1936

R v. Roux.

"Free Speech". A.D. take 'liberal' line.

Comments on fact: africans not represented in Parlt. where pass = liquor laws made: — "can only protest."

Beyers J.A.: constitutional development must be noted — majestas in people, not King.

by DAVIS, J., in *Rex* v. *John Gomas* (2.3.36), where he says: "It is not the injury to the King's dignity which is in law the essence of the charge but the injury to the *majestas* of the State." If the *crimen laesae venerationis* ever existed under the Roman-Dutch Law, it did not exist in the later law and does not therefore exist in the Union. *Majestas* resides in the people. It is the duty of the Judiciary to take cognisance of constitutional development and to have regard to changes in the constitution. [CURLEWIS, STRATFORD, BEYERS and DE VILLIERS, JJ.A.] (A.D. 1936, March 12 and April 17.) *Rex* v. *Roux and Another.*

Criminal law. — Criminal injuria. *Photograph of woman enceinte.—Laughter in connection with photograph.*—The accused was convicted of criminal *injuria*. The evidence showed that the accused photographed complainant whose husband purchased the film from accused, and complainant had the film developed and it showed that she was *enceinte*. The accused pleaded guilty but said he did not mean to do the woman any harm. The complainant stated that after the click of the camera accused and a companion walked past her and laughed, she thought, because the photograph was taken. *Held*, on review that the act of the accused in taking complainant's photograph (for it was she who had it developed) and the laughter of accused and his companion which there was no evidence to connect with complainant or the photograph was insufficient to constitute an aggression on the person, dignity or reputation of complainant and others to support the charge. [PITTMAN, J.] (E.D.L. 1936, May 28.) *Rex* v. *Wittstock.*

Criminal law.—*Culpable homicide—Negligence—Motor lorry with defective brakes.—Duty of driver as to ascertaining whether brakes in good order.*—A heavy lorry driven by one of appellants was fitted with a device called a "bouster" whose purpose was to supplement the operation of the brakes, and which did not operate when the engine was not running. While the lorry was being driven on an upward gradient the engine stalled, and the brakes without the assistance of the "bouster" were not sufficient to prevent the lorry from running backwards and causing the death of a person. A magistrate convicted the appellants of culpable homicide, holding that there was an obligation on the driver at all times to satisfy himself that the brakes of his vehicle were in order. *Held*, on appeal, that the ground of the magistrate's decision involved placing too heavy a burden upon the driver of a vehicle and the facts disclosed no negligence. In the present case there had been reasonable grounds for the accused to infer that the brakes were in order, and there was no duty on the driver to anticipate that the engine would stall. [BARRY and MARITZ, JJ.] (T.P.D. 1936, June 8.) *Rex* v. *Simon and Another.*

Criminal law.—*Housebreaking with intent to steal.—Proof of intent.—Charge of housebreaking with intent—Evidence disclosing malicious injury to property.—Powers of Court on review.*—Accused was charged with housebreaking with intent to steal. The evidence showed that accused threw a brick through the plate glass window of complainant's shop premises and then ran away, was seen by complainant's night watchman and pursued

He was found guilty by a magistrate of the offence charged. *Held*, on review, that the above facts did not constitute proof of entry or intent to enter, and the conviction should be set aside. *Held* further, that on a charge so framed it was not competent for the Court on review to alter the conviction to one of malicious injury to property. [DE WAAL, J.P., and DE WET, J.] (T.P.D. 1936, May 26.) *Rex* v. *Saleke.*

Criminal law.—*Murder.—What constitutes.—Sentence.*—Accused, who was very much under the influence of drink and whose mind was clouded thereby to some extent, had lost his money and, apparently being under the impression that it had been taken by the deceased and inflamed by anger at that (imaginary) wrong and by taunts of the deceased, attacked and stabbed him, thereby causing his death. Accused was convicted of murder by the Natal Native High Court and was sentenced to seven years' imprisonment with hard labour. Accused applied in person for leave to appeal on the ground that he had not intended to do the deceased serious injury as he was his friend, and that the evidence showed that he was acting in defence of his person. (As a fact the evidence clearly showed that in no sense could he be said to have acted in self-defence in stabbing the deceased.) Accused also contended that the sentence was excessive. *Held*, (STRATFORD, J.A., dissenting) that the Court below was entitled to bring in a verdict of guilty of murder and that the sentence was not under the circumstances too severe. [CURLEWIS, STRATFORD, BEYERS, DE VILLIERS, JJ.A.] (A.D. 1936, March 2 and April 21.) *Rex* v. *Ngobese.*

Criminal law.—*Perjury.—Conflicting statements on oath.—Elements of offence.—Administration of oath.—Proof of.—Corroborative evidence.—Act No.* 31 *of* 1917, *secs.* 131 *and* 284.—*Act No.* 46 *of* 1935, *sec.* 20.—One of the elements in the offence of contravening sec. 20 of Act No. 46 of 1935 is the fact that each statement was on oath and in terms of sec. 284 of Act No. 31 of 1917 there must be the evidence of one witness corroborated by some other independent testimony proving that each of the statements in question was on oath. *Rex* v. *Rajah* (1936, A.D. 45), applied. [JONES and CENTLIVRES, JJ.] (C.P.D. 1936, March 30.) *Rex* v. *Leiding.*

Criminal law.—*School.—Teacher.—Corporal punishment of pupil.—Effect of bona fides.*—Crimen injuria.—The discretion which the law gives to parents or teachers to inflict corporal punishment is not to be exercised in an arbitrary and capricious manner, but on just and reasonable grounds; and it is not for every disobedience of rules that corporal punishment is the appropriate disciplinary punishment; if, without proper enquiry and arbitrarily without having regard to the nature and gravity of the alleged offence, they were to inflict corporal punishment on pupils, the law would not protect them and they would be guilty of an offence. The mere fact that a teacher acted *bona fide* in his capacity as a teacher will not secure him any immunity from the criminal law. The law as laid down in *Rex* v. *Janke & Janke* (1913, T.P.D. 385) does not materially differ from the provisions of sec. 62 (5) of Ordinance No. 15 of 1930 (O.F.S.), which provides that corporal punishment shall be administered only in cases of serious neglect of duty, disobedience or immoral conduct and only after

Court.—*Natal Provincial Division.—Rule-making power.—Act No.* 39 *of* 1896 (*N.*), *sec.* 69.—*Advocates and Attorneys.*—"*Right of dual practice.*"—*Court's power to divest.—R.S.C.* (*N.*), *Order XXXII, Rule* 47.—Ultra vires.—*Act No.* 46 *of* 1935, *sec.* 102.—On 1st June, 1932, the Judges of the Natal Provincial Division, purporting to act under the powers conferred on them by sec. 69 of Act No. 39 of 1896 (N.), made certain Rules of Court which came into force on 30th June, 1932. The effect of these Rules may be summarised as follows: "(*a*) They repeal the existing Rules 36-39, 39A and 54 of Order XXXII, dealing with the admission of Advocates, and substitute for the repealed Rules four new Rules 36, 37, 38 and 39, which prescribe various alternative qualifications by the possession of which a person may become entitled to admission as Advocate. In these new Rules, while existing provisions enabling an Attorney to become qualified for admission as Advocate are in substance retained, it is stipulated that, before an Attorney can be admitted as Advocate, he must have had his name removed from the roll of Attorneys, and must, further, subject to certain exceptions in favour of Attorneys now practising and persons already admitted as Candidate Attorneys, have ceased to practise as an Attorney for a period of six months. (*b*) In new Rule 35 converse provision is made enabling an Advocate to become an Attorney, subject to his first having had his name removed from the roll of Advocates and to his having served 18 months' articles with an Attorney. (*c*) The existing Rule 47 of Order XXXII, which, save in certain excepted cases, has enabled Attorneys to practise as Advocates, and Advocates to practise as Attorneys, is repealed, and a new Rule 47 is substituted, which provides, subject to certain exceptions, that after the 30th June, 1937, a date referred to in the Rule as "the appointed day" no person enrolled as Advocate shall be entitled to practise as Attorney, and no person enrolled as Attorney shall be entitled to practise as Advocate. Special provision is made conferring on persons who have hitherto enjoyed the right of dual practice under the repealed Rule a right to elect to which branch of the profession they wish in future to belong, and also rights as to transfer from one branch of the profession to the other. (*d*) Provision is also made granting the same rights and privileges, as are granted to existing practitioners who have hitherto enjoyed the right of dual practice under the repealed Rule 47, (1) to persons who are Candidate Attorneys on the 30th June, 1932, and are admitted as Attorneys prior to the appointed day; and (2) to Advocates, or persons qualified to be admitted as Advocates who on 30th June, 1932, have begun to serve 18 months' articles under the existing Rule 47 (*d*) for the purpose of qualifying themselves to practise as Attorneys." Further, provision was made for the preservation of the rights of those who had actually been admitted and enrolled both as Advocates and Attorneys. One applicant had been admitted as an Attorney in 1897 under the then existing rules and, by virtue of those rules, had since that date practised both as Advocate and Attorney. The other applicant had been admitted as an Advocate in 1911 under the then existing rules and, by virtue of those rules, had since that date similarly practised. By virtue of sec. 102 of Act No. 46 of 1935, both applicants now sought an order declaring Rule 47 of Order XXXII *ultra vires* on the grounds that they had a legal right to "dual practice" and the Court had no power to divest them of that

right. *Held*, that both applications must fail. *van Aardt* v. *Natal Law Society* (1930, A.D. 385); *Starey* v. *Graham* (1899, 1 Q.B. 406); *Mahomed* v. *Union Government* (1911, A.D. 1); *Abbott* v. *Minister of Lands* (1895, A.C. 425); *Curtis* v. *Johannesburg Municipality* (1906, T.S. 308); *Pardo* v. *Bingham* (L.R. 4 Ch.D. 735); *Kruse* v. *Johnson* (1898, 2 Q.B. 91); *East Fremantle Corporation* v. *Annois* (1902, A.C. 213); *Boulton* v. *Crowther* (107 E.R. 544), referred to. Historical aspect of statutes and rules surveyed. [FEETHAM, J.P., MATTHEWS and HATHORN, JJ.] (N.P.D. 1936, February 14). *Ex parte Stuart*; *Ex parte Geerdts*.

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Criminal law.—Crimen laesae majestatis.—Crimen laesae venerationis.—*Essentials.*—"Majestas."—Appellants had been convicted in a magistrate's court on a charge of *crimen laesae majestatis* in that they had "unlawfully printed and published certain scandalous and dishonouring words against our Sovereign Lord the King and his Government in South Africa whereby the Majesty of our said Sovereign Lord the King and his said Government was dishonoured and their dignity and power injured." The words complained of, which had been published in a newspaper called "Umsebenzi", included the following: "Who is King George anyway . . . why should we celebrate his Jubilee? King George is the figure head of the English and Boer Imperialists, whose local representatives are Hertzog and Smuts. . . . These oppressors are robbing and exploiting the poor people and workers of South Africa, in particular the Bantu people . . . . It was the police of King George's lick-spittle South African Government who shot down the people of Durban. . . . Workers and oppressed people of Durban: do not be bluffed by this King George nonsense. Do not kiss the boot that kicks you. Refuse to worship King George, he is not our king but the king of our oppressors. Unite in protest against pass-laws, liquor laws and all other forms of oppression. Demand freedom in our land of your fathers. Refuse to go to Cartwright's Flats, the place where our martyrs were murdered in 1929 and 1930." An appeal to the Natal Provincial Division against this conviction had been dismissed. *Held*, on appeal, that the words used did not constitute either *crimen laesae Majestatis* or *crimen laesae venerationis*, as "we under the condition of our modern civilisation and development, and of our political liberty and freedom of thought and speech, cannot be expected to accept the narrow and restricted views of the 16th to 18th centuries as regards criticism of the Monarch, as applicable in the present state of our political advancement." If the language is unnecessarily strong, we must remember that the natives of Durban have no voice or vote in the passing of those laws" (i.e. in regard to passes and liquor) "or in the Government of the country and that they can only protest against what may be regarded by them as grievances. It may be said that the very fact that this appeal is addressed to natives should cause us to take a more serious view of the language used; but on the other hand if the appeal is intended to be effective, one can well imagine strong and extravagant language being used in order to influence natives." The charge should have alleged, not the generic crime of *laesae majestatis*, but the specific crime of *laesae venerationis*, as it is always advisable to charge an accused with a specific crime. Per BEYERS, J.A.: "I am entirely in agreement with the view expressed

N.B.

LMM/025/0002

Cape Judges:

Sir Andries Stockenstroom.

1879-1880

d. aged 36.

Swedish descent - family history.

Commissioner: decide - Diamond Field.

(pro O.F.S. determination).

A.G.

M.L.A.

Military: beau ideal.

" Koegas Atrocity."

Sat with C.J.

he took command. His fine figure in brilliant uniform and flowing whiskers was the envy of all, and his erect and handsome presence was regarded as the *beau ideal* of a Victorian volunteer cavalry officer.

As a man he was most popular with all. By nature somewhat reserved and sensitive, he felt very deeply the base charges levelled at his settlement of the Land Dispute, and was grieved when his application for a commission of enquiry was refused. Strong of character and yet sympathetic by nature, he is said to have had a gift for summing people up and dealing with any situation. The late Lord de Villiers, who had known him intimately from boyhood, when speaking of his qualities stated that the two which distinguished him more than others were " his fearless honesty and his thorough devotion to duty." " His hearty loathing of all baseness and trickery, sham and pretence: his love of truth and justice for their own sake: his scrupulous honour as an advocate, these qualities combined to make him an outstanding judge."

F. ST. L. S.

———o———

THE CASE OF STEENKAMP v. MARAIS N.O. AND OTHERS.*

("*An positi in conditione censeantur etiam positi in dispositione.*"(1))

A passage in the Digest(2) reads as follows (my rendering): "Where a grandfather had appointed as his heirs his son and a grandson (born of another son), and besought (*petit*) his grandson, in case he died before reaching the age of thirty, to restore the inheritance to his uncle: the grandson died within the prescribed period leaving children. I (*i.e.* Papinian) gave the ruling (*respondi*) that there had been a failure of the condition on which the *fideicommissum* depended, having regard to an interpretation founded on family affection (*pietas*)—for it would be found that less had been expressed in writing than what had been said." A motive similar to that which had initially prompted the appointment of son and grandson as beneficiaries—to wit, regard of ascendant for descendant—is assumed to be again operative (or indeed to have been expressed as operative) in the case which actually happened.

Papinian, however, does not deal with the actual case put in our head-note.

The marginal note in Gothofred's Digest goes further afield: " Ideoque nepos non restituet hereditatem patruo, sed liberis propriis: hinc collige, liberos in conditione positos intelligi ad hereditatem vocari "—which is the question *de qua agitur*.

In the Cape Courts a different answer was given in *Steenkamp* v. *Marais N.O.**(3) by an eminent, a respected, and a sagacious Judge. That case will call for notice later on; but

* 25 S.C. 483.

(1) Voet 39.5.44.

(2) D. 35.1.102. This passage is several times referred to by Voet: 25.1.24; 28.2.9; 28.3.9; 28.7.4; 36.1.17, 23, 30 and 66. *Vide etiam* Huber. Hed. Rechtsg, ii, c 19, sec. 49; Domat, sec. 3845; Bijnk. *Obs. Tum.* (i) 7[illegible]; McLaren. Wills, sec. 1238.

(3) This case was referred to by counsel in *Ex parte Annear* (1912, C.P.D. 362) and *Ex parte de Klerk* (ib., p. 388)—the latter case being cited in the judgment in *Ex parte de Wet* (1921, C.P.D. 812).

doomed to disappointment immediately became vociferous and Stockenström's reward for his harassing and unpleasant labours was a stream of accusations and abuse. These unfounded charges continued to be circulated until in 1879 he felt it incumbent upon him "to request the Governor that a Royal Commission, composed of persons not swayed by local prejudices, should be appointed to enquire into his conduct, which was alleged to have led up to the war in Griqualand West." Sir Bartle Frere advised such a commission but received intimation from London that the authorities had come to the conclusion that it was quite unnecessary "having regard to Mr. Stockenström's high reputation for the conscientious discharge of his official duties." His labours and high qualifications were appreciated by those who understood the task, and on his death the *Cape Times* expressed the views of many when it stated: "It always seemed to us that a grand opportunity was lost in not entrusting the Transvaal settlement to his hands instead of those of Sir Theophilus Shepstone. It is possible that under no circumstances would he have sanctioned an involuntary annexation: it is also possible that by his influence the step might have been taken without provoking resistance."

His work on the Land Court being completed, he returned to private practice, but in August, 1877, S. Jacobs' health gave way and Stockenström joined the Molteno Government as Attorney-General. He held this office without a seat in Parliament until the dismissal of Molteno on 5th February, 1878, and thereafter procured the Albert constituency without opposition, on the Hon. C. Brownlee's resignation after his appointment to the Native Territories. This seat he held in the 1879 election despite an urgent request from Graaff-Reinet to be their representative, only to resign it on his appointment to the bench shortly afterwards. In Parliament he made but infrequent appearances, the disease which was so soon to cause his death, having already manifested itself, but he made a number of effective speeches and was recognised as a "sturdy pillar of the opposition." It was said at times that he would have been more at home with his opponents, but nevertheless he was "straightforward and plain-spoken and a loyal supporter of the policy of his leader." Shortly after the prorogation of Parliament in 1879 Mr. Justice Fitz-

deVilliers: accepted that most gruesome atrocities committed against defenceless prisoners - men & women - A.G. shld. have acted when full info. : removed from bench. A.G. - very wrong: in Parlt. - speak flippantly. But criticism too extreme.

Patrick resigned, and although it was known that Stockenström's health was bad, he was obviously the person most suited for the vacancy and it was offered to him. After some hesitation he accepted and on 29th September he took his seat on the bench and was sworn in by Chief Justice de Villiers.

His health did not improve after his appointment and the Attorney-General very generously intimated to him that he would have lengthy leave of absence to proceed to Europe for treatment should he so desire. This he declined and insisted on doing his full share of the work as a judge. In March, 1880, it was his turn to take the Circuit, and his brother judges realising his condition and fearing the effect the fatigue of Circuit might have on his constitution, tried to dissuade him from going. He refused to give in, miscalculated his strength and collapsed at Swellendam. Dwyer was rushed down to carry on the work and on 22nd of March Stockenström's life faded out and he was buried on the following day.

As a lawyer he had held a great reputation, though during his short period on the bench few cases of much importance came before him. He sat with the Chief Justice in the case of *Upington* v. *Saul Solomon & Co. and Dormer* (1879, Buchanan 240) which caused such a stir in the Colony, in which the Attorney-General personally sued for defamation the editor and publishers of the *Cape Argus* for suggesting that he had for political reasons refused to remove to Cape Town the criminal charges arising out of the "Koegas Atrocities" when it was made clear to him that justice would not be done on Circuit. In a strong judgment he concurred with the Chief Justice in awarding 1s. damages against Solomon and £5 and costs against the editor. At the Bar he was always regarded as a sound and reliable advocate and his appointment to the bench met with the approval of everyone.

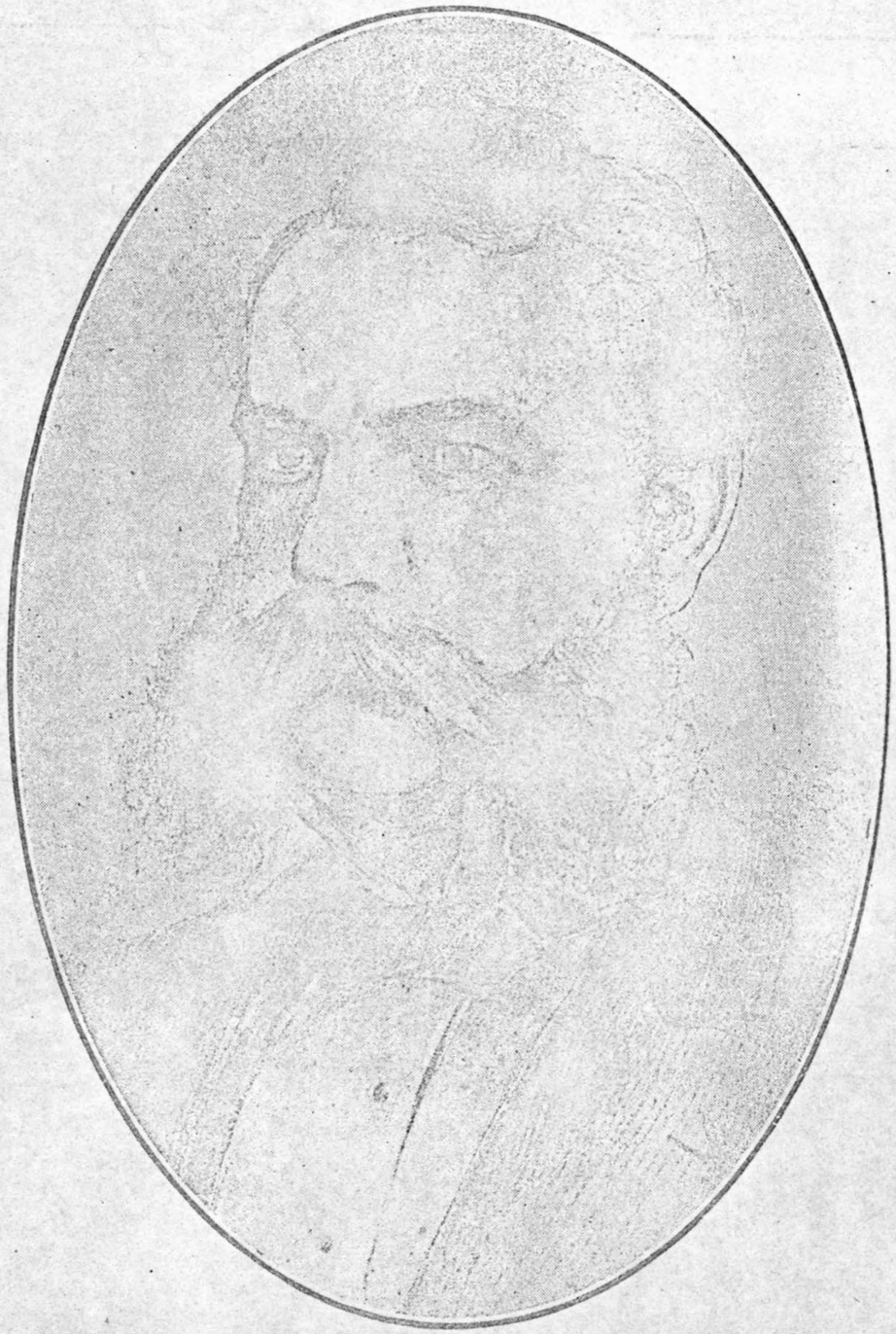
In private life he took a keen interest in everything and served on numerous committees. He was a great advocate of increasing educational facilities and at the time of his death was a member of the Council of the University of the Cape of Good Hope. He was an ardent supporter of the "volunteer" movement and took a prominent position in the militia while a student in London. In Cape Town he worked with great zeal on the resuscitation of the Cavalry Troop, of which

branches but one torn off," and accordingly bestowed on him the name of Stockenström, together with armorial bearings depicting the simile and the motto "*Fortis si jure fortis*"—which are retained by the descendants to this day. The founder of the South African branch, Captain Andries of Stockholm, arrived at the Cape on 2nd December, 1782, in the service of the Dutch East India Company, and in due course settled in the Eastern Province. He became Landdrost of Graaff-Reinet, had a most distinguished career, and was massacred by the kafirs on 28th December, 1811, when in command of the Colonial Militia. He married in 1786 Maria Gertruida Broeders, of Holstein, Denmark—her brother, Johan, was a Danish barrister who settled and practised at the Cape—and left a large family. His eldest son, Andries, who was the father of the subject of this sketch, was a widely read and much travelled man, and a great friend and supporter of Fairbairn. He took a leading part in political and military affairs of his day; was Landdrost of Graaff-Reinet, served on the Council of Advice, and later on the Legislative Council; was selected by Lord Glenelg as Lieutenant-Governor; created a baronet and retired with a pension "for his long and valued service." He married Elsabe Helena, daughter of G. H. Maasdorp, and produced five children, the youngest of whom was the future judge. The family has been closely bound up with the South African judiciary, for one of the judge's sisters married the late Sir Sydney Shippard, and another was the mother of the Hon. Mr. Justice F. A. Hutton, while the late Sir Andries F. S. Maasdorp and the late Mr. Justice C. G. Maasdorp were his first cousins.

The subject of this sketch showed great brilliance at an early age and his parents soon decided that he was destined for the Bar. While still in his 'teens he was sent to Europe and entered at King's College, London, where he acquitted himself well. He took his degree at the London University and thereafter proceeded to Germany, where he studied jurisprudence. On 17th November, 1865, he was admitted to the Bar by the Benchers of the Middle Temple and early in the following year proceeded to the Cape in the company of Mr. W. Downes Griffith, who had been appointed Attorney-General in succession to William Porter. On 20th March, 1866, he and Griffith were admitted before Mr. Justice Bell as

advocates of the Supreme Court. After a short stay at the Cape, he moved to Grahamstown to practise before the newly-established Eastern Districts Court, where in a very short time he became recognised as a "most popular and able advocate." On 24th December, 1867, he married Maria Hendrietta, daughter of Mr. J. H. Hartzenburg, M.L.A. for Graaff-Reinet, and in the following year the birth of his son added to his responsibilities. At about this time financial misfortune overtook his father-in-law and the young advocate cheerfully took on his shoulders the whole burden of the broken family. Though Stockenström was a man who was always extremely interested in philanthropic and public affairs, the circumstances in which he found himself compelled him to confine his attentions to his growing practice.

In 1876 he was prevailed upon to stand for Parliament, and contested the Albany seat, but was defeated after a hot election by the Hon. Richard Southey, C.M.G.—a foeman worthy of his steel. Later in the same year he was selected for the appointment of Judge of Griqualand West Land Court to settle the numerous claims to title which had arisen as a result of the recently-discovered wealth in the diamond fields. The territory had been regarded as, and appeared to belong to, the Orange Free State prior to the diamond discoveries, but thereafter the Crown had laid claim through an alleged title of the Griqua Chief, Waterboer; and after the practically *ex parte* Keate Award in 1871 the territory had been annexed as a Crown Colony. The disputed claims to land by individuals were most complicated and legion, some quite preposterous, and accordingly the High Commissioner insisted on a judge being appointed *ad hoc*. The task was obviously heavy and thankless but Stockenström had a stout heart and accepted the appointment. For months he sat patiently and conscientiously hearing the claims and supporting evidence and performed the Herculean task with marked ability. At last he gave his famous judgment in which with his characteristic fortitude he made it quite clear that Waterboer's claim was completely unfounded and knocked the bottom out of the case for the British annexation. President Brand proceeded to England and procured compensation for his State, which included a cash payment of £90,000. However, the numerous private suitors whom the judgment



THE HON. MR. JUSTICE ANDRIES STOCKENSTRÖM.

SOUTH AFRICAN
LAW JOURNAL.

THE HON. MR. JUSTICE ANDRIES STOCKENSTRÖM.

"His memory will long be held in honour as a man whom South Africa is proud to number among her sons"—so spoke a contemporary on the death of the Honourable Mr. Justice Andries Stockenström at the early age of thirty-six, who in the six months of his service on the Cape Supreme Court Bench had shown great promise as an able and fearless judge, and who, if he had been given the normal span of life, might have proved to have been one of South Africa's most distinguished judges. In April, 1844, he was born at Graaff-Reinet—the second son of Sir Andries Stockenström—and had a magician, learned in astrology, cast his horoscope, doubtless the figure "22" would have dominated it, for his birthday was the 22nd, and by a strange coincidence all the principal events of his life occurred on that day of the month. On 22nd September, 1868, his only child[1] was born, on 22nd August, 1877, he was appointed Attorney-General, on 22nd September, 1879, he was elevated to the Bench and on 22nd March, 1880, he died while on Circuit at Swellendam. His career, though short, was worthy of a member of a family which has played so prominent a part in South African history.

The Stockenströms come of ancient and noble Swedish lineage. The founder of the family, according to legend, was one Andersen, who, when Prime Minister to the King of Sweden, loyally continued his fealty through a troublesome period of the reign when all the courtiers had forsaken their monarch. His Majesty likened his faithful supporter to "a stump of a tree in the midst of a raging torrent, with all the

[1] The late Sir Andries Stockenström, 3rd Bart., M.L.A., of Maastrom, Bedford, Cape. Died 1922.