PART I

MELIUS DE VILLIERS – A BIOGRAPHICAL SKETCH

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1 Introduction

The cradle of the extended De Villiers family in South Africa was an estate near La Rochelle, France. The revocation of the Edict of Nantes in October 1685 meant that freedom of religion came under siege in France. ¹ Among the many French Huguenots who felt compelled to flee from their beloved France in order to secure their right to worship their God as they chose, were three De Villiers brothers. They first went to Holland (the then Dutch Republic), before they came to the Cape in 1689. The De Villiers family in South Africa descended from these three brothers.²

The contribution of the De Villiers family to South African law in general, and the South African judiciary in particular, has been enormous.³ No South African family has produced more judges than the De Villiers clan. Between 1828 and 2007 no less than eleven members of this family served as judges in the

¹ The Edict of Nantes was issued on 13 April 1598 by Henry IV of France to grant the Calvinist Protestants of France (also known as Huguenots) substantial rights in a nation still considered essentially Catholic. The main concern was civil unity, and the Edict separated civil from religious unity, treated some Protestants for the first time as more than mere schismatics and heretics, and opened a path for secularism and tolerance. In offering general freedom of conscience to individuals, the Edict offered many specific concessions to the Protestants, such as amnesty and the reinstatement of their civil rights, including the right to work in any field or for the State and to bring grievances directly to the King. It marked the end of eight religious wars that had divided the population of France during the second half of the sixteenth century. The Edict aimed primarily to end the long-running, disruptive French Wars of Religion. In October 1685, Louis XIV, the grandson of Henry IV, renounced the Edict and declared Protestantism illegal with the Edict of Fontainebleau. This act, commonly called the revocation of the Edict of Nantes, had very damaging results for France. Although the Wars of Religion did not re-ignite, many Protestants chose to leave France, most moving to Great Britain, Prussia, Holland and Switzerland. This exodus deprived France of many of its most skilled and industrious individuals, who would from then on aid France’s rivals in Holland and England: see Coertzen Die Hugenote van Suid-Afrika 1688-1988 (1988) 27-30, 33ff.

² For a more detailed exposition of the De Villiers ancestry, see par 2 below.

³ Law is by no means the only area of South African life in which the descendants of the three De Villiers brothers from La Rochelle have excelled. I will restrict myself here to a few examples from the history of South African sport and merely mention that between 1891 and 2007 seven De Villiers’ have played international rugby for South Africa (at the 2007 Rugby World Cup there were two De Villiers players in action, Jean for South Africa and Pieter, who plied his trade for his adopted country, France): see Colquhoun (ed) Sasol SA Rugby Annual 2008 (2008) sv “De Villiers, J (Jean)” 491; and De Villiers P (Pieter)” 515. In January 2008 Pieter de Villiers made history when he became the first black coach of the Springbok rugby team. Two players named De Villiers, Fanie and AB, have served South African cricket with distinction in the international cricket arena during the last fourteen years: see Bryden (ed) SA Cricket Annual 2006 (2006) 170. For a survey of the contribution made by the French Huguenots (including the De Villiers clan) to South African culture, science, politics, sport and the military, see Coertzen (n 1) 145ff.
colonies of the Cape and Natal, the Boer Republics of Transvaal and the Orange Free State, and still later, the Union and Republic of South Africa. They were: Johan Hendrik (Lord John Henry) de Villiers, Jacob Abraham Jeremy (Jaap) de Villiers, Melius de Villiers, Jean Etienne Reenen de Villiers, Jean Etienne de Villiers, Hans Heinrich Wicht de Villiers, JNC de Villiers, W de Villiers, DP de Villiers, JPO de Villiers and IWB de Villiers.

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4 Born in Paarl on 15 June 1842 and died in Pretoria on 1 September 1914. In December 1872 he became the Attorney General in Prime Minister Molteno’s cabinet and on 8 December the following year he became Chief Justice of the Cape Supreme Court. He was made Baron de Villiers of Wynberg in 1910 and on the last day of 1910 he became the first Chief Justice of the Union of South Africa: see Roberts A South African Legal Biography (1942) 356-357; Rose Innes “Lord de Villiers” 1914 SALJ 422; and Walker Lord de Villiers and his Times. 1842-1914 (1925) 508. For a more recent resume of his life and legal career, see Corbett “Notes and comments. Lord de Villiers of Wynberg” 1994 SALJ 373ff.

5 Born on 14 December 1868 in Fauresmith and died in London on 16 September 1932 while on sick leave. After Reinhold Gregorowski resigned as State Attorney of the Free State, De Villiers accepted this post in 1896. At the outbreak of the Anglo-Boer War he joined the Free State forces but was severely wounded in both legs and sent to Bermuda. Upon Union, he became the first Judge-President of the Transvaal Provincial Division. On 14 June 1920 he was appointed to the Appellate Division. He was Chief Justice of the Union of South Africa from 16 October 1929 until his death three years later: see Roberts (n 4) 355-356; and Hiemstra sv “De Villiers, Jacob Abraham Jeremy” in DSAB Vol III 217.

6 See par 3 below.

7 Nicknamed “Oefie”, Jean de Villiers was born in Beaufort West on 25 March 1875 and died in Bloemfontein on 4 February 1947. From 1915 he acted on various occasions as judge in the Cape Provincial Division and the Northern Cape Provincial Division but never received a permanent appointment until his appointment as Judge-President of the Orange Free State Provincial Division on 1 January 1920. Although he served as judge in the Water Court and acted on numerous occasions in the Supreme Court, he never took silk and his appointment as Judge President of the Orange Free State Provincial Division from the ranks of junior advocate came as a major surprise. He was appointed to the Appellate Division on 1 January 1933, but retired six years before the statutory retirement age. He spent the last years of his life an embittered and lonely man, sulking for not being promoted to the Appellate Division earlier. He was knighted in 1923; see Roberts (n 4) 357; and Hiemstra sv “De Villiers, Jean Etienne Reenen” in DSAB Vol IV 226-227.

8 He was born on 28 June 1894 in Somerset East and died in Durban on 7 June 1960. He was appointed to the Cape Provincial Division Bench on 1 March 1939. Thereupon he was appointed Acting Judge-President in 1947 and in 1949 he became Judge-President of the same Division. He retired on 28 June 1959: see Roberts (n 4) 357; and Diemont sv “De Villiers, Jean Etienne” in DSAB Vol IV 123-124.

9 Heinrich de Villiers was born in 1891 in the Paarl and died in Knysna in November 1973. He was a second cousin of Judge Etienne de Villiers and he descended from the same branch of the De Villiers family as Lord Henry and Melius de Villiers, as well as Chief Justice Jaap de Villiers. Before he had started his career as a lawyer he had been in turn a farmer, a teacher, a journalist and a representative of an insurance company. He was called to the Bar in Pretoria in 1922, took silk in 1938 and was appointed as Judge in the Transvaal Provincial Division of the Supreme Court in 1945. He served in that court until 1955. From 1957 to 1962 he was the Judge President of the Eastern Cape Division of the Supreme Court: see Jennett “In Memoriam: The Hon Heinrich de Villiers” 1974 SALJ 236.

10 He was born in January 1909 in Bloemfontein and died on 1 February 1998. He was appointed as judge in the Orange Free State Provincial Division in 1953 and served as Judge-President in the same Division from 1972 to 1976 when he was elevated to the Appellate Division. Failing eyesight caused him to resign from the Appellate Division the following year: see Forsyth In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950-80 (1985) 8; and Nienaber & Kahn “Reminiscences of Bench and Bar mainly of the Free State” 2002 SALJ 231 n 14.

11 He was appointed an acting judge in the Orange Free State Provincial Division in 1952 and held that appointment until the end of 1954.

12 He was first appointed an acting judge in the Cape Provincial Division in August 1958 and he served in that capacity until the end of 1959.

13 Jaap de Villiers was born on 4 February 1920 and died on 15 February 2008 in Pretoria. He was first appointed as an acting judge in the Transvaal Provincial Division in 1964. He
For a period of 122 years, between 1873 (when Lord Henry de Villiers was appointed as Chief Justice of the Cape Supreme Court) and 2005, when Judge IWB de Villiers retired as judge of the Transvaal High Court, there was always at least one De Villiers serving as judge in South Africa.

Three of these De Villiers judges reached the highest judicial office and served as Chief Justice – and two of them were brothers. It is rare for two siblings to become judges. It is even more extraordinary if one of these two becomes Chief Justice. And it is indeed a unique achievement for both siblings to become Chief Justice. This has happened only once in South African legal history. The two brothers who both reached the highest judicial office were Lord Henry and his younger brother Melius de Villiers.15

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 September 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.16

Lord Henry’s younger 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 than his elder brother.17 However, it is accepted that through his academic writings and judgments, Melius de Villiers made a far greater contribution to the

also served in an acting capacity in South West Africa (Namibia) from 1964 to 1966. In 1966 he was appointed permanently in the Transvaal Provincial Division, a position which he held for more than twenty years, until he retired in 1988.

14 He was first appointed in 1975 as an acting judge in the Transvaal Provincial Division. In 199; he was appointed permanently in that Division. He retired in 2005.

15 For a brief synopsis of the legal careers of the two brothers, see Roberts (n 4) 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”.

16 It was written by the well-known and prolific historian, Eric Walker, under the title Lord de Villiers and his Times. South Africa 1842-1914, and published in 1925.

17 On Melius de Villiers in general, see Anon “De hoofdrechter” 1893-1896 De Boerenvriend 17; Anon “Melius de Villiers” March 1905 De Goede Hoop 195ff; Anon “Melius de Villiers” 1910 SALJ 185ff (hereinafter: “Anon ‘Melius de Villiers’”); 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; Pont “Melius de Villiers” 1938 THRHR 267; Roberts (n 4) 357 sv “De Villiers, Melius”; Wiechers sv “De Villiers, Melius” in DSAB Vol II 184ff; and Du Toit “Ons regserfenis: Melius de Villiers” 1978 De Rebus Procuratoris 417ff.
development of Roman-Dutch law in South Africa, if not to the development of South African juridical science in general, than his elder, more famous brother.18

The remainder of this article will focus on the life and legal career of Melius de Villiers.

2 Ancestry

On 6 May 1689 the "Zion", with a party of French Huguenots on board, dropped anchor in Table Bay, Cape Town. Among these Huguenots were the three De Villiers brothers, Pierre, Abraham and Jacob. They were the sons of Pierre de Villiers of La Rochelle, a coastal town hugged by the Bay of Biscay, on the west coast of France. Melius de Villiers descended from the eldest of the three refugee brothers, Pierre de Villiers.19 Pierre’s eldest son, also Pierre,20 named his eldest son Pieter.21 Pieter de Villiers had seventeen children, the youngest of whom was Jacob Nicolaas.22 Jacob married Susanna Margaretha Bernharde in 1810.23 They had nine children, the eldest of whom was Carel Christiana.24 Carl married Dorothea Elisabeth Retief on 8 December 1834. They had nine children, one of whom was Melius de Villiers. The children were, in chronological order: Helena Alida, Jacob Nicolaas Pieter,25 Susanna

18 See Wiechers (n 17) 186.
19 Born in 1657 in France and died on the farm Picardie-La Brie, Paarl, on 22 January 1720. He was a farmer, first with his brothers at La Rochelle, Bourgogne, France, and later on Picardie-La Brie near Paarl. In 1694, that is five years after his arrival at the Cape, he married the twenty-year old Maria Elisabeth Taillefer(t) who was born on the farm Picardie-La Brie, Paarl. She died in 1735. They are both buried in the cemetery of the “Rietdakkerk” in Paarl: see De Villiers Genealogies of Old South African Families/Geslagsregisters van die ou Kaapse Families (completely revised edition augmented and rewritten by Pama) Vol III S-Z (1966) 1029.
20 Pierre II was born in 1695 and died on 22 April 1765. He farmed at Picardie and also owned La Paris from 1736 to 1755. In about 1724 he married Hester Roux. She passed away in 1754. She was the widow of Johan Heinrich Mylius: see De Villiers (n 19) 1029. For the interesting possibility that Melius de Villiers might have been named after the late husband of his great, great grand uncle’s second wife, see his “Memoirs” Part II below. It is also interesting to note that one of Pierre de Villiers II’s brothers, Jean or Jan, married one Hester Mylius (later Melius) on 7 August 1735. If one accepts this date to be correct, and if one too accepts the date of death of Pierre de Villiers II (22 April 1765) to be correct, the two De Villiers brothers Pierre II and Jean (Jan) indeed married two girls with identical names, namely Hester Mylius. Pierre II married his Hester Mylius in 1724, while Jean’s (Jan’s) Hester Mylius was only born and baptised in 1713 (making her eleven years old at the time of Pierre II’s marriage with his Hester Mylius).
21 He was born in 1725 and died in 1789. He farmed on Landskroon in “Achter-Paarl”. He married Helena Basson on 17 March 1756. She was born in 1731 and died in 1772. Two years later, in 1774, he married Johanna de Villiers. She was born in 1752, twenty seven years the junior of her husband Pieter. It came as no surprise that she outlived him by forty one years. In 1798, eight years after Pieter’s death, his widow sold Landskroon: see De Villiers (n 19) 1029.
22 He was baptised on 26 November 1786 and died on 27 June 1854 in Paarl: idem 1038.
23 She was born on 12 November 1792: ibid.
24 He was born on 26 October 1811: ibid.
25 He married Anna Marais: ibid.
Margaretha, John Henry, Catharina Maria, Charles Christiaan, Melius, Dorothea and Johanna Emerentia.

Melius de Villiers’ father, Carel Christiaan de Villiers, was a land surveyor by profession. Melius was the seventh child and the youngest of four sons, all of whom excelled in the legal profession. The eldest of the brothers, Jacob Nicolaas Pieter (Japie) de Villiers became a magistrate in Cape Town and also served as member of the Cape Senate. The second eldest was Johan Hendrik (who later became Lord Henry de Villiers, Chief Justice of the Cape and South Africa for more than thirty years). The third eldest, Carel (Charles or Charlie) Christiaan de Villiers became an attorney in Cape Town. Melius was the fourth and youngest brother.

3 Early years

Melius de Villiers was born on 5 September 1849 in Paarl. He was in all probability named after Johann Heinrich Mylius (Melius), a German from Grozheringen who was a barber and surgeon and lived in Drakenstein. He was the first husband of Melius de Villiers’ great great grand aunt, Hester Roux, who, as a widow, had subsequently married Pierre de Villiers, paternal great great grand uncle of Melius de Villiers.

Tragedy struck in 1854 when Carel de Villiers died at the age of forty two, leaving his widow to raise nine children, the eldest of whom was nineteen years old and the youngest nine months. Melius was five at the time. Three years later their mother too passed away, leaving the elder children to care for their younger siblings. Jacob, the eldest brother, assumed responsibility for Melius’ education. It was often difficult for the elder siblings to make ends meet but they were innovative. Helena, Melius’ eldest sister, converted part of the front of the family home into a shop which she managed with great success.

26 She married the Reverend Jacobus P Jordaan: ibid.
27 He married Aletta Jordaan: ibid.
28 He married Debora de Villiers: ibid.
29 Born in 1837 and died in 1922: ibid.
30 Born in 1847 and died in 1937: ibid.
31 See Wiechers (n 17) 184.
32 Ibid. Apart from that which has been penned by Melius de Villiers himself in his “Memoirs” on his pre-school years, none of the other sources which I consulted provide any further information on his pre-school years.
33 Walker (n 4) 7.
4 Education

The De Villiers siblings attended a school which was run by three Barker sisters. They were the daughters of a missionary, the Reverend George Barker of Paarl. Marion Barker taught the infants, Elizabeth the older children and the third sister presided at the piano. In 1849, Melius’ elder brother, John Henry, attended the local state-aided boys’ school. The principal was the Anglican clergyman of the town, Mr Inglis. Paarl Gymnasium opened its doors on 12 January 1858 and Melius attended that school from 1858 to 1863, when he turned fourteen.

Both John Henry and Melius received their secondary schooling at the South African College School (“SACS”), with English as medium of instruction. Melius, however, spent six years (primary school years) at Paarl Gymnasium where the medium of instruction was Dutch with an emphasis on the classics. Were the early seeds of empathy for the Dutch and their culture perhaps sown
during Melius’ formative years at Paarl Gymnasium? And does the absence of a formal education in Dutch also perhaps, if only partly, explain John Henry de Villiers’ declaration in later years that “in race I am French and not Dutch”35

Melius de Villiers (left) with his elder brother Charles. This picture was taken during the late 1920s, shortly before Charles passed away. (Source: Free State Archive Repository: Ref no VA 5428)

35 Idem 3.
In 1864 Melius and his brother Charles went to SACS in Cape Town. In doing so they followed in their elder brother John Henry’s footsteps. He attended SACS from 1853. At that stage it was just emerging from the gloomiest period in its history. It was founded in 1829 but twenty one years later, in 1859, it touched rock-bottom with a roll of seventeen scholars. By the time the De Villiers boys went to the school, the numbers were rising again. Historian Eric Walker explains that besides the boys who came from all parts of the Cape Colony, there were also boarders from the “far distant and much troubled new republic beyond the Vaal ['Transvaal'] as well as from the Sovereignty beyond the Orange River”. Walker points out that John Henry, and later also Melius, spent many of the most impressionable years of their lives “at a school which drew its boys from all parts of European South Africa, and which paid no heed to what a later generation learnt to call ‘racial’ distinctions”.

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36 Charles Christiaan (Charlie) de Villiers was at SACS for three years (1864-1866). On SACS, in general, see Walker The South African College and the University of Cape Town, 1829-1929 (1929) passim; and Linnegar SACS - 150 Years (1979) passim.

37 See Walker (n 4) 6. Walker’s use of the phrase “racial distinction” refers, of course, to “a distinction between different nations”, in contrast with “a distinction between different races”, as would later, during the twentieth century, become common.
Melius de Villiers excelled at SACS. Between 1862 and 1871 he was one of only five candidates who, between 1862 and 1871, 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 admission to the Cape Bar. Thus De Villiers became one of the first four law students (James Buchanan, who later served with him on the Free State Bench, was another) 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 legal training. His subsequent achievements are remarkable in that he was largely responsible for his own training in jurisprudence.

38  Lord Henry de Villiers and his younger brother Melius were not the only future Chief Justices to receive their education at SACS. In total there were seven old-SACS boys who reached the highest judicial office in South Africa. The other five were: (Sir) Jacobus Petrus de Wet (SACS: 1856-1858), Chief Justice of the Transvaal (1881-1881) and Acting Chief Justice of Ceylon (1882-1883); (Sir) John Gilbert Kotzé (SACS: 1864-1868), Chief Justice of the Transvaal (1881-1897); (Sir) Johannes Wilhelmus Wessels (SACS: 1872-1882), Chief Justice of the Union of South Africa (1932-1936); Francis William Reitz (SACS: 1878-1884), Chief Justice of the Orange Free State (1875-1888); and Albert van der Sand Centlivres (SACS: 1904-1907), Chief Justice of the Union of South Africa (1950-1957); see Ritchie History of the South African College Vol II (1918) 856, 861, 874, 888 and 903; Roberts (n 4) 353, 356-358, 372 and 382-383; and Forsyth In Danger for their Talents (1895) 5ff. Melius de Villiers and John Kotzé, despite the potential for rivalry between two contemporaries at SACS, were by all accounts on friendly foot. In his autobiography Kotzé refers as follows to Melius de Villiers: “He ultimately became [the Free State’s] Chief Justice, a position which he held with distinction. After the War of 1899-1902, he occupied the chair of Roman-Dutch Law at the University of Leyden for some years. A scholar and a learned jurist, we fortunately have him still with us”: see Kotzé Biographical Memoirs and Reminiscences (c.1933) 174. Melius de Villiers’ views of Kotzé are slightly less favourable: “Kotzé’s booklet [on contract law] contained a mixture of exceedingly bad law, incoherent and self-contradictory argument and bad taste. He had no love for the Chief Justice of the Supreme Court, Lord De Villiers, and years before had attacked him in the public press in a matter in which the writer made him no admirable figure. Apart from his public actions in other matters in regard to which I entertained a very decided disapproval, I personally liked him for his very genial disposition”: see De Villiers “Memoirs” (Part II below).

39  On his education, see Wiechers (n 17) 184-185.
The South African College School (SACS) (New Rosedale), Cape Town. Melius de Villiers studied here from 1864 to 1868. (Source: Ritchie The History of the South African College School (1918))

5 First trip abroad and the Cape Bar

In July 1872 he was admitted as an advocate in Cape Town. Shortly afterwards he went to Europe where he visited, among other institutions, the English law courts. His trip to Europe was paid for with a bursary that he received for the excellent results that he had achieved in the “First Class Certificate in Literature and Science” in 1871. This Certificate was the equivalent of a MA degree. On his return he practised as an advocate, but his reserved and unassuming nature deprived him of any early success at the Cape Bar.

This “unassuming nature” of his is described as follows in a tribute written by an anonymous colleague and friend in 1910:

Reserved, sensitive, retiring, modest in the extreme, it was apparent from the very first, when Melius de Villiers commenced practice at the Bar in Cape Town, that he was not cast in the mould of the successful advocate. This was not due to his want of ability or learning or knowledge of the law, but to a more or less constitutional shrinking from the hurly-burly of the strife connected with life at the Bar.

When his brother Henry was appointed as Chief Justice of the Cape in 1873, Melius retired from the Cape Bar and accepted the post of Registrar to the Chief Justice. But bigger and better things for Melius de Villiers were just around the corner.

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40 See Du Toit (n 17) 417
41 See Wiechers (n 17) 185; and Du Toit (n 17) 417.
42 Anon “Melius de Villiers” (n 17) 185.
6 Off to the Orange Free State

6.1 Appointment to the Bench

At the end of 1875 and two years after taking up the post of Registrar to his brother Henry, Melius de Villiers was offered the post of Second Puisne Judge of the newly constituted High Court of Justice of the Orange Free State. After some initial hesitation on his part, he eventually accepted the offer. 44

His appointment as judge came as no surprise to those who knew him at the Cape. He had a well-developed sense of justice. The story is told that, as a young advocate, he was on one occasion extremely upset by winning a case he thought he was bound to lose, and still more so by failing in another which in his opinion he ought to have won. 45

No railway link existed between Cape Town and Bloemfontein at the time when De Villiers accepted the position of judge in the Orange Free State late in 1875. Shortly before he had to depart for Bloemfontein in April 1876 to assume his duties on the Bench, President Brand and some members of his family travelled with the Orange Free State “vehicle of office” – a wagon drawn by eight mules – from Bloemfontein to Cape Town, where they boarded a steamer to England. 46 Still a bachelor at the time, De Villiers had to hitch a ride to Bloemfontein with the Orange Free State “vehicle of office”. He recalls how the journey (which fifty years later took thirty six hours by train, and today, 132 years later, slightly more than an hour by airplane) took him and his companions four weeks, although he admitted that to some extent the slow

43 On his tenure as Judge and later Chief Justice of the Orange Free State, see De Villiers “Memoirs” Part II below; and De Villiers “Random reminiscences of the Orange Free State Bench” 1920 SALJ 398ff (hereinafter “Reminiscences”).
44 Chief Justice Reitz, who was instrumental in identifying Melius de Villiers for the post of second puisne judge of the Free State, had to obtain special permission from the Free State House of Assembly before the offer could be made to De Villiers. Although De Villiers had not yet attained the statutory age required by the Free State Constitution when the offer was made to him, and he had also been in practice for only four years, Reitz was nevertheless satisfied that De Villiers was the right man for the job because he (De Villiers) had “zijne studie loffelijk volbragt”: see Moll (n 44) 63.
45 Anon “Melius de Villiers” (n 17) 185.
46 For the reasons why Brand had to travel to England, see Part II below. The term “vehicle of office” is used here tongue-in-cheek. There was no “vehicle of office” in those days in the Free State and transport for state officials such as judges had to be contracted out. When judges went on circuit transport was contracted out, and it took a special request by Chief Justice Reitz in 1883 to ensure that the spouses of judges were allowed to accompany their husbands without having to pay extra: Moll (n 44) 63.
pace of their journey was due to several misadventures, such as the death of mules in a mysterious manner along the road.  

He was sworn in on 15 May 1876 and took his seat together with Chief Justice Francis William Reitz and Judge James Buchanan. He was immediately put to work when he arrived in Bloemfontein. Nearly half a century later, De Villiers recalled that on his arrival there he found a good deal of arrear work that had been piling up.

6.2 Structure of the Orange Free State courts and its common law

Melius de Villiers arrived in Bloemfontein amidst exciting constitutional and judicial developments in the Orange Free State. In order to appreciate the role which he was to play in both state and judicial matters in Bloemfontein over the next quarter of a century, one must briefly consider the fledgling Republic’s common law and the structure of its courts when Melius de Villiers arrived there in May 1876.

Twenty two years before his arrival in the Free State, the Orange Free State on 23 February 1854 gained independence from Britain following the Bloemfontein Convention.

At the conclusion of the Bloemfontein Convention, the House of Assembly was tasked to draw up a constitution for the Orange Free State. Legislative power rested with the House of Assembly elected by enfranchised burghers. As regards the law to be applied in the newly constituted Republic, the Constitution provided that “het Romeinsch-Hollandsch recht zal de hoofwet van dezen staat sijn alwaar geen andere wet door den Volksraad gemaakt...”
is”. The Constitution further provided that Roman-Dutch law consisted of the principles found in the textbooks of Voet, Van der Linden, Van der Keesssel and the authorities cited there.

However, this did not mean that the judges of the Orange Free State Supreme Court considered themselves restricted to certain Roman-Dutch authorities. Reference was frequently made to the Cape and even English and Scottish decisions. In 1877, a year after Melius de Villiers’ appointment to the Free State Bench, his brother, Sir Henry – then Chief Justice of the Cape – wrote in a letter to Sir Henry Barkly that the Cape judgments carried as much weight in the Free State and Transvaal as the latter two courts’ own decisions. The law which was applied by the Free State Bench was not “pure” Roman-Dutch law, but rather Roman-Dutch law as it was applied in the Cape Colony.

As far as the structure of the courts was concerned the first half century of the new Republic experienced various changes. By 1854 the territory was divided into five districts: Bloemfontein, Smithfield, Winburg, Harrismith and Fauresmith. Each of these magisterial districts had its own magistrate. Between 1854 and 1874 the highest court of appeal in the Orange Free State was the Executive Council, of which the head was the State President. None of the first three State Presidents had any legal training. The fourth President of the Orange Free State was Johannes Henricus (“Jan”) Brand, who was the

52 “Roman-Dutch law will be the law of the land where no other laws have been made by the Volksraad [House of Assembly]”: see Oelofse (n 50) 65. On the legal system of the Republic of the Orange Free State, see further Verloren van Themaat “Die regstelsel en staatsregtelike instellings van die Oranje-Vrystaatse Republiek” 1954 THRHR 142ff.

53 A hundred years later, on 17 August 1974, the then Chief Justice of South Africa, FLH Rumpff, in his address delivered at the centenary celebrations of the Free State Supreme Court, remarked that the words “and the authorities there cited” ensured that the entire Roman-Dutch legal history was incorporated into the law of the Orange Free State: Oelofse (n 50) 65.

54 See Oelofse (n 50) 66 where he too alludes to the fact that there was a strong Cape influence in the Free State’s legislative sphere. He mentions the example of ch 104 of the Free State Statute Book (which dealt with insolvent estates), which was based largely on Cape Ordinance 6 of 1843, while both Ordinance 28 of 1902 (which dealt with bills of exchange) and the Cape Act 19 of 1893 were based on the 1882 British Bills of Exchange Act 45 & 46 Vict c 61.

55 See De Villiers “Reminiscences” (n 43) 398.

56 To wit, Josiah Philip Hoffman (1807-1879), who was the first President of the Orange Free State (1854); Jacobus Nicolaas Boshoff (1808-1881), who was the second President of the Orange Free State (1855-1859); and MW Pretorius (1819-1901), who was the third President of the Orange Free State (1859-1862): see Oelofse (n 50) 68-70; and Pelzer sv “Hoffman, Josiah Philip” in DSAB Vol I 164ff.

57 JH Brand (1823-1888) served as State President of the Orange Free State from 1864 to 1888. In 1843 he travelled to the Netherlands to study law at the University of Leyden and was later admitted to the Inner Temple in London. He practised as an advocate in Cape Town on his return from Europe. In 1862, while still practising law in the Cape, he was approached by the Free State President, MW Pretorius, to become a judge in the Free State. Because of a lack of money the Free State Legislative Assembly could, however, not appoint him as such. But two years later, on 2 February 1864, he was inaugurated as the fourth State President of the Orange Free State. He held the position of State President for a quarter of a century, until 1889, when he died in harness: see Moll (n 44) 37; and Van Schoor sv “Brand, Johannes Henricus” in DSAB Vol I 114 ff.
first of the Free State Presidents with legal training.\textsuperscript{58}

The lowest courts for the trial of both civil and criminal cases were the Courts of Landdrost, corresponding to the Resident Magistrates’ Courts of the Cape. A somewhat higher jurisdiction was exercised by the Courts of Heemraden in each district. The Courts of Heemraden were presided over by two assessors in each case, appointed by the Government. From these courts an appeal lay to the Circuit Courts held in each district, including that of the capital, Bloemfontein. Each of these courts was presided over by three magistrates who were appointed by the Government for that purpose. In the first instance they exercised jurisdiction in matters beyond the jurisdiction of the lower courts and below that of the High Court.\textsuperscript{59}

When the Orange Free State High Court was first established in 1874, it consisted of a Chief Justice and two assessors.\textsuperscript{60} Mr Francis William Reitz (who later succeeded Brand as the President of the Orange Free State) was appointed as the first Chief Justice. Like Brand, he had previously practised at the Cape Bar. In 1875, the assessors were done away with and James Buchanan was appointed First Puisne Judge.\textsuperscript{61} In the same year the Courts of Landdrost and Heemraden were also abolished.\textsuperscript{62}

The main criticism against the old judicial system (ie, before the introduction of the Orange Free State High Court with a circuit division) was that the magistrates ("landdroste") were laymen. When he introduced the proposed Bill to the House of Assembly, President Brand explained to the members of the House that "mannen van het vak, die de rechten wetenschappelyk bestudeert

\textsuperscript{58} Idem 114-115
\textsuperscript{59} De Villiers “Reminiscences” (n 43) 398.
\textsuperscript{60} The assessors were Mr Charles Ward Hutton, magistrate of Fauresmith, and Mr William Whiskin Collins, then practising as an attorney in Bloemfontein: \textit{ibid}. CW Hutton was born on 28 March 1825 in Cape Town and died on 9 September 1886 in Bloemfontein. He was a Free State official and member of the Free State House of Assembly, representing the Midde-Riet en Grootrivier ward from 1867 to 1871. It has been stated that "while the Free State Republic experienced serious problems with incompetent and dishonest officials and sometimes a rebellious population in the first decade of its existence, Hutton serves as an example both of the honest and dutiful public servants who maintained the prestige of the government, and of the many English-speaking people who were loyal citizens of the Republic": see Schoeman \textit{sv} “Hutton, Charles Ward” in \textit{DSAB} Vol V 371. WW Collins was born on 10 October 1832 in Cape Town and died on 30 May 1917 in Bloemfontein. He was a writer and Free State pioneer. He was admitted to practise as an attorney in the Free State in 1856 and was also appointed as Justice of the Peace for Bloemfontein. Already during the 1860s, ten years before Melius de Villiers’ arrival in Bloemfontein, Collins was one of the leading attorneys in Bloemfontein. In 1862 he was admitted as a member of the Board of Examiners of Attorneys and Advocates. He served as member of the Free State House of Assembly from 1862 until 1890. His autobiography entitled \textit{Free Statia ...} was published in 1907 and reprinted in 1965: see Moll \textit{sv} “Collins, William Whiskin” in \textit{DSAB} Vol III 167.
\textsuperscript{61} \textit{Ibid}.
hebben, de leden van het Hooge Gerechtshof uitmaken”. The Bill further proposed that “de leden van de regerlyke magt zullen moeten zyn, doctoren in de regten of advocaten, die minstens 7 jaren als advocaat hebben gepractiseerd”. The judges were further expected not only to tend to court cases, but also to assist the House in drafting new legislation, or in the parlance of the Bill: “[de regterlyke magt] … onledig houden met het vervaardigen van wetsontwerpen”.

The newly constituted High Court (consisting, for the first time, of judges who were all legally trained) held its inaugural session on 17 February 1876. Proceedings kicked off with twenty eight cases on the court roll but due to illness of attorney Mathey who was “by al de overage zaken betrokke”, the Court was adjourned for three days during March. However, this did not prevent the Court from finishing its initial batch of cases in time for Judge Buchanan to go on the first Circuit Court of the Orange Free State High Court during April 1876.

But soon the work load (including the cases to be heard on circuit) became too much for Reitz and Buchanan to deal with on their own, and in 1876 the Orange Free State Bench was further expanded when Melius de Villiers joined as Second Puisne Judge.

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63 The aim of the proposed Bill was thus to ensure that only those with formal legal training could act as judges in the High Court: ibid.
64 De Villiers “Reminiscences” (n 43) 398.
65 CC Mathey was one of eleven attorneys practising law in Bloemfontein in the late 1870s. The others were: HA Bier, WW Collins, A Fischer, JG Fraser, FA Hamelberg, Dr WHM Lagerwy, JG Luijt, JJ de Villiers, AD Voigt and C Voigt: see Reports of Cases Decided in the High Court of the Orange Free State in the Years 1874 (compiled by Albertus P de Villiers and edited by John N Eagle) Part I (1879).
66 Verschoor (n 62) 29.
67 However, not all the members of the House of Assembly were in favour of the introduction of the Orange Free State High Court. They were worried that the Free State Government would not be able to afford the salaries of the judges: R2 400 per year for the Chief Justice and R2 000 each for the two other judges: idem 28-29.
The Third Raadzaal, Bloemfontein. For thirty years, between 1874 and 1904, it housed the Supreme Court of the Orange Free State. Melius de Villiers and the other judges of the Orange Free State Supreme Court also had their chambers in the Third Raadzaal. It currently houses the archive repository and offices of the Nasionale Afrikaanse Letterkundige Museum (NALN). (Source: Schoeman Bloemfontein in Beeld. Portrait of Bloemfontein 1860-1910 (1987) 32)

6.3 Court buildings and judges’ offices in Bloemfontein: 1874-1900

In the early years of the Orange Free State High Court there was no “court building” as such. When the court was inaugurated on Monday 17 August 1874, it sat in the Bloemfontein Town Hall. The first session was attended by President Brand and a number of other luminaries of the capital. The interior of the court, naturally, was make-shift and the Friend described the scene of the first session of the Orange Free State High Court as follows: “[D]e geheele regterlyke faculteit aan een, bezonder voor haar, ingerigte tafel” sat “tegenover de regtbank, welker leden op een verhevenheid aan afzonderlyke lessenaars zaten.”

For nearly thirty years the High Court did not have a building of its own. When the House of Assembly was not in session, the High Court used its building (generally referred to as the “Derde Raadzaal” (“Third Raadzaal” or “Council Hall”)). When the House of Assembly was in session, court hearings were held in the Town Hall. For thirty years between 1874 and 1904, and thus for the full
duration of Melius de Villiers’ tenure as judge in Bloemfontein (ie 1876 to 1900), the judges’ offices were housed in the building of the Derde Raadzaal situated at the end of Maitland Street, behind the statue of President Brand. 69 In 1893 a new (Fourth) Raadzaal (“Fourth Council Hall”) was built for the use of the House of Assembly. Chief Justice Melius de Villiers and his staff then inherited the Third Raadzaal and so obtained for the first time an own, permanent building where the courts and judges’ chambers were housed.

In 1902 the British authorities decided to use the Third Raadzaal for their Legislative Council, and the High Court was moved to the somewhat statelier Fourth Raadzaal. 70 But by then the Republic of the Orange Free State had ceased to exist and Chief Justice Melius de Villiers had long departed from Bloemfontein, never to return to office.

6 4 Melius de Villiers’ tenure on the Orange Free State Bench: 1876-1900

6 4 1 General

The period between 1876 and 1900 (which coincided with Melius de Villiers’ term of office as Judge, and later also Chief Justice of the Orange Free State) was a time of relative peace and tranquillity in the constitutional and judicial history of the Free State.

It has been said that De Villiers worked diligently to “develop sound legal and enlightened penal systems” for the fledgling Orange Free State Republic, and so gained the confidence and respect of the general public. 71 In January 1889 he succeeded Reitz as Chief Justice after the latter had been elected President of the Orange Free State Republic. 72 He would remain the Chief Justice of the Republic until March 1900, when Bloemfontein fell to the British forces during the Anglo-Boer War. 73

During the late 1880s Melius de Villiers headed a commission tasked with collecting all existing Free State ordinances in a logical whole. The fruits of the Commission’s work were published in 1891 under the title Statute Book of the

68 Ibid.
69 Idem 28-30. In later years the “Third Raadzaal” housed the offices of the Free State Provincial Administration. It currently houses the offices and archival repository of the Nasionale Afrikaanse Letterkundige Museum (NALN).
70 Idem 30.
71 Wiechers (n 17) 185.
72 See De Villiers “Memoirs” Part II below; and Wiechers (n 17) 185.
73 See De Villiers “Reminiscences” (n 43) 407.
Orange Free State.\textsuperscript{74} It consisted of 146 chapters.

He was also held in high esteem outside the Orange Free State and in 1879 the British Government offered him a position as puisne judge on the Transvaal Bench. In 1882 the Cape Government offered him a position as judge of the Supreme Court of Griqualand West in Kimberley. Later that same year he was offered the position of Chief Justice of the Transvaal, which has been described as “truly a dazzling offer for a young man only thirty three years of age”\textsuperscript{75} He declined all these offers.\textsuperscript{76}

Further honour was bestowed upon him when in 1898 the University of the Cape of Good Hope conferred on him the honorary degrees of MA and LLB.\textsuperscript{77}

\section*{6 4 2 Troubled waters in Bloemfontein}

Although Melius de Villiers was generally regarded as an uncontroversial and accommodating judge and colleague, there were nevertheless a few incidents during his term of office in Bloemfontein which caused a ripple in the judicial waters of the young Republic.

First, the high turnover in personnel suggests that not all the members of the Orange Free State Bench showed the same level of loyalty to the ideals of the Republic as Melius de Villiers. In 1880 Judge James Buchanan resigned after a difference of opinion over pension benefits.\textsuperscript{78} Judge Reinhold Gregorowski\textsuperscript{79} filled his post. When President Brand passed away in harness in 1888, Chief

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{74} Ibid.
\item\textsuperscript{75} See Anon “Melius de Villiers” (n 17) 187.
\item\textsuperscript{76} Ibid.
\item\textsuperscript{77} See Wiechers (n 17) 187.
\item\textsuperscript{78} James Buchanan was born in Cape Town on 21 September 1841 and died in England in 1893. He was educated at SACS and admitted to the Cape Bar on 1 February 1865. In February 1876 he was appointed as judge in the Orange Free State. In October 1880, following the pension dispute with the Free State House of Assembly, he resigned and became the Recorder of the Griqualand West Court. In September 1882 he became Judge President of the Griqualand West High Court and resigned in September 1887 on account of ill-health. He contributed to South African legal literature through his translations of Voet. (See Johannes Voet Commentary on the Pandects Books I, II and III. Translated by James Buchanan (1880-1883). Published in eight parts.) He also edited and wrote the notes on the Menzies Reports; see Roberts (n 4) 324 351. The pension debacle is described in detail by Moll (n 44) 79ff.
\item\textsuperscript{79} Reinhold Gregorowski was born in Somerset East on 12 April 1856. He went to school at Gill College and took the BA at the University of the Cape of Good Hope in 1875. He entered Gray’s Inn and was called to the Bar on 18 November 1878. He commenced practice in Cape Town in December 1878. On 26 March 1881, at the age of twenty five, he was appointed as Judge in the Orange Free State High Court. In April 1892 he resigned to become State Attorney with the right to private practice. In 1896 he was appointed as Judge in the Transvaal High Court. He presided over the famous “Trial of the Reformers” following the Jameson Raid. On 31 March 1898 he was appointed Chief Justice in the Transvaal. After the Anglo-Boer War he practised as an advocate in Pretoria, until March 1913, when he was appointed to the Transvaal Provincial Division of the Supreme Court. He died in harness in Pretoria on 19 November 1922: see Roberts (n 4) 362.
\end{enumerate}
\end{footnotesize}
Justice MW Reitz succeeded him. This led to the appointment of Melius de Villiers in 1889 as the Republic’s second and last Chief Justice in 1889. MT Steyn, who later succeeded Reitz as State President, was appointed to fill De Villiers’ place as First Puisne Judge.80

When Melius de Villiers arrived in Bloemfontein in May 1876 as Second Puisne Judge, the Bench consisted of Chief Justice FW Reitz and First Puisne Judge Buchanan. During the next twenty four years, De Villiers shared the Free State Bench with a number of colleagues. Apart from Reitz, Buchanan and Steyn, there were also AJ McGregor,81 JBM Hertzog,82 AEJ Krause,83 LJ Jacobsz84 and H Stuart.85 In October 1880 Mr Justice Buchanan retired from the Free State Bench to take up an appointment as Registrar of the High Court of Griqualand West. On Buchanan’s departure Melius de Villiers was promoted to First Puisne Judge. In 1881 Buchanan was succeeded on the Free State Bench by Reinhold Gregorowski who had previously practised as an advocate in the Cape. After the death of President Brand in 1888, Chief Justice FW Reitz was elected as Brand’s successor. Melius de Villiers was promoted to Chief

80 Poor health forced Reitz to resign in 1895: Oelofse (n 50) 73.
81 Alexander John McGregor was born in Robertson in 1864. He studied at SACS and Oriel College, Oxford where he took a first class honours in modern history in 1887. He was called to the Inner Temple in January 1889 and admitted to the Cape Bar five months later. On 13 August 1889 he was appointed State Attorney in the Free State in succession to MT Steyn. In 1892 he was appointed as Judge of the Orange Free State High Court, but resigned in 1895 and went to Europe on holiday. On his return he practised at the Cape, taking silk in 1907. After he had acted as judge on a number of occasions, he was appointed to the Eastern Districts Bench in 1913 and transferred to the Orange Free State Bench two years later. He retired on 31 August 1931 and was a prolific contributor to the pages of the South African Law Journal: see Roberts (n 4) 370.

82 James Barry Munnik Hertzog was born in the Wellington district, Western Cape, on 3 April 1866. He obtained a BA degree from Victoria College, Stellenbosch, in 1889 and later also a Dr Juris at the University of Amsterdam. He returned in 1895 to practise in Pretoria, but was appointed in the same year as Judge in the Orange Free State. He served through the Anglo-Boer War and then returned to practice. He later became Prime Minister of the Union of South Africa from 1924 until 1939; see Roberts (n 4) 363.

83 Albert Edward Jacobus Krause was born in Bloemfontein in September 1856. He was a State Attorney in the Free State from December 1885. In January 1889 he was appointed as Judge in the Free State High Court but eight months later he resigned to take up the position of State Attorney in the Transvaal. He died in Bloemfontein on 31 July 1900. He was the brother of LE Krause and FET (“Fritz”) Krause, the latter served as Judge of the Transvaal Provincial Division and later also serving as Judge-President of the Orange Free State Provincial Division of the Supreme Court: see Roberts (n 4) 368 sv “Krause, Albert Edward Jacobus and Krause, Frederick Edward Traugott”. Fritz Krause was a larger-than-life character. He had, what was described at the time, as “the largest criminal practice ever known in this country”: see Kahn Law, Life and Laughter (1991) 120.

84 Louis Johannes Jacobsz was born on the farm Rietfontein, district Winburg, in the Free State on 6 November 1863. He was called to the Inner Temple on 17 November 1887 and was admitted as an advocate in the Cape on 23 October 1888. In the early 1890s he had built up a big junior practice in Pretoria and in 1896 he was appointed to the Orange Free State Bench. After a short period of office he resigned and returned to the Transvaal where he joined the side-bar and was for many years the senior partner in the firm of Roux and Jacobsz in Pretoria: see Roberts (n 4) 365.

85 Henri George Stuart was born on 17 February 1863. He was educated in Holland, Grey College (Bloemfontein), SA College (Cape Town) and Stellenbosch, where he obtained a BA degree in 1884. He practised in the Free State from 1887 to 1891 and was appointed to the Free State Bench on 1 December 1896. During the Anglo-Boer War he served as a Commandant. He later also served as member and deputy chairman of the Senate of the Union of South Africa: see Roberts (n 4) 378.
Justice, and MT Steyn, who practised at the Bloemfontein Bar, was appointed as Second Puisne Judge in Reitz’s place. In 1892 Judge Gregorowski resigned in order to take up the position of Attorney-General of the Free State, then held by Advocate AJ McGregor who, in turn, was appointed in Gregorowski’s place. McGregor resigned from the Free State Bench in 1895, having received an appointment as parliamentary draftsman in the Cape. In 1915 McGregor returned to the Free State Bench. After the election of MT Steyn as State President, in succession to Reitz, who had resigned for reasons of ill health, Louis Jacobsz, who practised at the Bloemfontein Bar, was appointed as Second Puisne Judge. Soon thereafter, however, he resigned to take up an appointment on the Transvaal Bench and was succeeded in 1896 by Henri Stuart, also of the Bloemfontein Bar. At the outbreak of the Anglo-Boer War in October 1899, the Free State Bench thus consisted of Chief Justice Melius de Villiers, First Puisne Judge JBM Hertzog and Second Puisne Judge Henri Stuart.

Melius de Villiers’ tenure of twenty four years on the Free State Bench was almost twice that of his closest “rival”, FW Reitz, who served for fourteen years before becoming State President. MT Steyn, another member of the judiciary who became State President, served on the Bench for seven years. Hertzog and Stuart had five and four years’ service at the outbreak of the War, respectively. Not one of the other judges served on the Free State Bench for longer than four years.

With the call to arms Judge Hertzog went to the front as legal adviser to the Head Commandant on the Kimberley border. He subsequently became one of the leaders of the republican forces. Judge Stuart accompanied another commandant to the front in a similar capacity.86

With the approach of the British forces early in 1900, the Orange Free State Government left Bloemfontein. President Steyn instructed Melius de Villiers to remain behind and attend to urgent legal matters. With the arrival of Lord Roberts in Bloemfontein the doors of the Third Raadzaal were locked and so came to an end the existence of the High Court of the Republic of the Orange Free State.87

Secondly, in 1890, during Melius de Villiers’ second year as Chief Justice, a serious conflict arose between him and the Free State House of Assembly. He

86 De Villiers “Reminiscences” (n 43) 406-407.
87 Ibid.
provides a cursory view to this conflict in his “Memoirs”. Importantly, this incident underlined the independence of the Free State judiciary which De Villiers so fiercely guarded. The incident turned on an illegal amendment of the Orange Free State Constitution. The Constitution could be altered or amended only in a certain prescribed manner and not by ordinary legislation. A certain Dutchman had insulted the House of Assembly in the press. Consequently an Ordinance was passed providing for the protection of the privilege of the House of Assembly. The passing of this Ordinance was not the correct procedure to amend the Constitution. In terms of this Ordinance, the House of Assembly would have the authority to fine or imprison anyone who transgressed its provisions. De Villiers condemned this Ordinance in public while he was on circuit in Boshoff in the Free State. The Ordinance was eventually repealed after much opposition throughout the Free State to the unconstitutional way in which the House of Assembly had amended the Constitution.

Seven years after this incident, Melius de Villiers published a detailed account of these events, including a full exposition of the constitutional background to the problem. Because of the current as well as historical relevance of this incident, it is worth referring to Melius de Villiers' account of what had happened between him, as representative of the judicial arm of government, and the Free State House of Assembly (“Volksraad”), the legislative arm of government. He wrote:

The question has already been frequently discussed whether the Courts are bound to carry out a law which they regard as unconstitutional. The grounds upon which an affirmative answer to this question is given by some, appear to me unsatisfactory and insufficient.

What is at stake here is in essence the separation of powers. More specifically, it is the right of the courts to test legislation against the Constitution. Melius de Villiers then proceeded to list the various arguments for and against the right of the court to “test” legislation. He thereupon proceeded to apply these theoretical principles to the facts underlying his disagreement with the Free State Assembly in 1890:

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88 See Part II below.
89 See Oelofse (n 50) 73; and Wiechers (n 17) 185. See further De Villiers “The relation of the judicial to the legislative authority” 1897 The Cape LJ 38 for an exposition by Melius de Villiers of the theoretical principles underlying the right of the courts to interpret the constitutionality of laws made by Parliament. He further discusses, in detail, the objections which he had made against this particular Ordinance, as well as the outcome of this incident (at 43ff). See also Verloren van Themaat (n 52) 158ff.
In the Orange Free State, the legislative power consists of a single chamber called the Volksraad. This body makes the laws of the land, without the intervention or assistance of the Head of the State. The Constitution can only be altered in one particular way. The competency of the Law Courts as to decide as the constitutionality of the laws is undoubted, and was acknowledged by a resolution in the Volksraad, dated Feb. 15, 1864 …

In the year 1890, the Volksraad adopted certain rules of order for the regulation of its own business … to make provision for the case of what was called ‘breaches of the privileges of the Volksraad’.

The main portion of the Rules was as follows:

(1) Every intentional breach of a privilege of the Volksraad is punishable as a crime according to circumstances, either with censure and warning, or with a fine of not exceeding £100, or with imprisonment without hard labour for not more than six months, or both such fine and imprisonment.

(2) The Volksraad, and it alone, decides as to what amounts to a breach of its privileges … (emphasis added).

De Villiers then proceeded to point out the inherent dangers of Rule (2):

Based upon an alleged “inherent” right of the legislative power to impose punishment for breach of its privileges, it might just as well have fixed a period of twenty or any other number of years imprisonment “with hard labour” … [f]urther, the legislator would not only be judge in his own cause, but also be able to declare ex post facto that an act already done was a crime, and force that view upon the law Courts …

Against this regulation, accordingly, strong objections were made by the Chief Justice [ie, Melius de Villiers himself], in a letter addressed to the Chairman of the Volksraad, mainly upon the ground that it created a breach of the constitutional powers of the Law Courts, and was calculated to bring about a conflict between the judicial and the legislative authorities, in the event that the Volksraad were really to

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90 See De Villiers (n 89) 38ff.
91 Idem 38.
92 Idem 43.
give effect to the regulation, and any person prejudiced thereby should appeal for protection to the High Court. [In this regard Melius de Villiers] relied on the fact that, while Section 8 of the Constitution provided, “The highest legislative power belongs to the Volksraad,” Section 48 provided that “the judicial power is exercised exclusively by the Law Courts which are established by the law,” so that no body can exercise judicial functions unless first declared to be a Law Court.

After some discussions, backwards and forwards, a resolution was passed by the Volksraad whereby it declared: “To be clearly of the opinion that by none of the provisions of the said regulation any encroachment whatever is made on any right of the Law Courts, and that by the enactment of the regulation, the Volksraad has not in any respect exceeded the powers and rights granted to it by the Constitution.”

In the following year, a new draft regulation was drawn up ... in the form of an Ordinance, of which it is enough to say that the time for which the Volksraad could impose imprisonment was limited up to the end of the sitting, and that the last Article reads as follows: “Nothing in this Ordinance contained, shall be regarded or taken as altering or diminishing the rights, powers and privileges of the Volksraad in any respect whatever.”

At this draft ordinance also the Chief Justice [ie, Melius de Villiers himself] announced his displeasure, and amongst the people it met with the greatest dissatisfaction; and finally the Volksraad did not insist upon it but allowed the regulation to drop.94

At the heart of this incident lies the separation of powers, or trias politicas. The reason for the division is that there can be no political freedom in a country where one and the same person or body of persons makes the laws, implements them and acts as arbiter when they are contravened. The Constitution of the Republic of South Africa, 1996, provides for a number of checks and balances in upholding the doctrine of separation of powers. One of these is the power of judicial review. This entails that the validity of the content of legislation and the fairness of administrative action may be challenged in court.

93 Idem 44.
6 4 3 Two criminal cases

There is a paucity of reported case law from the Orange Free State High Court during the first quarter century of its existence.\(^\text{95}\) For this reason the following two criminal cases involving murder which Melius de Villiers referred to in a short published note of his reminiscences on the Orange Free State Bench (which are not repeated in his “Memoirs”) make for interesting reading. It further adds impetus to his remark that as a result of the “earnest endeavour, on the whole, of juries in criminal cases” justice was done “without distinction of race or colour”.\(^\text{96}\)

He takes up the story:

Within the territory of the Orange Free State and beginning about 30 miles from Bloemfontein there was situate, like a small island in the ocean, the independent territory of the Barolong people under their Chief, Sepinare Maroko. A dispute had previously existed as to the Chieftainship, to which a certain Samuel also laid claim. The cases of the rival claimants were submitted to the arbitration of President Brand, and he had decided in favour of Sepinare. During his chieftainship, however, an armed band under the leadership of Samuel issued from Basutoland and, crossing Free State territory, attacked the ruling chief and his people in a midnight assault and killed him in the fight which ensued. To prevent inroads and misadventures of this nature for the future President Brand at once despatched an armed force to the spot, and shortly afterwards issued a proclamation bringing the territory under the jurisdiction of the Orange Free State. Samuel was subsequently apprehended and tried for murder in Bloemfontein, but it was held by Chief Justice Reitz, who presided at the trial, that the Court had no jurisdiction, inasmuch as the crime had been committed by an alien outside of the territory of the State.

The second case involved one Athelstone, who was convicted in Bloemfontein:

At Bloemfontein he [Athelstone] hired a cart and a pair of horses, in charge of a coloured driver, to convey him to some other place. At some distance from Bloemfontein he went to a farmhouse along the road and borrowed a spade and a gun, alleging that he was

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\(^{95}\) See Part III below for a list of those few Free State cases decided between 1876 and 1900 and which have been reported. The unreported judgments of the Free State High Court have survived in the archives of the Free State High Court: see Du Toit (n 17) 418.

\(^{96}\) See De Villiers “Reminiscences” (n 43) 400-401.
prospecting for gold and that there was a chance of his having a shot at a springbuck. When well out of sight of the farmhouse he made the driver get down and dig a hole, probably on the pretext that it was a likely place for gold to be found. When the hole was finished to his satisfaction, he shot the driver, buried him therein and himself drove the cart to Jagersfontein, where he sold the cart and horses and thence made his way to the Cape Colony. He was subsequently arrested, tried, convicted and sentenced to be hanged. On strong representations made on his behalf by the British residents at Bloemfontein the sentence was commuted to imprisonment with hard labour for his lifetime. However, after the arrival of Lord Roberts at Bloemfontein he was released together with another person charged with murder and received some appointment in the Provost-Marshal’s office. At a later date he was tried in Natal for some serious crime, when several previous convictions were proved against him and he received sentence of imprisonment with hard labour for a considerable period of time.

6 4 4  On circuit

Going on circuit in the early days of the South African judiciary, especially in the pre-railway days, was a time-consuming affair, often very taxing, but seldom boring. De Villiers referred to circuit travelling as “very enjoyable; a sort of pleasant picnic whilst on the road”. Circuit travelling was, however, often marred by heavy rains, thunder storms and bad roads. He recalled that on one occasion he left Bloemfontein on circuit with his wife and infant child. His account of what happened during that journey provides us with a wonderful insight into the trials and tribulations of a judge on circuit in South Africa during the late nineteenth century:

We arrived in the afternoon at Paardedrift on the Modder River and outspanned at a small hotel near the banks of the river. As it had been raining heavily, we intended not to stay there overnight, but to cross over and sleep in the wagon, lest we should find the river too swollen to cross the following day. However, an English farmer who had lived in those parts for some thirty years assured us that the river could not come down till the following night at the earliest and that we might safely stay where we were for the night; even if the river should be full

97 Idem 402-403.
98 His first child, Frank, was born in 1885. This episode to which he refers must thus have occurred sometime during the late 1880s.
the following morning, he told us, he would be able to send us across by boat. We decided accordingly to remain where we were, but to send our travelling wagon across at once. The following morning on awaking we found that the river was flooded almost to the level of its banks, the water being there some twenty feet deep. We sent for the boat; unfortunately during the night it had been carried away by the flood. The farmer who had given us the unrealised assurance previously now offered to send us with his trap to Abrahamskraal, about six miles lower down the river, where also there was a boat. We took advantage of this offer and gave instructions to the drivers to take the wagon [which was at that stage on the other side of the river] down to a spot on the river opposite to that to which we were going. Arrived at Abrahamskraal the owner of the place took us to the river and pointed out where we had to cross over. This was just above a weir built across the river, down which the water dashed with great force. It certainly looked a most dangerous place at which to cross over and we did not at all relish the idea of doing so. We were, however, assured that the crossing would be perfectly safe. To show how safe it was the owner of the boat offered to send two men across in it. This was accordingly attempted. The boat had not gone many yards on its voyage before it was hurled down over the weir and re-appeared some distance below in the form of mere planks; the two men who had been in the boat managed to swim out. The owner of the boat then suggested another plan. The plan, which was carried out the following morning, when the river was somewhat lower, was this. A couple of large wooden cases were lashed down on top of a bullock wagon, to which two teams of oxen were attached; and we, with such of our belongings as we had with us, occupied an elevated position on top of the cases. The idea of the two teams was that when some of the oxen were swimming in a rather deep part the others at all events would have sufficient foothold to drag the wagon through. Unfortunately, just as the hindmost oxen were in the deep part the wagon stuck, and it looked as if no effort could move it. What with the rocking of the wagon caused by the struggle of these hindmost oxen whose heads and noses were half the time under water, their bellowings when their heads emerged from the water, the shouts of the men urging on the oxen and the howling of the terrified infant, the position was somewhat exciting and trying. However, some of the men managed to dive down and succeeded in moving away the boulder against which one of the wheels had stuck. Then we went on with wild hurrahs from the spectators on the side from which we had
But this was not the end of the hardship for the judge and his family during that particular trip. Later, during the same trip, somewhere between Heilbron and Harrismith, his party again had to cross a swollen and rather broad river, the Liebenberg's Vlei. Melius de Villiers and his family crossed the river on a raft whilst the horses (that pulled the wagon) were held by their halters and had to swim behind the wagon.

Somehow the horses got entangled in the submerged willow trees growing on the sloping banks along the river and thus for a short while the position was decidedly unpleasant. Our wagon had been towed across with an empty barrel lashed under each of the axle-trees. Arrived on the other side the barrels were removed and we watched with dismay the wagon sliding backwards down the sloping banks into the river, until only a bit of the front of its tent remained visible. We never expected to see it again on dry land, but by putting a good team of oxen to it and whipping them up well, we had the satisfaction of seeing it emerging again, so that we were enabled to proceed on our journey, with the wagon in a rather wet condition. By this time our provisions had run out, but a wild duck shot on a vlei (albeit it was a Sunday) afforded us a very satisfactory meal.

6.4.5 His role as arbitrator in international affairs

Because of his high repute and his calm impartiality as a judge, Melius de Villiers acted as arbitrator in a number of important political and constitutional disputes. In the first of these, in 1885, he was appointed as arbitrator in a dispute between the South African Republic ("Zuid-Afrikaansche Republiek/Transvaal) and the British Government over the south-western border of the Transvaal. This appointment, so it is argued, served as proof of the fact that De Villiers’ “tact, uprightness and judicial integrity were thus officially recognised even outside his own country.”

In 1895, his qualities as an impartial adjudicator once again received international recognition outside his own country when, at the request of both the British Government and the Government of the South African Republic.
(Transvaal), he agreed to act as arbitrator. The dispute concerned the differences that had arisen between the two governments involved with regard to the interpretation of section 14 of the London Convention, 1884.

The dispute had a long background. In April 1881 the British government had conceded the South African Republic its independence. The enabling instrument was the Pretoria Convention of 1881. The Pretoria Convention provided that the British government would maintain suzerainty over the Republic. In 1884 the London Convention was promulgated to increase the South African Republic’s jurisdiction over its own affairs. But the London Convention refrained from addressing the issue of British suzerainty. The South African Government claimed that British suzerainty no longer existed as the London Convention had replaced the Pretoria Convention. The British Government, in turn, argued that those articles of the Pretoria Convention not specifically changed by the London Convention were still in effect. To complicate matters, article 14 of the London Convention provided that “[a]ll persons other than natives, conforming themselves to the laws of the South African Republic … will have full liberty, with their families, to enter, travel, or reside in any part of the South African Republic [and] … will be entitled to hire or possess houses … warehouses, shops, and premises ….”

The dispute highlighted some of the early problems created by race-based legislation. Article 14 of the London Convention provided that all persons who qualified for the rights stipulated in article 14 must conform to the laws of the South African Republic. The South African Republic’s basic law, the “Grondwet”, provided that coloured persons (including Indians), could not receive the same treatment as white persons and would be subject to special laws. The dispute turned on the question whether the “Grondwet” took precedence over the London Convention.

De Villiers had to adjudicate on two questions:

(1) Whether the words “all persons, other than natives”, excluded or included Asiatics; and

(2) Whether the British Government had given its assent to Law 3 of 1885.
On behalf of the South African Republic, Advocate Ewald Esselen contended that the words “all persons” had to be construed as meaning all persons of a similar race and civilisation as the contracting parties and that therefore Asiatics were not included. As to the second question, the South African Republic argued that Great Britain had given its assent to that Law. Both these contentions were disputed by Advocate Malcolm Searle who argued the British Government’s case.

De Villiers’ award in this dispute has been described as a “very closely reasoned and scholarly” one in which he decided in favour of the British Government on the first point and in favour of the South African Republic on the second.

6 5 Private life: The Bloemfontein years

Three years after his appointment to the Free State Bench in 1879, he married Adelaide Holmes-Orr. They had four children: Francis Melius (Francis or Frank), Claudine Seugnet Taillefer (Claudine), Marguerite Gardiol (Rita) and Frances Lilian.

The De Villiers residence in Bloemfontein, The Deodars, was a well-known landmark in the Orange Free State capital. Situated on the corner of President Brand Street and Charles Street, opposite to where the Appeal Court was later erected, this stately two-storied house dated from the early 1890s and was one of the elegant residences in Bloemfontein during the late republican era. Bloemfontein’s social and political luminaries often visited the “Chief” – as De Villiers was fondly referred to by his contemporaries – at The Deodars.

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106 Ewald August(e) Esselen (1858-1918) was a member of the Cape Bar (1885-1886), the Pretoria Bar (1890-1894; 1895-1917), State Attorney of the Transvaal (1894-1895) and Judge of the High Court of the South African Republic (Transvaal) (1886-1890). He has been described as “one of the greatest advocates South Africa has produced”: see Roberts (n 4) 359; and Kahn (n 83) 53.

107 Sir Malcolm William Searle was born in London on 7 July 1855 and came with his parents to South Africa in 1860. He was educated at Bishops and St Catherine’s College, Cambridge. He was called to the Inner Temple on 26 January 1882 and admitted to the Cape Bar four months later. He practised in Cape Town until his appointment to the Cape Provincial Division of the Supreme Court on 1 June 1910. He became Judge-President of that Division on 16 June 1922 and died in harness four years later when he was killed in a railway accident: see Roberts (n 4) 375.

108 See Anon “Melius de Villiers” (n 17) 189.

109 Ibid. In a letter dated 23 April 1895 and bearing the coat of arms of the South African Republic, De Villiers is thanked by the Secretary of State for the South African Republic, Dr WJ Leyds, for his (de Villiers’) “zorgen, toewyding en nauwgezetheid blykens de uitvoerige memorie van redenen, door U van het geschil besteed”. Leyds’ letter was accompanied by a cheque for the amount of £16.17.3, being payment by the South African Republic for fifty per cent of De Villiers’ expenses in adjudicating on the matter: see unnumbered letter dated 23 April 1895 in the “Melius de Villiers Collection”.

110 See Wiechers (n 17) 187.
President FW Reitz and his family were among the many that experienced the hospitality of Melius and Adelaide de Villiers.

After the fall of Bloemfontein and the departure of Melius de Villiers, as prisoner-of-war, to the Western Cape, The Deodars was first used as residence for Major-General Pretyman of the British army who acted as Military Governor in Bloemfontein. In later years it served as the Defence Headquarters in Bloemfontein. When it was demolished in 1933 the new Bloemfontein Town Hall was built on the site.111

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 received his secondary-school education in English contributed to his acceptance of that language as his preferred mode of communication.112 It was fashionable during the nineteenth century for prominent Dutch families in the Cape to adopt English as their favoured language. These families were often anglicised in their cultural and intellectual life. The fact that his wife came from Somersetshire, England, certainly played no small part in Melius de Villiers adopting English as his home language.

By the time Melius de Villiers accepted his appointment to the Free State Bench in 1876, there can thus be little doubt that he was, at least as far as his education and his intellectual and cultural life were concerned, a typical nineteenth-century English-speaking Cape Liberal.113

I will refer below to the fact that, notwithstanding his typical Cape-English education of the mid-nineteenth century, he was loyal beyond the call of duty to the ideals and Constitution of the Republic of the Orange Free State. His loyalty to Roman-Dutch law and his knowledge of this legal system was, in addition, a constitutional duty, since he was a citizen and judge of the Republic.

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111 Excavations for the new buildings of the Appeal Court (opposite The Deodars) started in 1928. A year later, on completion of the Appeal Court buildings, plans were put in place for a new Town Hall in Bloemfontein. The site of The Deodars was earmarked for this new project. The Deodars was demolished in 1933, and on 27 February 1934 the corner stone of the Town Hall was unveiled by the British Prince George. Nearly three years later, on 5 December 1936, the Town Hall was officially inaugurated by the then Governor-General, the Count of Clarendon: see Nienaber, Smit & Botes Vrystaatse Argitektuur (1987) 61; and Schoeman Bloemfontein in Beeld (1987) 85.

112 However, the “Melius de Villiers Collection” which is housed in the Free State Archival Repository in Bloemfontein contains a large number of documents in his own hand, written in Afrikaans.

113 See De Villiers “Memoirs” (Part II below) under the heading “My early years”; and also Du Toit (n 17) 417 where the author uses this quotation to emphasise the heavy bias towards English in De Villiers’ education.
of the Orange Free State.\textsuperscript{114} This loyalty was entrenched long before the outbreak of the Anglo-Boer War.

Melius de Villiers contributed also to the cultural life in Bloemfontein: he was involved in the Bloemfontein Literary and Scientific Society; he served as member of the Cape Board of Examiners as well as the Bloemfontein Library Committee. He also played an active part in agricultural matters in the Free State.\textsuperscript{115}

The Deodars in all its glory. It was the dwelling of Melius and Adelaide de Villiers for the larger part of the 1890s. It was one of the more elegant houses in Bloemfontein during the late-Republican era. (Source: Free State Archive Repository: Ref no VA 5512)

6 6   The Anglo-Boer War

In his capacity as Chief Justice of the Orange Free State Republic during the decade immediately preceding the Anglo-Boer War, Melius de Villiers played an important role in trying to reach a peaceful solution to the looming war. He often acted as broker and facilitator between the Free State President and his brother Sir Henry de Villiers (as he then was), who, in turn, was actively involved in the Cape in trying to find common ground between the British Government and the Boer Republics. The correspondence between the two

\textsuperscript{114} See par 6 2 above for a discussion of the constitutional entrenchment of Roman-Dutch law as the common law of the Free State.
brothers during the six months leading up to the War bears testimony to the important behind-the-scenes role which they played in this regard.

Melius’ sentiments against the War are clear from a letter which he wrote to his brother on 25 May 1899, less than five months before the outbreak of the War.

My dear Henry

... What seems to me to be forgotten at the Cape is that President Kruger has himself only a very limited power; that he has to deal with a Volksraad which is far more unyielding than he is; and that the Volksraad again has to do with “Het Volk”, which is probably more unyielding still. Men like Mr. Hofmeyr also have to some extent forgotten that the S.A.R. [Transvaal] like the Free State has a certain measure of self-respect, and cannot always yield in everything simply because they are threatened with evil consequences if they do not yield. I think the great majority of the inhabitants of the republics would rather not that the republics existed than that they should exist under such conditions ... I myself have all along looked upon this conference [the Bloemfontein Conference which was a last attempt to avoid war but which ended on 5 June 1899 in a deadlock] as a great mistake, but I hope I may prove to have been wrong. Chamberlain’s right to interfere is now virtually admitted, and the thin edge of the wedge having been admitted, when the conference is over we shall only be at the beginning of our troubles, as long as Chamberlain has the conduct of colonial affairs in his hands. – Yours affectionately,

Melius de Villiers

Three months later, Melius’ mood about the looming war was dark and sombre. On 22 August 1899, with war less than six weeks away, he shared his distrust of Chamberlain and Milner in another letter to his brother:

My dear Henry,

I have been aware of the new proposals [to avert war] for some days; but I deeply distrust both Chamberlain and Milner, and it seems to me pretty certain new claims will be started by these gentlemen and that they are fooling the Transvaal. You will note the terms of Chamberlain’s cablegram, which might mean several very different

115  See Wiechers (n 17) 185.
things. Unfortunately the Transvaal has no trained diplomat, and Smuts one might almost call an inexperienced youth. Accordingly their reply now sent is very loosely, and to my mind, to some extent, unfortunately worded. Instead of sending a copy here before handing it to Green[e],\textsuperscript{117} they did the opposite, so that there was no opportunity for this government to suggest alterations.\textsuperscript{118} However one can only trust all will come right … .\textsuperscript{119}

A vista over President Brand Street. This photograph was taken during the early 1900s and thus shortly after Melius de Villiers had left Bloemfontein. Elizabeth Street is in the immediate foreground. The Deodars is in the middle left with Naval Hill in the top right of the picture. The four houses in the middle of the picture were demolished during the late 1920s to make room for the Appeal Court which was erected on this site in the early 1930s. Charles Street splits The Deodars from the four corrugated-roof houses in the middle of the picture. (Source: Free State Archive Repository: Ref no VA 7586)

\textsuperscript{116} Walker (n 4) 337-338.
\textsuperscript{117} Conyngham Greene was the British Agent in Pretoria. He and JC Smuts tried right to the end in vain to reach a peace settlement: Pakenham \textit{The Boer War} (1979) (reprinted in 1998) 103.
\textsuperscript{118} The terms of the ultimatum sent by the Transvaal to Great Britain were indeed "absolutely uncompromising". The terms, which were drafted by Smuts, accused Britain of breaking the London Convention of 1884 by interfering in the internal affairs of the Transvaal (by taking up the "Uitlanders" case) and by deploying troops on the Natal border: \textit{ibid}.
\textsuperscript{119} Walker (n 4) 351.
To the De Villiers family as a whole the War was a tragedy. Sir Henry de Villiers had family and friends with and behind both armies. When it seemed inevitable, he offered Melius shelter at his residence, Wynberg House. Melius turned down the offer, declaring that he (Melius) must stand by his Republic. Sir Henry’s son-in-law was on commando in the Transvaal; a nephew was under arms in Kimberley; another relative was with the Imperial forces in Natal. And, on a personal level, Sir Henry’s hopes of a federation were “going down in blood to be shed in the name of federation”.120

Lord Roberts captured Bloemfontein in March 1900.121 After the capture of Bloemfontein, De Villiers was refused permission to join President MT Steyn and he was sent to the Cape as a prisoner-of-war.122

In his “Memoirs”, De Villiers does not mention what type of work he did following his return to the Cape in 1900. Arthur Barlow, editor of the Bloemfontein paper the Friend, who was a contemporary and friend of Melius de Villiers during their Bloemfontein days, mentions in his autobiography that De Villiers “went farming apples in the Western Province”.123 Another secondary source informs us that “[a]fter the War [Melius] de Villiers very reluctantly commenced practice at the Cape Bar, where he conducted a considerable chamber practice”. According to the latter source, there was nothing “unusual in a judge on retirement from his office … going back to the Bar”.124

The Anglo-Boer War, the circumstances that led to it, and what followed thereafter left De Villiers a disillusioned man. If his “Memoirs”, which were written nearly thirty years after the War, are anything to go by, De Villiers never quite forgave Britain for her share in this human catastrophe. On a personal level, too, De Villiers 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 his professional career for all practical purposes came to a halt for a period of five years.125

120 Idem 357.
121 Melius de Villiers describes that fateful day when Bloemfontein fell to the British as follows: “[I]t 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: see De Villiers “Memoirs” (Part II below) under the heading “The fall of Bloemfontein”.
122 See De Villiers “Memoirs” (Part II below); and Wiechers (n 17) 185.
123 Barlow Almost in Confidence (1952) 99. It is possible that Barlow had made this comment in jest.
124 Anon Melius de Villiers (n 17) 190.
125 See De Villiers “Memoirs” (Part II below).
De Begeerte 1893

HOOFDRECHTER DE VILLIERS behoort tot een familie van rechtsgeleerden. Zijn oudste broer is Resident-Magistraat van Worcester; de tweede is Hoofdrechtener van de Kaapkolonie; de derde, Prokureur te Kaapstad; hijzelf is de jongste van de vier. Hij werd geboren aan de Paarl op den 3den September 1849. Zijn vader was Carel Christiaan de Villiers en zijn moeder Retief—beide van Fransche (Hugenoten) afkomst. De heer de Villiers ging ter school aan de Paarl tot omtrent zijn veertiende jaar; daarna studeerde hij aan het Zuid-Afrikaansche College, Kaapstad, waaraan het land de vorming van zooveele zijner voornaamste mannen te danken heeft. Na verscheidene litteraire examens afgelegd te hebben promoveerde de heer de Villiers in Juni 1872 in de rechten, en werd hij kort daarna geadmenteerd als Advokaat van het Hooggerechtshof der Kaapkolonie. Daarop ging hij reizen in Europa en de Oostelijke Oorden in Engeland bijwonen. Eenigen tijd later vestigde hij zich als Advokaat aan de Kaap, en in 1876 werd hij door wijlen President Brand aangestaan tot Rechter van het Hooggerechtshof in den Oranjevrijstaat. In den loop van aanstaande jaar zal hij dus twintig jaren in 's lands dienst geweest zijn. Toen President Reitz in 1889 als noodig gekozen werd, nam Rechter de Villiers zijn plaats als Hoofdrechtener in—een waardige opvolger van een waarzeggen voorganger. De roem van onzen tegenwoordigen Hoofdrechtener heeft zich verspreid tot ver buiten de grenzen van den Staat. Zoo werd hij eenige jaren geleden benoemd tot Scheidsrechter in zake het disput tussen de Regeeringen van Groot-Britannie en de Zuid-Afrikaansche Republiek over zekere grenslijnen onder de bepalingen van de Conventie van Londen; en in het ten einde spoedende jaar is hij weer in dezelfde hoedanigheid opgetreden met betrekking tot de zoegenaamde Koelie kwestie. De Hoofdrechtener heeft ter gelegenheid een sterkere voorstander te zijn van republieksoorsbeginselen, zooowel als een hardnekkige verdediger van de rechten en machten van het Hooggerechtshof en van het volk; een man van diepe voorzichtig, groote en ingewikkeld geest en van onverschrokken, vastberaden karakter.

Melius de Villiers in 1893, aged forty three.
President FW Reitz, c 1899. This picture of Reitz was sold during the Anglo-Boer War as part of an appeal fund for the Boer soldiers. (Source: Moll *FW Reitz. Outobiografie en 62 Gedigte* (1978))
Excavations for the foundations of the Appeal Court (c 1928). In the background is The Deodars. (Source: Free State Archive Repository: Ref no VA 5624)

The construction of the Appeal Court was well under way in 1929. Elizabeth Street is in the foreground with President Brand Street to the left. The Deodars is in the middle of the picture. (Source: Free State Archive Repository: Ref no VA 5622)
7 The second trip abroad

Melius de Villiers and his family left for England during the middle of 1900. He left the Cape for a number of reasons: As a prisoner-of-war in the Cape his movements were severely restricted; he feared being sent to Ceylon as a prisoner-of-war; and, one suspects, there was a lack of work at the Cape Bar at the time. He mentions in his “Memoirs” that another reason for moving to England was that in the Cape his children lacked proper education. He and his wife therefore decided to go to Bedford in England, where the children would receive their schooling.126

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 Vereeniging was signed.127 Although I was unable to establish what type of work he had done in England between 1900 and 1902, I believe he might have worked in London during his stay in England. I could not find any trace in the records at the Bedford Local Council of him being economically active in that town.128

126 See De Villiers “Memoirs” (Part II below); and Du Toit (n 17) 420.
127 See 1903 Bedford Directory (Revised to November 31st (sic) 1902) (1902) 139 sv “Spenser Road; 7 de Villiers, M”. The semi-detached house at 7 Spenser Road, Bedford, was one of four houses built on what was originally known as the “Beckett Estate”. It had a basement; a ground floor with a parlour, dining room, kitchen, scullery, bathroom and a coal room; and a first floor with four bedrooms, a bathroom and dressing room attached to the main bedroom. The four houses at the Beckett Estate were built by James Potter of Bedford, probably during the late 1890s and were therefore quite new in 1900 when the De Villiers family moved in: see Bedford Local Town Council Archives File: Bor BP/1003/2.
128 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 a professional qualification to practise law in England it was highly unlikely that he would have been involved in any form of legal practice there. As a result, so Prof Pugsley opines, with his (ie, De Villiers’) qualifications, it was more likely that he worked as a personal tutor during his stay in England.
The two-storied semi-detached house at 7 Spenser Road, Bedford, England, where Melius de Villiers and his family lived between 1900 and 1902. (Source: Private Collection, WG Schulze)
8 Back in South Africa

When Melius de Villiers and his family returned to South Africa in the latter part of 1902, he once again practised 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, since he had sworn an oath of allegiance to the former Free State Republic, he refused the offer.

By 1905 De Villiers must have been 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 the two brothers 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, nearly thirty years had lapsed since he had first left the Cape Bar to take up the position as second puisne judge in Bloemfontein in 1876. Most of his business and professional contacts from the 1870s – when he originally practised law in the Cape – were probably no longer there in 1905. He had to rely on the goodwill and briefs of an unknown Cape fraternity of attorneys to make ends meet. His “Memoirs” are riddled with hints of his financial struggles following his departure from Bloemfontein in 1900. He had declined Lord Milner’s offer of being appointed Chief Justice of the Orange River Colony in 1902, and was not too likely to receive any favours from the British authorities. Because of the oath of allegiance that he had sworn to the Orange Free State, it is unlikely that he would have accepted a post as judge under the British flag anywhere in South Africa. Union was then a further five years away.

9 Leyden: 1905-1912

In 1905 Melius de Villiers’ professional career took him to the Netherlands. Dutch sympathy with the Boer Republics during the Anglo-Boer War was well-known. Early in 1905 the Law Faculty of the University of Leyden in the Netherlands established a Chair of “Zuid-Afrikaansche Recht” (South African law). This constituted an undisguised hand of friendship and solidarity by the

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129 There are reported cases to prove that after Melius de Villiers had returned from England in 1902, he practised at the Cape Bar for a third spell: see Franck v Sachs, Ginsberg, Hoffman & The Cape Town Town Council (1903) 20 SC 660 for an example of a case in which he appeared for the appellant. In this case he managed to secure judgment in his client’s favour.

130 See De Villiers “Memoirs” (Part II below) under the heading “Back in the Cape”; and Wiechers (n 17) 185.

131 For a note on the background to the introduction to 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 eeuwissel” 1991 (15(4)) De Negeniende Eeuw 203ff.
Dutch to the two former Boer Republics after the Anglo-Boer War. Not only did this chair recognise the common law of the two former Boer Republics, but it also provided the opportunity to preserve, augment and expand the future development and application of Roman-Dutch law as a living legal system.

The fact that the University of Leyden wanted to fill the post with a lawyer from one of the former Boer Republics emphasised the strong political undertones in establishing the Chair. Men such as MT Steyn, FW Reitz and JBM Hertzog had all refused the post which was then offered to Melius de Villiers. After some initial hesitation he accepted it.132 The offer to become the first professor of South African law at Leyden came at a good time.

The Leidse Fees (Masquerade) in 1905. It was from this Masquerade that Melius de Villiers and his family wanted to “escape” in 1905. They went to London, Pangbourne on the Thames and Oxford, and only returned to Leyden after the Masquerade had finished. (Source: Private Collection, WG Schulze)

132 See Wiechers (n 17) 186. Wiechers does not elaborate on the reasons for De Villiers’ initial hesitation in accepting the post.
He arrived in the Netherlands with his family in the first week of June 1905. They experienced all the usual frustrations of newly-arrived immigrants in a foreign country. For the first few weeks they had to stay in a hotel in Bree Street, Leyden. The Dutch cultural life, including the food at the hotel, was not what they were used to in South Africa. They soon moved out of the hotel to a house in Witte Singel close to the University.

The Hotel Lion d’Or in Bree Street, Leyden, where Melius de Villiers and his family lived during June 1905, shortly after their arrival in the Netherlands. They were surprised to learn that they had to pay extra to use the bathroom in the hotel because they “bathed too often” for the proprietor’s liking. (Source: Gemeentearchief, Leyden no 30 326)

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133 See De Villiers “Memoirs” (Part II below) under the heading “To England and the Netherlands”.
134 They resided at 70 Witte Singel for more than two years: idem.
The title page of Melius de Villiers’ inaugural lecture which was published in 1905 by EJ Brill of Leyden.
After a brief sojourn in England he delivered his inaugural lecture entitled “Het Oud-Hollandsch Recht in Zuid-Afrika” on 5 July 1905. In the lecture he explained the development of Roman-Dutch law in South Africa and strongly urged the retention of civil-law rules and principles.

He further pointed out that a good understanding of South African law (“Zuid-Afrikaansch Recht”) requires a thorough understanding of the four sources of law. The two primary sources are Roman law and Roman-Dutch law. In this regard De Villiers’ placed particular emphasis on an understanding of the works of Hugo de Groot as well as those authors who wrote commentaries on De Groot. Thirdly, so De Villiers argued, cognisance had to be taken of legislation. Fourthly, a South African lawyer should have knowledge of English law, but only in so far as it is relevant in interpreting and applying South African legislation which is based on an English statute.

In conclusion, he emphasised the strong cultural ties which existed between the Netherlands and South Africa, and thanked the University of Leyden for its share in strengthening this bond.

A view of Leyden seen from the lower end of Witte Singel, Leyden. (Source: Private Collection, WG Schulze)

135 See Siegenbeeck van Heukelom-Lamme (assisted by Idenburg-Siegenbeek van Heukelom) *Album Scholasticum. MDLXXV-MCMXL* (1941) 162 sv “Villiers. Melius De”.
Melius de Villiers’ colleagues at Leyden during his first year included some eminent names: Emeritus Professor RTHPLA van Boneval Faure; and Professors SJ Fockema Andreae (Oud-Vaderlandsche Recht); H van der Hoeven (Het Strafrecht); W van der Vlugt (De Wijsbegeerte van het Recht); PA Tichelaar (Romeinsch Recht); and AC Visser van IJendoorn (Mohammedaansche Recht).139

De Villiers’ tenue at the University of Leyden coincided with a steady flow of South African law students who obtained their degrees there. Many of these students came from the two Boer Republics which had recently been defeated by Great Britain in the Anglo-Boer War.

During Melius’ first year at Leyden (ie, 1905/06) there were 272 law students, including seventy one first-year students. At the end of his first year forty seven law degrees were awarded.140 Among these 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 better known as the legendary, if not somewhat eccentric, Professor Mortie Malherbe of the Faculty of Law, University of Stellenbosch.141

In the 1906/07 academic year there were two further appointments in the Law Faculty at Leyden: JH Carpentier Alting (Het Nederlands-Indisch Strafrecht) and J Ph Suylingh (Professor Extraordinarius). Forty first-year law students were registered and in total the Law Faculty had 262 students.142

There were 267 law students at Leyden in 1907/08, including seventy seven first year students. The ten successful doctorandi included one South African: Helgard Dewald Johannes Bodenstein of Potchefstroom with a thesis entitled

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140  Idem 48-49.
141  Mortie Malherbe was born in 1875 and died in 1964. He was a journalist, public servant and for thirty four years, from 1921 until 1955, a professor of law at the University of Stellenbosch. He fought in the Anglo-Boer War and was sent to India as prisoner-of-war. After the War he became the first editor of the popular Afrikaans magazine Die Brandwag. On Malherbe in general, see Kahn (n 83) 153ff. Apart from Malherbe, two other South African students completed their degrees in Heedendaegsche Romeinsch-Hollandsch Recht in 1906: Jan Hendrik Frederik Eduard Rudolf Claudius Gey van Pittius of Venterdorp and Cornelius Jansen Weilbach from the farm “Farao’s Fontein” district Heidelberg (Transvaal): idem 39-40.
142  There were only two South African law students at Leyden that year: Frederick David Bosch of Potchefstroom and Gert Cornelius Prinsloo of Rietpoort, Transvaal: see Jaarboek der Rijksuniversiteit te Leiden 1906-1907 en Verslag over 1906-1907 van het Leidsche Universiteitsfonds (1906) 40 60.
“Huur van huizen en landen volgens het hedendaagsch Romeinsch-Hollandsch Recht”.143

The building on the banks of the Witte Singel where the De Villiers family lived from 1905 until 1912. (Source: Private Collection, WG Schulze)

143 See Jaarboek der Rijksuniversiteit te Leiden 1907-1908 en Verslag over 1907-1908 van het Leidsche Universiteitsfonds (1908) 11 35 50.
There were 268 law students in Leyden in 1908/09. Among them were twenty-nine female students, including the nineteen-year-old Willemina Johanna Leyds of Pretoria. She was the daughter of Dr WJ Leyds, the Secretary of State of the South African Republic under President Paul Kruger.144

Professor EM Meijers joined the Faculty of Law in 1910. He taught Private Law and Conflict of Laws. There were eighty-two first-year students among the 269 law students in 1909/10. One South African student at Leyden obtained a doctorate in laws, namely August Arnold Schoch of Rustenburg.145

During the 1910/11 academic year there were no new appointments in the Faculty of Law, but the number of law students grew to 314, with 105 first-year students. No less than seventy-two students completed their studies in 1911, including two South African doctorandi: Frederick David Holleman of Potchefstroom (whose thesis was entitled “Stellingen in Rechtwetenschap”) and Christiaan Pieter van der Merwe of Bethlehem (with a thesis entitled “Stellingen in het Hedendaagsch Romeinsch-Hollandsch Recht”).146

During Melius de Villiers’ last year in Leyden, WJM van Eysinga was appointed as Professor of International Law. On 2 February 1912, Colin Fraser Steyn of Bloemfontein obtained his doctorate of law.147 Colin Steyn was the eldest son of President MT Steyn of the Orange Free State and his wife Tibbie. He was later elected Member of Parliament and also served as Minister of Justice. Although Melius de Villiers was thirty-eight years older than Colin Steyn,148 the two men probably knew each other well since De Villiers and Colin Steyn’s fathers were colleagues on the Free State Bench. Later, too, Steyn’s father was President of the Orange Free State while De Villiers was Chief Justice.

In 1907, while Melius de Villiers was at Leyden University, the London Council of Legal Education offered him a lectureship in Roman-Dutch law which he declined.149 Given his sensitive reaction to the Anglo-Boer War and the loss of

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147 See Jaarboek der Rijksuniversiteit te Leiden 1911-1912 en Verslag over 1911-1912 van het Leidsche Universiteitsfonds (1912) 12-13, 33, 43-44.
148 Colin Fraser Steyn was born in 1887 and died in 1959. He served as Minister of Justice in the War Cabinet of General Smuts from 1939 to 1945: http://rulers.org/safrgov.html (11 March 2008).
149 See Wiechers (n 17) 186.
the independence of the two Boer Republics at the hands of the British, his refusal was not surprising.

In 1912, aged sixty two, he resigned as Professor at the University of Leyden. I could not find any official explanation for his resignation in the available materials, and the official documentation at the University of Leyden merely states that his departure was a great loss to that University but unfortunately nothing could be done to prevent it. It is probably safe to assume that the dark clouds of war which loomed over Europe in 1912 contributed to his decision to return to South Africa.

During his time in Leyden he once again, unsuccessfully, raised the matter of his State pension with the British Colonial Office in London. In a letter dated 22 April 1907 and sent from his residence at 70 Witte Singel, Leyden, he pointed out to Lord Elgin at the Colonial Office that he had been appointed in 1876 as a Judge of the Orange Free State’s Supreme Court at a salary of £1 800 per year and that he was not receiving the amount of pension to which he was entitled.

10 His later years

After his return to South Africa in 1912 Melius de Villiers played an active part in public affairs and served on various commissions. He also became a prolific writer. From his pen came a steady flow of legal as well as non-legal articles published in scientific journals, mainstream magazines and newspapers.

In 1926, twelve years before his death, he moved to the farm “Zorgvliet West” and later to “Kleine Zalze”, both situated in the Banhoek Valley, outside Stellenbosch, where he and his wife Adelaide stayed with their eldest son, Francis (Frank). 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 manuscript form and is now housed, together with many of his other personal papers, in the National Archive Repository in Bloemfontein.

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.

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

For a more detailed discussion of his legal and other publications, see par 11 below. For a list of his publications, see the Addendum after Part II below.
The “Melius de Villiers Collection” in the National Archive in Bloemfontein gives an interesting glimpse of the things with which De Villiers occupied himself in his twilight years.

He obviously spent much time and trouble in writing (and often rewriting) certain parts of his “Memoirs”. The correspondence in the “Collection” gives no indication whether he intended having his “Memoirs” published. It is clear that he stopped working on his “Memoirs” at least seven years before he passed away in 1938.

For more than thirty years Melius de Villiers fought (apparently without any success) to have his rightful state pension paid to him. The background to the pension-saga was as follows: After the fall of Bloemfontein in March 1900, De Villiers was removed as Chief Justice of the Orange Free State by the British authorities. They then fixed his state pension at an arbitrary sum of £900 per annum, which constituted roughly two thirds of his annual salary while acting as Chief Justice. De Villiers had every reason to feel aggrieved with the arbitrary sum as it was £300 (25 per cent) less than the £1 200 to which he was entitled in terms of the Pension Law of the Orange Free State. He first raised this matter with the British authorities in 1901. His request for an increase in pension was rejected in October 1901.153 This marked the beginning of his unsuccessful struggles, first with the British authorities between 1901 and 1907, and later also with the Government of the Union of South Africa, to receive his rightful pension.

Later, during the early 1930s, he once again made official enquiries to the Union Parliament about the payment of his pension which was in arrears. In this regard he corresponded with various members of Parliament, including Colonel Deneys Reitz, Jan H Hofmeyer, CR Swart and General JC Smuts. Among the De Villiers papers is also a petition to Parliament setting out the grounds for his requests. It reads as follows:

To the Honourable the Speaker and Members of the House of Assembly of the Union of South Africa in Parliament assembled:

The Petition of the undersigned Melius de Villiers, sometime Chief Justice of the Orange Free State, now retired and residing at Banhoek in the district of Stellenbosch,

153 See Free State Archival Repository: “Melius de Villiers Collection”. No reference number. Letter from the Deputy Administrator’s Office, Bloemfontein, Orange River Colony, dated 16 October 1901 to the Secretary of State, a copy of which was sent to De Villiers.
Respectfully sheweth that your Petitioner was appointed one of the Judges of the High Court of the Orange Free State in the year 1875, and on the assumption of his office took his oath of office ‘to be faithful to the State and to maintain its independence’, and ultimately he was appointed Chief Justice of the State at a salary of £1800 a year.

By the law of the Orange Free State a judge who had been on the Bench for the period of twenty five years and had either attained the age of 65 years or was incapacitated by ill-health was entitled to a pension amounting to two-thirds of his salary; in this case therefore £1200 a year.

During his tenure of office the occupation of Bloemfontein by British forces took place and the doors of the Courts of law were closed by order of Lord Roberts.

Some time thereafter, but before peace was established, Lord Milner offered to maintain your Petitioner in his office of Chief Justice under the British Government, but inasmuch as war was still being continued by burghers fighting for the independence of their country, your Petitioner was, by reason of the oath which he had taken on his appointment, precluded from accepting such offer, and when afterwards peace was established another appointment had been made.

From the date of the occupation of Bloemfontein on the 13th day of March 1900 till the 1st day of July 1901, thus for a period of one year and nearly four months, your Petitioner received no salary or pension whatsoever, and being thus resourceless, was obliged to incur a heavy obligation of debt for the purpose of the support of himself and his family and of the education of his children.

Taking effect from the last mentioned date of 1st July 1901 a pension of £800 a year (being thus only two-thirds of the pension to which your Petitioner would have been entitled by the law of the Orange Free State) was granted to your Petitioner for the period of 8½ years; after which, taking effect on the 12th day of January 1910, it was increased to the full amount of £1200 by the then established Legislature of the Orange Free State. On this occasion your Petitioner was absent in Europe and was thus unable to advance his claim to the amount of pension which had been withheld.
After the passing of the South Africa Act when appointments were being made to the judicial offices of the Union, your Petitioner was passed over and he thus derived no benefit from the passing of the Act such as he reasonably might have expected, inasmuch as he had been on the Bench for a longer period than any of the persons who were then appointed with the exception only of the then Chief Justice of the Union and moreover, as he believes, he was generally considered not unworthily to have occupied his position on the Bench of the Orange Free State.

There has to the knowledge of your Petitioner been no fault or misfeasance on his part which, under the circumstances above detailed, disentitle him to a full amount of pension from the time of the occupation of Bloemfontein on the 13th day of March 1900 to the 1st July 1901 and to an additional £400 a year between the last mentioned day and the 12th day of January 1910.

Your Petitioner may respectfully point out that though he was no official of the Transvaal, yet in his capacity as Arbitrator between the British Government and the Government of the then South African Republic he rendered these Governments important services by settling disputes which had arisen firstly, as to a boundary question and secondly as to the so called Coolie question. In both cases these services were highly appreciated by the Governments concerned and in both your Petitioner declined to accept the remuneration offered by them, which remuneration would probably have amounted to some thousands of pounds. The settlement of the Coolie question Petitioner had been assured conduced considerably to the welfare of the country.

Wherefore your Petitioner prays that your Honourable House will be pleased to take his case into favorable consideration and grant such relief as it may deem fit.

(signed) Melius de Villiers

Perusal of the correspondence which has survived as part of the “Melius de Villiers Collection” bears testimony to the high regard in which he was held by members of the National Government of the day. The letters which he received in response to his enquiries make for interesting reading and provide absorbing
details of his stature as Chief Justice of the Orange Free State Republic thirty years earlier, as well as his personal relationship with some of these members of Parliament dating from the nineteenth century. Two of the addressees of his enquiries had strong Free State ties: Denays Reitz, a son of the former President of the Republic of the Orange Free State, FW Reitz; and a young Free State member of Parliament, CR Swart, who would later became Minister of Justice, and still later, State President of the newly constituted Republic of South Africa in 1961.

Correspondence which has survived among his papers shows that between 1929 and 1932 (but probably also before and after that) Melius and Adelaide stayed at the Grand Hotel in Muizenberg for lengthy periods. On 28 November 1929 he received the following letter from Denays Reitz addressed to him at the hotel:

My Dear Judge,

I beg to acknowledge receipt of your letter of the 22nd instant and have very carefully studied the contents.

As a Freestater I feel flattered at your having written me and at being consulted by so a prominent a citizen of our little State.

It is not quite clear to me how you arrive at the amount in arrear but I agree that your simplest course would be to petition Parliament for redress and if it be turned down I and other Members could take the matter up when the report of the Pensions Committee comes up before the House.

It seems cruel that at your age and after your long service to your country you should have to appeal for justice where men of little or no deserts are lavishly rewarded. If there is anything I can do to assist, please rely on me for old times' sake.

155 Denays Reitz (1882-1944) was a Minister of Cabinet, author and soldier. He was the author of three well-known autobiographical works: Commando (1929), Trekking On (1933) and No Outspan (c. 1942). On Reitz and his family, see further Part II n 103 below.

156 Charles Robberts Swart (1894-1982) was the last Governor-General of the Union of South Africa from 1960 to 1961 and the first State President of the Republic of South Africa from 1961 to 1967. Swart was born and bred in the Free State. After he had qualified as an attorney, he spent a brief period in Hollywood where he acted in silent films before he embarked on a public career. He was appointed Minister of Justice when the National Party came to power in 1948 and was instrumental in the introduction of legislation to suppress anti-apartheid activity: http://rulers.org/safrgov.html (11 March 2008).
I well remember as a boy how my brothers and I spent happy hours at your house opposite where the Raadzaal now stands in Bloemfontein and I remember your boy Frank spending his holidays with us at Muizenberg nearly forty years ago.

Please accept my best wishes, from, my dear Judge

Yours sincerely

(signed) Deneys Reitz\textsuperscript{157}

On 9 December 1929, after he had received Deneys Reitz’ letter, De Villiers wrote to the young Free State Member of Parliament, CR Swart, raising also with him the issue of his state pension. On 8 January Swart replied as follows:

Wel Edele Geleerde Heer:

Deur afwesigheid op vakansie kon ek U brief van 9 Desember nie eerder beantwoord nie, waarvoor ek U om verskoning vra. Met belangstelling het ek U brief in “Die Volksblad” gelees. As U ’n petiesie by die Parlement indien, sal dit seker my persoonlike aandag ernstig geniet en ek sal ook ander Vrystaatse lede daarin interesseer. Ek vermoed U sal by die eersvolgende sitting die nodige petiesie indien.

Met hoogagting

Dienswillig die Uwe

(signed) CR Swart\textsuperscript{158}

On 20 March 1930 JC Smuts\textsuperscript{159} wrote as follows to Melius de Villiers:

\begin{flushright}
See Free State Archival Repository: “Melius de Villiers Collection”. Ref: 75.3.
\end{flushright}

\begin{flushright}
Idem: Ref: 75.17.
\end{flushright}

\begin{flushright}
Jan Christiaan Smuts was born on 24 May 1870 near Riebeek-West and died on 11 September 1950 near Irene. He was a politician, soldier and philosopher. He fought in the Anglo-Boer War, during the latter stages of it also as a Boer guerrilla leader. After the War he served in consecutive cabinets as Minister of Defence (1910-1920; 1939-1948), Minister of Home Affairs (1910-1912), Minister of Finance (1912-1915), and Minister of Justice (1933-1939). He was the leader of the United Party (1919-1934 and 1939-1950) and served as Prime Minister of the Union of South Africa from 1919-1924 and again from 1939 to 1948: see Van der Poel & Du Plessis sv “Smuts, Jan Christiaan” in \textit{DSAB} Vol I 737ff.
\end{flushright}
Dear Mr de Villiers

I have received your letter of 17\textsuperscript{th} March, and shall take the liberty of showing it to my friends on the Pensions Committee.

The fate of your Petition would largely depend upon the attitude of the Government which would naturally influence the Committee greatly in a matter of this kind.

Yours sincerely,

(signed) JC Smuts\textsuperscript{160}

Although there is no conclusive proof from the available documents of the outcome of De Villiers’ Petition to the Pensions’ Committee regarding that part of his pension which was in arrears, it would appear that the matter was not resolved to the satisfaction of De Villiers. On 18 May 1931, eighteen months after he had first raised the matter with these three (as well as a number of other) parliamentarians, he received the following feedback from JC Smuts:

Dear Mr de Villiers,

I am very sorry to say that I can be of no assistance to you in the matter you wrote to me about on the 25 April. I have explored to the best of my ability, and find that as things are today, nothing can or will be done. In view of your age and the great services you have rendered the country, you may have my full sympathy, I regret that I can give you nothing better. The [Parliamentary] session is near its end, and the Pensions Committee has practically finished its work. If you will send in a petition early next year, I shall do my best to secure from Mr. Celliers a hearing for you by the Committee. I see no other course open.

With all good wishes,

Yours sincerely,

(signed) JC Smuts\textsuperscript{161}

\textsuperscript{160} See Free State Archival Repository: “Melius de Villiers Collection”. Ref: 75.30.

\textsuperscript{161} Idem: Ref: 75.36.
11 His contribution to South African juridical science

11.1 Introduction

Melius de Villiers was a prolific author. He published a large number of books, reports and articles during his lifetime. Some of his unpublished research too has survived.

During the first half of his professional career – which coincided with his twenty four-year tenure as Judge, and later also Chief Justice, of the Orange Free State – he published very little. Two reasons may be advanced to explain this. First, his workload as judge allowed little free time for research not directly relevant to the cases which came before him. Secondly, the time he had was dedicated to his magnum opus entitled The Roman and Roman-Dutch Law of Injuries (hereafter “Injuries”) which was published in 1899, shortly before the outbreak of the Anglo-Boer War. The War signalled the end of his career as a judge.

The most productive period of his writing career came after his return from the Netherlands in 1912, when he regularly published articles, analyses and correspondence in the South African Law Journal and other law journals abroad. In addition he often published articles in newspapers on esoteric topics ranging from rock structures to the meaning of the word “understand”. There is another practical and logical reason why he produced the bulk of his publications during the second half of his professional career: After his return from Leyden in 1912 – apart from serving on a number of commissions – he confined himself to writing mostly on law in which he, as a true, if self-taught, scholar, excelled. His last contribution to the South African Law Journal was published in 1935 when he was eighty six.

11.2 Books, articles and judgments

11.2.1 General

The strong Anglo-Saxon influence during Melius de Villiers’ school career and early professional life, the long periods of time that he spent in England and the fact that his preferred language of communication was English, might all have pointed to the cultural and intellectual make-up of a typical nineteenth-century

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162 See Kahn (ed) Fiat iustitia. Essays in Memory of Oliver Denyes Schreiner (1983) 109 n 26. Kahn mentions that Melius de Villiers did "contract research": first for WP Schreiner, advocate at the Cape Bar (1882-1893, 1900-1914), and also Prime Minister of the Cape Colony (1898-1900), and after March 1914, also for Schreiner’s son, OD Schreiner (who later became Judge of Appeal), looking up authorities for them.
Cape anglophile. At heart, however, Melius de Villiers was a continental, and in his publications a civilian.

As a lawyer and researcher he was a staunch supporter and developer of Roman-Dutch law. In this regard he systematised Roman-Dutch legal material. He furthermore developed Roman-Dutch legal concepts to meet the demands of his age. It is generally accepted that De Villiers was one of the pioneering jurists of South Africa during the nineteenth century.163

His most important contribution to South African legal literature, as indicated above, is his book entitled *The Roman and Roman-Dutch Law of Injuries*. A supplement to the main work was published in 1915. (The importance and relevance of this work will be discussed in more detail in par 1122 below.) In the years following the publication of *Injuries* in 1899, De Villiers associated himself closely with this subject. He regularly published on the topic and advocated the need to draw a distinction between the terms malice and *animus iniuriandi*. This caused him to be dubbed a "purist".164

De Villiers was furthermore the author of a number of important legal articles. Pride of place must go to the five seminal articles published between 1921 and 1927 dealing with the basis of contractual liability in South African law: the English-law doctrine of "consideration" versus the civil-law doctrine of *iusta causa*.165

The most famous contract-law debate that ever raged in our courts was the one dealing with the controversial introduction of the English-law concept of "consideration" into the South African law of contracts.166 Lord Henry de Villiers, in the 1904 Cape Supreme Court decision in *Mtembu v Webster*,167 was primarily responsible for this. In the opposite camp was Sir John Kotzé, of the

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163 See Pont (n 17) 267; Wiechers (n 17) 186; and Du Toit (n 17) 417.
165 See De Villiers "Is consideration an alien element?" 1921 SALJ 271ff; De Villiers "Some remarks on the contract of mandate" 1922 SALJ 22ff; De Villiers "Consideration reconsidered. Part 1" 1922 SALJ 422ff; De Villiers "Consideration reconsidered. Part 2" 1923 SALJ 15ff; and De Villiers "Consideration in the Roman law of contract" 1924 Journal of Comparative Legislation and International Law 120-124. Apart from this set of five articles, he published a number of articles dealing with aspects such as *causa* and *consensus* in contract.
166 For a concise account of this debate, which was full of egotistical, socio-political, historical and perhaps even constitutional undertones, see Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (1996) 556ff.
167 (1904) 21 SC 323.
Transvaal Supreme Court. In the 1904 Transvaal Supreme Court decision in *Rood v Wallach*, Kotzé CJ advocated *iusta causa* as the civil-law alternative to the English-law concept of “consideration”. In 1919, five years after Lord de Villiers' death, the South African Appellate Division in *Conradie v Rossouw* decided in favour of the presence or absence of *iusta causa* as the test for distinguishing between promissory transactions which are binding and those which are not.

After the decision in *Conradie v Rossouw*, Melius de Villiers decided to revive the debate. In four articles, published during the 1920s in the *South African Law Journal*, he strongly supported Lord de Villiers’ viewpoints in the “consideration versus *iusta causa* debate”. Strangely, this was one of the few instances where he did not wholeheartedly support the Roman-Dutch 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 Melius de Villiers was for once not true to his Roman-Dutch heart, but that this was a case of blood being thicker than water? And might it be his late elder brother’s involvement in the debate which caused Melius not to reject “consideration” as a concept foreign to our common law?

Ironically, neither Lord de Villiers nor Kotzé was correct. Lord de Villiers was wrong in conflating *causa* with consideration. But Kotzé and his followers were probably not right either. It has been pointed out 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”. Zimmermann argues that contractual liability depends on a serious intention to be bound to the agreement between the contracting parties. The agreement must not be tainted by illegality or immorality. If these requirements are met, an enforceable contract comes into existence.

Finally, it has been argued that although the Appellate Division in *Conradie v Rossouw* abolished the concept of “consideration” as a requirement for the

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168 1904 TS 187.
169 1919 AD 279.
170 See Zimmermann (n 166) 557.
171 There is also a fifth article by Melius de Villiers which deals with consideration: see “Consideration in the Roman law of contract” 1924 (6) Journal of Comparative Legislation and International Law 120-124.
172 See, in this regard, the comments made by Zimmermann (n 166) 557-558.
173 See Lee *Introduction to Roman-Dutch Law* (1953) 224. This statement by Lee is instructive. Lee was a friend and great admirer of Kotzé. They corresponded for thirty five years: see Lee “Extracts from letters written by Sir John Kotzé to Professor RW Lee, 1911 to 1936” 1950 SALJ 266.
174 See Zimmermann (n 166) 559.
conclusion of a valid contract under South African law, *iusta causa* in the law of contract is also not without problems. As such, Melius de Villiers’ articles on the concept of “consideration” have retained their relevance for modern contract lawyers.\(^{175}\)

Kotzé, in any event, was not impressed with De Villiers’ attempts to start the debate all over again nearly ten years after Lord de Villiers’ death and three years after the Appellate Division’s decision in *Conradie v Roussouw* in 1919. Melius de Villiers wanted to show that his late brother had reasonable grounds for advocating the conflation of *causa* with consideration.\(^{176}\) In February 1925, in a letter to Professor Lee (which was published only in 1950 after both Kotzé and De Villiers had passed away), Kotzé commented on De Villiers’ articles on *causa* and consideration: “However, no one takes what Melius has written seriously. The answers to his assertions are all to be found in my thesis.”\(^{177}\)

One can but speculate what Melius de Villiers’ reaction would have been had he been alive to read what Kotzé had written to Lee. It would certainly have brought further grist to De Villiers’ mill had he been aware of Kotzé’s remark. In his “Memoirs” he refers to the fact that Kotzé had no love for Lord Henry de Villiers and that he had years before attacked Lord Henry in the public press in a manner that “made him [Kotzé] no admirable figure.”\(^{178}\)

The bulk of Melius de Villiers’ published research indicates 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”.\(^{179}\)

### 11.2.2 The Roman and Roman-Dutch law of injuries

Melius de Villiers’ textbook on *Injuries* is by far his most important publication. Although 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, it has been described as “one of the deepest and most learned treatises on any branch of law.”\(^{180}\) The book contains about fifty pages of translation and more than two hundred closely printed pages of De Villiers’ own annotations and commentary on the various sections translated.

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175 See Wiechers (n 17) 187.
176 See Van Blerk (n 164) 563.
177 See Lee (n 173) 286.
178 See Part II below.
179 See Wiechers (n 17) 186.
180 Anon “Melius de Villiers” (n 17) 189.
The book has enjoyed wide-spread and unanimous approval and respect as a scholarly treatise on its chosen topic throughout Southern Africa.\(^1\) It has been referred to with approval by practising counsel and judges in more than 400 South African reported cases during the past 109 years.\(^2\) It was cited for the first time in a reported judgment in September 1900 when Finnemore J\(^3\)

\(^1\) It received a glowing review in the *Cape Law Journal* shortly after it was published. The anonymous reviewer remarks that "in addition to a very accurate translation, we have annotations in the form of a systematic commentary upon each section of the Title [of Voet], written in a clear style and showing a considerable amount of truly scholarly work and research", and "[w]e know of no other modern book dealing so fully with the Roman-Dutch Law of Libel and Slander. Not only should Mr. de Villiers' book find a place in every legal library in this country, but it should also take a leading place in England and America, where the study of Roman Law is being revived, for it is undoubtedly a learned book by a learned author": see Anon "Reviews. The Roman and Roman-Dutch Law of Injuries" *Cape Law Journal* 202-204. His supplement to the main work, entitled *Supplement to the Roman and Roman-Dutch Law of Injuries* which was published in 1915, sixteen years after the main work, also received a very favourable review: "This Supplement is a careful, accurate and worthy addition to the larger book. This kind of work is too rarely undertaken by South African lawyers": see Anon "Reviews. Supplement to the Roman and Roman-Dutch Law of Injuries" *Cape Law Journal* 1915 SALJ 241. Apart from *Injuries*, many of Melius de Villiers' other publications have also received judicial recognition. A small sample of the reported case law in which other publications from Melius de Villiers' pen were referred to, include: *Tayob Hajee Khan Mohamed v The Government of the South African Republic (F.W. Reitz NO)* (1898) 5 Off Rep [TS 1877-1910] 168, where the court (at 175, 176 and 178) refers to Melius de Villiers' sound reasoning in compiling his arbitration report on the so-called "Indian question". In *Klopper v Volkskas Bpk* 1964 (2) SA 421 (T), Viljoen J (at 425B) held that "I am in full agreement ... with the comments made by Professor Melius de Villiers in the *Cape Law Journal* [1931 20Q] in his article [which was published under the heading] 'R.D. on Returned Cheques'" in 1931 SALJ 200. In *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) Jansen JA (at 960G, 991H-992A) referred to the fact that Melius de Villiers' trilogy of articles which appeared in the *Cape African Law Journal* during the early 1920s, and as his article in *Theems* in 1927, had contributed towards re-opening the vexed debate of valuable consideration versus *iusta causa*. However, Jansen JA held that it was not necessary for the court (in the *Saambou* case) to take sides between the De Villiers brothers on the one hand, and Kotzé on the other hand. In 1984, eighty seven years after Melius had penned the article which dealt with the separation of powers and which was published in the 1897 *Cape Law Journal*, counsel in *Binga v Administrator-General, South West Africa, and others* 1984 (3) SA 949 (SWA) (IG Farlam: later Farlam JA at 955H) relied on his explanation of the "separation of powers" in arguing his case before the Court. Even De Villiers' Commission Reports retained their relevance: in *S v J* 1989 (1) SA 669 (A), Nicholas AJA (at 680I) referred to his Commission Report on sexual assaults on women which was published in 1913. Melius de Villiers, who chaired the Commission, recommended that the courts be left with the discretionary power to impose capital punishment for rape. This recommendation by the 1913 Commission was later entrenched in legislation. Section 338 of the *Criminal Procedure and Evidence Act* 31 of 1917 gave recognition to the De Villiers’ recommendation that the death sentence for rape was competent, but not compulsory. This position was maintained in s 277(1)(b) of the *Criminal Procedure Act* 51 of 1977. The death sentence was declared unconstitutional in *S v Makwanyane* 1995 (3) SA 391 (CC).

\(^2\) See http://mylexisnexis.co.za/nxt/gateway/villiers/injuries. Apart from *Injuries*, many of Melius de Villiers' other publications have also received judicial recognition. A small sample of the reported case law in which other publications from Melius de Villiers' pen were referred to, include: *Tayob Hajee Khan Mohamed v The Government of the South African Republic (F.W. Reitz NO)* (1898) 5 Off Rep [TS 1877-1910] 168, where the court (at 175, 176 and 178) refers to Melius de Villiers' sound reasoning in compiling his arbitration report on the so-called "Indian question". In *Klopper v Volkskas Bpk* 1964 (2) SA 421 (T), Viljoen J (at 425B) held that "I am in full agreement ... with the comments made by Professor Melius de Villiers in the *Cape Law Journal* [1931 20Q] in his article [which was published under the heading] 'R.D. on Returned Cheques'" in 1931 SALJ 200. In *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) Jansen JA (at 960G, 991H-992A) referred to the fact that Melius de Villiers' trilogy of articles which appeared in the *Cape African Law Journal* during the early 1920s, and as his article in *Theems* in 1927, had contributed towards re-opening the vexed debate of valuable consideration versus *iusta causa*. However, Jansen JA held that it was not necessary for the court (in the *Saambou* case) to take sides between the De Villiers brothers on the one hand, and Kotzé on the other hand. In 1984, eighty seven years after Melius had penned the article which dealt with the separation of powers and which was published in the 1897 *Cape Law Journal*, counsel in *Binga v Administrator-General, South West Africa, and others* 1984 (3) SA 949 (SWA) (IG Farlam: later Farlam JA at 955H) relied on his explanation of the "separation of powers" in arguing his case before the Court. Even De Villiers' Commission Reports retained their relevance: in *S v J* 1989 (1) SA 669 (A), Nicholas AJA (at 680I) referred to his Commission Report on sexual assaults on women which was published in 1913. Melius de Villiers, who chaired the Commission, recommended that the courts be left with the discretionary power to impose capital punishment for rape. This recommendation by the 1913 Commission was later entrenched in legislation. Section 338 of the *Criminal Procedure and Evidence Act* 31 of 1917 gave recognition to the De Villiers’ recommendation that the death sentence for rape was competent, but not compulsory. This position was maintained in s 277(1)(b) of the *Criminal Procedure Act* 51 of 1977. The death sentence was declared unconstitutional in *S v Makwanyane* 1995 (3) SA 391 (CC).

\(^3\) Robert Isaac Finnemore was born at Addington Park, Surrey, England, on 29 October 1842. In 1850, when he was seven, he came to Natal with his parents. They were shipwrecked when the *Minerva* went down at Durban on 4 July 1850. The *Minerva* was a British steam and iron ship (former East-Indiaman) of 987 tons, built in 1812 in Bombay, and commanded by Captain Moir. She was on her way to South Africa to bring a party of English settlers and general cargo to Durban. No lives were lost (see Turner *Shipwrecks & Salvage* (1988) 127 and 216). Finnemore later qualified by private study for admission to the Bar in Natal in January 1868. He was appointed Judge of the Natal Supreme Court on 1 November 1896, on the retirement of Mr Justice Turnbull. Finnemore is an interesting example of a nineteenth-century English-born judge who was privately educated in South Africa before becoming a judge in Natal. He died in Pietermaritzburg on 22 July 1906: see Roberts (n 4) sv "Finnemore, Robert Isaac" 360.
referred to it with approval in the Natal Supreme Court.\(^{184}\) Especially in the early years, shortly after *Injuries* was published, courts often quoted from it at length. By doing so large parts of the text of *Injuries* were incorporated into our case law *en bloc* and thus attained the status of "judicial precedent".\(^{185}\)

*Injuries* has retained its relevance and importance for generations of South African lawyers ever since, including a new generation of South African judges of the twenty-first century,\(^{186}\) in a wide range of judicial forums, including the Labour Appeal Court,\(^{187}\) the Supreme Court of Appeal\(^{188}\) and the Constitutional Court.\(^{189}\)

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\(^{184}\) See *M Renaud v AC Madore* (1900) 21 NLR 182-183. This was the first reported case in which De Villiers' *Injuries* was referred to by a court.

\(^{185}\) See, e.g., *Dukhi v Silverwell* (1903) 24 NLR 21 where Bale CJ (at 25-27) quoted almost a full page from *Injuries* before concluding that "I adopt this statement [by Melius de Villiers]."

\(^{186}\) See, e.g., *Du Toit and another v Minister of Welfare and Population Development and others* 2001 (12) BCLR 1225 (T) where Kgomo J (in pars 14 and 150) held that the citation from Melius de Villiers' *Injuries* is a "classical statement of the law more than a century ago [and that it] accords with the provisions of s 10 of the [1996] Constitution [which deals with human dignity]."

\(^{187}\) See, e.g., *Molla v University of the North & others* [2005] 5 BLLR 465 (LAC) where Nicholson JA in par 56 referred to and followed the reasoning by the Court in the earlier decision in *S v Tromp* 1966 (1) SA 646 (N). In the *Tromp* case the Court (per Caney J at 652) quoted with approval from De Villiers' *Injuries*.

\(^{188}\) See, e.g., *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) per Cameron JA in par 6 note 5; and *Dendy v University of the Witwatersrand and others* 2007 (5) SA 382 (SCA); [2007] 3 All SA 1 (SCA) where Farlam JA referred with approval to the judgment in the Court a quo, which referred to and followed the relevant principles regarding compensation for injury to dignity as enunciated by Melius de Villiers in his *Injuries*. In the Court a quo (the decision of which was reported as *Dendy v University of the Witwatersrand, Johannesburg and others* [2005] 2 All SA 490 (W); 2005 (5) SA 357 (W)) Burochowitz J held (in par 27) that "[t]he common-law position [regarding compensation for injury to dignity] has been authoritatively laid down by Melius de Villiers in *The Roman and Roman-Dutch Law of Injuries* (1899) at 27". Burochowitz J further quoted at length from the earlier decision in *Delange v Costa* 1989 (2) SA 857 (A), where that Court (per Smaalberger JA), referred to and quoted at length from De Villiers' *Injuries*. In the *Delange* case the Court specifically accepted the principle laid down by De Villiers that "[s]o long as an act is outwardly lawful it cannot be an injury, with whatever intention or motive it may have been committed".

\(^{189}\) See, e.g., *Dikoko v Mohatta* 2006 (6) SA 235 (CC) per Mokgoro J in par 63, referring to the earlier decision by Willis J in *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W), where the Court quoted with approval from *Injuries*. *Dikoko* is a good example of how Melius de Villiers' text on *Injuries* has contributed towards keeping the Roman and Roman-Dutch law alive. This case also constitutes an interesting example of a marriage of the principles of Roman-Dutch law with those of indigenous law. At stake in *Dikoko* was the question whether a defendant in a defamation action could be ordered to apologise. In this regard the Court considered a remedy which had existed in Roman-Dutch law, known as the *amende honorable*. In *Dikoko* Mokgoro J referred with approval to the earlier decision in *Modibane* where Willis J quoted at length from De Villiers' explanation of the origin and development of the *amende honorable*. Willis J held that the *amende honorable* had *fallen into disuse* in South African law, mainly because in Roman-Dutch law it was to be enforced by means of civil imprisonment, a remedy which our courts disapproved of. However, so Willis J reasoned (at 61), this does not mean that the *amende honorable* has been abrogated by disuse: it still forms part of our law. In arguing for the retention of the *amende honorable*, Mokgoro J held that whether or not the *amende honorable* technically still forms part of our law, it is important that once an apology is tendered as compensation or part of it, it should be sincere and adequate in the context of each case. She further illustrated how the principles of the Roman-Dutch law could be used to develop and expand the judicial acknowledgement of our indigenous law. In this regard she held that "[i]n our constitutional democracy the basic constitutional value of human dignity relates closely to ubuntu or botho, an idea based on deep respect for the humanity of another. Traditional law and culture have long considered one of the principal objectives of the law to be the restoration of harmonious human and social
relationships ... in cases of compensation for defamation, the re-establishment of harmony in the relationship between the parties, rather than to enlarge the hole in the defendant’s pocket ... ." (in pars 67-68).
It is now the oldest South African legal textbook which is still in regular use and referred to in our courts. It is highly unlikely that a first edition of any South African textbook will ever equal the record set by De Villiers' *Injuries* in being a, if not the, standard work on its topic, in an unchanged format, for more than a century.

*Injuries* furthermore played an important role, especially after Union (in 1910), in the development of Roman-Dutch law in the Cape and Natal. It is significant to note from the reported case law that immediately after its publication in 1899 (and before Union in 1910) De Villiers’ text on *Injuries* was referred to in the courts of all four colonies and not only in the courts of the two former Boer Republics.

Since it was written in English, the book played an important role in making the Roman-Dutch law of injuries accessible to a large group of lawyers (including judges) in Natal and the Cape. Many of the Natal and Cape lawyers and judges received their legal training in Great Britain and were not versed in the principles of Roman-Dutch law. Moreover, most of them neither spoke nor read Dutch. In this regard *Injuries* played an important role in making the Roman and Roman-Dutch law of injuries accessible to a predominantly English-trained and English-speaking Bar and Bench in Natal and the Cape in the years immediately before and after Union.

For more than fifty years, from 1899 until 1953, it was the only South African textbook in which the law of injuries was explained in any detail. Professor Willem Joubert was the pioneer of the modern South African law of personality (which includes “injuries”) and his doctoral thesis entitled *Grondslae van die Persoonlikheidsreg* was commercially published in 1953. Joubert’s endeavours in the law of personality were later continued and expanded on by Professor Johann Neethling. Neethling’s *Law of Personality* is now the


191 For a list of other translations of Voet’s *Commentary* in English by South African writers, all of which contributed to the establishment of Roman-Dutch law as a practical legal system in South African courts, see Van Blerk (n 164) 562. Voet’s status as one of the leading Roman-Dutch authorities in South Africa is based on his *Commentarius ad Pandectas* Vols I (1698) & II (1704). The so-called Paris edition of the *Commentarius ad Pandectas* was the one which was translated into English by Judge Percival Carleton Gane as *The Selective Voet: Being the Commentary on the Pandects by Johannes Voet and the Supplement to that Work by Johannes van der Linden* Vols I-VII (1955-1958). It is this translation which established Voet as an authority in South African law, second only to Hugo de Groot; see Van Zyl (n 190) 362-363.

192 Interestingly, the promoter of Joubert’s thesis was Professor WMR (Mortie) Malherbe of the University of Stellenbosch, who was a doctoral student at Leyden during the time when Melius de Villiers taught there. On Malherbe, see again n 141 above.

standard South African text on this branch of our law.\textsuperscript{194} The law of personality has become one of the important topics in the modern South African law of delict.\textsuperscript{195} The Constitution of 1996, and, more specifically, the incorporation of a Bill of Rights in the Constitution, have played no small part in the growing importance of this area of our law.\textsuperscript{196}

One final comment on the future relevance of De Villiers’ \textit{Injuries} remains. Because of the decision of the editors of the South African Law Reports in the early 1990s to do away with the publication of the heads of arguments in counsel in the Law Reports (with the exception of reported judgments of the Supreme Court of Appeal where a list of materials referred to by counsel is still published with the court’s judgment) the number of references to De Villiers’ \textit{Injuries} in the Law Reports has shown a decline over the past eighteen years. But as long as it is consulted and referred to by counsel in court, it will continue to guide and shape the South African law of injuries, as it has done for more than a century.

\section*{11 2 3 Judgments}

During his tenure on the Orange Free State bench, Melius handed down hundreds, if not thousands, of judgments.\textsuperscript{197} Unfortunately, because of the poor and irregular reporting of judgments in the Orange Free State, very few were reported. One of the few exceptions in this regard is his judgment in \textit{Preller v Schultz}, which was reprinted in volume 10 of the \textit{Cape Law Journal}. This decision was described as “an example of his acute reasoning and faithful

\textsuperscript{194} See Neethling’s \textit{Law of Personality} by Neethling, Potgieter & Visser (1996). The extended bibliography in Neethling \textit{Persoonlikheidsreg} 4th ed (1997) (at 339-347) bears testimony to the large number of South African materials on injuries which were published in the fifty-odd years since the commercial publication of Joubert’s thesis in 1953.

\textsuperscript{195} De Villiers’ \textit{Injuries} and Macintosh’s \textit{Negligence in Delict} (1926) were for many years the only South African texts dealing with the law of delict. In 1933 McKerron published \textit{The Law of Delicts in South Africa}. Although McKerron’s text was the standard work on delict in South Africa for many years, it aroused a spate of criticism for its English-law approach to the South African law of delict: see Van Blerk (n 3) 567ff. The last forty-odd years have witnessed an explosion of specialist works on the \textit{actio injuriam}. These include: Amerasinghe \textit{Aspects of the Actio Injuriam in Roman-Dutch Law} (1966); Amerasinghe \textit{Defamation and other Aspects of the Actio Injuriam in Roman-Dutch Law} (1968); Ranchod \textit{The Foundations of the South African Law of Defamation} (1972); Pauw \textit{Persoonlikheidskrenking en Skuld in die Suid-Afrikaanse Privaatrede} ‘n Reg祁historiese en Regsvergelykinge Onderzoek’ (1976); Davidtzy \textit{Animus Injuriandi as Vereiste vir Aanspreeklikheid op Grond van Privaatrede} (1976); Neethling \textit{Die Reg op Privaatrede} (1976); Burchell \textit{The Law of Defamation} (1985); and Burchell “The protection of personality rights” in Zimmermann & Visser (eds) Southern Cross. \textit{Civil Law and Common Law in South Africa} (‘Burchell “Protection”) (1996) 639ff.

\textsuperscript{196} See Burchell “Protection” (n 195) 653.

\textsuperscript{197} The first reported case in which Melius de Villiers was on the Bench was \textit{Walker v Waters}, Johnstone & Co. It dealt with breach of contract. The judgment was written by Reitz CJ and handed down on January 26, 1875. De Villiers J concurred in Reitz’ judgment: see \textit{Reports of Cases Decided in the High Court of the Orange Free State} (1874-1878) at 29. (Compiled by Albertus P de Villiers; edited by John N Eagle (1879).)
application of the Roman-Dutch law of libel”. Although accounts of his judgments often appeared in the Bloemfontein newspapers, these reports can hardly be described as a systematic and complete, let alone judicially reliable, record of his work as judge during an important and fruitful period of growth for the Roman-Dutch law in the Orange Free State. Neither could these fragmented reports fill the huge void in reported case law which was caused by the rather haphazard reporting of Orange Free State Supreme Court decisions before 1902. The reported Free State case law for the period before 1902 is contained in three separate volumes. No Free State reports were published from 1888 to 1902. There is a digest of cases in the Cape Law Journal, and in addition some cases of the late 1890s are fully reported there.

11.2.4 Conclusion

The impressive list of legal publications which Melius de Villiers produced over a period of nearly forty years, the important and enduring role which Injuries has played in South African legal practice over the last 109 years, as well as the influence of his published research on the development of mainstream South African materials in the field of delict (ie, other than reported case law such as text books, theses and articles in legal journals), bear testimony to the enormous contribution that he made to South African juridical science.

An in-depth study of the internal and qualitative influence of De Villiers on South African legal science falls outside the scope of the present study. A qualitative appreciation of his influence on the development of South African law will require nothing less than writing a doctoral thesis.

If and when such a qualitative study of the full range of South African legal materials (including reported South African cases, as well as the hitherto largely unexplored court files of the Orange Free State High Courts for the period 1874 to 1900 housed in the Free State Archival Repository) is undertaken, it will in all probability reveal what some legal historians have believed for many years, namely that Melius de Villiers’ contribution to South

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198 See Wiechers (n 17) 186.
199 These three sets of law reports are (1) Reports of Cases Decided in the High Court of the Orange Free State (1874-1878). Compiled by Albertus P de Villiers; edited by John N Eagle (1879); (2) Zaken Beslist in het Hooge Gerechtshof van den Orange-vrijstaat (Cases Decided in the High Court of the Orange Free State (1879-1883). There are four volumes in this set, each covering a year. They were published between 1880 and 1883. Reported in Dutch; and (3) Gregorowski Reports. Zaken Beslist in het Hoog Gerechtshof van den Oranjevrijstaat. Reported by Mr Justice R Gregorowski. Part 1 (1883-1885) published in 1886. Part 2 (1886-1887) published in 1893: see Hahlo & Kahn (n 190) 296.
200 Ibid.
201 See the Addendum below.
African legal science surpasses that of his older and more famous brother, Lord Henry de Villiers.

The headstone of Melius and Adelaide de Villiers' grave in the cemetery next to the Anglican Church outside Paarl. (Picture taken by Tiny Neethling)

12  The end

Melius de Villiers remained active as a researcher and author well into his eighties. The materials contained in the “Melius de Villiers Collection” do not contain any correspondence dated later than 1935. The available archival
material suggests that he did not publish anything after 1935. In his final years he had very bad eyesight.\textsuperscript{202} One has therefore to assume that the last three years of his life ebbed away rather unproductively.

On 6 July 1938, at the age of eighty, Melius de Villiers passed away on his son Frank’s farm “Kleine Zalze” outside Stellenbosch.\textsuperscript{203}

The financial impact of the Anglo-Boer War, which cut short his professional career as Chief Justice of the Orange Free State when he was only fifty years old, the less than favourable financial circumstances which he experienced during his stay in the Netherlands; and the ongoing but unsuccessful battle which he fought to obtain his rightful state pension all contributed to the rather modest list of assets reflected in his estate file. The liquidation and distribution account of his estate listed assets in the amount of £29 197,4. There were claims to the amount of £7 679,1,9 lodged against his estate, including an overdraft of £5 000 with Barclays Bank. The bulk of his assets consisted of mining shares to the value of £22 569,11,6 and insurance policies to the value of £6 408. His will was drawn up by Albert Heinrich Cluver of Stellenbosch, a partner of the well-known firm of Cluver and Markötter which still exists today.\textsuperscript{204}

He is buried in the graveyard adjacent to the Anglican Church in the Groot Drakenstein area on the road between Paarl and Franschhoek in the Western Cape.\textsuperscript{205}

His wife, Adelaide, passed away on 18 January 1940, less than two years after her husband. She was buried in her husband’s grave, only a stone’s throw away from the grave of their eldest son, Frank, who passed away in 1946, six years after his mother. Frank shares a grave with his younger sister, Rita.

\begin{footnotes}
\item[202] See Du Toit (n 17) 421 n 2.
\item[203] 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.
\item[204] Ibid.
\item[205] I am indebted to Messrs Koos van der Walt and Tiny Neethling of Paarl who both searched for (and found) Melius de Villiers’ grave. My own initial searches for his grave in Stellenbosch, the Helshoogte region, the Banhoek Valley, Pniel and as far east as Franschhoek yielded nothing. In September 2005 I made contact with Koos van der Walt, a genealogist and local historian of Paarl. His initial searches for Melius’ grave too, 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 found the grave in the graveyard of the Anglican Church just outside Paarl. Soon thereafter Van der Walt, in an independent search, also found the grave.
\end{footnotes}
13 Final observations

The life story of Melius de Villiers provides an interesting backdrop for a modern-day legal historian who is interested in the interaction of education, language, political developments and war in moulding a nineteenth- and early twentieth-century South African lawyer and judge. A biographical study of the life and legal career of Melius de Villiers has the added bonus that it provides – in a South African context – the unique opportunity to draw a comparison between the legal careers and political points of view of two brothers who both became Chief Justice.

I will briefly allude to the different legal outlooks of Melius de Villiers and his elder brother Lord Henry. The brothers' legal views were often diametrically opposed. While Melius concentrated on the correct application of civil-law principles, his brother was quick to accept and apply English legal doctrines.206

It has been suggested that the differences in legal approach and views between Lord Henry and his younger sibling, Melius, derive from their respective characters. Lord Henry, with his Cape loyalties, and even British loyalties, was a public figure, and far more of a man of action than Melius.207 He was a staunch supporter of the British Empire. In October 1899, at the outbreak of the Anglo-Boer War, he wrote 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 ... 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.208

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206 See Wiechers (n 17) 186–187.
207 Idem 187.
208 See Walker (n 4) 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 were originally of Huguenot stock but by the middle of the nineteenth century Lord Henry's branch of the family had became Dutch in culture, language and religion. Proof of this abounds in the materials that I have found on the family. I will restrict myself here and merely point out 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 cemetery 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 has survived and which forms part of the "Lord Henry de Villiers Collection" (MSC7) at the National Library, Cape Town, is in English. Schoeman "Some correspondence of Lord de Villiers" 1999 (54)(2) Quart Bull NLSA 65 65-66 explains that, although this correspondence was in English throughout, the members of the De Villiers family all had Dutch family names. He points 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
Lord John Henry de Villiers, elder brother of Melius de Villiers. Lord Henry de Villiers was Chief Justice of the Cape from 1873 until 1910, when he was appointed as the first Chief Justice of the Union of South Africa. He died in harness in 1914. He served as Chief Justice of South Africa for a record forty years. (Source: Eric Walker *Lord de Villiers and his Times. 1842-1914* (1925))

Afrikaans language movement and a series of political events such as the First Anglo-Boer War and the Second Anglo-Boer War bring about the development of Afrikaner nationalism and cause division among the European inhabitants of the Cape Colony*. Schoeman (66ff) provides further compelling proof that the De Villiers family most definitely had not "for several generations been British", as declared by Lord Henry to Alfred Milner.
In contrast, Melius was an introvert with a strong academic bent who preferred to engross himself in theory, logic and methodology. Throughout his life he remained loyal to the oath of independence that he had sworn to the Orange Free State in May 1876. During his time in the Orange Free State and thereafter, he had truly become a Republican.

Here it is worth repeating that Melius received his early schooling in Dutch, whereas John Henry’s entire schooling was in English. This might explain John Henry’s lukewarm attitude towards the two Boer Republics and their political and cultural aspirations.

But Melius de Villiers was not a blind loyalist of the Orange Free State and her people. The fact that he swore to protect the independence and uphold its constitution did not blind him to its particular problems and peculiar attitudes. Reitz’ term as President of the Free State was due to expire at the end of 1893. During 1893, steps were taken to secure Sir Henry de Villiers’ election as President to succeed Reitz. Melius promptly informed his brother by letter of these developments in the Free State. Later, during the same month, Melius again wrote to Sir Henry, warning him that the Free Staters had their “little ways”:

**Bloemfontein, May 26, 1893**

I do not know whether you are aware of the sort of people we have to do with in this State … When I was in the district of Vrede last circuit, I enquired what was the reason of public opinion there having veered round so in favour of the President [Reitz]. I was told that in the first place he had always been considered a very proud man but that he having shaken hands with every individual of the assemblage who had gone out to meet him, this had shown that he was a very “nederige” [humble] man; and secondly, that they had been under the impression that he was “een ongeloovige” man [an unbeliever] (poor Reitz is as little “ongeloovig” as he is proud) but inasmuch as he had issued a proclamation appointing a day of prayer for the destruction of the locusts, this had proved his “godvruchtigheid” [devotion] and he had

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209 Wiechers (n 17) 187.
210 See Du Toit (n 17) 420.
211 See the letter written by Melius de Villiers to Sir Henry on 9 May 1893 and which is referred to by Walker (n 4) 231.
consequently become immensely popular. This is the sort of thing one has to put up with in this country.²¹²

At the same time, Sir Henry was also in the running to become President of the South African Republic (Transvaal). He eventually declined the Free State’s offer to become their President. This was not because of Melius’ influence, but rather on the advice of his confidante, Ewald Esselen. He was Sir Henry’s regular and trusted correspondent in the Transvaal, and had sent him a letter advising him against becoming President of either of the two Boer Republics. Esselen wrote:

Before I left Cape Town I saw Rhodes who, at first, also thought that you [Sir Henry] ought to take the Free State Presidency as a stepping stone to something bigger but after discussion he agreed that it would perhaps be better if you were called in by us to a compromise when things have reached the deadlock they are bound to come to.²¹³

Esselen’s letter effectively ended De Villiers’ contemplated return to active political life, and also put paid to the intriguing possibility of the brothers, Sir Henry and Melius de Villiers, simultaneously heading the executive and judiciary of the Orange Free State.

Two years later, in 1895, Sir Henry was again contemplating a return to politics when Reitz resigned the Presidency of the Free State because of failing health. Abraham Fischer and ER Grobler urged Sir Henry to stand as President. Melius added his weight in trying to lure his elder brother to the Free State when he wrote to him as follows in November 1895:

I consider we require something more than the qualifications that [MT] Steyn possesses, someone who will have influence with Oom Paul [Kruger] and who is likely also to have it in respect of the British Government.

At that stage, however, Sir Henry was cautious, fearing that he might sacrifice his seat on the Cape Bench only to find himself the head of a faction rather than the President of the Orange Free State.²¹⁴

²¹² Idem 233.
²¹⁴ See Walker (n 4) 263-264.
Melius strove hard to persuade his brother to come to the Free State and avert the clouds of war which were gathering on the horizon. Two weeks later, on 1 December 1895, he again wrote to Sir Henry, trying in vain to persuade him:

The people have always loyally supported the President chosen by the majority ... The only effect of a Volksraad nomination is that its candidate ... comes before the public with such a prestige that few persons would venture to stand against him. Our people are always so afraid of anything like discord that they readily vote for such a candidate though otherwise they might not have done so.\textsuperscript{215}

Perhaps Melius knew that it would take a non-Free Stater as President (like his brother Sir Henry) to convince the Free State Volksraad not to join the South African Republic in war against Great Britain. But Sir Henry was not to be persuaded. His biographer suggests that by 1895 he was less hopeful of doing the good (ie, working at creating a federation of states in South Africa) than he might have been in 1893.\textsuperscript{216} After all, in December 1895 the Jameson Raid took place and went horribly wrong. The writing was on the wall for peace between Great Britain and the South African Republic. Four years later, the Free State Republic became a reluctant partner of the South African Republic in a war against the mightiest nation on earth.\textsuperscript{217} Perhaps Sir Henry already suspected in December 1895 that war was unavoidable.

The fact that Melius de Villiers heavily resented England for her role in the Anglo-Boer War did not mean that he was an Anglophobe. He definitely did not desire either the First or the Second Anglo-Boer War. On 3 February 1881, during the First Anglo-Boer War and shortly before Britain was defeated at Amajuba, Melius wrote to his brother Henry that it was unlikely that many Orange Free State burghers would join the Transvaal burghers against the British forces, for “the people here [in the Orange Free State] know only too well what the inevitable results will be of interference on our part in a struggle with which we have almost nothing to do except as a matter of sentiment”.\textsuperscript{218}

The two brothers, furthermore, had opposing views on the application of Roman-Dutch law. Melius was a staunch supporter of Roman-Dutch law and applied it wherever possible in his judgments. Roman-Dutch law was, after all,
statutorily entrenched as the common law of the Orange Free State. However, the law which his brother Henry administered in court has been described by his biographer as “neither Roman nor Roman-Dutch nor English but ‘de Villiers’ law”. Lord Henry had a strain of obstinacy in his character which was lacking in that of his younger brother Melius. It was this trait of Lord Henry which forbade him to go back on a judicial decision once taken, in spite of hostile authorities, living or dead. He highly resented being overturned on appeal. In only four cases did the Privy Council reverse his decisions. He bore these unaccustomed reversals of his decisions with great difficulty because he was a strong-minded man.

But, despite the political and ideological differences between the two De Villiers brothers, they were often in agreement on legal matters. It was one of Lord Henry’s ideals, even in the pre-union days, to create an appeal court for the whole of South Africa. He believed that the creation of a South African appeal court for the two colonies (Cape and Natal) and the two Boer Republics would lead to “if not [a] United South Africa, at least a more united South Africa”. Melius de Villiers and his colleague on the Orange Free State Bench, Judge Gregorowski, as well as the Attorney-General of the Orange Free State, McGregor, were enthusiastic about such an appeal court. Melius de Villiers, however, had his reservations about the fact that the Natal qualification (to practice law in that colony) was “far too low”.

Finally, I believe that Melius de Villiers’ disillusionment with Britain during and after the Anglo-Boer War played no role whatsoever in his preferring of Roman-Dutch law to 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 development of Roman-Dutch law as our common law, namely his well-known text on injuries, was published in 1899, that is before the outbreak of the War in October of that year. His admiration for Roman-Dutch law was in all probability rather the result of his long tenure as judge of the Supreme Court of the Orange Free State. After all, Roman-Dutch law was regarded as the undisputed common law of the two Boer Republics, while English law had a strong influence, but simply as one of several persuasive secondary sources. In short, in diligently applying Roman-Dutch law, Melius de Villiers was simply complying with his constitutional duties.

219 Idem 86.
220 Idem 86-87 and 500.
221 Idem 113.