MODERN SOUTH AFRICAN LAW AS A FIELD OF COMPARATIVE STUDY

The name "Roman-Dutch" was coined by van Leeuwen in the seventeenth century. It is the name for the amalgamation of the received Roman law with the indigenous customary law of Holland developed into a coherent body of law by the systematic treatises of jurists ranging from Grotius in the early part of the seventeenth century to van der Linden and van der Keesel in the early nineteenth century. The principal treatises are Grotius' *Introduction to the Jurisprudence of Holland* (written in 1620 and published in 1631), van Leeuwen's *Censura Forensis* and the *Roman-Dutch Law* (published in 1662 and 1664 respectively), and Voet's *Commentarius ad Pandectas* (published in 1698-1704). It was brought to the Cape by van Riebeeck and survived the advent of British sovereignty in 1806. Indeed, in a sense, it was preserved by the advent of British sovereignty, since it was shortly to be replaced by a code in Holland. The nineteenth century saw the Roman-Dutch law in the Cape giving substantial ground before the pressure of English law. But the retreat reflected in judicial decisions and statute law did not become a rout, and this was in large measure due to Lord de Villiers, appointed Chief Justice of the Cape in 1874, and later to become Chief Justice of the Union. Even in the Dutch Republics before the Anglo-Boer War the pressure of English law was felt, and legislation between the dates of annexation and Union brought their laws into substantial conformity with those of the Cape. At the same time a strong bench in the Transvaal was paralleling the work of de Villiers in the Cape.

The further development of modern South African law is the result of post-Union legislation and of the decisions of the Judges of the Supreme Court, especially the Appellate Division. Briefly the picture of modern South African law compared with English law is this:—

(i) The processes of law-making are the same—statute law and judicial precedent. The doctrine of *stare decisis* appears to be firmly established.

(ii) The law of procedure, civil and criminal, is modelled on English law.

(iii) The law of evidence is English law.

(iv) Commercial law is very largely English. There are statutes covering such matters as insolvency, bills of exchange, patents, designs and trade marks, and copyright.

(v) Criminal law is made up of English law and Roman-Dutch law elements.

(vi) The universal successor of Roman law has been replaced by the testamentary executor of English law. Apart from this, the law of inheritance is Roman-Dutch.

(vii) The law of persons and family law are Roman-Dutch. The proprietary relations of husband and wife remain what they were in the time of Grotius.

(viii) The law of property is Roman-Dutch.

(ix) The law of obligations is a mixture of English and Roman-Dutch law with a present tendency for Roman-Dutch law to prevail. The law of contract is substantially English law though there are important differences. The doctrine of consideration has no place in modern South African law and the law of some of the special contracts, e.g., the contract of sale, is unmistakeably Roman in foundation. The law of delict is substantially Roman-Dutch though there are many imported doctrines of English law, e.g., the doctrine of contributory negligence. But the prevailing tendency is to return where possible to the Roman-Dutch law.

The movement generally is away from English law, and this is explained by a number of factors:—

(a) Most important is the ever increasing development of Afrikaans culture, and a powerful national consciousness throughout South Africa.

(b) The fact that while judges and lawyers of the past were in the great majority English-trained, legal education at a high standard is now available in the South African universities, both English-medium and Afrikaans-medium. The tendency in the Afrikaans-medium universities is for the student to seek his overseas post-graduate training on the Continent rather than in England.

(c) The abolition of appeals to the Judicial Committee of the Privy Council. The Judicial Committee has not exercised any substantial direct influence on the development of South African law. It is possible that it has had an indirect influence by disposing the local Courts to follow the English law in cases where they believe, rightly or wrongly, that the Judicial Committee would incline to the English law should the case come before it on appeal. The abolition of

appeals to the Judicial Committee is perhaps not so much an explanation as a symptom of the movement.

It is easy to assume, when approaching the question of selecting material for comparative study by students who are trained in English law, that the value of the material selected will increase in proportion to the contrast it offers with English law. The writer would not admit that this is a valid criterion when the material is selected for post-graduate study and especially denies that it is a valid criterion when the material is selected for undergraduate study. When there are radical differences of structure and basic principles, the process of comparison, if it is to include consideration of the interests protected, is nigh impossible without a very deep knowledge of the foreign system and its social setting. And unless the process of comparison is functional, the writer considers that it may be very largely futile—it may become a process of haphazard listing of principles and rules in adjoining columns with nothing to show why the principles and rules are adjoining. But where there has been a reception of English law in a foreign system, the very reception provides the key to a significant study—why has the local law been displaced in this field and not in another? The answer in South African law, it will be shown in a moment, is often to be found in terms of superiority of function in modern South African society. But superiority of function is not always the answer—considerations of logical structure of the Roman-Dutch law and considerations of sentiment have played important roles.

The study of modern South African law thus provides at once a critical study of English law, an experience in analytical jurisprudence, in functional jurisprudence and theory of justice, and in historical jurisprudence. There are, moreover, certain important practical considerations which increase its value for undergraduate study.

1. PRACTICAL CONSIDERATIONS.

While it is true that an expert knowledge of Roman-Dutch law cannot be acquired without Latin and Dutch, and while some of the literature of modern South African law is in Afrikaans, most of the modern material is in English. Thus it is rare to find a judgment of any of the Provincial Divisions of the Supreme Court or of the Appellate Division which is not in English.

Again, the form of the materials will be quite familiar to the student. The doctrine of *stare decisis,* in its broad outlines, obtains. The law of evidence is English and the law of civil and criminal procedure very largely so.

The Roman law in the Roman-Dutch system is immediately recognisable as such. Codification has never operated, as it has done with practically every other Romanistic system, to conceal the sources of the materials. "There is no part of the world at the present day where the direct appeal to the texts of the Corpus Iuris is more frequent and effective than in the Union of South Africa."[1]

Moreover, and this is most important, the judgments of the Courts themselves, especially those of the Appellate Division, are very often studies in comparative law. The Appellate Division enjoys a unique position. Created in 1910, it is the ultimate Court of Appeal from the Provincial Divisions of the Supreme Court, from South-West Africa and the Native High Court of Natal, and appeals lie to it from the High Court of Southern Rhodesia. Though the Appellate Division regards itself as bound by its own previous decisions, unless they are clearly wrong, it otherwise enjoys unique freedom. "Inspired but unhampered by two great bodies of law—the civil law of Rome and the common law of England—it enjoys a position of enviable and unparalleled freedom. Day by day it is laying the foundation of a common law for South Africa, day by day it is raising upon this foundation a fair and harmonious fabric."[2] Writing in 1921, Lee was able to offer these striking illustrations:—"In the volume of reports for the current year, (the reader) will find a rule of law as old as the Twelve Tables recognised as forming part of the modern law of sale . . (*Laing v. South African Milling Co.,* (1921) A.D. 381, 394). On another page of the same volume he will find the Praetor's Edict *de nautis cauponibus et stabulariis* applied to the question of an hotelkeeper's liability to his guest for loss of baggage (*Davis v. Lockstone,* (1921) A.D. 153). Another case raises important questions of criminal law (*Rex v. Nlhovo,* (1921) A.D. 485); the American cases of *Hicks v. Commonwealth* and *Stabler v. Commonwealth* are cited and followed. Yet another involves a claim to repudiate a contract as having been procured by misrepresentation (*Karroo & Eastern Board of Executors and Trust Co. v. Farr,* (1921) A.D. 413). Reference is made to Halsbury's Laws of England, to *Redgrave v. Hurd,* (1881) 20 Ch. D. 1, and to other English cases. Finally, there are cases which raise questions as remote from English as from Roman law such as community of goods between the

1 Lee, in 61 South African Law Journal (hereafter quoted as S.A.L.J.) 170, at 173.
2 Lee, in 41 S.A.L.J. 297, at 302-303.

spouses, or again, questions of native law and usage taken on appeal from the Native High Court of Natal."[3]

II. AN EXPERIENCE IN HISTORICAL JURISPRUDENCE.

Everyone knows something of Savigny's theory of the *volksgeist,* of his argument with Thibaut, and the struggle between the Germanists and the Romanists which preceded the German codification, but few are aware that the drama is being re-enacted in South Africa at the present day, save that this time the conflict is between the protagonists of Roman-Dutch law as the true expression of South African national consciousness and the protagonists of English law. The extremist on either side would argue that Roman-Dutch law or English law should be followed for its own sake. The Roman-Dutch scholar may seriously offer the solution of Grotius writing, it will be remembered, in 1620, in preference to a recent decision of the Appellate Division. In 1932, in an article entitled *On Fundamentalism in Law,* Melius de Villiers wrote, "It is to be hoped that in South Africa there may be found on the Bench, in the Bar and amongst all branches of the legal profession a considerable and growing body of fundamentalists wishful to see that our law does not suffer unhealthy development in various directions under the influence especially of any system of law where the fundamental principles of the latter are divergent from those of the well-established and well-conceived principles of our own law and who desire to see these principles of our law re-established as far as possible, where they have been infringed."[4]

Fundamentalism may, however, easily become antiquarianism. While the writer realises that sentiment is itself part of the social complex that the law serves, sentiment may be at odds with other demands of that social complex. The retention of the system of community of property and of the husband's power, at odds with the modern emancipation of women, is, the writer believes, an illustration. As Lee put it, ". . . A revived interest in the history of Roman-Dutch law and the more systematic study of its principles in the universities of South Africa (both excellent things in themselves), coupled with a sense of nationality exhibiting itself in the field of law, may, one feels, create a certain atmosphere in favour of ancient institutions, not because they are convenient, but because they are

[3] 40 S.A.L.J. 442, at 447.
[4] 49 S.A.L.J. 199, at 204.

ancient. Where such an atmosphere exists, it is always easy to throw upon the legislature the burden of changing the law."[5]

As yet the Appellate Division has not departed from the example set by Lord de Villiers of judging the ancient materials in terms of the demands of modern civilisation. But extra-judicially Mr. Justice van den Heever has said, "If our law on this matter (vicarious liability) was uncertain or out of date, it was for Parliament to intervene and effect readjustment, not for judges to legislate, since they are constitutionally irresponsible, being answerable only to their consciences."[6]

Fundamentalism carries with it an attack on the principle of *stare decisis* and could lead to the destruction of the work of the Appellate Division in creating a modern system of law for modern South Africa. Thus Melius de Villiers has said, "If our courts of law, following examples derived from the divergent law of England, should have in practice by their decisions departed from recognition of *animus iniuriandi* as an essential ingredient in our law of defamation the proper course would be in future to discard these mongrel decisions and not with a stroke of the pen to strike at a fundamental principle of our law."[7] We are used to hearing that *stare decisis* is a barrier to progress. It is strange to find the principle disapproved as being a barrier to the return to ancient law.

But ancient law is not necessarily bad law for modern South Africa. In many contexts, as will be seen in a moment, the ancient law valued functionally is modern and progressive. The writer only intends to be critical of that emotional nationalism which would seek the restoration of Roman-Dutch law in every particular simply because it is Roman-Dutch law. There is comfort in remembering that the anti-Romanists did not prevent the assimilation of Roman law into the Dutch customary law nor did the Germanists prevent a substantial measure of Roman law from finding its way into the German Civil Code.

III. AN EXPERIENCE IN FUNCTIONAL JURISPRUDENCE AND THEORY OF JUSTICE.

Modern South African law is a rich field for the student of functional jurisprudence. In the words of Lord Tomlin, "(Roman-Dutch) law is a virile living system of law, ever seeking, as every

[5] 41 S.A.L.J. 297, at 308.
[6] *Aquilian Damages in South African Law, v.*
[7] 48 S.A.L.J. 308, at 309.

such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society."[8]

The reason for the adoption of English commercial law requires no demonstration.

The development of South African law to meet the demands of modern conditions has been the inspiration of the Appellate Division. Lee offers as illustrations *Green v. Fitzgerald*[9] and *Estate Heinamann v. Heinamann*.[10] In the first case the Court decided the question of the right of the offspring of adulterous intercourse to take under the mother's will on the broad ground that, the rule of the Roman-Dutch law which punished adultery as a crime having become obsolete by disuse, it would be unreasonable to penalise innocent issue of a union which no longer entailed criminal liability upon the parties to it. The same principle determined the decision of the majority of the Court in the later case to the effect that, inasmuch as adultery had ceased to be a crime in South Africa, all consequent penalties had also fallen away, including the prohibition of intermarriage between persons who have committed adultery together. In this case the Court had to brush aside, *inter alia,* the texts of the Roman law prohibiting such marriages.

The reception of much of the English law of defamation reflects a realisation that modern conditions require the recognition of reputation as an asset. The reception of the English law of vicarious liability has a functional justification. Van den Heever considered the reception premature: "In a young and undeveloped country such as South Africa was at the time, application of the principle of unlimited liability was calculated to stifle initiative and entrench monopoly."[11] His use of the words "at the time" leads to the inference that he would not regard the principle as inappropriate to-day.

The functional approach in other contexts dictates the retention of the Roman-Dutch law. The broad principle of liability for negligence stemming from the Lex Aquilia does not require the artificial distinctions drawn in English law between contractors, invitees, licensees, and trespassers. The same broad principle has inclined the South African courts towards Aquilian liability for negligent statements. The survival of the *actio iniuriarum* makes possible the

8 *Pearl Assurance Co. v. Government of the Union of South Africa,* [1934] A.C. 570, at 579.
9 (1914) A.D. 88.
10 (1919) A.D. 92.
11 *Aquilian Damages in South African Law, v.*

protection of a right of privacy in South African law, protection of which English law has not yet been able to afford.

The Roman-Dutch law action given to the dependants of a deceased person in respect of the pecuniary loss they have suffered in consequence of the death has been preserved. The action probably has its roots in early Germanic custom and is more generous than the action introduced into English law by Lord Campbell's Act.

The broad principle of the Roman law forbidding unjust enrichment continues unquestioned in South African law, in contrast with the attempts of English courts to find a rationale of quasi-contract.

None would suggest that the English law of real property should be preferred to the simplicity and certainty of the South African law of registered titles derived from Roman-Dutch law and dating in South Africa from van Riebeeck's settlement and thus preceding Torrens by centuries.

IV. AN EXERCISE IN ANALYTICAL JURISPRUDENCE.

Roman-Dutch lawyers claim powerfully the superiority of Roman-Dutch law over English law in logical structure. Thus, complaining of statutes interfering with the structure of the Roman-Dutch law, Sir John Wessels said, "The common law of South Africa—the old Roman-Dutch law—is like some stately cathedral or like some beautiful continental hotel de ville or town hall; every part of the structure has been made to harmonize with every other part and the whole inspires one with reverence, whereas the statute law is often like some botched building raised in a hurry with inadequate materials by an amateur who thought himself a Michaelangelo or a Christopher Wren or else like on interminable row of buildings in a dirty manufacturing town of the Black Country."[12]

So too, Melius de Villiers said, " . . . Law is distinctly a science and is to be cultivated as such . . . It may safely be said that the Roman law, evolved by the minds of jurists conversant with the theory of law in its highest sense, is based upon scientific and philosophical principles to a far greater extent than the law of England."[13] We are reminded that Austin sought inspiration from Romanist systems before attempting his analysis of the basic principles of English law.

Whether perfection of structure over the whole field of Roman-Dutch law can rightly be claimed might be questioned, but at least,

[12] 37 S.A.L.J. 265, at 277.
[13] 49 S.A.L.J. 199, at 199-200.

as one example, the Roman-Dutch law of delict offers a logical structure superior to the English law of torts.

It is commonplace nowadays to say that analysis is not enough; that because the principles of law are logically consistent, it does not follow that they are necessarily good principles. The writer agrees, but would suggest that it does not follow that because the principles are logically consistent they are necessarily bad. The completely illogical fuddle of the English law of contributory negligence did not make it proof against statutory betterment. The fundamentalists gleefully and justly declaim against the fact that the fuddle was received into South African law and there remains while it has been remedied in the place of its origin. Clear functional justification must be shown to warrant a departure from logical structure.

The insistence by the South African courts on the requirement of *culpa* and their refusal to follow the dictum of the Privy Council in *Eastern & South African Telegraph Co. Ltd. v. Cape Town Tramways Coys. Ltd.*[14] involves preferring logic where it is considered that functional advantage has not been clearly shown. But the fact remains that the very rationale of delictual liability as compensation for blameworthy conduct is out of harmony with the new gospel of insurance against loss. The South African law of delict has yet to meet the challenge of the new gospel. When it does, the logical structure will come in for some severe punishment. Sir John Wessels was not unmindful of the impending challenge when he said, "When this conflict between the social reformer and the lawyer becomes acute in England, I have no doubt we shall feel bound to follow suit, and when the new ideas are copied in South Africa, the Roman-Dutch law will probably undergo a great trial."[15]

If the study of Roman-Dutch law offers no more, it is at least a modest beginning towards that critical understanding of our own law which should be the aim of any comparative study. Those who consider that comparative study must take account of the more exotic Code systems of the Continent must at least admit that here is a way of approach which will make easier a significant comparative study of those systems.

Pretoria, May 1951. R. W. PARSONS.*

14 [1902] A.C. 381, at 393-394.
15 37 S.A.L.J. 265, at 279.

* *B.A., LL.B. (Sydney); lecturer in Law, University of Tasmania, 1947; senior lecturer in Law, University of Western Australia, 1948—; awarded an Australian National University research scholarship for 1951 and 1952.*