trial was set as if the case had “not been ordered to stand out pending [the] appeal”.<sup>108</sup> Arthur Cohen QC was not, however, to represent the defendants at trial.<sup>109</sup>

## V ESTABLISHING THE FACTS — THE TRIAL

It was well known to the Court in the demurrer that a number of similar cases depended on its result.<sup>110</sup> After the plaintiff’s success, four of these cases went to trial before Mathew J<sup>111</sup> in early May 1899.<sup>112</sup> Each involved a trooper who maintained he was induced to take part by fraudulent representations.<sup>113</sup> They were noted as being: *Adye v Rhodes and another*, *De Hoseason v Rhodes and another*, *Burrows v Rhodes and another* and *Clarendon v Rhodes and another*.<sup>114</sup> The “another” being referred to is Dr Jameson.<sup>115</sup> Hearings occurred for the *Adye* and *Burrows* cases, while *De Hoseason* and *Clarendon* were “settled” in the courtroom.<sup>116</sup> All four were unsuccessful.

While both *Adye* and *Burrows* were claims arising from the Raid, each plaintiff based his claim on different representations.<sup>117</sup> In the former, Sidney Adye was part of the second set of forces at Mafeking led by Colonel

106 *The Dundee Courier & Argus* (21 March 1899), above n 91, at 4; *The Yorkshire Herald* (21 March 1899), above n 85, at 5; *The Bristol Mercury and Daily Post* (12 April 1899), above n 87, at 7; and *Daily News* (21 March 1899), above n 83, at 10. See also *Chicago Daily Tribune* (30 December 1899), above n 94, at 13.

107 “Action against the Raid promoters” *The North-Eastern Daily Gazette* (Middlesbrough, England, 11 April 1899) at 3; *The Bristol Mercury and Daily Post* (12 April 1899), above n 87, at 7; “Law Intelligence” *The Morning Post* (London, England, 12 April 1899) at 3; “The Transvaal Raid Case” *The Dundee Courier & Argus* (Dundee, Scotland, 12 April 1899) at 5; and “Transvaal Trooper’s Claim” *Western Mail* (Cardiff, Wales, 12 April 1899) at 6.

108 *The Bristol Mercury and Daily Post* (12 April 1899), above n 87, at 7.

109 “The Law Courts” *The Standard* (London, England, 11 May 1899) at 4.

110 *Daily News* (21 March 1899), above n 83, at 10.

111 “Action against Rhodes and Jameson” *Reynold’s Newspaper* (London, England, 7 May 1899) at 1. This is presumably Sir James Charles Mathew. His “most notable contributions . . . were in the commercial court”: JB Atlay and Sinéad Agnew “Mathew, Sir James Charles (1830–1908)” in *Oxford Dictionary of National Biography* (Oxford, Oxford University Press, 2004).

112 “The Law Courts” *The Standard* (London, England, 10 May 1899) at 4.

113 *Reynold’s Newspaper* (7 May 1899), above n 111, at 1.

114 “Sequel to the Jameson Raid” *The Morning Post* (6 May 1899) at 4; “The Jameson Raid Litigation” *The Morning Post* (10 May 1899) at 4; and *The Morning Post* (11 May 1899), above n 25, at 3.

115 *Glasgow Herald* (11 May 1899), above n 101, at 6.

116 *The Morning Post* (10 May 1899), above n 114, at 4; and “The Actions by Jameson Raiders” *Manchester Times* (Manchester, England, 12 May 1899) at 8.

117 *The Morning Post* (6 May 1899), above n 114, at 4.

Grey. Cecil De Hoseason, the plaintiff in *De Hoseason*, also fought with Adye under Colonel Grey. Burrows, on the other hand, was part of the force led by Jameson and stationed at Pitsani.<sup>118</sup> Clarendon was also a member of this division.<sup>119</sup>

While it is not the central focus of this article, a few comments should be made on the case of *Adye*. Mr Adye claimed that Colonel Grey gave a speech while the troops were on the march.<sup>120</sup> It was alleged that in this speech, he stated that they would receive support from Imperial regiments, that they would be helping women and children, that there would be no fighting and that the High Commissioner of the Cape would meet them in Johannesburg.<sup>121</sup> Rhodes and Jameson's liability arose "vicariously through [their] responsibility for the language of Colonel Grey".<sup>122</sup> The witnesses for the defence denied that the representations were made and counsel suggested that even if they were, they did not induce participation. The jury found for the defendants.<sup>123</sup>

Let us now turn to the trial with which this article is concerned: *Burrows v Rhodes and Jameson*. The competing accounts of the Raid and the various allegations made will be addressed first. This will be followed by an examination of the defence's successful strategy of challenging the plaintiff's veracity and questioning whether the representations, if made, induced his involvement.

### The Alleged Representations

The allegation of misrepresentation, briefly noted in the demurrer, was given in more detail at trial. Burrows claimed that on the evening of 29 December 1895, Dr Jameson addressed the troops stationed at Pitsani. It was alleged that in this address, Jameson said that fighting was imminent in Johannesburg between the Uitlanders and the Boers, that "the women and children there were in great danger", that the Cape Mounted Rifles would cooperate with them on their advance and that they would meet the High Commissioner of Cape Colony — Sir Hercules Robinson<sup>124</sup> — when they arrived.<sup>125</sup> These accusations were made by Burrows in his examination-in-chief and were also corroborated by Claud Canton, Henry Barnett Jackson and Philip Theobald Hill, all troopers who took part in the Raid.<sup>126</sup>

Three important differences are immediately apparent between the facts alleged at trial and those first asserted in the statement of claim (and

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118 At 4.

119 *The Standard* (11 May 1899), above n 109, at 4.

120 *Glasgow Herald* (11 May 1899), above n 101, at 6.

121 At 6.

122 At 6.

123 *The Morning Post* (10 May 1899), above n 114, at 4.

124 Cousins, above n 14, at 24.

125 *The Morning Post* (10 May 1899), above n 114, at 4.

126 *The Morning Post* (11 May 1899), above n 25, at 3.

assumed to be correct in the reported demurrer). First, and most important, no accusation of fraud was made against Rhodes directly. This contrasts with the statement of claim in which each accusation was made against the defendants. For example, it was claimed that on “December 29, 1895, *the defendants* ... fraudulently represented ... that the proposed invasion had the sanction and support of Her Majesty’s Government”.<sup>127</sup> At trial, allegations of actual misrepresentation were solely targeted at Jameson, Rhodes’s liability only arising vicariously.<sup>128</sup> There was never any suggestion that Jameson was following Rhodes’s instructions when he made this speech or that Rhodes even knew that the representations were made.

While, in retrospect, it may seem relatively obvious that Rhodes himself would not have made representations directly to a member of the Company’s forces, this is the clear impression conveyed by the statement of claim in the demurrer. This is especially so given his position as first defendant and because all alleged actions upon which this action was founded were done by “the defendants”. This is particularly significant because many contemporary reports (and no doubt many subsequent readers of the case) believed that the defendants admitted, rather than assumed, the facts alleged in the demurrer. This author would suggest that a reasonable person, while recognising that the allegations were yet to be proved, could assume that there was some factual foundation for them and that Rhodes did play some part in the events in question. Given this, it seems clear that Rhodes’s reputation was unfairly tarnished by the demurrer.

The second difference is that there seems to have been no reference to the first alleged misrepresentation mentioned in the statement of claim. It was originally claimed that the defendants represented in September 1895 that Burrows’s detachment was about to be employed in active service of a lawful nature.<sup>129</sup> This seems to have been abandoned at trial. The alleged representations, therefore, occurred only once: during Jameson’s speech on 29 December 1895.

Thirdly, there was no allegation that the defendants expressly represented that the British Government had sanctioned the Raid. Instead, this representation of legality arose indirectly from the statement that Imperial troops would assist in the Raid and, possibly, because the High Commissioner would meet them in Johannesburg.

In response to this case, the defence called only one witness: Dr Jameson himself. Jameson accepted that he gave a speech to the troops immediately prior to the Raid and claimed to have made the following points in it.<sup>130</sup>

- (a) He expected there to be no fighting, but that depended on the speed

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127 *Burrows*, above n 1, at 817–818 (emphasis added).

128 Whether such liability could arise vicariously, as it was then understood, is beyond the scope of this article.

129 *Burrows*, above n 1, at 817.

130 *The Morning Post* (11 May 1899), above n 25, at 3.

- of their movements;
- (b) He believed, from a personal conversation he had with the High Commissioner, that the High Commissioner would either meet them in Johannesburg or arrive soon after they did;
  - (c) They would be expected to keep law and order in Johannesburg;
  - (d) There would be no question of fighting if the High Commissioner was there; and
  - (e) Other troops of the Company would probably render assistance to them if needed.

After giving the troops that information, he claimed that he asked for volunteers, making it plain that “anyone who did not wish to go was free to fall out”.<sup>131</sup> Particularly important is the following exchange between Mr Gill (counsel for the defendants) and Dr Jameson:<sup>132</sup>

Mr. Gill — Did you say anything that would lead the men to believe that they would be joined and assisted by a detachment of Imperial Forces? Witness: Nothing.

Or that what you were doing was done under the sanction of the Queen? — Nothing.

One report of the trial said that Jameson accepted that he mentioned government forces during the speech, but not in a way that could have intimated that they would assist in the Raid. *The Times* of 11 May 1899 stated that Jameson told the troops that there would be no fighting if the High Commissioner was there because “they must remember the position of the Transvaal, with the Cape Mounted Rifles on one border and the Natal Mounted Police on the other”.<sup>133</sup> If he did say this, one could readily envisage Burrows mishearing and believing that those forces would actively take part in the Raid.

During cross-examination, Dr Jameson reinforced the points above and said that he “wished the men to know nothing”, deliberately withholding information from them while making it clear that they were not compelled to take part.<sup>134</sup>

It is striking that Dr Jameson did not deny some of the allegations against him. He did not refute the accusation that he told the troops that women and children were in danger. He also accepted that he told them that he believed the High Commissioner would join them in Johannesburg.

131 At 3. See also “Queen’s Bench Division” *The Times* (London, England, 11 May 1899) at 3.

132 *The Morning Post* (11 May 1899), above n 25, at 3.

133 *The Times* (11 May 1899), above n 131, at 3.

134 *The Morning Post* (11 May 1899), above n 25, at 3.

These issues, however, seem to have fallen out of the trial and were not picked up in cross-examination. The reason for this is unclear. The representation relating to the endangerment of women and children may have been considered an incidental part of keeping law and order in the city, which they would have to do if successful. The representation regarding the High Commissioner appears to have been merely a “sanguine anticipation” insufficient to constitute a representation.<sup>135</sup> The case seemed to turn on whether he told the troops that they would be supported by Imperial troops, thereby implying that the Raid was legal.

### Veracity and Inducement

The defence’s strategy appears to have been to question indirectly the accuracy and truthfulness of Burrows’s evidence and to show that even if the representations did occur, they played no part in inducing his participation in the Raid.

To understand the subtle attacks on Burrows’s veracity, an examination of what happened between the Raid and his bringing the action is required. After a “shot passed through the body of Dr. Parry and entered the Plaintiff’s knee, necessitating the amputation of the limb”,<sup>136</sup> Burrows was “carried to the railway station and thrown into a cattle truck and taken to Natal”.<sup>137</sup> It is then reported that he returned to London after being sent for by the Company owing to the trial of Dr Jameson and the other officers who took part in the Raid.<sup>138</sup> These events ended Burrows’s 17-year career in various mounted forces in southern Africa.<sup>139</sup>

Mr Carson, cross-examining Burrows, managed to adduce evidence from the plaintiff that countered some of the reputational damage this trial (and the demurrer before it) was no doubt doing to the defendants. It became clear that Burrows had received £100 as “wound money” from the Company.<sup>140</sup> Rhodes, as chairman of the Bechuanaland Railway Company, also promised to get Burrows a job when he returned to southern Africa. This promise was kept and Burrows left England to become a “timekeeper and storesman on the railway”.<sup>141</sup> Additionally, when Burrows complained about his salary, Rhodes had this increased to £15 a month. Dr Jameson claimed that it was he who asked Rhodes to ensure that a job was given to Burrows.<sup>142</sup> He also told the court that £15 per month was “much higher than the amount usually paid to timekeepers” and that this “excellent pay” was

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135 *Glasgow Herald* (11 May 1899), above n 101, at 6.

136 *The Standard* (10 May 1899), above n 112, at 4.

137 *The Morning Post* (10 May 1899), above n 114, at 4.

138 At 4.

139 *The Standard* (10 May 1899), above n 112, at 4.

140 At 4.

141 At 4.

142 *The Morning Post* (11 May 1899), above n 25, at 3.

owing to “Mr. Rhodes’s personal interest in the man”.<sup>143</sup>

The defence used these facts relating Burrows’s job and pay in two ways. First, it seems clear that the defendants sought to create an impression in the jury’s mind that Burrows was only taking this suit and possibly fabricating the facts upon which it was based, because he became unsatisfied by Rhodes’s genuine attempts to help him. For example, in cross-examination, he was asked the following question after revealing he was paid £15 per month: “And you thought that was very good pay until you were told you might make a good thing by throwing up your berth and bringing this action?”<sup>144</sup> He was questioned as to why he failed to make any accusation of deceit or misrepresentation until this action, some three years after the events in question.<sup>145</sup> These facts also, quite naturally, portray the defendants in a good light, reclaiming some of their damaged reputations. This seems to have been successful with one contemporary report stating that “the defendants appear to have acted with considerable generosity towards Mr Burrows”.<sup>146</sup>

In response to these attacks, Burrows said that his current salary was not good pay and that he needed at least £20 per month to live. On this, Mr Carson saw an opportunity to make significant ground for the defendants, seamlessly moving from attacking the accuracy of his evidence to questioning whether the representations — even if they did occur — induced the plaintiff’s participation. He noted that Burrows was paid much less than £20 while he was a member of the Company’s forces. The following then occurred:<sup>147</sup>

I understand that you remained on in the Force, though the pay was bad, because you liked the excitement of the life. I take it you like fighting? — Yes, I do. (Laughter)

Then, as you thought there was a good chance of a fight you would not have fallen out of the Expedition even if its object had been divulged to you?

Even though Burrows responded with “[m]ost certainly I should not”,<sup>148</sup> Mr Carson’s point was made: it was unlikely that the representations, even if they did occur, induced the plaintiff’s involvement.

The defence did not even need to go this far. All they needed to show was that had no statement been made, Burrows would nevertheless have participated in the Raid. This point was made during the cross-examination of Henry Jackson, a trooper who gave evidence for Burrows. Jackson said that “he would not have gone if he had known the raid to be illegal, but if the

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143 At 3.

144 *The Morning Post* (10 May 1899), above n 114, at 4.

145 *The Standard* (10 May 1899), above n 112, at 4.

146 *Glasgow Herald* (11 May 1899), above n 101, at 6.

147 *The Morning Post* (10 May 1899), above n 114, at 4.

148 At 4.

officers had said ‘Right wheel, quick march’ he would have gone”.<sup>149</sup>

Mr Carson’s closing address to the jury also emphasised points similar to those outlined above. As well as stressing Burrows’s love of fighting, reminding the jury of his possible financial motivations and questioning why no allegation of fraud had been made immediately after the Raid, Carson criticised the plaintiff for “turning right around upon his old comrades in arms”.<sup>150</sup> He told the jury that the allegation that Jameson represented that the Raid was sanctioned by the government, was “simple moonshine”.<sup>151</sup> In his final attempt to discredit the plaintiff, he “commented severely on the fact that Burrows, who usually wore his wooden leg, came into Court to give his evidence supported on crutches”.<sup>152</sup>

Mr Jelf then made some closing remarks on behalf of the plaintiff. Unfortunately, these are not reported.

At this point, Mathew J made some concluding comments, of which we have little detail, and then the jury — without leaving the box — announced that they found for the defendants “on all points”.<sup>153</sup>

## VI ISSUES ARISING FROM THE TRIAL

### Legal Issues

What is striking, at least from a modern perspective, is the apparent absence in both the evidence presented and the Judge’s direction of a vital element of the tort of deceit. *Derry v Peek*, decided by the House of Lords in 1889, held that actual fraud must be proved for a claim in deceit to be successful.<sup>154</sup> Nevertheless, in this case there seems to have been an explicit rejection of the question of fraud being put to the jury.<sup>155</sup> Instead, they were only asked to decide whether the representations were made, whether they induced participation and whether harm to the plaintiff resulted.<sup>156</sup> With these questions in mind, it is difficult to see how the elements of deceit identified in *Derry v Peek* could be satisfied.<sup>157</sup> It is possible that the plaintiff (and the Judge) considered that if the representations were found to have been made, a conclusion that Jameson knew that they were false was inevitable. This is particularly so given Jameson’s evidence at his own trial and the official inquiry.

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<sup>149</sup> *The Times* (11 May 1899), above n 131, at 3.

<sup>150</sup> *The Standard* (11 May 1899), above n 109, at 4.

<sup>151</sup> At 4.

<sup>152</sup> At 4.

<sup>153</sup> At 4.

<sup>154</sup> *Derry v Peek* (1889) 14 App Cas 337 (HL).

<sup>155</sup> “The Law Courts” *The Standard* (London, England, 6 May 1899) at 4.

<sup>156</sup> At 4.

<sup>157</sup> While it could be argued that the representations became terms of the contract for service, this would make the British South Africa Company liable as the party to that contract, not Rhodes or Jameson: See John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [11.1].

Given that the jury found for the defendants on all points, it seems that they considered the representations not to have been made. It also suggests, somewhat curiously, that they did not think any harm to Burrows resulted. That Burrows clearly suffered from his involvement, suggests that the jury thought that no harm resulted from the representations, if made, because they did not induce participation. From a modern perspective, the question of inducement seems by far and away the easiest way of justifying a verdict for the defendants.

## Historical Issues

The central issue of historical importance is whether Jameson actually lied to his troops in order to induce their participation in the Raid. This issue is occasionally addressed in general histories of the attempted coup d'état. For example, Elizabeth Pakenham claimed that Jameson told the troops that the Imperial authorities *were* backing the Raid.<sup>158</sup> This is supposedly supported by the evidence given by Sir John Willoughby, one of the officers in Jameson's division to the 1897 Parliamentary Committee of Inquiry. However, this author could find no such claim in the published minutes of Willoughby's evidence in the 846-page report from the Select Committee on British South Africa.<sup>159</sup> Willoughby did claim that Jameson intimated to him that "practically ... the Government would back it up".<sup>160</sup> It is suggested that this is very different from saying it was actually sanctioned. Willoughby also made no mention of Jameson making similar intimations to the troops.

Stuart Cloete also touched on this point, but in a way inconsistent with Pakenham. He was of the view that fewer than 500 marched with Jameson "because many of his troopers refused to fight unless the Queen gave them orders".<sup>161</sup> This conflicts with Burrows's contention that a representation was made that the Queen *had* given her backing to the expedition. Unfortunately, Cloete makes this comment in passing and does not provide evidence for it.

In the light of these conflicting historical accounts and the inconsistent testimonies by witnesses in the trial, it is unlikely that we will ever be able to settle this question. It is suggested that the most likely answer is that Jameson did mention Imperial troops in his speech, but not in a way that could lead one reasonably to assume they would actively help in the Raid.<sup>162</sup> Given Jameson's clear reluctance to tell his officers explicitly whether their expedition was supported by the Government,<sup>163</sup> it is likely that he was careful in his choice of words in the speech to the troops.

This case is also of historical interest in its own right for the insight it

158 Elizabeth Pakenham *Jameson's Raid* (Weidenfeld and Nicolson, London, 1959) at 76.

159 *Second Report from the Select Committee on British South Africa; Together with the Proceedings of the Committee and Minutes of Evidence* (Eyre and Spottiswoode, (311) Reports of Committees IX.5, 13 July 1897) at 297–305.

160 At 301.

161 Cloete, above n 24, at 302.

162 As suggested by *The Times* (11 May 1899), above n 131, at 3.

163 Select Committee on British South Africa, above n 159, at 297–305.

gives us into the views held by the British public on Jameson, Rhodes and the political issues in southern Africa. One must remember that the trial was occurring a mere five months before Britain was at war with the Transvaal Republic.<sup>164</sup> Therefore, it happened in a context of mounting tension and, no doubt, greater sympathy for the organisers of the Raid who — while unsuccessful — could at least be seen to have been fighting for British interests.

There are indications of this context throughout the trial. One of the more significant of these occurred at the end of Jameson's cross-examination. Reporting on this, *The Morning Post* said:<sup>165</sup>

[Jameson] knew perfectly well that if the ride was unsuccessful he would get into trouble, but if it was successful his wrongful act would be forgiven.

Mr. Jelf — And, if I may be pardoned for saying so, Dr. Jameson, you have been. (Laughter.)

Dr. Jameson — Yes; thank you very much. (Laughter.)

This suggests that even if public opinion was divided at the time of the Raid, by mid-1899 there was significant support for those involved. It also goes some way to explaining the verdict, as the jury was no doubt more likely to believe Jameson in these circumstances.

The positive public reaction to the verdict also supports this point. The *Glasgow Herald* was of the view that “the public will probably entirely approve of the exoneration” given to the defendants.<sup>166</sup> Given that the troopers knew that fighting was a possibility, the editor was of the opinion that any verdict against the defendants would have been “little short of a miscarriage of justice”.<sup>167</sup>

## VII CONCLUSION

From the preceding analysis three important points are clear. First, Cecil Rhodes was the subject of a number of unfounded allegations in the original statement of claim. The reported demurrer created the clear impression that Rhodes fraudulently deceived Company troops into taking part in an illegal expedition to further his own political and economic interests. This is plainly incorrect.

Secondly, Jameson never explicitly told the troops that the Raid was sanctioned by the British Government. Again, this accusation was made

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<sup>164</sup> See Smith, above n 13, at 1.

<sup>165</sup> *The Morning Post* (11 May 1899), above n 25, at 3; A very similar account is given in *The Standard* (11 May 1899), above n 108, at 4. This occurrence was also reported in *Auckland Star* (24 June 1899), above n 95, at 1.

<sup>166</sup> *Glasgow Herald* (11 May 1899), above n 101, at 6.

<sup>167</sup> At 6.

in the demurrer. Any representation of the Raid's legality had to come indirectly through claims that Imperial troops would assist. It is unlikely that such claims were ever made. Therefore, Jameson's reputation was also unjustly affected by the demurrer.

Finally, this case can give us insight into the views held by the British public on both the Raid itself and the people involved. It seems that by the time of trial, there was strong support for the organisers of the Raid and a jury verdict against them was unlikely.

Above all, this article has reinforced a point already made by others: one must be very careful in reading a demurrer.<sup>168</sup> The facts alleged are simply that, accusations made by a plaintiff without having to produce any evidence whatsoever in support of them.

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<sup>168</sup> This point was made by Williams in the context of the *Wi Parata* case: Williams, above n 11, at ch 3.