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# CHIEF JUSTICE MELIUS DE VILLIERS: A CAPE LIBERAL WITH A ROMAN-DUTCH HEART\*

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## 1 Introduction

It is rare for two siblings to become judges. It is even more extraordinary if one of these two becomes Chief Justice. For both siblings to become Chief Justice is indeed a unique achievement. This has happened only once in South African legal history. The two brothers who had both reached the highest judicial office were Lord Henry and his younger brother Melius de Villiers.<sup>1</sup>

Lord Henry de Villiers was Chief Justice of the Cape from 1873 to 1910. In 1910 he became the first Chief Justice of the Union of South Africa and served in that capacity until 1914, when he died in harness. He was one of the most celebrated South African personalities of his time and it has been said that he could have reached the highest political office in this country had he so wished. Much has been written on the life of Lord Henry de Villiers, including a fully-fledged biography.<sup>2</sup>

Lord Henry's brother, Melius de Villiers, Chief Justice of the Orange Free State from 1889 to 1900 when Bloemfontein fell to the British forces of Lord Roberts, had only a slightly less illustrious legal career.<sup>3</sup> However, it is widely accepted

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\* For the past seven years I have been collecting material on the personal life and professional career of Melius de Villiers. The aim is to publish a series of articles on De Villiers in the foreseeable future – including a full bibliography of archival and secondary material. This article represents work in progress and should be seen as a mere introduction to the planned series.

\*\* I acknowledge the financial assistance received from a number of institutions which allowed me to travel to the Free State, Western Cape, England and the Netherlands to follow the footsteps of Melius de Villiers. They are, in no particular order: the University of South Africa, the Van Ewijk-Stigting and the Nederlandsch Zuid-Afrikaansche Vereeniging. In addition, I would like to thank a number of individuals who have assisted me in my research. They are, again in no particular order, Rentia Roodt of the Free State Archival Repository in Bloemfontein, Koos van der Walt and Tiny Neethling, both of Paarl, my colleague, Prof Johan van Niekerk, who has supplied me with a number of references relevant to Melius de Villiers, the staff at the Bedford Local Council Archives, and Corrie Maris and Prof Willem Otterspeer (both of the University of Leyden).

1 For a brief synopsis of the legal careers of the two brothers, see Roberts *A South African Legal Bibliography* (1942) 356 sv “De Villiers, Johan Hendrik” (Lord Henry de Villiers’ Christian names were “Johan Hendrik”, but he had anglicised his names and preferred to call himself “John Henry de Villiers”); and 357 sv “De Villiers, Melius”.

2 Walker *Lord de Villiers and his Times. South Africa 1842—1914* (1925).

3 On Melius de Villiers in general, see Anon “De Hoofdrechter” *De Boerenvriend* 1893-1896 17; Anon “Melius de Villiers” March 1905 *De Goede Hoop* 195ff; Anon “Melius de Villiers” 1910 *SALJ* 185ff; De Villiers “Oud-Hoofregter en Krygsgevangene Vertel. My Ervaringe as Krygsgevangene” 21 December 1929 *Die Volksblad* 5; Anon “Persoonlike Berigte” 7 July 1938 *Die Volksblad* 1; Anon “Oud-Hoofregter van die Vrystaat Oorlede” 7 July 1938 *Die Burger* 2 c 3; Anon “Notes” 1938 *SALJ* 296; Wiechers in De Kock & Krüger (eds) *Dictionary of South African Biography* Vol II (1972) 184ff sv “De Villiers, Melius”; and Du Toit “Ons Regserfenis” 1978 *De Rebus* 417ff.

that through his academic writings and judgments, Melius de Villiers made a far greater contribution to South African jurisprudence than his more famous brother.<sup>4</sup>

## 2 Birth and early life

In order to consider the circumstances and surroundings which had shaped Melius de Villiers' legal mind and literary outpourings, a brief account of his private life and legal career is necessary.

Melius de Villiers was born on 5 September 1849 in the Boland town of Paarl. He was the seventh child of Carel Christiaan de Villiers, a land surveyor of Paarl, and Dorothea Elisabeth Retief.<sup>5</sup> He was the youngest of four brothers, all of whom excelled in the legal profession. The eldest of the brothers, Jacob Nicolaas Pieter (Japie) de Villiers<sup>6</sup> became a magistrate in Cape Town and also served as member of the Cape Senate. The second eldest was Lord Henry de Villiers, Chief Justice of the Cape and South Africa for forty three years. The third eldest, Carel (Charles) Christiaan de Villiers,<sup>7</sup> became an attorney in Cape Town. Melius de Villiers was the fourth and youngest brother.<sup>8</sup>

## 3 Education

From the age of four until he was fourteen, Melius de Villiers attended school at Paarl Gymnasium. He then went to the South African College School (better known as SACS) in Cape Town.<sup>9</sup> He excelled there and was one of only five candidates between 1862 and 1871 who succeeded in obtaining the "First Class Certificate in Science and Literature" of the Cape Board of Examiners. In 1872 he obtained the "Certificate of the Higher Class in Law and Jurisprudence". In terms of Act 12 of 1858 this Certificate, together with one of the two other Certificates of Merit and Attainment of the Board of Examiners, gave him admission to the Cape Bar. De Villiers was one of the first four law students to obtain the qualifications for admission to the Bar in South Africa. The Certificate in Law and Jurisprudence constituted the sum total of his formal

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4 See Wiechers (n 3) 186.

5 Melius de Villiers *Memoirs*. Between 1926 and 1931, Melius de Villiers wrote his *Memoirs* consisting of more than 100 pages. It was never published, but the hand-written manuscript has survived. It is housed at the Free State Archive Repository in Bloemfontein as part of the "Melius de Villiers Collection".

6 Born in 1837 and died in 1922.

7 Born in 1847 and died in 1937.

8 See Wiechers (n 3) 184.

9 See, in general, Walker *The South African College and the University of Cape Town. 1829-1929* (1929) *passim*.

legal training. His subsequent achievements are remarkable since he was largely responsible for his own training in jurisprudence.<sup>10</sup>

#### 4 First trip abroad

In July 1872 he was admitted as an advocate in Cape Town. Shortly afterwards he went to Europe where he attended, among other institutions, the English law courts. His trip to Europe was paid for with a bursary awarded for the excellent results he had achieved in the "First Class Certificate in Literature and Science" in 1871. This Certificate was the equivalent of a Master's degree.<sup>11</sup> On his return from abroad he practiced as an advocate, but his withdrawn and unassuming nature deprived him of any early success at the Cape Bar.<sup>12</sup>

#### 5 Free State Bench<sup>13</sup>

He gradually made a name for himself and in 1876, at the age of twenty seven, he accepted the position of Second Puisne Judge of the newly constituted High Court of Justice of the Orange Free State offered to him by President JH Brand. He was sworn in on 15 May 1876 and took his seat together with Chief Justice FW Reitz and Judge James Buchanan.<sup>14</sup>

Three years after he was appointed to the Free State Bench, he married Adelaide Holmes-Orr who became his life-long companion and the mother of his four children.<sup>15</sup> Although Melius de Villiers' ancestors were of French stock and his parents Dutch speaking, his home-language in adult life was English. The fact that he had received his education in English played no small part in his accepting that language as his preferred mode of communication. It was fashionable during the nineteenth century for prominent Dutch families in the Cape to speak English and to become Anglicised in their cultural and intellectual life. The fact that his wife came from Somersetshire, England, certainly played no small part in the De Villiers family adopting English as their home-language.

By the time Melius de Villiers accepted the appointment to the Free State Bench in 1876, there can be little doubt that he was, at least in education and

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10 On his education, see Anon "Melius" 1910 *SALJ* (n 3) 186-187; and Wiechers (n 3) 184-185.

11 See Du Toit (n 3) 417.

12 See Wiechers (n 3) 185; Du Toit (n 3) 417.

13 On his tenure as Judge and later Chief Judge of the Orange Free State, see De Villiers *Memoirs* unpaginated; and De Villiers "Random reminiscences of the Orange Free State Bench" 1920 *SALJ* 398ff.

14 See Wiechers (n 3) 185; Du Toit (n 3) 418.

15 See Wiechers (n 3) 187.

in intellectual and cultural life, a typical nineteenth century English-speaking Cape liberal. In 1925, aged seventy six, he described his upbringing as follows:

I was brought up in what I may call an Anglophil family and in an Anglophil environment. In my youngest childhood I went to an infant school kept by an English woman and later on to a more advanced school kept by her sister. We were drilled in English spelling ... and sang songs like 'Rule Britannia, Britannia rule the Waves'.<sup>16</sup>

De Villiers worked diligently to develop a sound and enlightened legal system for the fledgling Orange Free State Bench, and so gained the confidence and respect of the general public. In January 1889 he succeeded Reitz as Chief Justice after the latter's election as President of the Orange Free State Republic.<sup>17</sup> He remained Chief Justice of the Republic until May 1900, when Bloemfontein fell to the British forces during the Second Anglo-Boer War.<sup>18</sup>

During his tenure as Chief Justice, Melius de Villiers fought courageously for the independence of the Supreme Court. One example will suffice: De Villiers relentlessly opposed the Volksraad's attempts to curtail the formal testing capacity of the courts. During a session of the Circuit Court at Boshoff he addressed a public meeting, criticizing the Volksraad. His comments at this meeting led to general opposition against the policy of the Volksraad. The offending regulation was eventually shelved.<sup>19</sup>

Melius de Villiers was also held in high esteem outside the Orange Free State. In 1879 the Transvaal offered him a judgeship and, three years later, the position of Chief Justice. In 1882 he was offered a judgeship of the Supreme Court of Griqualand West in Kimberley. All three these offers he declined.<sup>20</sup>

Because of his high repute and his calm impartiality as a judge, he acted as an arbitrator in a number of political and constitutional disputes, including the one between the Transvaal Republic and the British Government over the South Western Border of the Transvaal.<sup>21</sup>

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16 See De Villiers *Memoirs* (n 5); and Du Toit (n 3) 417 where she refers to this quotation in emphasising the heavy bias towards English in De Villiers' education.

17 See De Villiers *Memoirs* (n 5); and Wiechers (n 3) 185.

18 See De Villiers "Reminiscences" (n 13) 407.

19 See Wiechers (n 3) 185.

20 *Ibid.*

21 See De Villiers *Memoirs* (n 5); Wiechers (n 3) 185; and Du Toit (n 3) 419.

In 1898 the University of the Cape of Good Hope conferred on him the honorary degrees of MA and LLB.<sup>22</sup>

## 6 The Second Anglo-Boer War

With the approach of the British forces early in 1900, the Orange Free State Government left Bloemfontein. President Steyn instructed De Villiers to remain behind and attend to urgent legal matters. Lord Roberts captured Bloemfontein in March 1900. In his *Memoirs* De Villiers described the events of that fateful day as follows: “[it was] the most miserable ... of sights to see the British troops entering Bloemfontein; their triumph of unrighteousness and afterwards to hear of the proclamation of annexation being read on the market square.”<sup>23</sup>

After the capture of Bloemfontein, De Villiers was refused permission to join President Steyn and he was sent to the Cape as a prisoner of war.<sup>24</sup>

The Second Anglo-Boer War, the circumstances that led to the War and subsequent events left De Villiers perplexed and disillusioned. If his *Memoirs*, which was written nearly thirty years after the War, is anything to go by, De Villiers never quite forgave Britain for her share in that human catastrophe. On a personal level De Villiers too, paid a heavy price. Following the Anglo Boer War, he lost the position of Chief Justice of the Orange Free State. He was for long without any income, his state pension was drastically curtailed and for all practical purposes his professional career came to a halt for five years.<sup>25</sup>

## 7 The second trip abroad

De Villiers and his family left for Bedford in England during the middle part of 1900. The reasons for the decision to move were that his movements as prisoner of war in the Cape were severely restricted and he feared being sent to Ceylon. In addition, there was a lack of work at the Cape Bar during that time. In his *Memoirs* he further mentions that since his children were not receiving any education at the Cape he and his wife decided that they should be schooled in England.<sup>26</sup>

The De Villiers family stayed at 7 Spenser Road in Bedford, England, for two years before returning to the Cape in 1902 after the Peace Treaty of

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22 See Wiechers (n 3) 187.

23 See De Villiers *Memoirs* (n 5); Wiechers (n 3) 185; Du Toit (n 3) 419.

24 See De Villiers *Memoirs* (n 5); Wiechers (n 3) 185.

25 See De Villiers *Memoirs* (n 5) *passim*.

26 See De Villiers *Memoirs* (n 5) *passim*; and Du Toit (n 3) 420.

Vereeniging was signed.<sup>27</sup> Although I have not yet established what type of work Melius de Villiers had done and where he had worked during his stay in England between 1900 and 1902, I believe he might have worked in London. I could not find any trace in the records at the Bedford Local Council of him being economically active in that town.<sup>28</sup>

## 8 Back in South Africa

After Melius de Villiers and his family returned to South Africa in the latter part of 1902, he began to practise as an advocate at the Cape Bar. The post of Chief Justice of the Orange River Colony was offered to him by Lord Alfred Milner, but, because he had sworn allegiance to the independence of the former Free State Republic, he declined the offer.<sup>29</sup>

By 1905 Melius de Villiers must have felt depressed by the thought of spending the rest of his professional life at the Cape Bar. First, there was the aspect of appearing before his brother. Although there is no surviving record suggesting any ill-feelings between the brothers – on the contrary, they had a very good relationship – it must have been somewhat awkward for ex-Chief Justice Melius de Villiers to appear as counsel before his elder brother. By 1905 it was nearly thirty years ago that he had left the Cape Bar to take up the position as Second Puisne Judge in Bloemfontein. Most of his business and professional contacts from the 1870s when he first practiced law in the Cape were probably no longer there. He had to rely on the good will and briefs of an unknown Cape fraternity of attorneys to make ends meet. And ends meet it certainly was. His *Memoirs* are riddled with hints of his financial struggles following his departure from Bloemfontein in 1900. Given his rejection of Lord Milner's offer to become Chief Justice of the Orange River Colony in 1902, he was not expected to receive any favours from the British authorities either. Because of the oath of allegiance that he had sworn to the Orange Free State, it was unlikely that he would have accepted a post as judge under the British flag anywhere in South Africa. Union was in any event a further five years away.

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27 See *1903 Bedford Directory (Revised to November 31st (sic) 1902)* (1902) 139 sv "Spenser Road 7 de Villiers, M".

28 I am indebted to Prof David Pugsley of the University of Exeter who has pointed out to me that because Melius de Villiers did not have any professional qualification to practice law in England it was highly unlikely that he would have been involved in any form of legal practice there. According to Pugsley, with De Villiers' qualifications, he was more likely to have worked as a personal tutor during his stay in England.

29 See De Villiers *Memoirs* (n 5); Wiechers (n 3) 185.

## 9 Leyden: 1905-1912

Early in 1905 the Law Faculty of the University of Leyden in the Netherlands established a Chair in “*Zuid-Afrikaansche Recht*”.<sup>30</sup> The Chair constituted an undisguised hand of friendship and solidarity of the Dutch to the two former Boer Republics after the Second Anglo-Boer War.

Men such as MT Steyn, FW Reitz and JBM Hertzog had all refused the post offered to them. The post was then offered to Melius de Villiers. After some initial hesitation he accepted it.<sup>31</sup> The offer to Melius de Villiers to become the first Professor of South African law at Leyden came as a welcome life buoy in his professional career.

He arrived in the Netherlands with his family in the first week of June 1905 and delivered his inaugural lecture the next month.<sup>32</sup> He tells us that

my [inaugural] dissertation was not a long one; I afterwards discovered that a long one is better appreciated than a short one and is considered more dignified. [In] Leiden we stayed at the Hotel Lion d’Orr in Bree Straat. The proprietor had built a new bathroom. We engaged use of the bathroom without extra payment. When the month’s bill was first presented we found the bathroom was charged for. I represented this to the proprietor who remarked that he thought we would require and have an occasional bath [only] but that we had baths every day. Thereafter I [had] to pay for the bathroom. We did not relish Dutch hotel food it was rather different from what we were accustomed to. From there we went into a home we had lived [in] on the Witte Singel.<sup>33</sup>

The title of his inaugural lecture was “Het Oud-Hollandsch Recht in Zuid-Afrika”. In this lecture he explained the development of Roman-Dutch law in South Africa and strongly urged the retention of common-law rules and principles. He emphasised the strong cultural ties which existed between the

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30 For a note on the background to introducing a course in South African law at the University of Leyden, as well as the chair of “*Zuid-Afrikaansche Recht*”, see Otterspeer “Boeren en akademici. De Leidse universiteit en het enthousiasme voor de Zuidafrikaanse Boeren rond de eeuwwisseling” 1991 (15(4)) *De Negentiende Eeuw* 203ff.

31 See Wiechers (n 3) 186.

32 See Siegenbeeck van Heukelom-Lamme (assisted by Idenburg-Siegenbeeck van Heukelom) *Album Scholasticum. MDLXXV-MCMXL* (1941) 162 sv “Villiers. Melius De”.

33 They stayed for more than two years at 70 Witte Singel: see De Villiers *Memoirs* (n 5).

Netherlands and South Africa and thanked the University of Leyden for its share in strengthening this bond.<sup>34</sup>

At the end of Melius' first year at Leyden forty seven law degrees were awarded.<sup>35</sup> Among the successful candidates were three South African law students. The best-known among them was one William Mortimer Robertson Malherbe of Potchefstroom in the Transvaal, who later became known as Professor Mortie Malherbe of the Law Faculty at the University of Stellenbosch.<sup>36</sup>

While he was at the University of Leyden, the London Council of Legal Education offered him a lectureship in Roman-Dutch law in 1907, but he declined.<sup>37</sup> This was not surprising, given his sensitive reaction to the Second Anglo Boer War and the loss of the independence of the two Boer Republics at the hands of the British.

In 1912 he resigned as Professor.<sup>38</sup> I could not find any explanation for his resignation in the available material on Melius de Villiers and the official documentation at the University of Leyden merely states that his departure was a great loss to that University but that unfortunately nothing could be done to prevent it.<sup>39</sup>

## 10 His later years

After his return to South Africa in 1912 Melius de Villiers played an active part in public life and served on various commissions. He also became a prolific writer on a wide range of legal as well as non-legal topics published in scientific journals, mainstream magazines and newspapers.<sup>40</sup>

In 1926, twelve years before his death, he moved to the farm "Kleine Zalze" in the Banhoek valley, outside Stellenbosch, where he stayed with his eldest son. In the same year he started writing his *Memoirs*. He worked on this over a period of five years, but it was never published. Fortunately it has survived in

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34 See Wiechers (n 3) 186.

35 See Anon *Jaarboek der Rijksuniversiteit te Leiden 1905-1906 en Verslag over 1905-1906 van het Leidsche Universiteitsfonds* (1906) 48-49.

36 *Idem* 40.

37 See Wiechers (n 3) 186.

38 For a fascinating account of the day-to-day life of a lecturer at the University of Leyden during the nineteenth century as well as the first part of the twentieth century, which coincided with Melius de Villiers' tenure as a professor there, see Otterspeer *De Wiekslag van Hun Geest. De Leidse Universiteit in de Negentiende Eeuw* (c 1992) *passim*.

39 See Anon *Jaarboek der Rijksuniversiteit te Leiden 1911-1912 en Verslag over 1911-1912 van het Leidsche Universiteitsfonds* (1912) 43-44.

40 A conspectus of his publications falls outside the scope of the present article and will be included in the planned series on Melius de Villiers referred to above.



manuscript form and is now housed, together with many of his other personal papers, in the National Archive Repository in Bloemfontein.

Melius de Villiers passed away on 6 July 1938 at the age of eighty nine.<sup>41</sup> He is buried in the graveyard of the Anglican Church in the Groot Drakenstein area on the road between Paarl and Franschoek in the Western Cape.<sup>42</sup>

## 11 Melius de Villiers' contribution to South African legal literature

As indicated, the strong Anglo-Saxon influence during his school career and early professional life, the long periods of time that he spent in England and the fact that he had adopted English as his language of communication, all pointed to the cultural and intellectual make-up of a typical nineteenth century Cape liberal. Yet Melius de Villiers was by heart European.

As a lawyer he was a staunch supporter of Roman-Dutch law. He systematised the legal material and developed Roman-Dutch law concepts to meet the demands of his time. It is generally accepted that De Villiers was one of South Africa's pioneering jurists of the nineteenth century.<sup>43</sup> His most important contribution to South African legal literature was his *Roman and Roman Dutch Law of Injuries* which was published in 1899. A supplement to the main work was published in 1915.

Apart from its professional importance, this work was, and still is, for a number of reasons, hugely important in the further development of the Roman-Dutch law.

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41 He was survived by his wife, Adelaide, and three of their four children: Francis Melius (Francis or Frank), Claudine Seugnet Taillefer (Claudine) and Marguerite Gardiol (Rita). Their fourth child, Frances Lilian, predeceased her parents: see "Estate File: De Villiers, Melius": Cape Archive Repository, Cape Town. Depot: KAB. Source: MOOC. Vol: 6/9/5120. Ref: 60179.

42 I am indebted to Messrs Koos van der Walt and Tiny Neethling of Paarl who both searched (and found) Melius de Villiers' grave. My own initial searches for his grave in Stellenbosch, the Helshoogte region, the Banhoek Valley, Priel and as far East as Franschoek yielded nothing. In September 2005 I made contact with Koos van der Walt, a genealogist and local historian of Paarl. Also his initial searches for Melius' grave yielded nothing. In January 2006 I mentioned in passing to Tiny Neethling, a resident of Paarl, that I was looking for Melius de Villiers' grave. Neethling magnanimously offered to assist me in my search. He mentioned to me that he had a strong suspicion where the grave could be. Less than a week later he phoned me to confirm that he had located the grave in the graveyard of the Anglican Church just outside Paarl. Soon thereafter Van der Walt, in an independent search, too, found the grave.

43 See Wiechers (n 3) 186; Du Toit (n 3) 417.

First, it was an important counter to the prevailing (and particularly the Cape) tendency of the late nineteenth and early twentieth centuries to accept English law as a primary and binding source of South African law.<sup>44</sup>

Secondly, it was probably the first South African legal textbook which discussed the development, after 1800, of Roman jurisprudence in the Netherlands and, particularly, in Germany. In this regard De Villiers provided ample proof of his acquaintance with the German Historical School of Von Savigny and the Pandectists such as Puchta, Windscheid and others.<sup>45</sup>

Thirdly, it remains a *tour de force* and glowing example of academic research of the highest standard. The title page of this book states in a rather unpretentious manner that it is a translation of book 47, title 10, of Voet's *Commentary on the Pandects*, with annotations, and yet, it has been described as "one of the deepest and most learned treatises on any branch of law [published at the time]".<sup>46</sup> The book contains about fifty pages of translation from Voet and over two hundred closely printed pages of De Villiers' own annotations and commentaries on the various sections translated.<sup>47</sup>

Fourthly, this text is still today, 107 years after its first publication, a work of first reference on the South African law of injuries. Although a number of modern South African texts have been published on the same topic, De Villiers' *Roman and Roman Dutch Law of Injuries* is still referred to with approval by South African courts, the most recent decision of which is *Dendy v University of Witwatersrand, Johannesburg & Others*.<sup>48</sup> Over the years this text has been referred to, mostly with unanimous approval, in no less than 190 reported decisions of the Supreme Court of South Africa.<sup>49</sup>

De Villiers was also the author of a number of important legal articles. Pride of place must go to four articles published between 1921 and 1927 dealing with the controversial introduction of the English-law concept of "consideration" into the South African law of contracts.<sup>50</sup> This development caused one of the most famous contract law debates that ever raged in our courts..<sup>51</sup> Lord Henry de

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44 See Wiechers (n 3) 186.

45 *Ibid.*

46 See Anon "Melius" 1910 *SALJ* (n 3) 189.

47 *Ibid.*

48 [2005] 2 All SA 490 (W).

49 Electronic search done on "LexisNexis" (<http://bibinfo.unisa.ac.za/nxt/gateway.dll?f=xhitlist>) (24 January 2006).

50 See De Villiers "Is consideration an alien element?" 1921 *SALJ* 271; De Villiers "Some remarks on the contract of mandate" 1922 *SALJ* 22; De Villiers "Consideration reconsidered" 1922 *SALJ* 422 and 1923 *SALJ* 15. In addition to these four articles, he published a number of articles that dealt with aspects such as *causa* and *consensus* in contract.

51 For a concise account of this debate, which was full of socio-political, historical and perhaps even constitutional undertones, see Zimmermann *The Law of Obligations* (1996) 556ff.

Villiers, in the 1904 Cape Supreme Court decision of *Mtembu v Webster*,<sup>52</sup> was primarily responsible for introducing the doctrine of “consideration” into South African law. In the opposite camp was Sir John Kotzé, of the Transvaal Supreme Court. In the 1904 Transvaal Supreme Court decision in *Rood v Wallach*<sup>53</sup> Kotzé CJ advocated *iusta causa* as the common-law alternative to the English-law concept of “consideration”. In 1919, five years after Lord de Villiers’ death, in *Conradie v Rossouw*<sup>54</sup> the South African Appellate Division decided in favour of *iusta causa* as the test to distinguish between promissory transactions which are binding and those which are not.<sup>55</sup> Strangely enough, this was one of the few instances in which Melius de Villiers did not wholeheartedly support the common-law side of the debate, but rather preferred cautiously to justify the use of the concept of “consideration” in South African contract law. Dare one suggest that for once Melius de Villiers was not true to his Roman-Dutch heart, but that this was a case of blood being thicker than water, and might it be that his elder brother’s involvement in the debate has caused Melius not outrightly to reject “consideration” as a concept foreign to our common law?<sup>56</sup>

It has been pointed out that although the Appellate Division in *Conradie v Rossouw* abolished the concept of “consideration” as a requirement for the conclusion of a valid contract under South African law, not all the problems in regard to *iusta causa* in the law of contract have been eliminated. As a result, so it is argued, De Villiers’ articles on the concept of “consideration” have retained their relevance for modern contract lawyers.<sup>57</sup>

Melius de Villiers’ articles on *iusta causa* and consideration, as well as his text on injuries, indicate that he was in favour of retaining and developing “the particular character of the Roman-Dutch law in South Africa against a persistent attempt to make it a mere imitation of English law”.<sup>58</sup>

Because of the poor and irregular reporting of judgments in the Orange Free State between 1874 and 1902 hardly any of his judgments have been preserved in any official format. A rare and welcome exception is his judgment in *Preller v Schultz*, which was reprinted in volume 10 of the *Cape Law Journal*

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52 (1904) 21 SC 323.

53 1904 TS 187.

54 1919 AD 279.

55 See Zimmerman (n 51) 557.

56 But see the comments made by Zimmermann (n 51) 557-558 where he refers with approval to Lee when the latter argues that “[i]t may, indeed, be doubted whether the doctrine of *causa* really occupied the important place in the Roman-Dutch law which has been assigned to it in modern discussions”.

57 See Wiechers (n 3) 187.

58 *Idem* 186.

and has been described as “an example of his astute legal reasoning and faithful application of the Roman-Dutch law of libel”.<sup>59</sup>

## 12 Conclusion

Finally, I would like to conclude with a brief comparison between the legal views of Melius de Villiers and his elder brother Lord Henry. Their legal views were often diametrically opposed. While Melius concentrated on the correct application of common-law principles, his brother was quick to accept and apply English legal doctrines.<sup>60</sup>

It has been suggested, and correctly so I must hasten to add, that the difference in legal approach and views between Lord Henry and his younger sibling Melius de Villiers may probably be found in their respective characters. Lord Henry de Villiers, with his Cape and even British loyalties, was a public figure and far more of a man of action.<sup>61</sup> He was a staunch supporter of the British Empire. In October 1899, at the outbreak of the Second Anglo-Boer War, he wrote as follows to Sir Alfred Milner:

In race I am French and not Dutch, and therefore the ties of race would not be very strong with people the majority of whom are of purely Dutch descent. As to tradition our family has for several generations been British, and therefore all my sympathies are with the empire within the folds of which we enjoy liberty, peace and free government.<sup>62</sup>

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59 *Ibid.* See further Du Toit (n 3) 418.

60 See Wiechers (n 3) 186-187.

61 *Idem* 187.

62 See Walker (n 2) 361. Lord Henry de Villiers' remark in his letter to Sir Alfred Milner that “[a]s to tradition our family has for several generations been British ...” is at its best political coaxing by the Chief Justice, and at its worst, a blatant lie. The De Villiers family was originally of Huguenot stock but by the middle of the 19<sup>th</sup> century Lord Henry's branch of the family had become Dutch in culture, language and religion. Proof of this abounds in the materials that I have found on the family. I will restrict myself to the fact that Lord Henry and his siblings were baptised in the famous Dutch Reformed “Strooidak Kerk” (“Thatched Roof Church”) in Main Street, Paarl. Lord Henry and Melius de Villiers' parents were members of this congregation and are in all probability also buried in the graveyard adjacent to this Church: information supplied by Mr Koos van der Walt of Paarl. The private correspondence between Lord Henry de Villiers and his siblings which had survived and which forms part of the collection of official and personal papers which constitute the Lord Henry de Villiers Collection (MSC7) in the National Library, Cape Town, is all in English. Schoeman “Some correspondence of Lord de Villiers” 1999 (54)(2) *Quart Bull NLSA* 65-66 explains that although this correspondence was in English, the members of the De Villiers family all bore Dutch family names. He pointed out that their schooling was in English and that “social life in the Boland was largely anglicised by the middle of the nineteenth century; only towards the end of the [nineteenth] century did the rise of the Afrikaans language movement and a series of political events such as the Anglo-Transvaal War and the Anglo-Boer War bring about the development of Afrikaner nationalism and cause division among the European inhabitants of the Cape Colony”. Schoeman (66f) provides further compelling proof that Lord Henry's assertion to Alfred Milner that his family has “for several generations been British” is not correct.

In contrast, Melius was an introvert with a strong academic bent who preferred to engross himself in theory, logic and methodology. And throughout his life he had remained loyal to the oath of independence sworn to the Orange Free State.<sup>63</sup> During his time in the Orange Free State and thereafter, he had truly become a Republican.<sup>64</sup>

I believe that the disillusionment that Melius de Villiers had with Britain during and after the Second Anglo Boer War, played no role whatsoever in his preference for Roman-Dutch law over English law – at least during the pre-Leyden part of his legal career. I base this belief on the fact that his most important contribution to the preservation and further development of Roman-Dutch law as our common law, namely his well-known text on injuries, was published before the outbreak of the War in October 1889. In all probability his love and admiration for Roman-Dutch law was rather the result of his twenty four-year tenure as Judge of the Supreme Court of the Orange Free State, where Roman-Dutch law was regarded as the undisputed common law of the two Boer Republics, and English law, however influential, merely as one of several persuasive secondary sources.

And put in the context of this Conference's theme: Melius de Villiers' furtherance of Roman-Dutch law in the young Boer Republic of the Orange Free State 130 years ago, ensured that the common law of that Republic was developed to cater for the young and transforming society which that Republic was in the late nineteenth century.

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63      Wiechers (n 3) 187.

64      See Du Toit (n 3) 420.