

LAW AND LEGISLATION IN THE UNION OF SOUTH AFRICA

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The Union of South Africa, the youngest of the self-governing Dominions within the British Empire,¹ came into being on the thirty-first of May, 1910, the eighth anniversary of the Treaty of Vereeniging, which concluded the Anglo-Boer War of 1899-1902, and recognized the annexation of the two Boer Republics, the South African Republic (or Transvaal) and the Orange Free State, to the British Crown. The Union, therefore, is barely twelve years old, and for four years of that time has had to live through the abnormal conditions of a world-wide war. It would be surprising, in these circumstances, if the process of growth had not in some respects been arrested or set back. The development in South Africa of a homogeneous sentiment of national existence within the Empire might have been more marked if there had been no war to check it. But by the lawyer the ebb and flow of political movement can happily be disregarded except so far as they affect directly the legal processes which form the subject of his study. These processes, as exhibited in South Africa at the present day, are of peculiar interest. They present a picture of a system of law in the making. Seldom have the courts of any country enjoyed the opportunity which the courts of South Africa now enjoy, of moulding the laws to their will, inspired but not hampered by tradition, aided but not checked by the legislator. For, as we shall see, though the Union Parliament has not been inactive in consolidating the laws of the Union, the task of directing the course of legal development has principally rested with the courts of justice. Before proceeding to details, a few words may be in place with regard to the several organs of legal change.

The Constitution of the Union is the most perfect type of a self-governing Dominion. Brought into being, like the Dominion of Canada and the Commonwealth of Australia, by an Act of the Imperial Parliament,² it differs from the first in having within itself unlimited power of constitutional change, and from the second in being a union and not a confederation, and in the fact that constitutional changes (with one exception)³ can be effected without any special formality of enactment. The laws that we shall speak of relate rather to "civil rights and property" than to constitutional questions, but it is impor-

¹ The constitution of the Irish Free State had not been settled when this was written.

² South Africa Act (1909) 9 Edw. VII, c. 9.

³ South Africa Act, *supra* note 2, sec. 35.

tant to observe that within its territorial limits the legislative authority of the Union Parliament is as "omnipotent" as that of the British Parliament itself. The refusal of the Governor-General to assent to a bill passed by both Houses and overriding legislation by the Imperial Parliament are indeed constitutional possibilities, but scarcely of the kind which lie within the range of practical policy. The judicial organization of the Union differs from the legislative in that the ultimate court of judicature is not situated within the Union. The South Africa Act, Section 106, while excluding an appeal as of course, leaves unimpaired the right of the King in Council (in other words, of the Judicial Committee of the Privy Council) to grant special leave to carry appeals from the Appellate Division of the Supreme Court to this body, which in practice consists mainly of judges whose professional experience lies within the limits of the United Kingdom. But recent pronouncements of this tribunal point to the conclusion that, except in matters of grave constitutional concern, leave to appeal will generally be refused. We may take it, therefore, that, for most purposes, the interpretation no less than the enactment of the laws of the Union will fall entirely within the competence of local authority. The highest importance, therefore, attaches to the decisions of the Appellate Division of the Supreme Court of South Africa, upon which is cast the weighty task of creating a common law for the whole of British South Africa south of the Zambesi and for the mandated territory, formerly German South West Africa. Appeals lie to this court from: (1) the Provincial and Local Divisions of the Supreme Court of the Union;⁴ (2) the High Court of Southern Rhodesia;⁵ (3) the Native High Court of Natal;⁶ and (4) the High Court of the mandated territory officially known as the Protectorate of South-west Africa.⁷

Before proceeding to a detailed examination of the work accomplished by the Legislature and the courts of the Union during the past twelve years, a few words will not be out of place with regard to the state of the law in the four colonies, which formed the original constituent members of the Union. The Colony of the Cape of Good Hope had been British since 1806, the title of Great Britain, founded upon cession and conquest, having been confirmed by the Treaty of London of the thirteenth of August, 1814. In accordance with invariable constitutional practice the existing legal system of the country remained in force. But this statement must be accepted with qualifications. From the very first, British influences asserted themselves. This was, for example, the case as regards the more barbarous features of the Dutch criminal law and in respect to the administration of estates, the universal successor of the civil law being replaced by the testamentary

⁴ South Africa Act, *supra* note 2, sec. 103.

⁵ *Ibid.*

⁶ Union of South Africa Sts. 1911, Act. No. 1.

⁷ Union of South Africa Sts. 1920, Act. No. 12.

executor of the English type. At the same time the local legislation of the Dutch governors of the Cape, as well as the enactments of the Dutch East India Company and of its Governor-General, whose seat was at Batavia in the island of Java, received scant attention from the British rulers. These circumstances tended to confirm the authority of the principal text-books, in which the jurists of the Netherlands had expounded the mixed system to which Van Leeuwen in the seventeenth century had given the name of *Roman-Dutch Law*. Chief amongst these were Grotius' *Introduction to the Jurisprudence of Holland*,⁸ written in 1620, and published in 1631; the two works of Van Leeuwen, the *Censura Forensis* and the *Roman-Dutch Law*, published in 1662 and 1664, respectively; and the *Commentarius ad Pandectas*, of Joannes Voet, published in 1698-1704. The eighteenth century did not produce any systematic treatises comparable to the above, though one must not pass over in silence the commentary of Schorer on *Grotius* (1767) and of Decker on *Van Leeuwen* (1780),⁹ and at the beginning of the nineteenth century the useful works of Van der Linden and of Van der Keessel, the first a practising advocate of Amsterdam, the second a professor of law in the University of Leiden. These, with many others, are the authorities to which the South African lawyer still turns for information as to the common law of his country. During the first half century of Dutch rule in South Africa the old law barely held its own against the competing influence of English law. To investigate and accommodate its principles to modern conditions was the life work of that great jurist, the late Lord de Villiers, who, appointed Chief Justice at the Cape in 1874 at the early age of thirty-two, retained this office and subsequently the office of Chief Justice of the Union until his death in 1914. In Natal, the other British colony of South Africa, British influences had been predominant. The Roman-Dutch law remained indeed the common law of the country, but with a bias towards English law which was reflected in the statute books and in the decisions of the courts. In the Dutch republics also, particularly in the Transvaal, English influences had made themselves felt. But at the date of annexation the law of these territories retained an archaic character which was afterwards partly removed by pre-Union legislation. Simultaneously the decisions of the Transvaal courts began to command an increased respect and importance. The occasional clashes of judicial opinion between the courts of the Cape and those of the Transvaal indicated that the work of Lord de Villiers, great as it was, was yet not necessarily final. The work which he had done—and admirably done—for the Colony was to be passed under review by the court which owed its existence largely to his own far-

⁸ That is, of the Province of Holland, one of the nine provinces of the United Netherlands.

⁹ English translation by Kotzé (1921).

seeing patriotism—the Appellate Division of the Supreme Court of South Africa. This court as constituted by Section 96 of the South Africa Act consisted of the Chief Justice of South Africa, two ordinary Judges of Appeal, and two additional Judges of Appeal. These last were to be assigned by the Governor-General in Council to the Appellate Division from any of the provincial or local divisions of the Supreme Court, but were to continue to perform their duties as judges of their respective divisions when their attendance was not required in the Appellate Division. The experience of this court during the first ten years of Union had shown that it did not possess the element of permanence which is indispensable to the satisfactory working of a court of ultimate appeal. Cases had occurred in which the Chief Justice and the two ordinary judges of appeal being absent on leave or from sickness, the majority of the court was made up of acting members some of whom might be members of the court from which an appeal was taken. For the avoidance of such difficulties and to give a more permanent character to the court, a recent statute, repealing Section 96 of the South Africa Act, has established a court consisting of a Chief Justice and four judges of appeal, all of whom devote themselves exclusively to the work of the Appellate Division. The policy of this change is apparent as well from what has been said as from the fact that the Constitution of the Union provides for no court of intermediate appeal. This is perhaps a weakness in the judicial system. No doubt different opinions may be held as to the value of a second appeal, but English experience favors it, and the immense importance of the issues committed to the Appellate Division might seem to make it desirable. Happily the judicial quality of this court is of the very highest order. In grasp of principle and in width and depth of erudition it can challenge comparison with any tribunal in the world.

The legislative output of the Union Parliament need not detain us. It includes some consolidating and amending acts of the first importance. Such are the Administration of Estates Act,¹⁰ the Patents, Designs, Trade-marks, and Copyright Act,¹¹ the Insolvency Act,¹² the Criminal Procedure and Evidence Act,¹³ the Magistrates' Courts Act,¹⁴ the Deeds Registries Act.¹⁵ These provide a code of law for the subjects with which they deal. But uniformity is still to be sought in the law of companies and of bills and notes. A Wills Act for the Union might easily be framed and would remove some undesirable inconsistencies between the laws of the several provinces. A uniform marriage

¹⁰ Union of South Africa Sts. 1913, Act No. 24.

¹¹ Union of South Africa Sts. 1916, Act No. 9.

¹² *Ibid.* Act No. 32.

¹³ Union of South Africa Sts. 1917, Act No. 31.

¹⁴ *Ibid.* Act No. 32.

¹⁵ Union of South Africa Sts. 1918, Act No. 13.

law is scarcely attainable in a country where differences of race raise fundamental questions of policy.

But it is of the development of the law by means of judicial decisions that it is my principal purpose to speak. Space will not admit of an exhaustive treatment of this interesting subject. It will be enough, by means of examples drawn from various branches of the law, to illustrate the processes by which the system is being constructed and reconstructed from day to day. An early case which came before the Appellate Division illustrates in a very striking degree the high antiquity of parts of the fabric. This was the case of *Green v. Fitzgerald*.¹⁶ Action was brought to have the court declare void a bequest by a mother to her children born in adultery. Ultimately the decision turned upon the interpretation of texts in the *Corpus Juris* of Justinian and their application in the law of Holland and of South Africa. These texts, according to Voet,¹⁷ declare that "incestuous and adulterous issue, being born of illegal relations (*ex damnato complexu natos*) may not be instituted heirs to any share by their parents, or by any other title receive any sort of liberality from them." But an examination of the original sources suggests a narrower interpretation of their meaning. There is some reason to think that they relate (1) to the issue of incest only and not of adultery; (2) perhaps only to the issue of incestuous marriages; (3) to succession from the father only and not from the mother.¹⁸ However this may be, the court decided the question upon 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 penalize innocent issue of a union which no longer entailed criminal liability upon the parties to it. *Cessante ratione legis cessat ipsa lex*. The ground of the decision leaves untouched the case of the issue of an incestuous union as well as the rule of the Roman law which prohibited simple bastards¹⁹ from taking more than one-twelfth under a father's will if there were also legitimate issue surviving. But it is scarcely likely that these survivals from a remote past will be allowed (should be question arise) to perpetuate their existence in the modern law. The same principle determined the decision of the majority of the court in the later case of *Estate Heinemann v. Heinemann*²⁰ to the effect that, inasmuch as adultery has ceased to be a crime in South Africa, all consequent penalties have also fallen away, including the prohibition of intermarriage between persons who have committed adultery together. In this case the court had to brush aside not only texts of the Roman law prohibiting such marriages

¹⁶ [1914] A. D. 88.

¹⁷ *Commentarius ad Pandectas* (1608-1704) 28. 2. 14.

¹⁸ See the learned judgment by Kotzé, J. P., in *Fitzgerald v. Green* [1911] E. D. C. 432.

¹⁹ That is, not born in incest or adultery.

²⁰ [1919] A. D. 99.

but also statutory enactments of the States General and of the States of Holland of the seventeenth century. Two members of the court, however, refused to go this length. The above cases show how the court will depart from old rules because they are adjudged to be inapplicable to modern conditions. There is no question here of the influence of a foreign system of law, unless it be said that the general feeling in favor of freedom of testamentary disposition which characterizes the modern law has been inspired from English sources. In another case the influence of English law is more apparent. In *Van Niekerk and Union Government (Minister of Lands) v. Carter*,²¹ the question arose as to the ownership of the bed of a non-navigable public river. The riparian owner held a crown grant of land which was expressed to be bounded by the river. Did this carry a grant of the bed of the river *usque ad medium filum aquae*? The texts of the old law left the solution of this question uncertain, and the analogy of the English law was allowed to incline the balance in favor of an affirmative answer. "In the absence of any clear or authoritative rule in the South African courts on the subject," said Soloman, J. A.,²² "I think that we should be well advised to follow the English rule that the grant of a piece of land bounded by a river must be construed as conveying the land, up to the middle of the stream, unless it was intended to exclude the bed from the grant." This case is interesting as illustrating the attitude of the court towards English decisions. They are followed, so far as they are followed, not because they are authoritative (and they are not), but because they are reasonable in themselves, and not in disaccord with the principles of South African law. But it would be a mistake to suppose that the court exhibits any bias in favor of English law. American cases are cited with equal respect though sometimes with little effect, owing to "the great array of authorities on both sides of the question."²³ Decisions on the Scotch common law also receive attention since that system "bears a close affinity to the law of Holland."²⁴ Rarely perhaps has any court of justice been so favorably situated as the Appellate Division of the Supreme Court of South Africa in its treatment of authorities. Administering a system of law which is neither pure common law nor pure civil law, but a mixture of both, it is heir to two great traditions, inspired by each, enslaved to neither.

The fame of the controversy between *consideration* and *cause* in relation to the law of contracts, lately set at rest by the decision of the Appellate Division in *Conradie v. Rossouw*,²⁵ has passed beyond the limits of South Africa. In a series of cases which came before him in the old Supreme Court of the Cape, Chief Justice, afterwards Lord, de

²¹ [1917] A. D. 357.

²² [1917] A. D. at p. 391.

²³ [1916] A. D. at p. 521.

²⁴ [1921] A. D. at p. 498.

²⁵ [1919] A. D. 279.

Villiers supported with all the weight of his great authority two propositions, neither of which can be lightly dismissed. The first was that, whatever text-book writers may have thought or said, the courts of Holland (apart from the special case of donation) did not give effect to a promise which was unsupported by a *quid pro quo*. The second was that this view was in accordance with the law of the Colony. This interpretation of the law was not accepted in the Transvaal, and the Appellate Division, a few years after Lord de Villiers' death, decided against it. The case of *Conradie v. Rossouw* decided quite clearly that a valuable consideration is not necessary to support a promise in the law of South Africa. The doctrine of consideration being cleared out of the way, the doctrine of cause is established in its place. But what cause means, if it means anything at all, the decision in *Conradie v. Rossouw* has scarcely explained.

The effect of this decision is to bring the law of South Africa, in relation to the constituent elements of contract, into general conformity with the law of other civil-law countries. Another divergence from common-law doctrine is seen in the treatment of the *stipulatio alteri*. As long ago as 1887, in the case of *Tradesmen's Benefit Society v. Du Preez*,²⁶ Chief Justice de Villiers admitted the principle that a third party may sue upon a contract made for his benefit, with the qualification that there must be in existence "a binding engagement for valuable consideration between the promisor and the promisee." Since the establishment of the Union numerous cases have recognized the *stipulatio alteri* as firmly established in the jurisprudence of South Africa, though the theoretical basis of the relations established by it have not yet been completely elucidated. A recent instance of its application was to the case of a contract entered into for the benefit of a company not yet formed.²⁷ The court was in some difficulty owing to the rule in *Kelner v. Baxter*²⁸ having been unreservedly adopted by the Privy Council in an appeal from Natal.²⁹ But a distinction suggested by a passage in Grotius' *de Jure Belli et Pacis*³⁰ was called in aid with good effect. If A, without authority, contracts on behalf of B, he may do so either as agent or as principal. In the first case there can be no ratification by a principal not in existence at the date of the contract. In the second case B may take advantage of the contract. "By our law . . . it is possible to contract independently for the benefit of a third person; it is not necessary to do so as agent. Such a contract when duly accepted by the person for whose benefit it was made may be enforced by him. I know no reason in principle why this right of acceptance should be confined to cases where the third person was in

²⁶ 5 Cape of Good Hope Sup. Ct. 269.

²⁷ *McCulloch v. Fernwood Estate Ltd.* [1920] A. D. 204.

²⁸ (1866) L. R. 2 C. P. 174.

²⁹ *Natal Land Co. v. Pauline Colliery Syndicate* [1904] A. C. 120.

³⁰ (1625) *Lib. 2*, cap. 11, sec. 18.

being at the date of the contract. There is nothing in the authorities which points to such a conclusion. The sole test is whether the offer is open. And I cannot see why by our law a man should not himself stipulate in favor of his unborn child, or of a company which he is engaged in bringing into existence, leaving it to the beneficiary in due time to decide whether or not he will accept the benefit offered."³¹

It was said above that the court shows no bias in favor of English law. Perhaps one might go further and say that it displays a bias, inclination, leaning (I wish to find a neutral word) away from it. This is natural. Union has engendered a growing sense of the "South Africanness," of South African law. Where a few years ago English cases alone would have been cited and the identity of the two systems would have been unquestioned, this is no longer the case. One can detect, I think, a desire to establish the sufficiency of the Dutch law to meet new situations as they arise, and to trace its historical continuity in the modern system. An instance may be found in a discussion by the Appellate Division of the law of tender. "Tender," said Innes, C. J., "is essentially a term of English law; and one is apt on that account to regard it in the light of English practice. That was certainly the case in *African Agricultural Corporation v. Bouguenon*,³² where none but English authorities were considered."³³ But it must not be inferred "that our doctrine of tender was rooted in English law. . . . That is not so. It came to us from Holland; which accounts for the fact that such limitations as those which in England prevent a tender from being pleaded to a claim for unliquidated damages and which confine its operation to the period before summons have never been recognized in South Africa, so that in the absence of well established practice to the contrary the incidents of tender must be regulated by Roman Dutch Law."³⁴

It does not fall within the scope of this article to give a finished picture, on however small a scale, of the legal system of South Africa. The design has been to indicate its spirit and tendency. If the reader will give himself the trouble of turning over the pages of any volume of the reports of the Appellate Division he will, if I may assume him to be versed more particularly in the common law, find much that is familiar to him, but he will find as much or more with which he is less likely to be acquainted; and often the familiar and the unfamiliar will be found strangely associated and combined. In the volume of the reports for the current year he will find a rule of law as old as the Twelve Tables recognized as forming part of the modern law of sales. "Now the rule of the civil law was clear. The sale and delivery of

³¹ Innes, C. J., in *McCulloch v. Fernwood Estate Ltd.*, *supra* note 27, at p. 208.

³² [1904] T. S. 535.

³³ *Odendaal v. Du Plessis* [1918] A. D. at p. 473.

³⁴ *Ibid.* 477, 478.

goods did not operate to transfer the *dominium* unless the price was paid, security found or credit given. That principle was adopted in Holland and has been recognised and enforced by our South African courts."³⁵ 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 hotel-keeper's liability to his guest for loss of baggage.³⁶ Another case raises important questions of criminal law.³⁷ The American cases of *Hicks v. Commonwealth*³⁸ and *Stabler v. Commonwealth*³⁹ are cited and followed. Yet another involves a claim to repudiate a contract as having been procured by misrepresentation.⁴⁰ Reference is made to Halsbury's *Laws of England*, to *Redgrave v. Hurd*,⁴¹ 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 spouses, or again, questions of native law and usage taken in appeal from the native High Court of Natal. The general impression which the reader will derive from these reports and, if I have not failed in my object, from this paper, is of a system of law singularly rich in the sources that it draws upon, singularly unhampered in the use that it makes of them; of a court which enjoys a liberty of action scarcely to be paralleled in the history of modern states. Such conditions call for judicial talent of the highest order. It is to be hoped that the newly instituted universities of the Union will be successful in establishing a scheme of legal education which will guarantee a succession of persons fit to carry on the work of the eminent men who, in every division of the Supreme Court of South Africa, are building up a great system of law for generations yet unborn.

³⁵ *Laing v. South African Milling Co. Ltd.* [1921] A. D. at p. 394.

³⁶ *Davis v. Lockstone* [1921] A. D. 153.

³⁷ *Rex v. Nlhovo* [1921] A. D. 485.

³⁸ (1889) 86 Va. 223, 9 S. E. 1024.

³⁹ (1880) 95 Pa. 318.

⁴⁰ *Karoo and Eastern Board of Exrs. and Trust Co. v. Farr* [1921] A. D. 413.

⁴¹ (1881) 20 Ch. Div. 1.