

# AN INTRODUCTION TO SOUTH AFRICAN LAW REPORTS AND REPORTERS, 1828 to 1910

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JP van Niekerk\*

## 1 Background

Judicial decisions, as any first year law student knows, are one of the fundamental sources of our law. Yet court decisions can only effectively be a source of law if they are accessible, if not to the public at large, then at least to the members of the legal profession.

Without accessible records of court decisions, and, of course, an established hierarchy of courts, the doctrine of *stare decisis* or judicial precedent, even in the somewhat watered down and flexible version that applies in South African law,<sup>1</sup> would not function properly, if it did so at all.<sup>2</sup> The main advantages of the doctrine – legal certainty, predictability of the outcome of litigation, the protection of vested rights, and uniformity and equality in the application of legal principles – would consequently be lost.

How, then, are judicial decisions best made accessible?

They are disseminated by publication. And historically the primary form of publication has been the law report, in which are collected the reasoned judicial decisions

1 In English law, the peculiar feature of the doctrine of precedent is said to be its “strongly coercive nature”, resulting in English judges occasionally being obliged to follow a previous decision although they may have what would otherwise be good reasons for not doing so: Rupert Cross & JW Harris *Precedent in English Law* 4 ed (Oxford, 1991) at 3.

2 On judicial precedent, see generally HR Hahlo & Ellison Kahn *The Union of South Africa. The Development of Its Laws and Constitution* (London, 1960) at 29-35; HR Hahlo & Ellison Kahn *The South African Legal System and Its Background* (Cape Town, 1968) (hereafter Hahlo & Kahn *SA Legal System*) at 214-216, 226-231, 244-282; Ellison Kahn “The rules of precedent applied in South African courts” (1967) 84 *SALJ* 43-55, 175-193, 308-330; and on the development of the doctrine of *stare decisis* in England, see T Ellis Lewis “The history of judicial precedent” (1930) 46 *LQR* 207-224, 341-360, (1931) 47 *LQR* 411-427, (1932) 48 *LQR* 230-247.

\* Professor, Department of Mercantile Law, School of Law, University of South Africa. I should like to thank my research assistant, Evelyn Edwards, for her perseverance in tracing, copying and scanning the materials necessary to write this piece, and my colleague Heinrich Schulze for snapping away on my behalf while he could have stood in awe of Hoeri'kwaggo.

of the various courts.<sup>3</sup> So, it has been said, the law is “found written and recorded in the law reports ... [and the] law reports ... are the *public record*” of the use and practice of legal principles, “having recorded the decisions, actions and opinions of those most extensively involved on a daily basis with all segments of it”.<sup>4</sup> Today law reports have become an indispensable element in the dissemination of our case law.<sup>5</sup>

Law reports are, of course, well known in English law, and their format in that system has been largely adopted in South Africa as it has in other legal systems influenced by the common law.<sup>6</sup>

The practice of law reporting in English law dates from at least the thirteenth century,<sup>7</sup> when the reports were mainly tools for the training of lawyers. At first in the form of manuscript collections of decisions taken down by apprentice lawyers or scribes, known as *Year Books*,<sup>8</sup> the reports later, from the sixteenth century onwards, increasingly took the form of private collections of reports by individual law reporters published on their own initiative. These nominate or named reports, currently taken up in the massive 178-volume series entitled *English Reports*<sup>9</sup> and also available online,

- 3 At various stages in the past, newspapers, too, played a role in the publication of judicial decisions. However, newspaper reports were (and are) generally unofficial and often unreliable since they are produced by journalists without any background in law. That largely diminishes their importance and value for legal practitioners. Still, they remain an important if generally undervalued source for legal historical research: see, generally, James Oldham “Law reporting in the London newspapers, 1756-1786” (1987) 31 *American J of Legal History* 177-206; Jeremy Patrick “Beyond case reporters: Using newspapers to supplement the legal-historical record (A case study of blasphemous libel)” (2011) 3 *Drexel LR* 539-560.
- 4 Gerald J Postema “Roots of our notion of precedent” in Laurence Goldstein (ed) *Precedent in Law* (Oxford, 1987) 9-34 at 15-16.
- 5 Whether they will remain so is another matter, though. The hard-copy law report seems to be on the verge of extinction, about to be overtaken by online versions of judicial decisions.
- 6 See, eg, William Holdsworth “Law reporting in the nineteenth and twentieth centuries” 1941 *Anglo-American Legal History Series (Series 1, no 5)* (New York, 1941); Thomas J Young “A look at American law reporting in the 19th century” (1975) 68 *Law Library J* 294-306; Susan Barker “Law reporting in England and the United States: History, controversy and access to justice” (2007) 32 *Canadian Law Library Rev* 178-183; Peter Spiller “The development of law reporting in New Zealand” 1994 *New Zealand LJ* 75-79. See also generally Chantal Stebbings (ed) *Law Reporting in Britain* (London, 1995).
- 7 On the history of law reporting in England, see, eg, WTS Daniel *The History and Origin of the Law Reports* (London, 1884); Frank Pegues “The medieval origins of modern law reporting” (1953) 38 *Cornell Law Quarterly* 491-510.
- 8 These continue to be edited, reprinted and published under the auspices of the Selden Society.
- 9 Cases reported there are referred to as follows: *Biccard v Shepherd* (1861) 14 Moo PCC 471, 15 ER 383. “Moo PCC” is the abbreviation for the reports of Privy Council Cases 1836-1862 compiled and published by Edmund F Moore, “ER” the abbreviation of the *English Reports*. Since the original report is in all probability no longer accessible to the modern researcher, it has become necessary to add a reference to the reproduced version in the *English Reports* as well. One sure reason to suspect that students and researchers have not consulted old English cases at first hand is an absence of any reference to the *English Reports*. The decision referred to earlier concerned an appeal from the Cape Supreme Court (in *Namaqua Mining Co v Commercial Marine & Fire Insurance Co* (1859) 3 Searle 231) and the Privy Council decision was also reported locally: (1861) 3 Searle 242 (PC). Moore also reported Privy Council decisions from 1862-1873 (“Moo PCC (NS)”) as well as Privy Council

display the rudiments of the format (headnotes, summarised arguments) with which we are familiar. However, these reports varied in quality and reliability and often caused problems of legal certainty.<sup>10</sup>

After years of agitation, a single set of *Law Reports*, under the auspices of the independent Incorporated Council of Law Reporting representing the legal profession, was published from 1865 onwards. In this way law reporting became “authorised”, and a uniform standard came to be established, with professional law reporters, input from the judiciary and regular publication greatly enhancing the standard and authority of the reports themselves.

It has been argued that it was only upon the establishment of a hierarchy of English courts and the formalisation of law reporting in the latter part of the nineteenth century, that the modern doctrine of precedent could develop.<sup>11</sup>

However, let us not forget that reports of judicial decisions were known in our Roman-Dutch common law, too – there are several collections of such privately produced “reports”,<sup>12</sup> although not in the form we know today. And that indeed goes for civil law generally.<sup>13</sup> But, of course, the value of such reports was and is quite different to its value in the largely uncoded common-law systems: the role of precedent is less pronounced, the judgments less analytical and reasoned, and law reporting is therefore of a lesser or at least a different import and value.<sup>14</sup>

Nevertheless, although ours is a mixed system, the “English style of law reporting was, indeed, so strong that it even influenced and eventually converted judicial writing in such strongholds of Civil Law as Scotland, Dutch South Africa, and Quebec”.<sup>15</sup> And, it may be surmised, one of the principal reasons for this was that the judges initially appointed to the various local benches and the lawyers practising before them were with very few exceptions trained in England.<sup>16</sup>

decisions from 1836-1872 on appeal from India (“Moo Ind App”). For a guide to pre-1865 English law reports, see JC Fox *A Handbook of English Law Reports from the Last Quarter of the Eighteenth Century to the Year 1865* (London, 1913).

10 This is especially evident if reports by different reporters of the same decision are compared. The result is uncertainty.

11 See Peter Wesley-Smith “Theories of adjudication and the status of *stare decisis*” in Goldstein (n 4) 73-88 at 81.

12 For details, see DH van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (Durban, 1983) at 321-323 (collections of judicial decisions) and 323-327 (collections of legal opinions).

13 See, eg, JH Baker “Dr Thomas Fastolf and the history of law reporting” (1986) 45 *Cambridge LJ* 84-96 (on the reports of papal *decisiones rotae* in canon law in the thirteenth century); D Heirbaut “The oldest part of the *Lois des pers dou castell de Lille* (1283-1308/1314) and the infancy of case law and law reporting on the Continent” (2007) 75 *Tijdschrift voor rechtsgeschiedenis* 139-152; Dolores Freda “‘Law reporting’ in Europe in the early-modern period: Two experiences in comparison” (2009) 30 *J of Legal History* 263-278.

14 See generally Igor I Kavass “Law reporting: Comparisons between Western Europe and common law countries” (1977) 5 *International J of Law Libraries* 104-120.

15 *Idem* at 115.

16 See, further, Hahlo & Kahn *SA Legal System* (n 2) at 240-244.

## 2 Pre-Union South African law reports and law reporters

Prior to 1910 and the unification of the various provinces and independent territories in the Union of South Africa, there were several independent systems of superior courts: those in the Cape Colony (being the Cape Supreme Court, the Eastern Districts Court and the High Court of Griqualand), in Natal, in the Orange Free State, and in the South African Republic or Transvaal.

Each of these courts was served by a series or several series of law reports. These were generally the result of private initiative and not officially sanctioned by either the relevant government or the particular court. They were not specialised, but covered decisions on all areas of the law. Needless to say, there was no uniformity in either the method or the standard of reporting,<sup>17</sup> which was a matter of some concern.<sup>18</sup> Also, the reports were not always continuous, so that there were overlapping reports of decisions handed down during certain periods and no coverage during other periods.

In short, the law reporting scene pre-Union consists of a patchwork of reports of varying quality, presenting a navigational nightmare for those unfamiliar with general and legal history or local geography.

In this article I shall attempt to provide the uninitiated with some further guidance to the various law reports.<sup>19</sup> I shall do so by region, that is by province or territory, in no particular order. Then I shall list the reports under each relevant court chronologically, according to years covered. It makes little sense to list the reports chronologically according to the date of publication as not all were published contemporaneously and as some went through reprints or were translated subsequently.<sup>20</sup> By way of illustration, I have included reproductions of the title pages of some of these reports.<sup>21</sup>

However, the article also serves another purpose: to cast some light on the law reporters themselves.<sup>22</sup> Our law reporters, unlike those in other jurisdictions, have for the most part not received the recognition they surely deserve for their endeavours in that capacity.

17 That was achieved only in 1910, with the creation of a uniform hierarchy of courts throughout South Africa and the consistent and regular reporting of their decisions: see Hahlo & Kahn *SA Legal System* (n 2) at 282.

18 See, eg, Anon "Uniformity in law reporting" (1900) 17 *Cape LJ* 172-173, expressing a need for definite and uniform rules for reporting and indexing cases to be arranged and agreed upon by the various reporters.

19 Such guidance is already to be found in different formats in AA Roberts *A South African Legal Bibliography* (Pretoria, 1942) *sv* "Reports of South African Courts" at 257-264; and in Hahlo & Kahn *SA Legal System* (n 2) at 293-301. The latter's list is also reproduced in a slightly different format in Ellison Kahn's *Contract and Mercantile Law. A Source Book* 2 ed, vol 1 (Cape Town, 1988) at xxiii-xxvi under the apt heading "A bibliographical guide for the perplexed, or pathway through the jungle of case law ...". I readily acknowledge standing on these gigantic shoulders.

20 The pre-Union reports were all reprinted in the well-known Digma series of photo-litho reproductions from the early 1970s onwards and are all now accessible online on various databases.

21 I have not reproduced here the title pages of all reports. Apart from the fact that some reports are notoriously rare in their original versions, title pages contain no information not obtainable elsewhere and hence described in my text.

22 For English law, Fox (n 9), eg, provides detail on the reporters themselves, as does John William Wallace, himself a reporter of decisions of the American Supreme Court in the nineteenth century, in his *The Reporters Arranged and Characterized* I had access to the 4 ed (Boston, 1882).

I shall therefore add to the lists of the various reports the names and some biographical detail of the reporters responsible for compiling and editing them. In this regard, too, I have had to be succinct, focusing on the South African legal careers of particular reporters and only adding such further detail as might make for interesting reading.<sup>23</sup>

As will appear from the details given, most of the law reporters were, when they took up law reporting, young advocates, waiting for work but wishing to keep busy and to make themselves known. A few of them left little or no trace of their subsequent legal careers, died young, or became law teachers. However, as may be expected of lawyers showing such enterprise, by far the majority went on to achieve greater heights,<sup>24</sup> becoming leading advocates of their time, or being appointed to the Bench. Of these a few went even further, becoming a judge president, or judge of appeal, or even chief justice. And some even went into politics, becoming a minister of justice or, alas, a prime minister.

As this article covers only the period up to 1910, I must point out that many of the reporters subsequently continued law reporting, a continuity not readily apparent from my discourse. And not surprisingly, either, given the period with which I am concerned here, a great many of them were English-trained lawyers,<sup>25</sup> and therefore no doubt familiar with the English method of law reporting.

### 3 The Cape Supreme Court

The Cape Supreme Court was established in 1828, taking the place of the old Raad van Justitie. It continued in existence until 1910, when it became the Cape Provincial Division of the Supreme Court of South Africa.

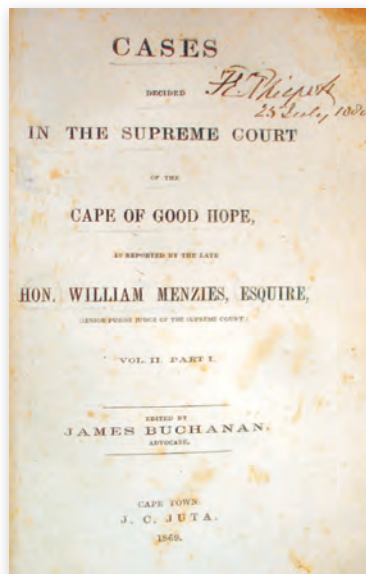
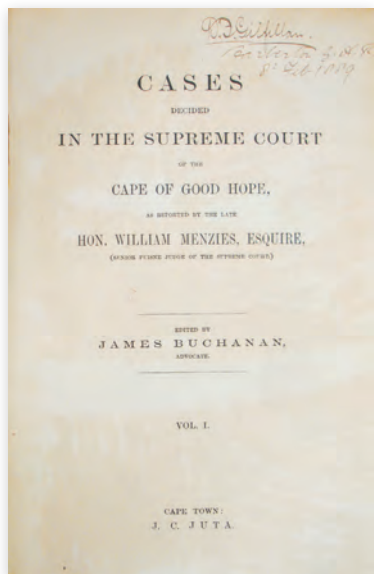
23 Biographical details were, in the main, culled from Roberts (n 19) and also from the wonderfully entertaining books by Ellison Kahn *Law, Life & Laughter. Legal Anecdotes & Portraits* (Cape Town, 1991) (hereafter Kahn *LLL*) and *Law, Life & Laughter Encore. Legal Anecdotes & Portraits from Southern Africa* (Cape Town, 1999) (hereafter Kahn *LLLE*). Additional sources that provided information will be referred to where necessary.

24 One illustration of the later prominence of those who were also reporters is provided by the list of delegates nominated by various bar councils to attend a conference in Jan 1910 on the unification of the various South African bars. Of the fourteen delegates, six had also been at some stage of their earlier careers law reporters: MW Searle and Porter Buchanan (from the Cape), WA Macfadyen (from the Eastern Districts and later the Transvaal), S de Jager (from the Free State), CH Tredgold (from Rhodesia), and WS Duxbury (from the Transvaal). See, further, Anon "Unification of the South African bars. Conference of delegates" (1910) 27 *SALJ* 63-64; RL Selvan "Early days at the Johannesburg Bar" 1994 Oct *Consultus* 115-127, where there is a photograph of the delegates at 116.

25 One example: the following were all contemporaries at Cambridge in 1879: AF Russell, NJ de Wet, JER de Villiers, Percy Fischer, M Alexander, JPR van Hoytema, SB Kitchin, Henry Lewis, George Sutton, Douglas Buchanan, HS van Zyl, Grindley Ferris, and Gus Hartog (see HTL "Mr Justice Russell" (1929) 46 *SALJ* 1 at 2; SB Kitchin "The Cambridge School of Law" (1926) 43 *SALJ* 129-139 at 130). Eight of them were later active as law reporters in South Africa.

### 3 1 *Menzies' Reports*

*Menzies' Reports*<sup>26</sup> cover the decisions of the various Cape courts, including the Cape Supreme Court, from 1828 to 1849.



They were edited from the manuscripts of Judge William Menzies (1795-1850) who served on the Cape Bench from 1828 to 1850<sup>27</sup> and who during his tenure prepared his compilation of judgments for possible publication. In that format they were often referred to in his time by the Court as well as in argument before it. His wish that they be published after his death remained unfulfilled for many years.

After an early attempt,<sup>28</sup> it was to be almost twenty years after Menzies' death before his manuscript reports were eventually published in full, in three volumes, in 1868, 1869,

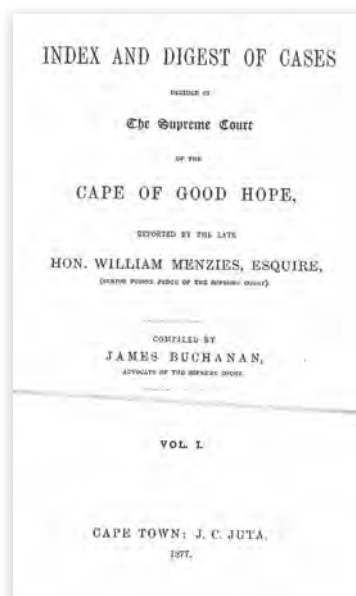
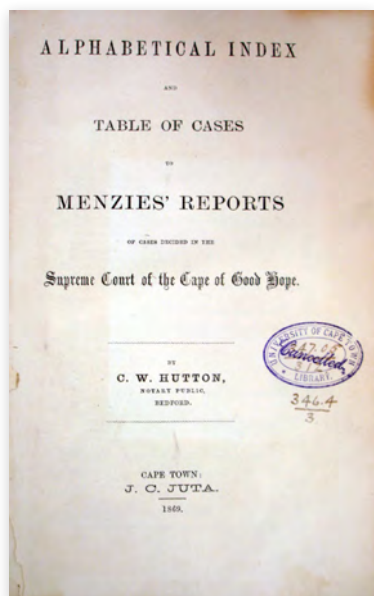
26 Abbreviated "Menzies", "Menz", or "M"; eg, *Chiappini & Co v Jones* (1837) 3 Menzies 181.

27 On Menzies, see, further, Roberts (n 19) *sv* "Menzies, Mr Justice W" at 210 and *sv* "Menzies, William" at 371-372; the biographical sketch by C Graham Botha "The Honourable William Menzies, 1795-1850. Senior Puisne Judge of the Supreme Court of the Cape of Good Hope" (1916) 33 *SALJ* 385-404; Kahn *LLL* (n 23) at 162-167; Kahn *LLLE* (n 23) at 202.

28 See Ellison Kahn "The finding of Phipson's Reports" (1972) 89 *SALJ* 246-248 (hereafter Kahn "Phipson's Reports") at 247-248 and Kahn "Solution to a mystery about the earliest South African law reports" (1985) 102 *SALJ* 187-190 (hereafter Kahn "Solution") at 188, where he mentioned the existence of an unbound copy of vol 1, parts 3 and 4 of *Menzies' Reports*, published in Cape Town in 1854, only four years after Menzies' death. Apparently, according to the publisher's announcement, all the reports were then virtually ready for publication. The editorial work on the first volume was undertaken by members of the Cape Bar: William Porter (Attorney General 1839-1866: see, further, Anon "The Late Hon William Porter" (1905) 22 *SALJ* 1-9); Daniel Denysen (Dutch lawyer, classicist, fiscal of the former Court of Justice, member of the Cape Bar from 1828, and father of Petrus Johannes Denysen, Judge of the Cape Supreme Court 1868-1877: see Anon "The late Hon Petrus J Denysen" (1903) 20 *SALJ* 221-223); EB Watermeyer (more about him in n 45 below); Christoffel Joseph Brand



and 1871 respectively,<sup>29</sup> as *Cases Decided in the Supreme Court of the Cape of Good Hope, as reported by the Late Hon William Menzies, Esquire*. The introductory note in volume 1 explains that the reports are in accordance with the plan and system devised by Judge Menzies. Decisions are therefore reported – sometimes so briefly that they do not amount to anything more than a cryptic statement of what was decided<sup>30</sup> not chronologically, but according to subject matter.



The editorial task was undertaken by James Buchanan,<sup>31</sup> later also the compiler of his own reports. Given the method of their arrangement, indexes to the *Menzies' Reports* soon appeared. The first, *Alphabetical Index and Table of Cases to Menzies' Reports of Cases Decided in the Supreme Court of the Cape of Good Hope*, by CW Hutton, a notary public from Bedford in the Eastern Cape and later Treasurer of the Cape Colony,

(LLD, Leiden with a thesis entitled *Dissertatio de jure coloniarum* (1820), member of the Cape Bar from 1828, first speaker of the Cape House of Assembly 1854-1874: see, further, Roberts (n 19) *sv* "Brand, Christoffel Joseph" at 59-60; Kahn *LLL* (n 23) at 11-12; and Johannes Henricus (Sir John) Brand (son of CJ Brand, DCL from Leiden, President of the Free State 1863-1888: see, further, Anon "Johannes Henricus Brand" (1888) 5 *Cape LJ* 194-197). However, only vol 1 appeared in 1854 and it was to be fifteen years before vol 1 re-appeared together with vols 2 and 3.

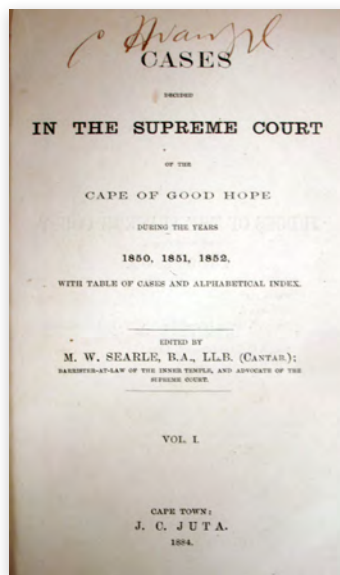
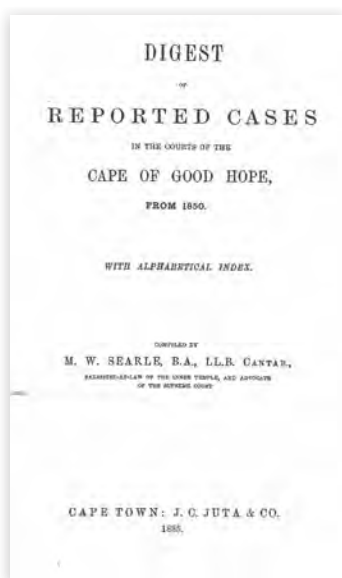
29 Several reprints followed in later years; eg, vol 2 was reprinted 1882, but with a different pagination!

30 See the review in (1909) 26 *SALJ* 549, in which it was observed that the headnotes were often "very meagre" and incomplete, but that the *Reports* otherwise constitute a valuable contribution to the survival of the Roman-Dutch common law in South Africa.

31 More about him later: see the text at n 55 below.

appeared in 1869, thus even before the full publication of all the Buchanan editions. Buchanan's own index, entitled *Index and Digest of Cases Decided in the Supreme Court of the Cape of Good Hope, reported by the late Hon William Menzies, Esquire*, appeared in three volumes in 1877.

### 3 2 Searle's Reports



*Searle's Reports*<sup>32</sup> contain decisions of the Cape Supreme Court from 1850 to 1867.

They were published between 1884 and 1894<sup>33</sup> in five volumes: volume 1 (1850-1852); volume 2 (1853-1856); volume 3 (1857-1860); volume 4 (1861-1863); and volume 5 (1864-1867).

The reports were compiled by MW Searle<sup>34</sup> and appeared under the title *Cases Decided in the Supreme Court of the Cape of Good Hope, during the years ...*. In the preface to the first volume, Searle explained that he had compiled the decisions given more than thirty years earlier from court records, reports in contemporary newspapers, and the notebooks of Judge John Wylde, Chief Justice of the Cape Supreme Court 1828 to 1855.<sup>35</sup>

32 Abbreviated "Searle" or "S"; eg, *Cock v Cape of Good Hope Marine Assurance Co* (1858) 3 Searle 114.

33 In order to fill the gap between *Menzies' Reports* (1828-1849) and *Buchanan's Reports* (1868-1879): on the latter, see the text at n 50 below.

34 In vol 4 he acknowledged the valuable assistance given him in the preparation of that volume and the next one by advocates Watermeyer and Tredgold of the Cape Bar. We shall come across both of them in due course.

35 Wylde (1781-1859), was Judge Advocate (the office that involved duties both as Chief Justice and prosecutor) in New South Wales until 1825 before he came to the Cape in 1827.



Malcolm William Searle (1855-1926) was a member of the Cape Bar from 1882 to 1910 and then a Judge of the Cape Provincial Division from 1910 to 1922, and Judge President of that court from 1922 to 1926, when he died tragically in a railway accident.<sup>36</sup>

At the time when he prepared his *Reports*, Searle was a “talented young Colonist”, practising as a junior advocate but receiving very few briefs.<sup>37</sup> At the same time he was also involved, with a colleague, JA Joubert, in translating books 7 and 16 of Voet’s *Commentarius ad Pandectas*, which appeared in 1887. The *Reports* were received without great enthusiasm, and were described as a “compilation” rather than as true reports, as incomplete (no doubt because of gaps in the source material), and as containing opinionated headnotes.<sup>38</sup>

Subsequently, though, Searle’s law-reporting endeavours were acknowledged as involving “an extremely difficult task” given the obscure sources on which he had to rely, and as “a task which only persistence and patience could have accomplished”.<sup>39</sup> Searle continued his involvement with the law reports by producing in 1885 a *Digest of Reported Cases in the Courts of the Cape of Good Hope, from 1850*. Covering decisions from 1850 to 1883, the *Digest* was a continuation, albeit in less elaborate form, of *Menzies’ Index and Digest*. It was periodically updated in subsequent years,<sup>40</sup> and these volumes were until shortly before Union the only available source through which the precedents of all the Cape courts could be traced.

36 See, further, Roberts (n 19) sv “Searle, MW” at 284, sv “Voet, Johannes” at 325, and sv “Searle, Sir Malcolm William” at 375; Anon “Mr Justice Searle” (1919) 36 *SALJ* 1-4. Searle married the daughter of Frederick York St Leger, founder and editor of the *Cape Times*, and their son, Frederick (Fred) St Leger Searle, was a Judge in the Cape Provincial Division: see HHB “Mr Justice St L Searle” (1948) 65 *SALJ* 333-338.

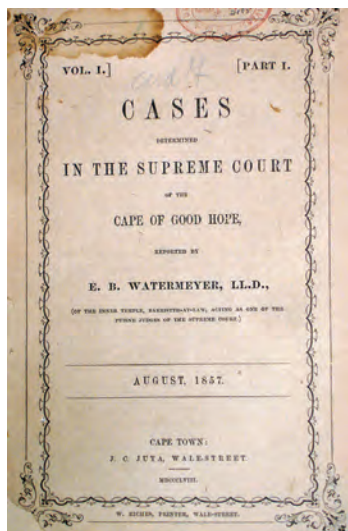
37 See the review of vol 1 in (1885) 2 *Cape LJ* 78-81.

38 *Ibid.* A review of vol 2, in (1886) 3 *Cape LJ* 36, thought they evidenced “undue haste and ... indifference to ordinary rules of indexing”.

39 See Anon (n 36) at 2. Reviews of the later volumes of the reports were generally more favourable. The review in (1887) 4 *Cape LJ* 119-123 considered them “distinctly valuable”; that of vol 3 in (1888) 5 *Cape LJ* 199-202 considered Searle “entitled to unstinted praise” for his undertaking and had “no hesitation in cordially commending the third volume ... to the attention of the profession and of the public”.

40 See, eg, *Consolidated Digest to the Reported Cases in the Courts of the Cape of Good Hope to 1895* (Cape Town, 1898), with PST Jones, which contains a useful list of abbreviations of the various Cape reports; *Supplementary Digest of the Reported Cases in the Courts of the Cape Colony to the end of 1904* (Cape Town, 1906), with JA Joubert. Percy Sidney Twentyman Jones was a member of the Cape Bar 1902-1926; a lecturer and examiner in law, *inter alia* at the University of Cape Town, a Judge of the Cape Provincial Division 1926-1946, its Judge President from 1946, a translator of Voet, the author of various legal works, and, most importantly, a rugby and cricket Springbok: see Heinrich Schulze *South Africa’s Cricketing Lawyers* (Pretoria, 1999) at 65-71; Roberts (n 19) sv “Jones, PST” at 169 and sv “Jones, Percy Sidney Twentyman” at 365; FR “Mr Justice Jones” (1928) 45 *SALJ* 1-5; Kahn *LLL* (n 23) at 102-103; and Kahn *LLLE* (n 23) at 143-144. Joubert was the author of *General Municipal Law of Cape Colony* (Cape Town, 1907), co-translator with Searle of Voet, and with PST Jones he revised the 2 ed of MacLeod Bawtree Robinson & John Steven Curlewis *Resident Magistrates’ Act 1856* (Cape Town, 1906): see, further, Roberts (n 19) sv “Joubert, JA” at 169.

### 3 3 *Watermeyer's Reports*



The solitary, slim volume of *Watermeyer's Reports*<sup>41</sup> contains a mere ten decisions of the Cape Supreme Court delivered in the year 1857. Published first in 1858 as *Cases Determined in the Supreme Court of the Cape of Good Hope*, it was long thought to have been the first law report published at the Cape.<sup>42</sup> There are at least two editions of this work, a standard one published by Juta & Co, and another edition, differently paginated and with several misprints; there are also several reprints. The fact that the publication was indicated as volume 1 suggests that other volumes were planned, but for whatever reason they never saw the light of day.<sup>43</sup>

The reporter was Egidius Benedictus Watermeyer (1824-1867), who had obtained the LLD *cum laude* at Leiden in 1843 at the age of nineteen with a thesis entitled *Dissertatio de jure patronatus*. His mother was Anna Maria, only daughter of Aegidius Benedictus Ziervogel, of Upsala, Sweden, a sworn translator and interpreter in the Cape Vice-Admiralty Court from 1800 until his death in 1818, after whom EB was named. He became a member of the Cape Bar in 1847 (the first new advocate to be admitted in eight years) and was subsequently appointed a Judge of the Cape Supreme Court in 1857, at thirty-one years of age. A learned lawyer, excellent classicist and translator of Martial's epigrams into English verse, EB corresponded with his advocate brother Frederick Stephanus Watermeyer<sup>44</sup> in Greek for the sake of practise. He was said to have possessed a phenomenal memory "which was of the greatest value in the days before the publication of the South African reports":<sup>45</sup> at the time case law was quoted from memory by members of the Bar, and EB always corrected any misquotations.

41 Abbreviated "Watermeyer" or "W"; eg, *Levy v Calf & Others* 1857 Watermeyer 1.

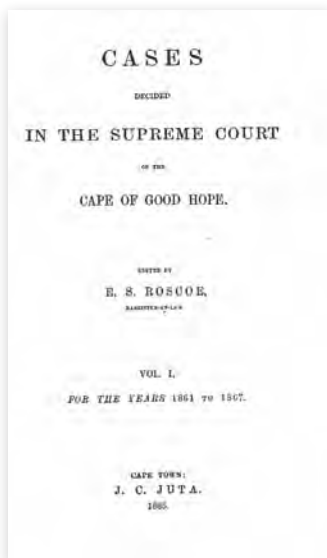
42 Until the discovery of the first volume of *Menzies' Reports* published in 1854: see n 28 above.

43 See, further, Kahn "Phipson's Reports" (n 28) at 247; Kahn "Solution" (n 28) at 189.

44 Frederick's son, John Philip Fairbairn Watermeyer (1861-1914), a member of the Cape Bar 1885-1896 (his was the 100th admission since the foundation of the Cape Supreme Court in 1828), was later a Judge of the High Court of Matabeleland 1896-1898, and a Judge of the High Court of Southern Rhodesia 1898-1914: see, further, Roberts (n 19) *sv* "Watermeyer, John Philip Fairbairn" at 382; F St L S "Hon Mr Justice JFP Watermeyer" (1937) 54 SALJ 1-3.

45 F St L S "Mr Justice EB Watermeyer" (1935) 52 SALJ 135-142 at 138. See, further, on EB Watermeyer Roberts (n 19) *sv* "Watermeyer, EB" at 332 and *sv* "Watermeyer, Egidius Benedictus" at 382; Kahn LLL (n 23) at 335-336. *Selections from the Writings of the Late EB Watermeyer* (Cape Town, 1877) appeared posthumously.

### 3 4 *Roscoe's Reports*



The *Reports*<sup>46</sup> compiled by the relatively unknown ES Roscoe,<sup>47</sup> entitled *Cases Decided in the Supreme Court of the Cape of Good Hope*, appeared in three volumes: volume 1 (1861-1867); volume 2 (1871-1872); and volume 3 (1877-1878). All the volumes were published in 1885 and were subsequently reprinted.

The prefatory note to volume 3 explained that only cases from 1877 were included, so that the volume was not a complete collection for the two years it covered and therefore perforce had to take its place in the series of law reports of the Cape Supreme Court “in a somewhat fragmentary condition”.<sup>48</sup> A reviewer in fact thought that of the reports filling the gaps after the period covered by *Menzies' Reports*, those of Searle “by far excelled” the other such publication “recently” published, no doubt referring to *Roscoe's Reports*.<sup>49</sup>

### 3 5 *Buchanan's Reports*

Covering the period 1868 to 1878, *Buchanan's Reports*<sup>50</sup> of Supreme Court cases appeared in eight volumes entitled *Cases Decided in the Supreme Court of the Cape of Good Hope*.

They were the product of the labours of the Buchanan cousins, James and Ebenezer John.

The series is made up as follows: volumes 1, 2 and 3<sup>51</sup> cover the years 1868, 1869 and 1870, respectively: they were published between 1868 and 1870 and were edited by James Buchanan. Volumes 3-8,<sup>52</sup> covering the years 1873 to 1878, were published

46 Abbreviated as “Roscoe” or “R”; eg, *Namaqua Mining Co v Commercial Marine Insurance Co* (1862) 1 Roscoe 47. They were also referred to as “Roscoe's Cape Reports” (see, eg, (1891) 8 *Cape LJ* 144 at 153) or as “Roscoe's Sup Ct Repts” (see, eg, (1888) 5 *Cape LJ* 261 at 263).

47 He is described merely as “Barrister-at-Law” on the title pages.

48 It further explained that even the newspaper reports collected by the late Mr Justice Simeon Jacobs (Judge on the Eastern Districts Bench 1880-1883: see Roberts (n 19) *sv* “Jacobs, Simeon” at 365), the sole source of the *Reports*, were less than half a dozen for 1877.

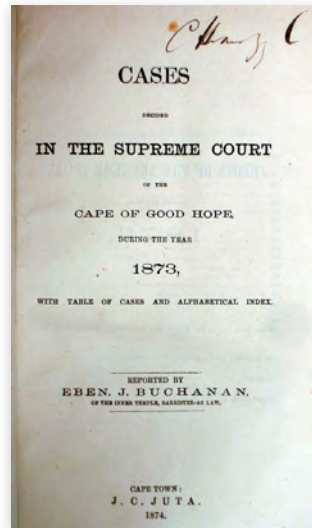
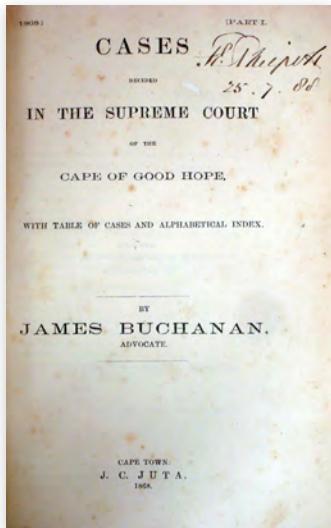
49 See (1885) 2 *Cape LJ* 80. Kahn “Phipson's Reports” (n 28) at 247 points out that the cases cited in the three volumes of *Roscoe's Reports* include several to be found in the *Menzies' Reports*, which is actually cited with volume and page references.

50 Abbreviated “Buch” or “B”; eg, *Myburgh & Co v Protecteur Fire Assurance [Protecteur Insurance] Co* (1878) 8 Buchanan 152.

51 The volume numbers are not mentioned on the original title pages, only the years covered.

52 They were actually numbered III-VIII. There were therefore two vols 3. A memorandum to vol VII explained that the mode of citation of the reports edited by J and EJ Buchanan would be altered so as

between 1891 and 1894 and were compiled by EJ Buchanan. Although not covering the period 1871 to 1872, *Buchanan's Reports* acquired a reputation for being a reliable source of judicial decisions and were often referred to in the early part of the twentieth century.



James Buchanan (1841-1893) joined the Cape Bar in 1865, was State Prosecutor in the Transvaal from 1872 to 1875, Judge of the new High Court of the Orange Free State from 1876 to 1880, Recorder of Griqualand West 1880 to 1882, and then first Judge President of the High Court of Griqualand from 1882 until he retired in 1887. A prolific author with a literary and journalistic bent – he was editor of *Menzies' Reports*,<sup>53</sup> translator of books 1-3 of Voet's *Commentarius ad Pandectas* (published 1880-1883), and author of textbooks<sup>54</sup> – James was the son of William Buchanan, journalist and founder of the *Cape Town Mail*, later the *Commercial Advertiser and Mail*. He has been described as one of “that band of pioneer judges who did much to elucidate the Roman-Dutch law and lay the foundation of our Common law”.<sup>55</sup>

to make all the volumes “one complete set”; the volumes were to be cited by numbers instead of by year; thus, the volume for 1868 would be 1 Buch, that for 1869, 2 Buch, that for 1870-1873, 3 Buch, that for 1874, 4 Buch, and so on. It appears, therefore, that according to this system vol 3 and vol III were combined.

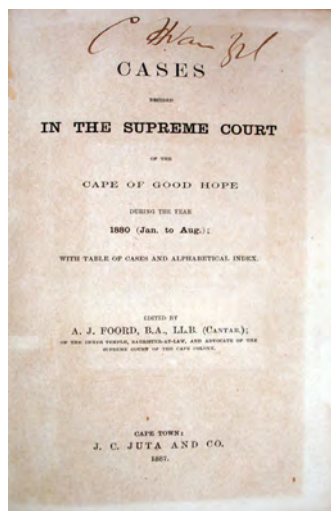
53 See n 31 above.

54 *Precedents in Pleading* (1878); *Decisions in Insolvency* (1879), 2 ed by EJ Buchanan (1887), 3 ed by EJ Buchanan (1896), 4 ed by DM Buchanan (1906).

55 See F St L S “The Hon Mr Justice James Buchanan” (1933) 50 *SALJ* 137-144 at 142. See, further, Roberts (n 19) sv “Buchanan, James” at 65, sv “Voet, J” at 324 and sv “Buchanan, James” at 351. James named his eldest son after his friend William Porter, the Attorney General: see, further, n 69 below.

Ebenezer John (Sir John) Buchanan (1844-1930), who was a cousin of James,<sup>56</sup> was a member of the Cape Bar from 1873 to 1880, acting Attorney General in Griqualand West from 1879 to 1880 and was, after only seven years in practice, appointed Judge in the Eastern Districts' Court.<sup>57</sup> Subsequently he was transferred to the Cape Supreme Court Bench where he served from 1887 to 1920, often acting as Chief Justice during the absences of Lord Henry de Villiers.<sup>58</sup>

### 3 6 *Foord's Reports*



Purporting, according to its preface, to fill the gap between the last of Buchanan's reports covering 1879 and a new series by HH Juta that had commenced in September 1880, *Cases Decided in the Supreme Court of the Cape of Good Hope During the Year 1880 (Jan to Aug)* appeared in 1887. It was edited by AJ Foord, compiled with the aid of records, newspapers, and the notes of judges, and was purportedly revised by the Chief Justice, Lord de Villiers. Except for the remark that they did not do justice to the arguments of counsel, *Foord's Reports*<sup>59</sup> received a favourable review, being described as a "valuable addition to our decided cases".<sup>60</sup>

AJ Foord was English-trained and a member of the Cape Bar. He is best known as the translator of books 2 and 3 of part 1 of Leeuwen's *Censura forensis* (1884 and 1885).<sup>61</sup>

### 3 7 *Supreme Court Reports*

The most extensive series of reports of the Cape Supreme Court commenced in 1882. Consisting of twenty-seven volumes, covering decisions as from September 1880, and ending in May 1910 when the Cape Provincial Division of the Supreme Court of South Africa replaced the Supreme Court of the Cape of Good Hope, it was the first series of

56 His father, Ebenezer, and James's father, William, were brothers.

57 He also reported the decisions of that court: see n 96 below.

58 On EJ Buchanan, see, further, Anon "The Hon Mr Justice EJ Buchanan" (1900) 17 *Cape LJ* 109-113; Roberts (n 19) *sv* "Buchanan, Ebenezer John" at 65 and *sv* "Buchanan, Ebenezer John (Sir John)" at 351; Kahn *LLL* (n 23) at 15; Kahn *LLLE* (n 23) at 67-68.

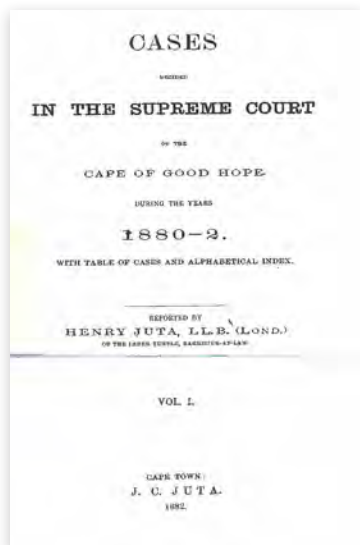
59 Abbreviated as "Foord"; eg, *Booyesen v Colonial Orphan Chamber* 1880 Foord 48. They are also referred to as "Foord's Cape Reports": see, eg, (1894) 11 *Cape LJ* 241 at 248, 256.

60 See the review in (1888) 5 *Cape LJ* 23.

61 See Roberts (n 19) *sv* "Leeuwen, Simon van" at 185. Book 1 (of part 1) had been translated by WP Schreiner (then still a member of the Cape Bar) in 1883, book 4 by Barber and Macfadyen (more about both of them in due course) in 1896, and book 5 only in 1991 by Margaret Hewett: see HJ Erasmus's review of the latter in (1992) 109 *SALJ* 371-373.



regular law reports. Initially entitled *Cases Decided in the Supreme Court of the Cape of Good Hope*, the title was later changed to *Supreme Court Reports. Decisions of the Supreme Court of the Cape of Good Hope*.<sup>62</sup>



The first nine volumes, covering the years 1880 to 1892,<sup>63</sup> were edited by HH Juta.<sup>64</sup> Henricus Hubertus (Sir Henry Hubert) Juta (1857-1930) was a member of the Cape Bar from 1880 to 1914, and had built up a large and lucrative practice interrupted only by acting appointments when he became Judge President of the Cape Provincial Division in which he served from 1914 to 1920. He was a Judge of Appeal in Bloemfontein from 1920 to 1923. Although he was an author of legal and other works,<sup>65</sup> legal historians know him best as the translator of Van der Linden's *Koopmanshandboek*.<sup>66</sup>

The son of Jan Carel Juta, a Dutch immigrant who became the Registrar of the High Court of the South African Republic in the late 1880s and later a magistrate in the Transvaal Colony, Henry Hubert was the great-nephew of Jan Carel Juta, founder of the publishing house JC Juta & Co – publisher of many of the early law reports – and the nephew of Karl Marx who was his mother Louise's brother. Like so many other reporters, on joining the bar Henry Hubert Juta "did not immediately fall into a large and lucrative practice, but also had to know his days of waiting and struggle", days he put to good use by reporting the decisions of the Cape Supreme Court; he continued doing so for many years, even after he had become a far busier practitioner, and staying up "every night up to one or two he wrote up the Reports".<sup>67</sup>

62 Abbreviated "SC"; eg, *Viviers v Juta & Co* (1902) 19 SC 222.

63 The first four volumes did not cover separate years (vol 1: 1880-1882; vol 2: 1883-1884; vol 3: 1884-1885; vol 4: 1885-1886), but subsequent volumes each covered a single year (vol 5: 1887; vol 6: 1888; and so on).

64 They were therefore formerly sometimes cited as "Juta Reports of SC Cases" (see (1947) 64 SALJ 217) or as "Juta's Supreme Court Reports" (see (1884) 1 Cape LJ 328).

65 Including four volumes entitled *A Selection of Leading Cases for the use of Students and the Profession generally* (vol 1 was reviewed in (1896) 13 Cape LJ 196 as a "useful handbook and synopsis of the law" with "short abstracts of cases" but no full reports), and *Reminiscences of the Western Circuit* (1912).

66 It first appeared in 1884; 2 ed (1891); and eventually a 5 ed (1906).

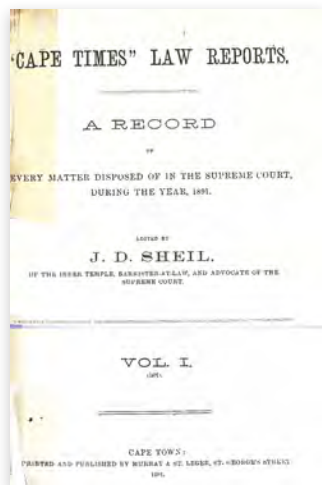
67 See RPB Davis "The Honourable Sir Henry Hubert Juta, Kt" (1915) 32 SALJ 1-10 at 2, 7. See, also, "Recent judicial changes" (1914) 31 SALJ 426; Roberts (n 19) *sv* "Juta, Sir Henry" at 171 and *sv* "Juta, Sir Henricus Hubertus" at 366; Kahn LLL (n 23) at 106-108; Kahn LLE (n 23) at 40, 160-162.



Subsequent volumes in the series of *Supreme Court Reports* were put together and edited by a number of Cape lawyers, many subsequently achieving greater heights and fame. Volume 10 (1893) was compiled and edited by Juta and Clarkson H Tredgold;<sup>68</sup> volumes 11-13 (1894-1896) by Tredgold and WP Buchanan;<sup>69</sup> volumes 14-16 (1897-1900) by WP Buchanan; volumes 17-20 (1900-1903) by WP Buchanan and FG Gardiner;<sup>70</sup> volumes 21-22 (1904-1905) by AF Russell<sup>71</sup> and PS Twentyman Jones;<sup>72</sup> volume 23 (1906) by Russell and BK Long;<sup>73</sup> and volumes 24-27 (1907-1910)<sup>74</sup> by Russell and GM Swift.<sup>75</sup>

- 68 Clarkson Henry Tredgold (1865-1938) became Public Prosecutor in 1898, then in 1900 Solicitor General and in 1903 Attorney General in Southern Rhodesia before serving as a Judge of the High Court there from 1919-1925. He was the author of *A Handbook of Colonial Criminal Law* (1897), 2 ed (1904). His son Robert Clarkson Tredgold was Judge and later Chief Justice of the High Court of Southern Rhodesia and then of the Federation of Rhodesia and Nyasaland before resigning in 1961 in protest at the introduction of repressive legislation. See, further, Roberts (n 19) *sv* "Tredgold, CH" at 306 and *sv* "Tredgold, Sir Clarkson Henry" at 379; Anon "Resignation of the Rt Hon Sir Robert Clarkson Tredgold, Chief Justice of the Federation of Rhodesia and Nyasaland" (1961) 78 *SALJ* 13-14.
- 69 William Porter Buchanan, son of James Buchanan (see at n 55 above), followed in his father's footsteps, practising at the Cape Bar and translating books 30-32 of Voet's *Commentarius* (Cape Town, 1895), 2 ed (Cape Town, 1902). On him, see Roberts (n 19) *sv* "Voet, J" at 325.
- 70 Frederick (Fritz) George Gardiner was a member of the Cape Bar 1897-1910, Attorney General of the Cape from 1910, a Judge in the Cape Provincial Division from 1914 and its Judge President 1926-1935. He was the author with CWH Lansdown of the well known *South African Criminal Law and Procedure* in 2 vols (1917-1919). See, further, Anon "Mr FG Gardiner, KC" (1912) 29 *SALJ* 123-126; Roberts (n 19) *sv* "Gardiner, FG" at 127 and *sv* "Gardiner, Frederick George" at 361; Kahn *LLL* (n 23) at 115; Kahn *LLLE* (n 23) at 114-115.
- 71 Alexander Fraser Russell (1876-1952) was a member of the Cape Bar 1901-1915; Judge of the High Court of Southern Rhodesia 1915-1931 (on his appointment he was at thirty-eight the youngest judge in Southern Africa), and its Chief Justice 1931-1942. See, further, Anon "Personal" (1915) 32 *SALJ* 262; HTL (n 25) observing at 2 that "[h]is work as a reporter, which extended over a period of 13 years, is well-known"; Roberts (n 19) *sv* "Russell, AF" at 271 and *sv* "Russell, Sir Alexander Fraser" at 374; Kahn *LLL* (n 23) at 216-217.
- 72 On Jones, see n 40 above.
- 73 I could find no more on Long than appears from the title page of the relevant volume, namely that he graduated at Oxford and was a member of the Cape Bar.
- 74 In vols 26 and 27, the editors acknowledged the assistance rendered by their colleagues JW (Wessel) Roux and EF Watermeyer in reporting the decisions. EF (Ernest Frederick ("Billy")) Watermeyer, later Judge of the Cape Provincial Division 1922-1937, Judge of Appeal 1937-1943, and Chief Justice 1943-1950, in his earlier years at the bar, like so many other juniors had a hard time of it and was compelled to augment his income by taking on other work. He went on circuit, "did law reporting and examined papers written by candidate attorneys": see Alpha "The late Rt Hon EF Watermeyer" (1958) 75 *SALJ* 232-234 at 234. See, also, GGS "Mr Justice Watermeyer" (1923) 40 *SALJ* 99-105; Roberts (n 19) *sv* "Watermeyer, Ernest Frederick" at 382; Kahn *LLL* (n 23) at 336.
- 75 Gerard Molyneux Swift was a Cape Town advocate who translated book 46 1-3 of Voet's *Commentarius* with HC Payne in 1907; he was also the author of *Cape Divisional Councils and Roads Ordinance Handbook* (Cape Town, 1918), and co-author of *The Cape Municipal Ordinance*, 1912 (Cape Town, 1927): see Roberts (n 19) *sv* "Swift, GM" at 300.

### 3 8 *Cape Times Reports*



Commencing in 1891 and running contemporaneously with the *Supreme Court Reports* until 1910, the *Cape Times Reports*<sup>76</sup> are an important but not always fully utilised source of the decisions of the Cape Supreme Court in the decades on either side of the turn of the century.

The series consist of twenty volumes, each made up of four quarterly parts continuously paginated and then bound in the year after the one covered by the relevant report. These reports are edited reprints of the daily reports of proceedings in the Supreme Court that were published in the *Cape Times* newspaper. Although they largely coincide with the decisions reported in the *Supreme Court Reports*, the *Cape Times Reports* contain many cases not reported elsewhere and even in the case of duplication provide

different and often fuller detail on the decisions and counsels' arguments. At first entitled "*Cape Times*" *Law Reports. A Record of every matter disposed of in the Supreme Court, during the year, 1891*, the title changed to *Reports of All Cases Decided in the Supreme Court of the Cape of Good Hope, during the year 1893*, but reverted to the original title in 1899.

Volumes 1-11 (1891-1901) were reported and edited by JD Sheil. John Devonshire Sheil (1855-1935) practised at the Cape Bar for a few years from 1889 until he was appointed assistant legal adviser in 1896, and then became Judge of the Eastern Districts' Court (1902-1913). Although Sheil had enough work when he commenced practice, he found "progress slow" and in 1891 turned to publishing what were at first known as *Sheil's Reports*.<sup>77</sup> The reports were published by the *Cape Times* newspaper, not by JC Juta & Co which published most of the other Cape reports, and so later became known as the *Cape Times Reports*. Personally prepared and edited for publication by Sheil until his elevation to the Bench, they have been described as containing the "most complete detail as to evidence, argument and judgment" of all the Supreme Court reports.<sup>78</sup>

Subsequent volumes in the series were edited by a number of Cape advocates: volumes 12-17 (1902-1907) by SH Rowson;<sup>79</sup> and volumes 18-20 (1908-1910) by C

76 Abbreviated as "CTR"; eg, *Abrams, Estate of v Industrial Life Assurance Co of South Africa Ltd* (1907) 17 CTR 134.

77 See F St L S "The Honourable Mr Justice JD Sheil" (1937) 54 SALJ 143-145 at 144. See, further, Anon "Notes" (1902) 19 SALJ 313; Anon "Recent judicial changes" (1913) 30 SALJ 330-341; Roberts (n 19) *sv* "Sheil, John Devonshire" at 375.

78 See the review in (1898) 15 *Cape LJ* 109.

79 Samuel H Rowson, who passed the preliminary LLB examination in 1898 alongside Murray Bisset, CJ Langenhoven, Paul Anders and Charles B Smith (see (1898) 15 *Cape LJ* 206, where he is stated to be from Cathcart), translated book 48 4 and 6 of Voet's *Commentarius* in 1902.

Gutsche<sup>80</sup> and GG Sutton.<sup>81</sup> By 1905, though, the standard of editing had declined and the *Cape Times Reports* came in for criticism, it being suggested that “one or two competent and intelligent young advocates” be appointed to eliminate the inaccuracy of the reports produced by lay shorthand-writers and to reduce the delays in reporting.<sup>82</sup>

The *Cape Times Reports* nevertheless remain a valuable supplementary source of information. It may often be worthwhile, if one is commenting on a Cape decision from 1890 to 1910, to ascertain whether it was not also reported in the *Cape Times Reports*, in which case it would invariably have been reported more fully.<sup>83</sup>

### 3 9 *Buchanan’s Appeal Court Reports*

The Cape Appeal Court, hearing appeals from the Cape Supreme Court and the other Cape courts, the Eastern Districts’ Court and the High Court of Griqualand, existed from 1880 to 1886 and again from 1904 to 1910.

The decisions of this court were reported in four volumes, entitled *Cases Decided in the Court of Appeal of the Cape of Good Hope*. The Buchanans<sup>84</sup> were responsible for editing what are generally known as *Buchanan’s Appeal Court Reports*.<sup>85</sup>

Volume 1, covering decisions from 1880 to 1884 and appearing in 1885, was the result of the labours of James Buchanan and EJ Buchanan. Volume 2 (1885-1905)<sup>86</sup> was edited by James, EJ and Douglas M Buchanan;<sup>87</sup> and volume 3 (1906-1909) and volume 4 (1909-1911) were edited by Douglas M Buchanan. Volume 4 also contained decisions

80 Clemens (“Clem”) Gutsche (1876-1947), a member of the Cape Bar 1904-1920, was firstly a Judge of the High Court of South West Africa from 1920-1930 and then a Judge in the Eastern Districts’ Local Division from 1930-1946. After joining the bar, “during the inevitable period of waiting for briefs”, he taught some law classes at the South African College, was permanently appointed to the lecturing staff in 1907 while he continued to practise, and was for a short time in 1919 Dean of the Law Faculty at the University of Cape Town: see Anon “The Hon Mr Justice Gutsche” (1925) 42 SALJ 275-276; and further Roberts (n 19) *sv* “Gutche, Clemens” at 362-363; Kahn LLL (n 23) at 80-82.

81 George Gerhard Sutton (1880-1950) was a member of the Cape Bar 1903-1929, a Judge of the Cape Provincial Division 1929-1946, and Judge President 1946-1948. For many years he lectured on law at the South African College and afterwards at the University of Cape Town. WP Schreiner was his uncle and he married EF Watermeyer’s sister: see, further, GS “Mr Justice Sutton” (1929) 46 SALJ 383-286; Roberts (n 19) *sv* “Sutton, George Gerhard” at 378; Kahn LLL (n 23) at 260-261; Kahn LLE (n 23) at 266-267.

82 See Anon “Law reporting” (1905) 22 SALJ 129.

83 Of assistance in this regard may be the *Digest of the “Cape Times” Law Reports, during the years 1891-1906, vols I-XVI inclusive, with Table of Cases and Index of Titles*, compiled by Robert Inchbold (1908). Presumably this was the same RU Inchbold who occupied a full-time chair in law at the University of Natal in 1910, and on whose death Frank Burchell moved to Pietermaritzburg in 1922: see Ellison Kahn “The birth and life of the *South African Law Journal*” (1983) 100 SALJ 594-641 at 600, observing that Inchbold “contributed little to the development of the law or legal training”.

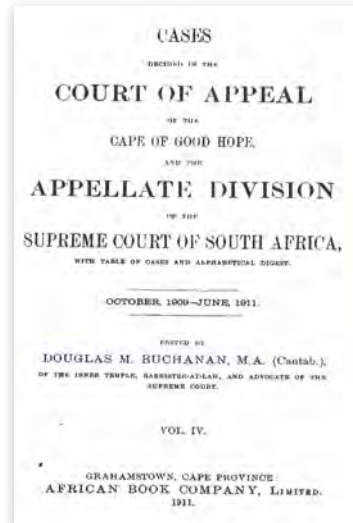
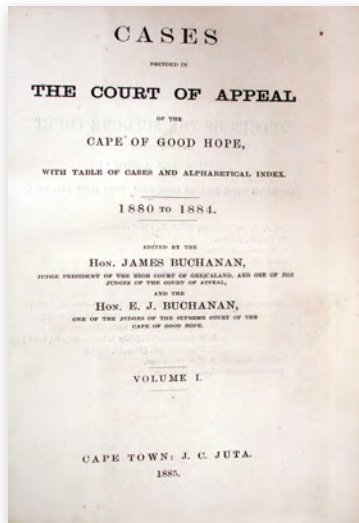
84 On the Buchanans, see nn 55-58 above.

85 Abbreviated “Buch AC” or “BAC”; eg, *Bulawayo Municipality v Bulawayo Waterworks Co Ltd* (1906) 3 Buchanan AC 6, (1908) 3 Buchanan AC 249 (PC).

86 Actually 1885-1886 and 1904-1906.

87 The son of EJ Buchanan and also a Cape Town advocate.

of the newly constituted Appellate Division<sup>88</sup> and a final volume 5 (Jul 1911-Aug 1912), edited by Douglas M Buchanan and ER Roper,<sup>89</sup> continued with reports of some of the Appellate Division decisions of that period.<sup>90</sup>



### 3 10 A chronology of Cape reports up to 1910

It may be useful, at this stage, to set out briefly which periods were covered by the various reports of the decisions of the Cape Supreme Court:<sup>91</sup>

1828 to 1849:	<i>Menzies' Reports</i>
1850 to 1867:	<i>Searle's Reports</i>

- 88 To clarify: vol 3 covered decisions given by the Court of Appeal of the Cape Supreme Court from Aug 1906 until Sep 1909; vol 4 contained decisions of that Court up to May 1910, but also included decisions of the newly created Appellate Division from Oct 1910 to Jun 1911. The Cape Appeal Court decisions of the period 1909-1910 and recorded in vol 4 of Buchanan's Appeal Court Reports were also published in a separate volume entitled *Juta's Cases Decided in the Court of Appeal of the Cape of Good Hope* by AF Russell and WH Stuart. On Russell, see n 71 above. Stuart, a member of the Cape Bar (not to be confused with Henri George Stuart, Free State advocate 1887-1891 and Judge there as from 1896), was the compiler of the *Guide and Index to Cape and Union Statute Law* (Cape Town, 1913).
- 89 Edwin Ridgill Roper (1885-1974) was a member of the Cape Bar 1919-1935, a member of the Johannesburg Bar 1935-1945, Judge of the Transvaal Provincial Division 1945-1955, and then held several judicial appointments in neighbouring countries: see Anon "Mr Justice ER Roper" (1970) 87 SALJ 1-2; Roberts (n 19) *sv* "Roper, ER" at 269; Kahn LLL (n 23) at 215-216.
- 90 On the early Appellate Division decisions appearing in vols 4 and 5 of *Buchanan's Appeal Court Reports*, see Jerold Taitz "The 1912 Appellate Division Reports" (1985) 102 SALJ 181-184, who observes at 182 that there is a considerable difference between the manner in which the cases were reported in *Buchanan's Reports* and that in which they were reported in the Appellate Division's own reports.
- 91 The reports (up to 1895) are usefully listed in Searle & Jones *Consolidated Digest to the Reported Cases in the Courts of the Cape of Good Hope to the 1895* (Cape Town, 1898).

1857:	<i>Watermeyer's Reports</i>
1861 to 1867, 1871 to 1872, 1877 to 1878:	<i>Roscoe's Reports</i>
1868 to 1870, 1873 to 1879:	<i>Buchanan's Reports</i>
January to August 1880:	<i>Foord's Reports</i>
1880 to 1910:	<i>Supreme Court Reports</i>
1891 to 1910:	<i>Cape Times Reports</i>

There are several digests of these reports, both for criminal cases and for civil cases: Victor Sampson's *Criminal Law Decisions and Dicta in the Cape Colony* (1897) with a second volume in 1909;<sup>92</sup> Daniel Ward's *Digest of the Reported Criminal Cases Decided in the Supreme Courts of the Colony of the Cape of Good Hope, from the commencement of the reports to the end of 1896* (1897);<sup>93</sup> and *A Digest of Decisions and Dicta in Civil Cases Heard in the Supreme Court, Cape Colony, from 1850 to 1900 inclusive*, compiled and published in East London in 1907 by attorney Ernest Edward Webb,<sup>94</sup> aided lawyers at the time through the various reports.

## 4 The Eastern Districts' Court

The Eastern Districts of the Cape Colony obtained its own superior court in 1864,<sup>95</sup> with its seat in Grahamstown. It was a local division of the Cape Supreme Court and existed until 1910 when the court became the Eastern Districts' Local Division of the South African Supreme Court.

### 4 1 *Eastern Districts' Court Reports*

The Eastern Districts' Court had no law reports until 1880, and there is a further gap in reporting from July 1887 until March 1891.

The first series of law reports, volumes 1-5, covering 1880 to 1887 and entitled *Cases Decided in the Eastern Districts' Court of the Cape of Good Hope*<sup>96</sup> was the work of that indefatigable reporter EJ Buchanan,<sup>97</sup> then acting and soon to become permanent

92 See the reviews in (1897) 14 *Cape LJ* 228; (1909) 26 *SALJ* 614. Sampson (1855-1940), at first a civil servant, was a member of the Cape Bar 1881-1885 and of the Grahamstown Bar 1885-1898 and 1909-1915, Attorney General of the Cape 1904-1908, and a Judge of the Eastern Districts' Local Division 1915-1925. Apart from his *Digest*, he also translated books 4-6 and 9-10 of Voet's *Commentarius* and a part of Groenewegen's *De legibus abrogatis*: see, further, SB Kitchin "The Hon Victor Sampson" (1915) 32 *SALJ* 313-314; Roberts (n 19) *sv* "Sampson, Victor" at 374; Kahn *LLLE* (n 23) at 247.

93 Ward (1848-1926) wrote books on tax and parliamentary election practices while at the English Bar. He became a member of the Cape Bar in 1894 and was a Judge in the Orange Free State 1904-1923. He authored books on the marriage laws of the Cape (1897) and the laws of Bechuanaland (1893-1895), and received a doctorate from the University of Cape Town: see, further, Anon "The Honourable Daniel Ward" (1915) 32 *SALJ* 123-127; Roberts (n 19) *sv* "Ward, Daniel" at 381-382.

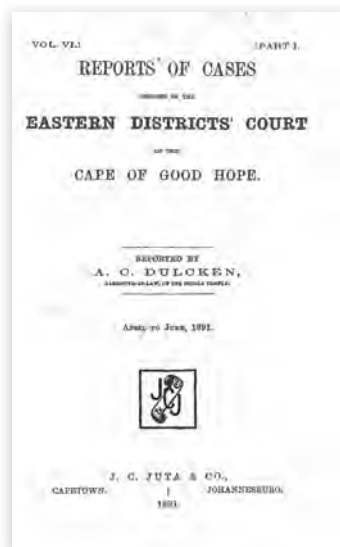
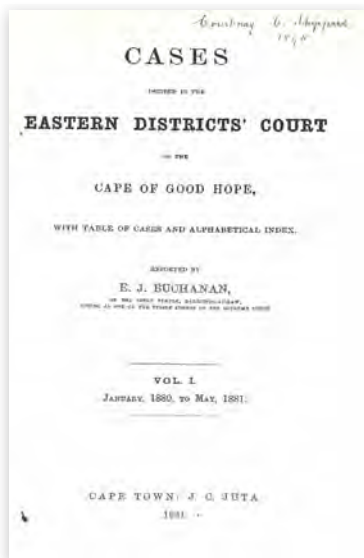
94 The work was said in its preface to be a continuation of Buchanan's "Digest of Menzies", but a review in (1910) 27 *SALJ* 165 criticized it for being limited to decisions of the Supreme Court, to civil cases, and for excluding decisions reported in *Menzies' Reports*.

95 See, further, Anon "Centenary of the establishment of a Supreme Court in the Eastern Cape" (1964) 81 *SALJ* 438-448.

96 Abbreviated "EDC"; eg, *Juridini v Deutsche Ost-Afrika Linie* (1905) 19 EDC 74.

97 See again n 58 above.

Puisne Judge in the Eastern Districts' Court, having been assigned there in May 1880. The *Reports*, referred to initially as *Buchanan's Eastern Districts' Court Reports*,<sup>98</sup> were described as having been compiled and edited with "care and accuracy".<sup>99</sup>



On Buchanan being transferred to the Cape Supreme Court Bench, his task as reporter of the Eastern Districts' Court decisions was, after an unfortunate gap of almost four years, shouldered by a succession of local legal luminaries. Volumes 6-8 (1891-1894) were edited by A Dulcken,<sup>100</sup> Robert M King<sup>101</sup> was responsible for volumes 9-15 (1894-1901), and Marwood Tucker<sup>102</sup> edited volume 16 (1901-1902). From volume 17 (1904),<sup>103</sup> Percival C Gane of Huber and Voet fame<sup>104</sup> took over, continuing until 1909.<sup>105</sup>

98 See the review in (1884) 1 *Cape LJ* 170.

99 See Anon (n 58) at 112.

100 Whom we will meet again when considering the law reports of Natal: see n 125 below.

101 Robert Macfarland King (1862-1903), a member of the Irish Bar for two years, came to the Cape for reasons of health in 1890 and was a member of the Grahamstown Bar 1890-1903: see Anon "The late Robert M King, KC" (1904) 21 *SALJ* 1-5.

102 Tucker acted as Solicitor General from April to September 1904 and in that capacity probably welcomed Judge JG Kotzé on his appointment as Judge President of the Eastern Districts' Court in July of that year: see (1904) 21 *SALJ* 322.

103 Which, as the reporter's note explains, was published only after the next two volumes since it was only compiled in 1906. Vol 18, 1904, published in 1905, explained why vol 17 had stood over. Gane probably came to the task late, deciding to report the most recent decisions first and returning to the older ones later when he had more time.

104 Percival Carleton Gane was a member of the Cape and Transvaal bars from 1903, and after a number of acting appointments he became Judge of the Eastern District's Local Division in 1934. He translated the 5 ed of Huber's *Hedendaegsche rechtsgeleerdheyt* (1939) and later also produced a seven-volume translation of Voet's *Commentarius ad Pandectas* (Durban, 1955-1958): see Roberts (n 19) *sv* "Gane, P" at 127 and *sv* "Gane, Percival Carleton" at 361.

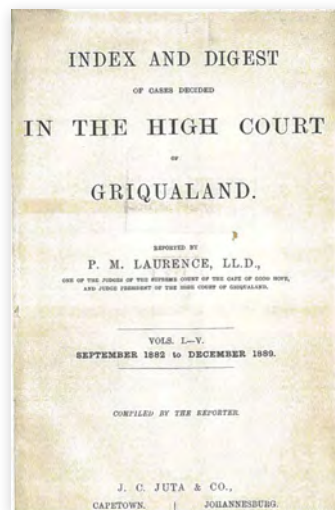
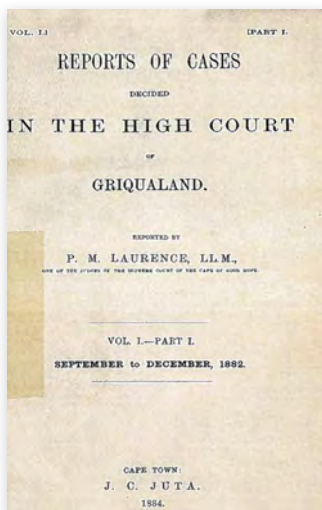
105 The last volume to be numbered was vol 19, 1905, those appearing subsequently only indicated the year covered. The *Eastern Districts' Court Reports* ceased in 1909, the reports for Jan-May 1910 being



## 5 The High Court of Griqualand

A High Court was established in Kimberley in 1871. In 1880 the territory of Griqualand was annexed by the Cape and the Recorder of the existing court was accorded the status of an additional Puisne Judge of the Cape Supreme Court. The Cape Supreme Court was given concurrent jurisdiction in Griqualand, and the Griqualand High Court in effect became another local division of the Cape Supreme Court. Its relationship to the Cape Court was similar to that of the Eastern Districts' Court. Initially a three-judge court, a reduced case-load caused the High Court to be reduced to having a single judge in 1907.

### 5.1 *Reports of the High Court of Griqualand*



Reports of the decisions of the High Court in Kimberley appeared only from 1892 onwards, and were then published without interruption until 1910 when the court became the Griqualand West Local Division of the South African Supreme Court.

The first five volumes of the *Reports of Cases Decided in the High Court of Griqualand*<sup>106</sup> were compiled by one of the court's judges, PM Laurence. They were published in several periodic parts which were then bound in annual, bi-, or multi-annual volumes. Volume 1 covered decisions delivered from 1882 to 1883;<sup>107</sup> volume 2: 1883 to 1884;<sup>108</sup> volume 3: 1884 to 1885; volume 4: 1886 to 1887; and volume 5: 1888 to 1889. In 1890, together with the last volume, an *Index and Digest of Cases Decided in*

included in the reports of the Eastern Districts' Local Division, vol 1, 1910.

106 Abbreviated "HCG"; eg, *Makonto v M'Dabankulu* 1890 HCG 244.

107 The reviewer of vol 1 in (1884) 1 *Cape LJ* 327 regretted that cases decided in the "old High Court" had not also been included, but nevertheless considered the volume to contain "full and elaborate" reports that had been "carefully prepared".

108 In producing vol 2, Laurence was assisted by William Musgrove Hopley (1853-1919), then practising at the Kimberley Bar until he was appointed to the Bench there in 1892: see, further, SB Kitchin

*the High Court of Griqualand, reported by PM Laurence, vols I-V, Sep 1882-Dec 1889* also appeared.

Perceval Maitland Laurence (1854-1930), an author,<sup>109</sup> classical scholar, educationalist, and pioneer of public libraries (he founded the Kimberly Public Library, described at the time as “one of the leading institutions of its kind in the British Colonial world”,<sup>110</sup> and also compiled its catalogue which appeared in 1891), was a member of the Kimberley Bar from 1881 to 1882, a Judge of the High Court of Griqualand from 1882 to 1888, and its Judge President from 1888 to 1910. On his retirement from the Bench, his contribution as law reporter was described as remaining, “together with his judgments in some of the Supreme Court reports, as a monument of his judicial industry and research”.<sup>111</sup>

Being frequently away from Kimberley on judicial business meant that Laurence could not continue his full-time involvement in the *Reports*. Other local lawyers had to assist. Volume 6 (1890-1892) was reported by FJ (Francis) Collinson;<sup>112</sup> volume 7 (1893-1894) by H Burton;<sup>113</sup> volume 8 (1895-1898) by Laurence and Burton; volume 9 (1899-1904) again by Laurence alone; and volume 10 (1905-1910)<sup>114</sup> by SB Kitchin.<sup>115</sup>

## 6 The Supreme Court of Natal

The territory of Natal had a district court as from 1845, with appeals going to the Cape Supreme Court. The Natal Supreme Court was established in 1857 and started functioning in April of the following year. Its decisions were reported from the outset.

“The Hon William Musgrove Hopley” (1914) 31 *SALJ* 245-250; Roberts (n 19) *sv* “Hopley, William Musgrave” at 364.

109 His *Collectanea Essays, Addresses and Reviews* appeared in London in 1899; *On Circuit in Kaf-[i]rland and Other Sketches and Studies* in 1903; *Problems of a Closer Union Precedents for South Africa A Plea for Thought* in 1908; and *The Life of John Xavier Merriman* in 1930.

110 See Anon “The Hon Mr Justice PM Laurence” (1901) 18 *SALJ* 114-126 at 123-124.

111 See Anon “Recent judicial changes” (1913) 30 *SALJ* 204-205; and further Roberts (n 19) *sv* “Laurence, Perceval M” at 182 and *sv* “Laurence, Sir Percival [sic] Maitland” at 369; Kahn *LLL* (n 23) at 133-134.

112 Collinson was an advocate in Kimberley and subsequently practised in the Transvaal from 1903 onwards. He wrote “The administration of justice in Zanzibar” (1898) 15 *Cape LJ* 171-174, in which he drew a parallel with the procedure in appeals from Kimberley to Cape Town and at the end of which he is described as an “Assistant Judge”, possibly of the court in Zanzibar which had such an officer.

113 Henry Burton (1866-1935) was registrar to Judge Laurence in Kimberley for about four years from 1888, during which time he studied law; after qualifying he commenced practice at the local bar, but moved to Cape Town in 1899 to practise there. See Anon “Henry Burton, BA, LLB, KC, MLA” (1908) 25 *SALJ* 393-395.

114 The reporter observed in his preface that this “completes the Reports of the High Court of Griqualand properly so called”.

115 Shepherd Braithwaite Kitchin practised as an advocate in Kimberley. He authored *A History of Divorce* (Cape Town, 1912) (reviewed in (1912) 29 *SALJ* 134), and its publication by Juta & Co may have persuaded that company to appoint him as editor of the *SALJ*. He held that post from 1913-1918, during which time he contributed several pieces to it. See, further, “The editorship” (1918) 35 *SALJ* 298; Kahn (n 83) at 605; Roberts (n 19) *sv* “Kitchin, SB” at 177.

## 6 1 *Phipson's Reports*

The very scarce *Reports of Cases in the Supreme Court of Natal*<sup>116</sup> by Thomas Phipson cover the period May 1858 to July 1859. Consisting of only forty-eight pages, they “contain little of legal interest”.<sup>117</sup>

Phipson<sup>118</sup> (1815-1876), who had arrived in the colony of Natal from England in 1849, was its Sheriff from 1852 until 1861, and is best remembered for his infamous quarrel with the Supreme Court Judges – Walter Harding the Chief, Henry Lushington Phillips,<sup>119</sup> and Henry Connor – after they had criticised his *Reports*, and also for the large volume of correspondence and letters to newspapers he left behind.

## 6 2 *Finnemore's Notes and Digest*

*Finnemore's Notes and Digest of the Principal Decisions of the [Natal] Supreme Court*<sup>120</sup> appeared in five parts from 1880 to 1881. They covered decisions delivered from 1860 to 1867. There is a gap from July 1865 until 1866. It is stated in the preface that the work is based on the notes of one of the Judges of the Supreme Court, most probably those of Henry Connor who graced the Natal Bench for thirty-three years from 1857 and was Chief Justice from 1874.

Robert Isaac Finnemore as an immigrant travelled in the *Minerva*, which was shipwrecked at Port Natal (later Durban) in 1850. Finnemore was a public servant from 1859 to 1865 and a member of the Attorney General's office before he was admitted to the Natal Bar as advocate and attorney from 1865 until 1868. Filling many judicial posts, including that of magistrate, Crown Solicitor, legislative draftsman, and Master of the Supreme Court, he was a Judge in that Court from 1896 to 1904.<sup>121</sup>

## 6 3 *Natal Law Reports (Old Series)*

The first series of reports of the Natal Supreme Court was the work of William Boase Morcom (1846-1910), a Pietermaritzburg advocate. Reprinted from the *Times of Natal*, the *Natal Law Reports (Old Series)*<sup>122</sup> cover the period 1867 to 1872 in five multi-part volumes: July 1867 to November 1868, 1869, 1870, 1871 and 1872.

116 Abbreviated “Phipson” or “Phip”.

117 Kahn “Phipson's Reports” (n 28).

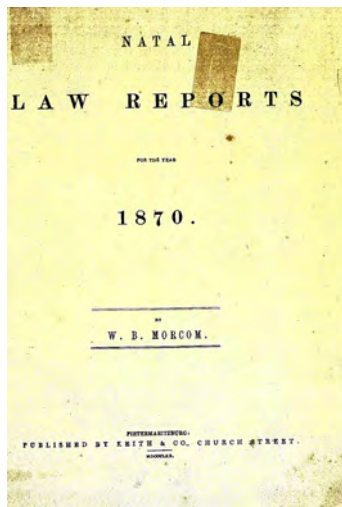
118 On Phipson, see RN Currey (ed) *Letters & Other Writings of a Natal Sheriff Thomas Phipson 1815-76* (Cape Town, 1968) (hereafter Currey *Letters*); Ellison Kahn “Thomas Phipson's feud with the Natal judges” (1970) 87 *SALJ* 364; RN Currey “Correspondence” (1971) 88 *SALJ* 125; Kahn “Solution” (n 28) at 189-190.

119 Phillips, first Puisne Judge of Natal at the time of the Phipson polemic, at first co-operated in producing the *Reports*, but then apparently lost interest: see Currey *Letters* (n 118) at 231.

120 Abbreviated “Finnemore” or “FND”; eg, *Rutherford v Lupkes* 1864 FND 21; The “*Bermondsey*” 1864 FND 58.

121 See Roberts (n 19) *sv* “Finnemore, Robert Isaac” at 360; Kahn “Solution” (n 28) at 190.

122 Abbreviated “NLR (OS)” and also referred to as “Morcom”; eg, *Natal Fire Assurance & Trust Co, Official Manager of v Loveday & De Kock* 1869 NLR (OS) 93.



An immigrant to the colony in 1861 and admitted as an advocate in 1878, Morcom was Attorney General of the Transvaal during the British Occupation from 1880 to 1881 and later also Attorney General in Natal from 1889 to 1893. In addition to his work as law reporter, Morcom was also the author of *Rules of the Supreme Court of Natal* (1880) and also translated book 26 7 of Voet's *Commentarius* (1895).<sup>123</sup>

#### 6 4 *Natal Law Reports*

The *Natal Law Reports*<sup>124</sup> cover the decisions of the Supreme Court from 1873 to 1879 in six volumes, published in 1881. The preface to volume 1 explained that the old series of the Court's reports had terminated in December 1872, while the new series commenced only in November 1879. This

collection – the annual issues, only one of which exceeds forty pages, are usually bound together in a single volume, which therefore has no continuous pagination – was intended to gather together most of the important decisions rendered in the intermediate period.

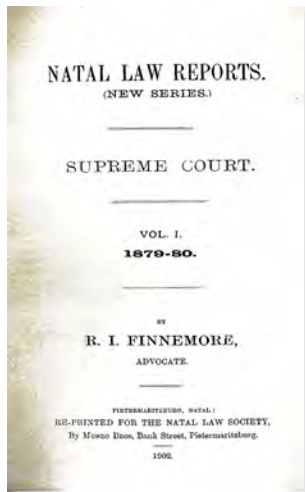
The first volume, that for 1873, was edited by Finnemore, and the remaining five volumes, 1874 to 1879, by Albert C Dulcken, an advocate who subsequently also reported decisions of the Eastern Districts' Court.<sup>125</sup>

123 See Roberts (n 19) *sv* "Morcom, WB" at 217; Kahn "Solution" (n 28) at 189-190; *The Natal Who's Who* (Durban, 1906) at 141, from which it appears that Morcom's brother, Richard Francis Morcom, was admitted as an attorney in 1878 and as an advocate in 1882; there was also a Horace Beauchamp Morcom, who was admitted as an attorney in 1906.

124 Abbreviated "NLR"; eg, *Re Natal Fire Assurance & Trust Co* 1873 NLR 21.

125 See n 100 above. Dulcken also wrote "Appeals in Native cases" (1891) 8 *Cape LJ* 204-210.

## 6 5 *Natal Law Reports (New Series)*



The main series of Natal reports are the *Natal Law Reports (New Series)*.<sup>126</sup> They commenced in 1879 and continued until 1932. A list of the reporters involved in the series until 1910 reads like a roll call of leading Natal legal personalities from the era.<sup>127</sup>

Finnemore was responsible for volume 1 (1879-1880) and also, together with Dulcken, for volume 2 (1880-1881). Dulcken was also involved in volume 3 (1882) and volumes 7-10 (1886-1889), the last two of these with WTH Frost.<sup>128</sup>

Arthur Weir Mason edited volumes 4-6 (1883-1885).<sup>129</sup> Admitted as an attorney in 1881 and as an advocate in 1884, Mason practised in Durban for a short while and then joined the firm of Hathorn<sup>130</sup> and

Mason in Pietermaritzburg. Appointed as a Judge in Natal in 1896, he was transferred to the Transvaal Supreme Court in 1902 and eventually became the Judge President of the Transvaal Provincial Division from 1923 to 1924.<sup>131</sup>

The reporter for volumes 11-17 (1890-1896) of the *Natal Law Reports (NS)* was William Broome (1852-1930). A sometime gold digger in the Eastern Transvaal, civil servant in Natal from 1875 to 1882, Broome was admitted as an advocate in 1882, returned to the civil service from 1885 to 1888, was magistrate of Newcastle from 1888 to 1889, Master and Registrar of the Natal Supreme Court from 1889 to 1907, and Chief

126 Abbreviated “NLR (NS)” or just “NLR”; eg, *In re Mutual Life Insurance Co of New York* (1895) 16 NLR 120.

127 Each volume of the *Natal Law Reports* also usefully contains a list not only of the judges on the Bench at the time (this is in fact a common feature of all South African reports), but also of the practitioners in the colony. Some of the biographical information mentioned here was obtained from those lists.

128 William Thomas Hyde Frost was admitted as an attorney in the Transvaal in 1885 and practised mainly in Johannesburg in the firm Frost, Mulligan and Routledge, Mulligan being the well-known George Angus Mulligan (1870-1960), Johannesburg attorney 1897-1914, and member of the local bar 1915-1960: see Kahn *LLL* (n 23) at 190-193.

129 In the review of vol 4 in (1884) 1 *Cape LJ* 274-276, there is an oblique reference to the quality of the headnotes.

130 Kenneth Howard Hathorn (1849-1933), later Judge in the Natal Provincial Division 1910-1926: see Roberts (n 19) *sv* “Hathorn, Kenneth Howard” at 363; TBH “Mr Justice KH Hathorn” (1927) 44 *SALJ* 1-6.

131 He also translated book 20 1 of Voet’s *Commentarius* in 1891 and authored “A Native law suit in Natal” (1891) 8 *Cape LJ* 144. See, further, Roberts (n 19) *sv* “Mason, Sir AW” at 203 and *sv* “Mason, Sir Arthur Weir” at 371; Anon “The Hon AW Mason” (1916) 33 *SALJ* 1-5.

Magistrate of Durban from 1897 to 1900 and from 1902 to 1904.<sup>132</sup> He was elevated to the Natal Bench in 1904 and retired in 1917.<sup>133</sup>

After WE Pitcher<sup>134</sup> had produced volume 18 (1897), WS Bigby edited volumes 19-25 (1898-1904) and also the first half of volume 26 (1905). William Scott Bigby, English-trained (he obtained an LLM at Cambridge) was admitted as a Natal advocate in 1898. A note in the *Cape Law Journal* in 1900<sup>135</sup> explained that the delay in the inclusion in that journal of reports of Natal decisions was not the fault of Bigby, “the reporter”. He had been confined in Ladysmith during the siege of that town, where he then also contracted enteric fever. “He is now convalescent”, the note continues, “but it must have been an effort on his part to supply us with the batch of reports which we publish today. We sincerely congratulate Mr Bigby upon his escape and his recovery.”<sup>136</sup>

DB Pattison<sup>137</sup> was the reporter for the second half of volume 26 (1905) and, with H Murray, for volume 27 (1906). Herbert Murray<sup>138</sup> looked after the last pre-Union volumes of the *Natal Law Reports*, volumes 28-30 (1907-1909),<sup>139</sup> and continued being involved with reporting until 1916.

For guidance on the *Natal Law Reports*, practitioners could turn to PE Coakes<sup>140</sup> *Digest of Decisions and Dicta of the Supreme Court, Natal 1873-1887*, which appeared

132 In the interim Broome acted as a commissioner, with James Smith and Arthur Weir Mason, of the Special Court for the trial of persons accused of treason during the Anglo-Boer War: see John Dugard “The political trial: Some special considerations” (1974) 91 *SALJ* 59-72 at 61 n 11.

133 See, further, *Natal Who's Who* (n 123) at 31; Roberts (n 19) *sv* “Broome, William” at 351; Kahn *LLL* (n 23) at 14-15; Ellison Kahn “The appointment of magistrates as judges” (1971) 88 *SALJ* 512-516 at 514. William Broome’s son, Francis (Frank) Napier Broome (1891-1980), was also a Judge in Natal 1939-1950 and then Judge President until 1961: see Kahn *LLL* (n 23) at 10, 209, 225-226; Kahn *LLLE* (n 23) at 66-67; Anon “Retirement of Mr Justice FN Broome” (1961) 78 *SALJ* 133; Anon “The late Hon Francis Napier Broome” (1980) 97 *SALJ* 296-299.

134 William Edward Pitcher (born 1857 in London, came to Natal in 1875) was admitted as an attorney in 1880 and as an advocate in 1883. There was also a contemporary Pietermaritzburg attorney called Edmund William Pitcher (born in 1859 in London, who came to Natal in 1877): see *Natal Who's Who* (n 123) at 158. They were seemingly not related, even if curiously enough William Edward’s father was called William Edmund. To confuse matters further, mention is made (in Anon “William Burne, KC” (1937) 54 *SALJ* 423-426 at 424) of a William Edmund Pitcher who became a leading Natal advocate.

135 (1900) 17 *Cape LJ* 103.

136 As regards the *Law Reports* themselves, a review of vol 21, parts 2-5, Mar-Sep 1900 in (1901) 18 *SALJ* 216 explained that Bigby was “rapidly bringing his reports up to date”; see, also, (1901) 18 *SALJ* 310, stating that the publication of vol 21, part 6, Nov 1900 “completes the volume, with index, ready for binding”.

137 David Ballingall Pattison, who had obtained the MA and LLB at Glasgow, and then an LLB at the Cape, was admitted as an attorney in Natal and in the Transvaal in 1906.

138 Murray (b 1871, in Cape Town) was admitted as an attorney in 1892 and practised in Pietermaritzburg from 1880. He was president of the local Juridical Society 1905-1906 and also a member of the Committee of the Natal Law Society: see *Natal Who's Who* (n 123) at 145.

139 In vol 31: 1910, Murray combined coverage of decisions of the Natal Supreme Court Jan-May 1910 with those of the Natal Provincial Division Jun-Dec 1910.

140 Percy Evans Coakes was admitted as an attorney in Natal in 1887. In 1904 he failed in an attempt to be admitted in the Free State where he wished to open a branch office, because he had not acquired

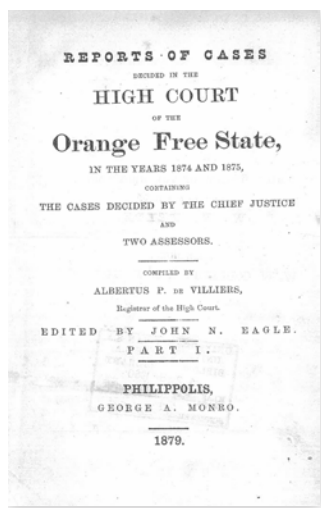


in 1889, and to the more comprehensive *Digest of the Natal Law Reports* in two volumes, the one covering 1858 to 1893 and the other 1894 to 1901, published in 1896 and edited by William Broome. Broome's *Digest*, usefully listing the various Natal reports, incorporated references to decisions reported in *Phipson's Reports* (May 1858-Jul 1859); *Finnemore's Notes and Digest* (Jan 1860-Jan 1867); *Morcom's Reports* (Jul 1867-1872); *Finnemore's Selected Cases* (1873-1879); and volumes 1-14 of the *New Series* (Nov 1879-1893). A further volume of Broome's *Digest*, covering volumes 15-22 (1894-1901) of the *New Series*, appeared in 1903.<sup>141</sup>

## 7 The High Court of the Orange Free State and the Orange River Colony

The High Court (Hooge Gerechtshof) of the Orange Free State was established in 1874. After the British annexation, a restructured High Court of the Orange River Colony continued to administer justice until it was converted into the Orange Free State Provincial Division of the Supreme Court of South Africa in 1910.

### 7 1 Reports of the High Court of the Orange Free State



The first series of reports for the Orange Free State, entitled *Reports of Cases Decided in the High Court of the Orange Free State in the years ...*,<sup>142</sup> was compiled by Albertus P de Villiers, Registrar of the Court, and after he had been transferred, edited by publisher John N Eagle, and was published in Philippolis from 1879 to 1880. There were three volumes: volume 1 (1874-1875); volume 2 (1876); and volume 3 (1877-1878). The editor explained that the format of the reports followed those of Menzies and Buchanan in the Cape. The pagination is rather erratic.

The period from 1879 to 1883 was covered by the four-volume *Zaken Beslist in Hooge Gerechtshof van den Oranjevrijstaat gedurende het jaar ...*,<sup>143</sup> published in Bloemfontein from 1880 to 1883. The volumes reported cases decided in 1879, 1880, 1881 to 1882, and 1883 respectively.

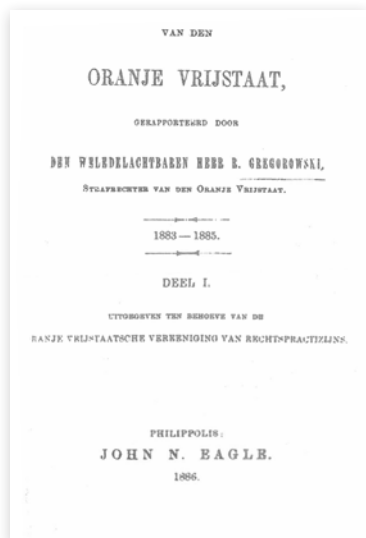
nor had any intention of acquiring a domicile there: see Anon "Admission of attorneys in the Orange River Colony" (1904) 21 SALJ 448. See, also, Roberts (n 19) *sv* "Coakes, PE" at 79.

141 There was also the *Commentaries on the Reported Decisions of the Courts of South Africa*, by FA Laughton, a Natal advocate, published in 1895, which commented on Cape and Natal decisions (on the topic of husband and wife only), referred to "text writers" and was aimed at law students.

142 Abbreviated "OFS".

143 Also abbreviated "OFS"; eg, *Rabie v Neebe* 1879 OFS 5.

## 7 2 Gregorowski's Reports



The third series of law reports of the Orange Free State High Court was the fruit of the labours of Reinhold Gregorowski. Entitled *Zaken Beslist in het Hoog Gerechtshof van den Oranje Vrijstaat*,<sup>144</sup> it reported cases from 1883 to 1887 in two volumes, volume 1 (1883-1885);<sup>145</sup> and volume 2 (1886-1887).

Gregorowski (1856-1922) had a checkered legal career. He was a member of the Cape Bar from 1878 to 1881. In 1881, at the age of twenty-five, he was appointed as a Judge in the Free State High Court. He continued in that role until he resigned in 1892, when he became State Attorney with the right to private practice. In 1894 he returned to full-time private practice until he was appointed, on Melius de Villiers' refusing the appointment, as an acting Judge of the High Court

of the South African Republic from 1896 to 1897 to preside over the controversial trial of the "Reformers" stemming from the Jameson raid: he sentenced the principal accused, including Frank Rhodes, brother of Cecil, to death for high treason; these sentences were later commuted. From 1897 to 1898 he was State Attorney of the South African Republic (he was succeeded by JC Smuts) and then, on the resignation of JG Kotzé, he became a Judge on its Bench from 1898 to 1900. After the Anglo-Boer War, Gregorowski again practised as a member of the Pretoria Bar from 1902 to 1913 and was then a Judge of the Transvaal Provincial Division from 1913 to 1922.<sup>146</sup>

## 7 3 Reports of the High Court of the Orange River Colony

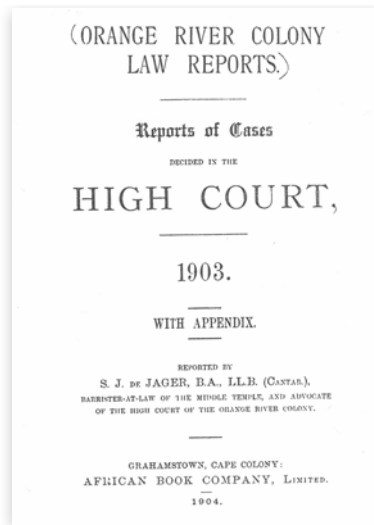
After the early series of privately produced reports, the High Court of the Orange River Colony lacked law reports from 1888 until 1902. The *Orange River Colony Law Reports. Reports of Cases Decided in the High Court*<sup>147</sup> commenced in 1903 and continued until the Court became the Orange Free State Provincial Division of the Supreme Court of South Africa in 1910.

144 Abbreviated "Greg"; eg, *In re de Villiers* (1886-1887) 2 Greg [OFS] 52.

145 Volume 1 was printed in Philippolis in 1886, by John Eagle, a medical doctor there who had a little printing press (see Roberts (n 19) *sv* "Eagle, John N" at 112); vol 2 appeared in Bloemfontein in 1893.

146 See, further, (1900) 17 *Cape LJ* 164; Anon (n 111) 204; Anon "Mr Justice Gregorowski" (1921) 38 *SALJ* 1; Roberts (n 19) *sv* "Gregorowski, Reinhold" at 362; Kahn *LLL* (n 23) at 75-76; Kahn *LLLE* (n 23) at 123.

147 Abbreviated "ORC"; eg, *Boyd v Manchester Assurance Co* 1905 ORC 26.



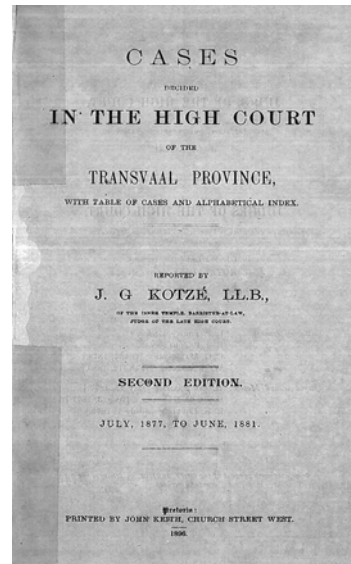
Two reporters were involved, SJ de Jager from 1903 to 1906,<sup>148</sup> and RC Streeten from 1907 to 1910.<sup>149</sup> Samuel James de Jager was English-trained and a Bloemfontein advocate. As Attorney General he represented the Free State at the Conference of South Africa bars in January 1910 and again in July 1911.<sup>150</sup> Reginald Craufurd Streeten was a Bloemfontein advocate who for many years reported the decisions of both the Orange Free State Provincial Division and the Appellate Division.<sup>151</sup>

## 8 The High Court of the Transvaal and of the South African Republic; the Transvaal Supreme Court; the Witwatersrand High Court

A High Court of Justice was established in the Transvaal in 1877 during the British occupation. Becoming the High Court of the South African Republic in 1881, it was replaced after the Anglo-Boer War by the Transvaal Supreme Court in Pretoria and the Witwatersrand High Court in Johannesburg. The latter two courts became the Transvaal Provincial Division and the Witwatersrand Local Division respectively of the Supreme Court of South Africa in 1910.

### 8 1 Kotzé's Reports

Judge John Gilbert Kotzé reported the decisions delivered by the Transvaal High Court during the British Occupation when he was first Puisne Judge.<sup>152</sup> Entitled *Cases Decided in the High Court of the Transvaal Province, with table of cases and*



148 The 1904 volume was announced in (1905) 22 SALJ 478 as containing all reportable cases decided in the High Court of the Orange River Colony and as being bound in “half-calf in office pattern”.

149 Reports for Jan-May 1910 were included in the 1910 volume of the OPD Reports.

150 See Selvan (n 24) at 117.

151 He was the contributor of “Free State notes” in (1920) 37 SALJ 49-54.

152 JP de Wet was Chief Justice (on whom, see WG Schulze “‘One JP de Wet’: South Africa’s first judicial export?” (2010) 16(2) *Fundamina* 98-120) and luminaries such as EJP Jorissen, CG Maasdorp and WB Morcom served as attorneys general during that period, while Henry Rider Haggard of *King Solomon’s Mines* (1885) fame was the court’s Registrar and Master from Aug 1877-Jul 1879.

*alphabetical index*,<sup>153</sup> it covered decisions from July 1877 to June 1881. The first edition appeared in Pretoria in 1885,<sup>154</sup> with subsequent editions in 1886 and 1912.

## 8 2 *Reports of the High Court of the South African Republic*

First commenced in Dutch as *Zaken in de Hoog Gerechtshof van de Zuid Afrikaansche Republiek*, these reports are better known as *Reports of Cases Decided in the Supreme Court of the South African Republic (Transvaal)*.<sup>155</sup> They cover the period 1881 to 1892, were first published in 1893 and are also found in reprinted versions.

Volume 1 (Aug 1881-Dec 1884) was reported by JG Kotzé and appeared in Dutch in 1893, but was translated in 1894; the following volumes are all in English: volume 2 (Jan 1885-Dec 1888)<sup>156</sup> by Kotze and SH Barber; and volumes 3 (1889-1890) and 4 (1891-1892) by Barber and WA Macfadyen. In both the last two volumes, Kotzé, who had in the meantime been appointed as Chief Justice of the Court, is thanked for his interest and the trouble he had taken in reviewing the work.

Johannes Gysbert (Sir John Gilbert) Kotzé (1849-1940) was a member of the Cape Bar from 1874 to 1876 and a member of the Grahamstown Bar from 1876 to 1877 (while there, he translated a large portion of Leeuwen's *Het Roomsche-Hollandsch recht* which later, in 1881, appeared as *Commentaries on Roman-Dutch Law*<sup>157</sup>) before he was appointed as a Judge on the High Court of the South African Republic, aged just twenty-seven. He continued in that role during and after the British occupation and became Chief Justice in 1881. Dissatisfied with Kruger's dismissive attitude towards the judiciary, he accepted the first puisne judgeship of the new High Court of Griqualand, but was eventually persuaded not to resign. With him on the Bench were PW Burgers, senior Puisne Judge as from December 1882, and CJ Brand, junior Puisne Judge as from January 1883. Both were, like Kotzé, English-trained lawyers. In 1886, Kruger's interference in the *Nellmapius* case<sup>158</sup> led to the resignation of Brand. Constant clashes between Kruger, who in 1897 sought to limit the independence of the High Court and its power to question the validity of laws passed by the Volksraad, and the Bench under the leadership of Kotzé, resulted in Kotzé's resignation in 1898 after his decision in *Brown v Leyds*.<sup>159</sup>

153 Abbreviated as "Kotzé" and also referred to as "Kotzé's Transvaal Reports"; eg, *R v Fleischman & Another* 1880 Kotzé 172.

154 It was announced in (1885) 2 *Cape LJ* 336 with a remark on the *lacuna* from Dec 1880 to Apr 1881.

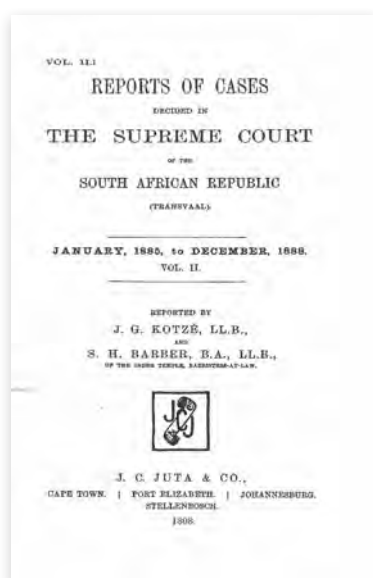
155 Abbreviated as "SAR"; eg, *Israel Bros v Northern Assurance Co & Union Assurance Society* (1892) 4 SAR 175.

156 Its prefatory note explains that, like vol 1, it did not contain all the cases decided in the Supreme Court during the years covered, but that the editors had selected those bearing on points of law or practice likely to prove of use and interest to the profession.

157 The significance of this is that Leeuwen's work was, together with Grotius's *Inleidinge tot de Hollandsche rechtsgeleerdheid*, mentioned in the 1859 Constitution of the South African Republic as a subsidiary source of the law in cases where Van der Linden's *Koopmanshandboek* did not provide a solution.

158 *S v Nellmapius* (1886) 2 SAR 121.

159 (1897) 4 OR 17.



Kotzé then joined the Transvaal Bar for a short period of nine months from 1898 to 1899, became Attorney General of Southern Rhodesia in 1900, and Judge of the Eastern Districts' Court in 1903. He was its Judge President from 1904 to 1913, Judge President of the Cape Provincial Division from 1920 to 1922, and Judge of Appeal in Bloemfontein from 1922 to 1927. A prolific author,<sup>160</sup> one of the few judges of quality in the Transvaal before 1900, Kotzé was a champion of Roman-Dutch law, advocating codification to ensure its survival in South Africa.

Sydney Hilton Barber<sup>161</sup> (1869-1906) was an advocate at the Cape and later the Transvaal bars before he became a law adviser to the Transvaal government. He was the translator, with Macfadyen, of book 4 of Leeuwen's *Censura forensis* (1896),<sup>162</sup> and, with Macfadyen and JHL Findlay, translator of *Statute Law of the Transvaal* (1901). He also wrote *Transvaal Gold*

*Law* published in 1899, with a further edition in 1902, which contained what were known as *Barber's Gold Law Reports*.<sup>163</sup>

William Allison Macfadyen (1865-1924), a Manchurian, was a multi-talented lawyer, academic and author. He obtained an MA at Oxford and then passed the final LLB exam at the Cape in 1892.<sup>164</sup> A member of first the Cape and then the Transvaal bars, he wrote *Political Laws of the South African Republic, with an appendix containing the Constitution of the Orange Free State* (1896) and translated part of Leeuwen's *Censura forensis* with SH Barber,<sup>165</sup> advised Alfred Milner on educational matters, and taught

<sup>160</sup> In addition to his work as a law reporter in the Transvaal, he was also the compiler, with Fred Jeppe, of *Transvaal Statute Law 1845-1885, De locale wetten der Zuid-Afrikaansche Republiek, 1849-1885* (Pretoria, 1887). He published several major contributions on Roman-Dutch law in the *Cape LJ* and the *SALJ* – particularly noteworthy are his lengthy reviews of Wessels' *History of the Roman-Dutch Law* (Grahamstown, 1908) which, as Roberts (n 19) *sv* "Kotzé, Sir John Gilbert" at 367-368 observes, "form an important addition to that work" – and authored his *Bibliographical Memoirs and Reminiscences* (Cape Town, 1934?), and *Memoirs and Reminiscences* (Cape Town, 1949?, ed by BA Tindall). See further on Kotzé, Roberts (n 19) *sv* "Kotzé, Sir JG" at 178; Anon "The Hon JG Kotzé" (1903) 20 *SALJ* 101-110; Kahn *LLL* (n 23) at 115-119, 318; Kahn *LLLE* (n 23) at 88, 167.

<sup>161</sup> See Roberts (n 19) *sv* "Barber, Sydney Hilton" at 44 and *sv* "Leeuwen, Simon van" at 185; Anon "The late Sydney H Barber" (1907) 24 *SALJ* 1-3.

<sup>162</sup> See n 61 above.

<sup>163</sup> The main work's subtitle explains that it is a translation into English of the relevant gold-law legislation "together with reports of cases decided under" it and in terms of the applicable proclamations and ordinances. The first edition was reviewed in (1900) 17 *Cape LJ* 77; the second in (1904) 21 *SALJ* 432.

<sup>164</sup> See (1892) 9 *Cape LJ* 210, where he is described as being from Graaff-Reinet.

<sup>165</sup> See Roberts (n 19) *sv* "Macfadyen, William Allison" at 198. There was also an Alfred Newth Macfadyen who published a volume of statutes in force in the Native Territories of the Cape Colony:

English and logic at the *Staatsgymnasium* in Pretoria. In 1899 he became the first student to be awarded an LL.D by the then University of the Cape of Good Hope. In 1905, Dr Macfadyen was appointed South Africa's first full-time professor of law and jurisprudence at Rhodes University where he taught for a brief period.<sup>166</sup> Both before going to and after he had left Rhodes, Macfadyen lectured in mathematics at the Grey University College in Bloemfontein, and then joined the staff at the Transvaal University College where he became a professor of philosophy (including psychology) and economics. He seems to have continued to be involved in legal practice and played an important role in the foundation of the Society of Advocates.

### 8 3 *Hertzog's Reports*



Seeking to fill the gap between the last of the *Reports of the High Court of the South African Republic* in 1882 and the *Official Reports*, which commenced in 1894, JBM Hertzog, then a young advocate, produced a volume of reports for the year 1893, in Dutch. An English translation by JWS Leonard<sup>167</sup> appeared in 1903 as *Cases Decided in the High Court of the South African Republic during the year 1893*.<sup>168</sup>

James Barry Munnik Hertzog (1866-1943) graduated in law in 1889 at the Victoria College in Stellenbosch and then obtained a doctorate in law from the University of Amsterdam in 1892. On returning to South Africa, he joined the Pretoria Bar from 1893 to 1895 “where, within a very short time of his arrival, we find him occupied with the reports of the High Court of the Transvaal”.<sup>169</sup> Shortly afterwards, he was appointed Judge of the Orange Free State High Court from 1895 to 1899. He served first as legal adviser to

and later as a General in the Boer forces during the War (he was one of the signatories of the Vereeniging Peace Treaty), and then again practised at the Free State Bar from 1902 to 1907. Although he had aspirations of becoming a legal academic, on being offered the chair in South African law by the University of Leiden in 1904, he declined, leaving the

*idem* *sv* “Macfadyen, Alfred Newth” at 198.

166 See Kahn (n 83) at 600; AJ Kerr “Legal education at Rhodes University, 1904-1996” (1996) 9 *Consultus* 135-141.

167 In his preface the translator expressed the hope that the volume might be of some assistance to the increasing number of professional men in South Africa “to whom the Dutch language is not familiar”. Leonard was J Woodford S Leonard, a Transvaal advocate and not to be confused with James Weston Leonard (1853-1909), member of the Cape Bar 1876-1888, and of the Johannesburg Bar 1888-1899, 1902-1909: see Kahn *LLL* (n 23) at 136-138; Anon “The Hon JW Leonard KC” (1905) 22 *SALJ* 132-142.

168 Abbreviated “Hertzog”. Given its coverage, it is also sometimes referred to as “5 SAR”.

169 Anon “The Hon James BM Hertzog” (1908) 25 *SALJ* 233-235 at 234.



door open for Melius de Villiers to become its first incumbent. Instead Hertzog turned to politics, becoming Advocate General and Minister of Justice in the Orange River Colony from 1907 to 1910 and then Minister of Justice in the Union from 1910 to 1912. After returning to the Free State Bar and practising there from 1912 to 1924, and founding the National Party, he became Prime Minister of the Union of South Africa in 1924 and continued to hold that office until he was defeated and resigned in 1939.<sup>170</sup>

#### 8 4 *Official Reports of the High Court of the South African Republic*

The *Official Reports of High Court of the South African Republic*<sup>171</sup> appeared in six volumes and covered decisions delivered by that court from 1894 to 1899.

The first four volumes appeared first in Dutch, entitled *Officieele Rapporten van het Hooggerechtshof der ZA Republiek*, published by the *Staatsdrukkerij* in Pretoria and were later translated into English.

Volume 1 (1894) was reported by FB Tobias, A Muller and JBM Hertzog; volume 2 (1895) and volume 3 (1896) were reported by A Muller, WH Lohman and TEF (*sic*) Krause, and volume 4 (1897) by SH Barber, NJ de Wet, and JC Kakebeeke.

The first three volumes, after revision by JG Kotzé, were translated in 1903 by Walter S Webber,<sup>172</sup> while Kotzé himself translated volume 4 in 1907. A reviewer thought the translations most welcome and indispensable, for the “original reports were almost unobtainable, they were badly paged, and being in the Dutch language they were not accessible to a large number of the present-day lawyers”.<sup>173</sup>

Volumes 5 and 6, for 1898 and 1899 respectively, were not, strictly speaking “official”, but were compiled from various sources and translated into English by B de Korte from 1911 to 1912.<sup>174</sup>

170 See, further, Roberts (n 19) *sv* “Hertzog, James Barry Munnik” at 363; Kahn *LLL* (n 23) at 87-88; Kahn *LLLE* (n 23) at 131; CGH “The late general JBM Hertzog as law student” (1943) 60 *SALJ* 175-178.

171 Abbreviated “OR” or “Off Rep”; eg, *Commercial Union Assurance Co v Geo Heys & Co* (1897) 4 OR 414.

172 In his preface to the translated volumes, Webber explained that he began the translation in 1901 “when the state of professional business in the Transvaal left considerable leisure on my hands”. He was initially assisted by Charles A Wentzel (more about him in n 183 below), until the latter’s appointment to the office of Chief Magistrate of the Witwatersrand District. At first, he had thought of revising and translating the original reports, but as they were “Official Reports” he realised it would be unwise to revise them. He also stated that it was regrettably impossible for him to continue the translation beyond the third volume, but that arrangements had been made with Mr Macfadyen, “one of the gentlemen selected by the Government to translate the edition of the Transvaal Laws” which had already been published, to continue the translation of the reports. These arrangements ultimately did not materialise.

173 See the reviews in (1903) 20 *SALJ* 214; (1903) 20 *SALJ* 442; (1904) 21 *SALJ* 178.

174 In his preface, De Korte explained that the volumes were a continuation of the “Official Reports” of the later High Court of the South African Republic, but were not a translation of those reports since none had in fact appeared for 1898 and 1899. They were prepared from judges’ note books, records and judgments in various volumes housed in the archives of the Transvaal Supreme Court in Pretoria. JG Kotzé was again thanked for revising and correcting the proofs.

While those reporting the decisions of other courts were almost without exception young practitioners, who did this work on a part-time basis and for private gain, the government of the South African Republic employed official and salaried law reporters (*officieele rapporteurs*) for its “Official Reports”.<sup>175</sup> Although little is known about some of them, there are snippets of information about others.

Frederick Edward Traugott (Fritz) Krause<sup>176</sup> (1868-1959), who obtained a doctorate from the University of Amsterdam in 1893, was a member of the Pretoria Bar from 1893 to 1896, the first State Prosecutor in Johannesburg from 1896 to 1899, a member of the Cape Bar from 1904 to 1905 (during which time the University of Cape Town conferred another doctorate on him<sup>177</sup>) and a member of the Johannesburg Bar from 1905 to 1923. He was a Judge in the Transvaal Provincial Division from 1923 to 1933 and then in the Orange Free State Provincial Division from 1933 to 1938. A criminal conviction for a minor political war crime in England during the War landed him in jail for two years and raised the question whether that disqualified him from practising as an advocate in the Transvaal;<sup>178</sup> he was pardoned in 1909. In later years he was again involved in litigation, unsuccessfully protesting the imposition of tax on his salary as a judge.<sup>179</sup>

Nicolaas Jacobus de Wet<sup>180</sup> (1873-1960) was a member of the Pretoria Bar from 1896 to 1899, joined the Boer forces during the War, and then returned to practice from 1902 to 1913. He was a Member of Parliament from 1913 to 1920, a Senator from 1921 to 1929, and Minister of Justice from 1913 to 1924. He returned to practice from 1924 to 1932 and was on the Bench in the Transvaal Provincial Division 1932 to 1937, Judge of Appeal from 1937 to 1939, and Chief Justice from 1939 to 1943.

Little is known of JC Kakebeeke, a Dutch immigrant with an LL.D. who came to practise in the Transvaal in the 1890s. He was deported after the War, probably because of his anti-British, pro-Dutch sentiments.<sup>181</sup>

175 See Hahlo & Kahn *SA Legal System* (n 2) at 283.

176 See Roberts (n 19) *sv* “Krause, Frederick Edward Traugott” at 368; IG-F “The Hon Mr Justice Krause” (1923) 40 *SALJ* 385-388; Kahn *LLL* (n 23) at 119-125; Kahn *LLLE* (n 23) at 167-170. FET was the brother of attorney Ludwig Emil Krause who translated several books of Voet’s *Commentarius* from 1920-1926: see Roberts (n 19) *sv* “Voet, J.” at 325; Ellison Kahn “Romance of a law library” (1960) 86 *SALJ* 107-108 at 108. Another brother, Albert Edward Jacobus Krause (1856-1900), was State Attorney of the Orange Free State 1885-1889, Judge in that High Court in 1889, and State Attorney of the Transvaal 1889/1890-1893: see Roberts (n 19) *sv* “Krause, Albert Edward Jacobus” at 368.

177 Was he, then, the first South African lawyer to obtain two doctorates in law?

178 See *Ep Krause* 1905 TS 221.

179 See *Krause v CIR* 1928 TPD 656, confirmed 1929 AD 286.

180 See, further, Roberts (n 19) *sv* “De Wet, Nicolaas Jacobus” at 358; Anon “The Honourable NJ de Wet, KC, minister of justice” (1914) 31 *SALJ* 369-372; BA Tindall “The late Right Hon NJ de Wet” (1960) 77 *SALJ* 133-135; Kahn *LLLE* (n 23) at 94-95.

181 See Vincent Kuitenbrouwer *War of Words Dutch pro-Boer Propaganda and the South African War (1899-1902)* (Amsterdam, 2012) at 219, from which it appears that Kakebeeke wrote several pro-Boer pieces during the War, including “De toekomst van het Hollandsche ras in Zuid-Afrika” 1901 *Onze Eeuw*; and “Engelands opvattingen van het oorlogsrecht” 28 Aug-2 Sep 1900 *Nieuwe Rotterdamse Courant*.



Walter S Webber is best remembered for his translation in 1892 of Van den Sande's *Commentarius de prohibita rerum alienatione* as *A Treatise Upon Restraints*.<sup>182</sup> Although he became a member of the Cape Bar in 1890, he was subsequently admitted as an attorney in the Transvaal and became, with Charles A Wentzel,<sup>183</sup> a partner in the law firm that became known as Webber Wentzel.<sup>184</sup>

Finally, Benedictus (Bennie) de Korte (1859-1922), who was English-trained, practised as a member of the Cape Bar from 1885 to 1886 and at the Johannesburg Bar in 1887 at the age of twenty-nine before he was appointed a Judge of the High Court, which office he held from 1888 to 1896. Then, after being charged with misconduct for having had nefarious financial dealings while on the Bench and being suspended, he resigned even though he had been found not guilty as

charged. He returned to part-time practice in Pretoria from 1902 to 1922 where he also served as librarian of the Supreme Court library until his death.<sup>185</sup>

Before closing the chapter on the law reports of the South African Republic, mention may be made of a single and very rare volume, entitled *A Complete Record of all Cases Decided in the High Court of Justice of the South African Republic during the months of May and Jun 1895, with an index and digest of cases, published every other month*. It was compiled by WS Duxbury.<sup>186</sup> Although a series of reports may have been intended, only volume 1, part 1, May to June 1895, ever appeared.<sup>187</sup>

With this motley assortment of reports covering the decisions of the Transvaal prior to the Anglo-Boer War, it is obvious that practitioners would require some guidance in the form of indexes and digests. At least three such works appeared.

182 See the announcement in (1892) 9 *Cape LJ* 278-279. Webber also wrote an article entitled "The custody of lunatics" in (1891) 8 *Cape LJ* 155-162.

183 See n 172 above.

184 See Anon "Solomon & Thompson" (1904) 21 *SALJ* 323. See, also, "Correspondence" (1966) 83 *SALJ* 229, in which a letter from a Walter S Webber, "Attorney-at-Law, Bloemfontein" is published.

185 See Roberts (n 19) *sv* "Korte, B de" at 178 and *sv* "De Korte, Benedictus" at 355; Kahn *LLL* (n 23) at 35-36; Kahn *LLLE* (n 23) at 286; Ellison Kahn "The history of the administration of justice in the South African Republic" (1958) 75 *SALJ* 397-417 at 406. See, further, as regards De Korte, the fascinating account by Liezl Wildenboer "For a few dollars more: Overcharging and misconduct in the legal profession of the Zuid-Afrikaansche Republiek" (2011) 44 *De Jure* 339-363 at 358-359.

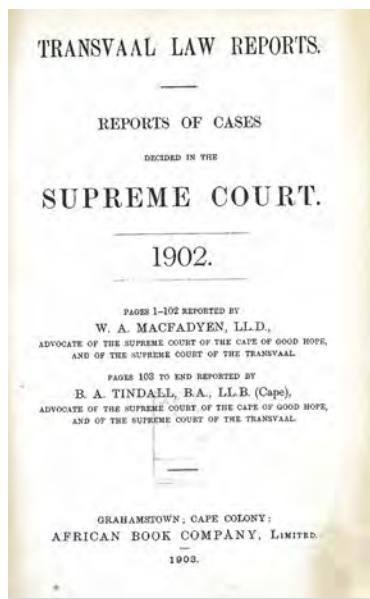
186 He was admitted as an advocate but was at one time Resident Magistrate at Potchefstroom (see Aaron Mendelow "Oupa Hortor's Diary" 1988 *Consultus* 34-35 at 35) and also represented the Transvaal at the January 1910 Conference of South African bars: see Selvan (n 24) at 116.

187 See Roberts (n 19) *sv* "Duxbury, WS" at 111.

First there was Charles Augustus Wentzel's *Digest of Reported Cases in the Transvaal from 1877*, published in Cape Town in 1901. In a review it was welcomed, being likened to Searle's *Digest* of Cape decisions,<sup>188</sup> as "good, carefully executed and well printed".<sup>189</sup> Far less successful was JCM Wilde's *Index op de Rapporten over de jaren 1877-1888 en 1893-1897, van het Hof te Pretoria*, which appeared in Leiden in 1904. A review was scathing: "[T]here is no scientific or other correct arrangement about this work, and we wonder why it was published, for it cannot be of use to anybody."<sup>190</sup> No wonder, for the compiler apparently did not have the original reports at hand when he put the index together. Then in 1906 the *Digest of Law Reports of the South African Republic, including cases decided during the British Occupation Prior to 1881, for the period 1877 to 1899*, by advocate JPR van Hoytema and attorney Siegfried Raphaely appeared. It received a favourable review.<sup>191</sup>

There were no law reports for the Transvaal for the period from 1900 to 1901.

## 8 5 Reports of the Transvaal Supreme Court



The *Reports of the Transvaal Supreme Court*<sup>192</sup> appeared in annual volumes from 1902 to 1910, when the court became the Transvaal Provincial Division of the Supreme Court of South Africa.

Several leading advocates remained or became involved in reporting these decisions. The volume for 1902 was reported by WA Macfadyen and BA Tindall; that of 1903 by NJ de Wet, AJ Barry, and Tindall; that of 1904 by De Wet and Tindall; that of 1905 by I Grindley-Ferris, AS Benson and Tindall; and those of 1906 to 1909 by Tindall and Grindley-Ferris. The 1910 volume contained decisions of the Supreme Court from January to May, reported by Tindall and Grindley-Ferris, and decisions of the new Provincial Division, reported by Grindley-Ferris and FC Niemeyer.

Involved in the *Transvaal Supreme Court Reports* from 1902 to 1910, Benjamin Arthur Tindall (1879-1963) became private secretary to James Rose-Innes, new Chief Justice of the Transvaal in 1902, and then a member of the Pretoria Bar from 1903 to 1922. He was

188 See n 40 above.

189 (1901) 18 *SALJ* 210-211 at 211.

190 (1904) 21 *SALJ* 312.

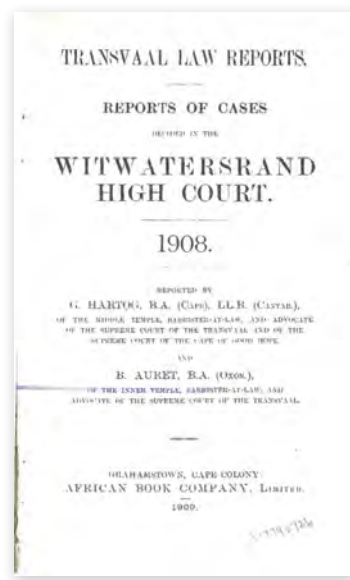
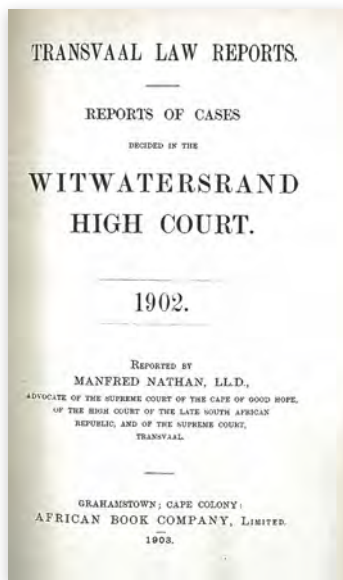
191 (1906) 23 *SALJ* 301.

192 Abbreviated "TS"; eg, *Kroon v Enschede & Others* 1909 TS 374.

appointed to the Bench in 1922, was the Judge President from 1937 to 1938 and a Judge of Appeal from 1938 to 1949.<sup>193</sup>

Another reporter of long standing in the Transvaal was Ivon Grindley-Ferris<sup>194</sup> (1876-1957) who was admitted to the Cape Bar in 1901, but after a few months went to India as censor and interpreter in Boer prisoner-of-war camps. On his return, he was a member of the Pretoria Bar from 1902 to 1931. After accepting several acting judgeships all over Southern Africa, and being Judge President of the Natal Native High Court from 1931 to 1933, Grindley-Ferris was a Judge in the Transvaal Provincial Division from 1933 to 1946.

## 8 6 *Reports of the Witwatersrand High Court*



The *Reports of the Witwatersrand High Court*<sup>195</sup> likewise appeared in annual volumes from 1902 to 1910, when the court became the Witwatersrand Local Division of the Supreme Court of South Africa. Although the High Court reports were published separately, they were often bound together with the reports of the Supreme Court of the corresponding year in the same volume, a practice that fooled many a young lawyer who for the life of him could never find the High Court reports, since the bound volumes invariably only had “Transvaal Supreme Court” embossed on their spines.

193 See Roberts (n 19) *sv* “Tindall, Benjamin Arthur” at 378-379; Kahn *LLL* (n 23) at 265-266; IGF “The Hon Mr Justice Tindall” (1923) 40 *SALJ* 245-246; Anon “In memoriam: The Hon BA Tindal” (1963) 80 *SALJ* 164-165. Tindall also edited the second volume of Kotze’s *Memoirs*: see n 160 above.

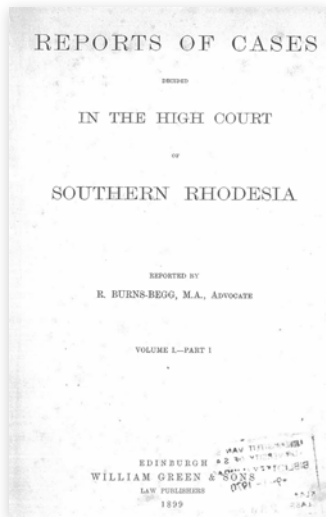
194 See Roberts (n 19) *sv* “Grindley-Ferris, Ivon” at 362; Kahn *LLL* (n 23) at 77; Kahn *LLLE* (n 23) at 124; TBH “Mr Justice Grindley-Ferris” (1932) 49 *SALJ* 1-3.

195 Abbreviated “TH”; eg, *Littlejohn v Norwich Union Fire Insurance Society* 1905 TH 374.

A number of local practitioners served as law reporters. The 1902 volume was the work of Manfred Nathan, prolific author of legal works, including the multi-volume *The Common Law of South Africa* (1904-1907).<sup>196</sup> IP van Heerden, an advocate at the local bar, took charge of the 1903 to 1905 volumes, while G Hartog and B Auret were responsible for those of 1907 to 1910. Gus Hartog, also a member of the Johannesburg Bar, went on to become a Senator;<sup>197</sup> his colleague Ben Auret,<sup>198</sup> after having represented the Transvaal at the Third Conference of South Africa bars in 1911, died tragically in Flanders during the First World War.<sup>199</sup>

## 9 A few other courts

### 9 1 Reports of the High Court of Southern Rhodesia



The *Reports of Cases Decided in the High Court of Southern Rhodesia*<sup>200</sup> first appeared in 1899 in Salisbury and apparently also in Edinburgh, and again only from 1911. The reporter of the early volume was R Burns-Begg.

### 9 2 Reports of the Native High Courts

There are several pre-1910 series of reports of various Native High Courts.<sup>201</sup>

The *Reports of the Decisions of the Full Court of the Native High Court* in several annual volumes from 1899 to 1910, covered the decisions of the Native High Court of Natal.<sup>202</sup> They were usually reported by registrars of the court: FA Farrer and RA Marwick were responsible for volume 2 (1901(?)); Marwick for volume 3 (1902); TA Jackson for volumes 4-7 (1903-

196 Vol 1 of which was reviewed by JC Smuts (1904) 21 *SALJ* 305. On Nathan (1875-1945), who was a member of the Johannesburg Bar 1897-1999, 1901-1931 and then President of the Income Tax Appeal Court 1931-1945, see, further, Roberts (n 19) *sv* "Nathan, Manfred" at 221-222; Kahn *LLL* (n 23) at 318.

197 Cambridge-trained (see n 25 above), Hartog discussed the Transvaal provincial ordinances of 1918 in (1920) 2 *J of Comparative Legislation and International Law [Third Ser]* 118, and assisted Manfred Nathan with his *Transvaal Company Law* (Cape Town, 1925), being responsible for the chapters on winding up: see (1926) 43 *SALJ* 31; Kahn *LLLE* (n 23) at 58.

198 See Selvan (n 24) at 119.

199 See Roberts (n 19) *sv* "Auret, B" at 40; (1917) 34 *SALJ* 494, announcing the death of Captain Ben Auret of the Bar. Auret was a pupil of Professor Robert Lee at Oxford: see Anon "Professor Robert Warden Lee" (1922) 39 *SALJ* 1-4 at 2.

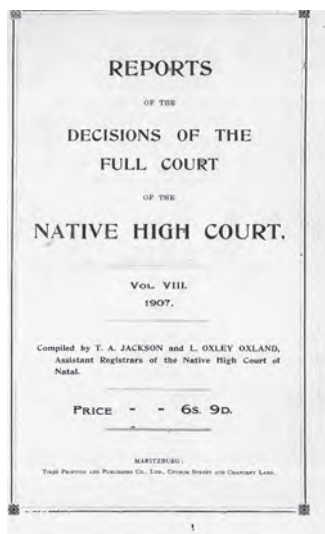
200 Abbreviated "SR".

201 For further details, see Roberts (n 19) *sv* "Reports" at 260.

202 Abbreviated "NHC"; eg, *Daniel v Hester* 1910 NHC 119.



1906) and Marwick and L Oxley Oxland for volume 8 (1908). In addition, a *Digest of the Native High Court Reports [Natal], 1899-1915*, by HC Lugg, likewise a registrar of the Court, appeared in 1916.



The *Reports of Cases Decided in the Native Appeal Courts of the Transkeian Territories, 1894 to 1909*,<sup>203</sup> selected and reported by Benjamin Henkel, a clerk of the court, appeared in 1910.<sup>204</sup>

A publication entitled *Report of all the Important Cases Heard in the Native Territories Appeal Court, sitting in Umtata and Butterworth from the date of its establishment to the beginning of the year 1907*,<sup>205</sup> by WE Warner, a solicitor from Idutywa, appeared in 1907.<sup>206</sup>

Finally Wilfred Massingham Seymour's *Native Law and Custom*, published in 1911, contained reports of decisions of the Native Appeal Court of Griqualand East from 1901 to 1909.<sup>207</sup>

## 10 Concluding observations

Such, then, are the law reports of pre-Union South Africa. Hopefully two things will be clear from this article.

First that the early law reporters generally<sup>208</sup> rendered sterling service to the development of South African law despite their lack of experience. In many cases the reports captured for posterity the early judicial shaping of a truly South African law. There are gaps, periods not served by any reports, and although this is certainly an area in which legal historical endeavours may prove useful,<sup>209</sup> I venture to suggest that

203 Abbreviated "NAC"; eg, *Adonis v Zazini* (1901) 1 NAC 46.

204 It was reviewed in (1910) 27 SALJ 333, the absence of headnotes being commented on. It was followed by vol 2, *Reports of Cases Decided in the Native Appeal Courts of the Transkeian Territories, 1910-11* in 1912.

205 Abbreviated "NTAC".

206 It was reviewed in (1909) 26 SALJ 193, where the volume was described as containing reports of the appeals heard in the court in "native cases" from magistrates' courts in the Native Territories in the Cape Colony, even though the cases "have been reported more in the form of a digest than a report".

207 It was subtitled: *A compendium of recognized native customs in force in the native territories of the Colony of the Cape of Good Hope, together with legislative amendments and reports of some of the more important decisions of the Native Appeal Court of Griqualand East, 1901-1909*.

208 These days law reporting has become a full-time occupation, with competing publishing houses (as to which, see Peter Clinch "The establishment v Butterworths. New light on a little known chapter in the history of English law reporting" (1990) 19 *Anglo-American LR* 209-238) each employing a battery of editors to polish the decisions the "reporters" in the various courts submitted for publication. On how to teach and learn law reporting, see the now somewhat outdated *A Manual on Law Reporting* by my (very close) namesake Paul H Niekirk (London, 1977).

209 For an Australian initiative along these lines, see Bruce Kercher "Recovering and reporting Australia's early colonial case law: The Macquarie project" (2000) 18 *Law and History Rev* 659-665. For a South

attempting to report decisions more than a century after they were rendered will prove a rather daunting task.

Secondly, many of the reporters remain shadowy figures after what has admittedly been no more than a skimming of the biographical surface. Again there is scope for further legal historical digging.

But, I remain a sceptic. These days law reports are invariably available and searchable online, and into the bargain the law is commonly supposed to be found solely in the last few years' law reports. In addition, a rapidly increasing torrent of unreported, unedited and, alas, unvetted<sup>210</sup> decisions are made available online. I therefore fear that the pre-Union law reports will continue to slip into obscurity, and with them will be lost a little more than just historical nostalgia.

## Abstract

As a source of law, judicial decisions stand central in any legal system that applies the doctrine of precedents. South African law is such a system. This article traces the publication of the pre-Union decisions of the various courts functioning in the region. The published reports were unofficial and the result of private initiatives. Some biographical information is also provided of those who compiled these reports, South Africa's early law reporters.

African equivalent, involving "Decisions of the Court of Justice, Court of Appeal 1806-1828", see <http://www4-win2.p.nwu.ac.za/dbtw-wpd/textbases/rmrqbe.htm> (accessed 12 Nov 2012).

210 On the politics of law reporting, see Keith J Eddey *The Law Reporting of the Court of Appeal (Civil Division)* (B Litt, Oxford, 1977); Howard Slavitt "Selling the integrity of the system of precedent: Selective publication, depublishing, and vacatur" (1995) 30 *Harvard Civil Rights-Civil Liberties LR* 109-142; and, closer to home, Frans Viljoen "Canonizing cases: The politics of law reporting" (1997) 114 *SALJ* 318-333. On the dangers of non-, under- and over-reporting as well as inaccurate reporting, see Hahlo & Kahn *SA Legal System* (n 2) at 283.