Sir James Rose-Innes
Chief Justice 1914-1927

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James Rose Innes: the making of a constitutionalist

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WE know his judgments for their limpid precision and compelling reasoning. In so many fields they remain the leading cases. Innes was however considerably more than a lawyer. The course of his career affords considerable insight into the moulding of one of our greatest judges, and in particular into his contribution to the development of our constitutional and administrative law.

He was a third-generation South African, the grandson of the first Superintendent-General of Education in the Cape and the great-grandson of Robert Hart of Glen Avon, the founder of Somerset East, who landed as a member of the British expeditionary force in 1795. In his own forthright words:

> "I should call myself an Afrikaner, were it not for the tendency to confine that term to those whose ancestors landed here before the British occupation, and to such newer arrivals as are animated by the 'South African spirit'. I have neither Voortrekker nor Huguenot blood in my veins, and 'the South African spirit', as understood by those who extol it, implies a view on the native question which I cannot share. But I am proud to be a South African, and I claim to stand on the same national footing as if my forebears had landed with Van Riebeeck or followed Piet Retief over the Drakensberg".

James Rose Innes – "Rose" was a given name which his brother's descendants have retained – was born on 8 January 1855 in Grahamstown. His father was then secretary to the Lieutenant-Governor of the Cape, and later Cape Under-Secretary for Native Affairs. Young Innes followed his father to Riversdale, Uitenhage, Bedford, Somerset East and King William's Town, where his father served as a magistrate. Much of his schooling was received at Bedford, a little village school which uniquely within a space of a few years had as its pupils (as they became in later life) W H Solomon, CJ, Sir Richard Solomon, KC, the Hon. W H Schreiner, KC and Prime Minister of the Cape, the Hon. J W Leonard, KC, and W Danckwerts, KC (father of a future Lord Justice of Appeal).

On leaving school, Innes supported himself by working briefly in a bank, and afterwards in the Native Affairs Department in Cape Town. At that time, there was no formal higher education in South Africa. The University of the Cape of Good Hope was purely an examining institution. He passed his BA examinations in 1874 and his LLB in 1877.

He was admitted to the Cape Bar in February 1878. His practice seems to have grown steadily. He is described by one before whom he appeared as having the ability to "think on his legs"; he had too a "fund of quiet humour and a gentle quizzing satire". On circuit he was said to be in the middle of any mischief.

In 1884 he was elected the Member of the Cape House of Assembly for Victoria East, standing on an uncompromising Native policy:

> ". . . the policy of repression has been tried, and it has failed. What the country requires is that the existing laws should be fairly and equitably administered, and that the Natives should cease to be the subjects of rash experiments in the art of 'vigorous' government".

In time Innes served as Attorney-General in Rhodes's Ministry, together with his close allies John X Merriman and J W Sauer. His earlier years had been characterised by his opposition to forced removals of black people across the Kei River. In politics, he was always something of a detached figure ("I have really almost come to look upon myself as belonging to no party and bound to acknowledge no leader"). His dilemma was best expressed in a letter written in 1888 to the black journalist and political figure, J Tengo Jabavu:

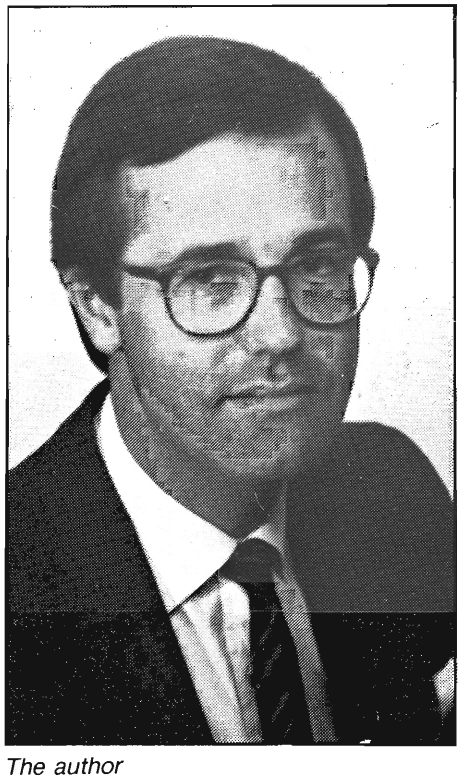
> "Thanks for your suggestions as to the next election. From what I hear, and on all hands, it is very doubtful whether I shall get in again. I have alienated the Europeans on the Registration Bill, and I think the favour of the Natives has been cooled by my refusal to go in for any appeal to England on that question."

After three years, Rhodes's first Ministry came to an end over the Logan scandal (Sivewright, a member of the Cabinet, gave his friend Logan the Goverment Railway refreshment concession without going to tender).

Innes thereafter maintained correct relations with Rhodes, but was never close to him. He described him privately as "entirely an opportunist and, more than that, like Napoleon he is a law unto himself and has established for himself such a position that he is able to do things which smaller men could not possibly do without losing self-respect". In his memoirs, his final considered view was that Rhodes "infected Cape public life with a harmful virus, and to South Africa he brought not peace but a sword". He deplored the way Rhodes jettisoned his alliance with Hofmeyr's Bond (tactical though it was), for the ready fruits of Jingoism.

Again and again through his letters and memoirs his quiet but insistent concern for individual rights sounds. He was as much concerned about the effect of oppression on the oppressor as on the oppressed. Writing to Richard Solomon about the indenturing of the Langberg prisoners, he said:

> "What I feel is that these men are condemned without trial to what is virtually enforced servitude. They may say they enter into it willingly, but any Native who could not help himself would say that . . . Now it is the responsibility upon ourselves that seems to me the serious part of the whole business, for even if all these Natives turn out to be well treated, that is no excuse for our depriving them of their individual liberty of



The author

> choice, and we are bound to reap the fruits of it sooner or later. Slavery in some countries was not altogether a bad thing for the slaves, but it was always a bad thing for the dominant race; it seems to me that if we violate principles that lie at the bedrock of freedom we are going to pay the penalty for it . . . Of course I do not mean to say that I do not take into account the hardships which some of the individual Natives will suffer. I do, and I feel indignant at it; but still I think that the stronger objection is that founded upon a violation of constitutional principles. It makes one sick to see how [nobody], except a few church people, will trouble themselves to consider this business; it shows a great lowering of moral tone to find that everybody dismisses the subject by saying that after all they are only niggers, and that they are not badly off, for they would have starved in the Langberg. What can you expect in the way of tone in public opinion in a country where the most intelligent part of the community are engaged in the worship of the high priest of opportunism."

The last reference was, of course, to Rhodes.

The outbreak of the Anglo-Boer War led to Innes's appointment as Attorney-General again. Almost at the outset, he was involved in a determined correspondence with Sir Alfred Milner, the High Commissioner, warning against the unrest and discontent stirred up in the Colony by the deportation of women and children. "Not only is the thing itself one which naturally arouses men's feelings; but it lends itself to exaggeration and mischief to a degree that hardly any other topic would."

His views on martial law were expressed with equal clarity and force. Writing again to Milner, he said:

> "As Your Excellency knows I *hate* the thing. It is abhorrent to me. But where it is necessary for military operations I am quite prepared to accept it; and at a time like this I am willing to sink my own judgment to a very great extent. But I cannot, without violating my own ideas of what is constitutionally right and wrong, agree to it being applied where there is no disturbance and where it is not required for military operations. I may be quite wrong; but I cannot satisfy myself that a proclamation of martial law can to any appreciable extent supply the place of vigilant guards in protecting a railway line. And I feel in my bones that a Cape Town Commandant would employ himself largely in supressing certain newspapers and in laying one's political opponents by the heels. I have no great love for them naturally; but to proclaim martial law because they are troublesome seems to be out of the question. I only mention this aspect of the matter because I know that it is at the bottom of much of the popular outcry in the press and elsewhere for martial law."

This is the thinking, and indeed in parts the very language which one finds in his judgment in *Krohn v Minister of Defence* 1915 AD 191. He had a profound and practical mistrust of the vesting of unlimited discretion in officials. He writes in his autobiography:

> "Officials, whose activities are, for the time being, practically unhampered, are vested with authority to an extent which is a searching test of character. The conduct of the ordinary man, under ordinary circumstances, is largely determined by convention. The atmosphere of his environment, the public opinion of the community, are restraining factors which operate automatically. But when these restraints are removed, when the officer is a law unto himself, when publicity is darkened and criticism is silent, it is only a strong man who can preserve an equal mind and a balanced judgment. And the administrators of the system are not universally the strongest men."

This echoes his strictures some 25 years earlier in *Shidiack v Union Government* 1912 AD 642 against "a grave tendency in modern legislation to clothe with finality the decisions of public officials in matters which seriously affect the rights of the public [auguring] a serious menace to the liberty of the subject".

James Rose Innes resigned as Chief Justice in 1927. ("No statutory age limit operated and I still enjoyed my work, but the 71st milestone had been left behind, and I knew that waning powers were perceptible to outsiders before they were realised by the victim. Judicial experience is apt, if unduly protracted, to induce staleness.") He did not, of course, publicly articulate what everyone knew: that he believed W H Solomon (whom he long outlived) should be given the opportunity to serve as Chief Justice.

For him, the next ten years seemed retrospectively "to be filled with memories of the long struggle over the Native Bills and shadowed by a sense of loss, due to the departure of valued friends". His only child, Dorothy (who had married the son of the Kaiser's great Field-Marshal, Von Moltke), suddenly died in 1935, "and the bottom dropped out of our little world. I cannot even now do more than record the fact". He became a leader of the Non-Racial Franchise Association. He wrote of its predicament – not unique in South African history – with delicate irony:

> "The Prime Minister (Hertzog), searching for a full-blooded term of reproach, has branded us as a South African Party organisation, and General Smuts, alarmed at the charge, has hastened to disavow us. So that we may proceed to plough our furrow – not, we trust, a lonely one – if not in peace, at any rate in detachment."

His vision of the future was striking. He warned that change in Africa was dynamic. Its inhabitants were subject "to the continuous impact of industrial civilisation, to a forcing process unique in the annals of human development, and it is impossible to estimate their progress in the future by the precedents of the past". The absence of an industrial colour bar in large areas of Africa and the granting of political privileges to Natives and others "enormously increased the difficulty of justifying, to our own Natives, not only an industrial but also a political colour bar in the Union". Union had brought about a tension in that

> "As regards the black man, the policy of the south has been a policy of full political status, while the policy of the north has been one of no political status – the one a policy of liberty, the other a policy of repression."

His Association set its face against the abolition of the Cape franchise, and the attempt to introduce separate representation for blacks. His first objection was that sectional representation was wrong in principle ("we do not allow separate representatives for Jews and Gentiles, for Catholics and Protestants, for farmers and merchants. The

result would be chaos. Why then should there be separate representation for the Natives? No doubt, the ethnological distinction between European and Bantu constitutes a wider separation than exists between any of the classes which have been mentioned. But that does not alter the fact that both races are interested in the welfare of the whole country; and that the economic position of the one reacts upon the other. The part of statesmanship is not to stress racial differences, but to emphasise the interests which exist in common.") A second objection was that the representation allotted to Natives was intended to be final. He warned in one of his last public utterances, more than 50 years ago:

> "In a comparatively short time, we shall have to deal with a great body of Natives whose education has enabled them to appreciate the value of the political status denied them, and has stimulated their determination to obtain it, and they will be embittered by the grievances, economic and administrative which are bound to accumulate when one section of the people is deprived of those voting rights which its fellow citizens enjoy. Is it seriously contemplated, may I ask, to repress these aspirations, to hold this aggrieved and angry multitude down by force? Because – let us make no mistake – it will come to that in the end. This is not a mere denial of liberty; it is a case of taking away liberty which has been long enjoyed. That process, however disguised, is an act of spoliation dependent on force but force is not solvent of human problems. One would think that in South Africa there would be no need to press home that truth. And yet we are apt to forget, in dealing with this problem, that you cannot kill the soul of the people; and that the spirit of man will not tamely submit to the loss of rights which materially and spiritually he values . . . .
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> "I end where I began. South Africa stands at the parting of the ways. She may take the path of repression, easy at first with its downward grade, but it leads to the abyss – not in our time, but in the time of our descendants, whose interests it is our sacred duty to guard."

Innes died on 16 January 1942. He had never really recovered from the loss of his daughter, Dorothy. He was spared the death of her son, Count Helmuth James von Moltke, a leading figure in the Kreisau Circle of young Protestant idealists, who was convicted of hostility to National Socialism in Freisler's People's Court, and executed three months before the end of World War II.

Innes did, indeed, end where he began. His steady adherence to constitutionalism endured. His wisdom encompassed a luminous intellect, clarity of expression, great scholarship and a balance between detachment and commitment to liberal values. He believed in "duty, for duty's sake", and in "intellectual and spiritual honesty". He adhered to each in his own life.

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Etiese vrae

LESERS word uitgenooi om probleme van 'n etiese aard wat hulle mag ondervind, in hierdie rubriek te stel. Die geval sal bespreek word sonder openbaring van identiteit en op so 'n wyse dat dit nie verleentheid sal veroorsaak nie. Dit sal ook waardeer word as Balierade interessante probleme wat onder hulle aandag gekom het, tot die kennis van die redaksie bring.

'n Balieraad het onlangs geleentheid gehad om Reël 7.2.1 te oorweeg. Daarvolgens moet iedere opdrag by die vroegste redelike geleentheid na afhandeling van die werk ten opsigte waarvan die gelde gedebiteer word, gemerk word. In die betrokke geval het 'n advokaat verskyn in 'n siviele verhoor wat 'n week of wat geduur het en toe deelsverhoor *sine die* uitgestel is. 'n Nuwe datum is toe vir etlike maande later gereël. Die advokaat het nie sy gelde vir die eerste been van die verhoor gemerk nie, maar dit agterwee gehou. Eers toe die hele verhoor, maande later, beëindig is, het hy sy volledige gelde gemerk. Volgens 'n letterlike vertolking van die reël moes die advokaat natuurlik toe die saak uitgestel is, sy brevet gemerk en teruggestuur het. Die Balieraad het egter besluit dat die reël (in elk geval by dié Balie) nie letterlik toegepas word nie. So gebeur dit dikwels dat daar nie dadelik gelde gemerk word vir konsultasies wat met die oog op 'n verhoor gevoer word nie. Die indruk het ook bestaan dat dit in strafsake nie gebruiklik is om by elke uitstel dadelik gelde te merk nie. Gevolglik is daar beslis dat die betrokke lid die reël nie oortree het nie. Dit sal interessant wees om te verneem wat die praktyk by die verskillende balies is.

'n Ander probleem wat onlangs by 'n balie opgeduik het, is dié van reistyd. 'n Advokaat moes in 'n siviele saak op 'n afgelee plattelandse dorp verskyn. Die reistyd daarheen het iets soos vier uur beloop. Benewens sy konsultasiegelde, verhoorgelde en reiskoste, het hy gelde vir reistyd gedebiteer. Dit is bereken per uur teen 'n betreklik lae tarief, sê R20,00 tot R30,00 per uur. Die Balieraad het besluit dat die item nie toelaatbaar is nie. Al word hoeveel tyd deur reis in beslag geneem, kan 'n advokaat nie geld daarvoor vra nie. Wat hy wel kan doen, is om sy verhoorgelde aan te pas om voorsiening te maak vir die feit dat hy tyd moet bestee om die plek te bereik waar hy sy opdrag moet uitvoer. CB

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