

1-1960

South Africa and the Law

Graham Douthwaite

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

 Part of the [Law Commons](#)

Recommended Citation

Graham Douthwaite, *South Africa and the Law*, 11 HASTINGS L.J. 411 (1960).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol11/iss4/2

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

SOUTH AFRICA AND THE LAW.

By GRAHAM DOUTHWAITE*

Introduction

As a member of the British Commonwealth of Nations, the Union of South Africa is autonomous. Her political tie with Great Britain rests solely on free association. Though in the field of constitutional law the South African picture presents features which, to one raised in the American tradition, may well provoke the raised eyebrow, in other respects it presents a legal system with claim to unique merit. The purpose of this paper is to present a bird's-eye view of both these aspects.

Constitutional Law

Like England, South Africa has no constitution in the sense of a written guarantee of those rights and liberties regarded here as fundamental. The document from which the Union derives its existence as such is an enactment of the British Parliament, passed after full consultation with, and on the recommendations of, a national convention of South Africans. The South African legislature is, in this enactment, given full power to amend any of its provisions; with the qualification, however, that the clauses therein safeguarding the rights of certain classes of voters, and the clause guaranteeing the continuance of the two official languages, English and Afrikaans, are "*entrenched*." That is, they cannot be amended without a two-thirds majority of both Houses—the House of Assembly and the Senate—sitting together as a body.

Between the years 1951 and 1956 a grim struggle raged between the South African legislature and the courts in regard to one of these entrenched clauses. In 1951 the Union Parliament passed an Act removing non-whites from the common voters' roll and placing them on a separate roll. In so doing it did not comply with the provision that requires a two-thirds majority of both houses sitting together. On this ground, the Appellate Division of the Supreme Court held it void.

Nothing daunted, the legislature then passed, in the ordinary way of legislation, another statute. This act created a "High Court of Parliament"—consisting of parliamentarians themselves—endowed with jurisdiction to pass on any decision of the Appellate Division pronouncing on the validity of its enactments. This "court" duly set aside the decision holding void its voter's roll enactment.

* B.A. 1934, LL.B. 1936, Univ. of Witwatersrand, Johannesburg, So. Africa; B.C.L. 1940, Oxford, England. Admitted to practice in the Supreme Court of So. Africa, 1936. Practice in Johannesburg, 1936-38. Assistant Professor of Law, Univ. of Santa Clara Law School, Santa Clara, Calif.

When, in due course, it fell to the Appellate Division to pronounce on the validity of the statute creating this "High Court of Parliament," it unanimously declared that act to be invalid. After several abortive rallies in the form of attempts to amend the South Africa Act (the act containing these entrenched clauses) by the required two-thirds unicameral majority, the legislature decided on another course. It passed an act "packing" the Senate.

With this reconstituted Senate, the legislature in 1956 was able to get through, by a two-thirds majority of both houses sitting together, a much broader measure than the original statute that had started the dispute. The 1956 act, in flat terms, empowers Parliament to prescribe the qualifications necessary to entitle persons to vote for members of the House of Assembly. This act, though criticized as violating the spirit of the entrenchment provisions, in that it puts an end to the right of an individual to keep his name on the voters' roll, has been upheld by the Appellate Division. Thus the courts recognize that Parliament has the right, by ordinary legislation, to prescribe the membership of the Senate and in this way provide itself with an artificial majority.¹ No longer can it be said that the constitution is in part rigid. This goes to add further strength to a fact already well recognized, namely, that in South Africa the legislature is sovereign.

Though the fundamental freedoms which are held dear here in this country are, in large part, respected² they can be disregarded by the legislature, whose constitutional power to do so is unquestioned.³ South Africa recognizes, for example, that it is against natural justice for a person to be deprived of his rights without due notice and a hearing. When an authority has power to give a decision which may affect the rights of, or involve consequences to, an individual, the person so to be affected ought to be informed of the substance of prejudicial allegations against him.⁴ This flows from the Roman doctrine of "audi alteram partem" (hear the other side). But this doctrine has no application where it is clear that Parliament has, expressly or by necessary implication, enacted that it should not apply.⁵ Where the legislature, in the exercise of its supreme legislative power, sees fit to deprive a person of the right of being heard in his own defense, or of

¹ *Collins v. Minister of Interior*, [1957 (1)] So. Afr. L.R. 552 (A.D.).

² One aspect of "due process," for example, finds counterpart in the principle that, where the statutory procedure prescribed for an administrative tribunal is not followed, and this results in prejudice to one affected, the proceedings will be set aside by the courts.

³ The criminal procedure act as now amended permits trials in the absence of the accused "for any reason."

⁴ *Minister of Interior v. Bechler*, [1948 (3)] So. Afr. L.R. 409 (A.D.).

⁵ *Regina v. Ngwevela*, [1954 (1)] So. Afr. L.R. 123 (A.D.), followed in *Monagotla v. Min. of Native Affairs*, [1959 (1)] So. Afr. L.R. 686 (T), holding however that the authorities cannot depose an acting tribal chief without giving him an opportunity of a hearing.

facing his accusers and of cross-examining them, the "supremacy of the law that Parliament made prevails over the rule of natural justice." The legislature may make any encroachment it chooses on the life, liberty or property of any individual subject to its sway, and it is the function of the courts to enforce its will.⁶ Nevertheless, when a statute is reasonably capable of more than one meaning, the courts will give it the meaning which least interferes with the liberty of the individual.⁷

In short, aside from situations where the legislature did not follow the machinery prescribed by law—which machinery the legislature is always free to alter—the authority of the courts to declare legislation void is restricted to power to set aside the laws of subordinate legislative bodies which go beyond their delegated powers.

Some of the powers with which the legislature has armed administrative bodies and officers, to an American, seem extraordinarily broad and arbitrary. The authorities have power to prohibit public meetings when they have reason to believe that the public peace will thereby be endangered. They may prohibit gatherings which might result in feelings of hostility between whites and others. They may forbid the dissemination of documents calculated to engender such hostility. Under the Suppression of Communism Act, 1950 (wherein a definition is given to communism which, *inter alia*, embraces any doctrine or scheme which aims at encouraging hostility between the races) the Governor-General may, without giving any reasons, declare an organization to be unlawful; he may, if satisfied that they are connected with such an organization, prohibit the printing, publication and dissemination of periodicals; he may prohibit "named" persons from attending gatherings and order such persons to resign from organizations to which they belong. Under the Public Safety Act, 1953, he may declare a state of emergency, whereupon he or his delegates have almost unlimited authority to make regulations to cope with the situation.

Legislation to restrict the movement of Asiatics from one province to another—even on a visit—has long been in force. In 1950 an act—the Group Areas Act—which has occasioned voluminous litigation—created separate areas for the different racial groups and prohibited persons of one race from acquiring land in an area from persons of another race without a permit.

Common Law

So much for the constitutional aspects of the South African legal system. In contrast, a broad survey of South Africa's common law points up a feature of its judicial process which is not shared by other legal systems.

⁶ *Sachs v. Min. of Justice*, [1954] So. Afr. L.R. 11 (A.D.).

⁷ *Regina v. Sachs*, [1953 (1)] So. Afr. L.R. 392.

The judges draw their law from three independent sources, the laws of seventeenth century Holland, the jurisprudence of England and America, and the Roman law. This has resulted in a virile and sound jurisprudence. A little history will explain how this came about.

Some three decades after the Mayflower sailed for this continent, the Dutch East India Company sent, from Holland, a small body of Dutchmen to establish a settlement at the southernmost tip of Africa, the Cape. With them, of course, they took the legal system prevailing in Holland at the time. This system, aside from local statutes, was a miscellany of indigenous Dutch laws and customs, doctored by the writings of Dutch jurists into a systematic body of law and infused with liberal doses of Roman law doctrine. This is the basic source of South African law.

When, in 1806, the Cape passed to the British, it had become something more than a mere port of call for scurvy-stricken sailors of the Dutch East India company to replenish their supplies of green vegetables on their long voyage to the Far East. A flourishing community, with problems often quite dissimilar to any faced by their ancestors in Holland, was spreading northward and eastward. The British—perhaps reluctant to wish on to unsuspecting newcomers-to-empire such technicalities as their law of future interests—allowed the existing legal system to remain.

But when confronted with problems in regard to which such legal giants as Grotius, van Leeuwen and Voet of Holland were silent, what more natural than that those entrusted with the administration of justice should turn to Britain for an answer? It was not long before the whole of the "law merchant"—covering maritime law, insurance, bills of exchange and the like—had become substantially what it was in England.

For the same reason the adjectival law of the Union shares the general pattern of that of England. Though there are remedies not known to the common law, such as the attachment of the property of or the arrest of the person of a non-resident to found jurisdiction, or the procedure whereby a litigant can secure a decree of perpetual silence to prevent a possible future suit when he is no longer in a position to defend it, the system of pleading and the rules of evidence are, in the main, based on the common law of England. The nomenclature of the remedies is not of course always the same.⁸

Further, the English dichotomy of functions between barristers (advocates who try cases in the superior courts) and solicitors (attorneys who handle all the other work of a law practice) prevails. Unlike the rule in England, however, a higher standard of legal training is expected of the barrister, not of the solicitor. And, as in England, agreements between an

⁸ A mandatory injunction to restore possession, for example, is called a "spoliation order."

attorney and his client for a share in the proceeds of any contemplated litigation are regarded as serious professional misconduct.

The judicial system of South Africa, for obvious reasons, is not identical with that of Great Britain. However, there are basic similarities. Judges are appointed by the Governor-General-in-Council, and are not elected. There is no legislative confirmation of or even discussion on such appointments. They cannot be removed from office except by the Governor-General-in-Council on an address from both houses of the legislature. There is a division of the supreme court for each province of the Union, from which all appeals go to a single Appellate Division. Appeals from there to the English Privy Council have now been abolished. Inferior courts are presided over by magistrates; there are no justices of the peace courts.

The native is, in general, subject to the ordinary courts and to the laws of the land. However, to accord some recognition to native laws and customs—where not repugnant to South Africa's laws—and to furnish him with a less costly forum for his disputes—there are special tribunals for the litigation of causes where only natives are involved. These matters are adjudicated by white officials schooled in the native customs.

A noteworthy exception to the rule that the judicial system is fundamentally British in character is in the matter of jury trials. These have long been abolished in civil matters. Herein South Africa retains the law of Holland where juries were unknown. In criminal matters, unless the defendant elects a jury trial he is normally tried by a judge and one or two assessors. Both the judge and the assessors resolve questions of fact. The jury, where jury trial is had, ordinarily consists of nine jurors, a majority of seven of which determines the verdict. Non-whites cannot and never could serve. Though a woman has the theoretical right to an all-female jury, this right has little value since women are not required for jury service unless they specially apply for enrollment on a special list of woman jurors.

Probably due to the heterogeneous nature of the country's population (roughly 2.5 million whites, 8.5 million natives, and about 1.5 million of mixed blood, with either Asiatic, European, native or Hottentot elements) jury trials have never been regarded with much favor. Even on an all-white jury, the danger of racial bias between the English-speaking and the Afrikaans-speaking cannot be ignored. Prosecuting and defending officers alike tend to frown on jury trials because, in sparsely populated areas, a jury will often perforce be made up of the defendant's personal friends or enemies. So it is that the right to jury trial has been progressively whittled down by statute. Today, when the charges involve certain offenses, such as treason, violations of the Atomic Energy Act, or crimes wherein the evi-

dence is likely to involve technical matters—for example accountancy—the Minister of Justice may direct a trial without jury; this discretion now extends to robbery type crimes and certain violations of the Suppression of Communism Act.

What of the substantive law of South Africa? To what extent has it retained its roots in the Roman and Roman Dutch principles of its original source, and to what extent has it drawn on the common law as we know it? One finds many words and phrases alien to the legal vocabulary of an American—"vindicatio," "condictio causa data causa non secuta," "litis contestatio," and so forth. No attempt can here be made to cover the field. Sufficient to point up, in each major branch of the substantive law, some of the principal features of interest to the comparative lawyer.

Crimes

Though, as is to be expected, there are crimes, such as *laesae majestatis* (akin to treason and sedition) and *injuria* (a wrongful and intentional impairment of another's dignity) which have no exact counterpart in the Anglo-American system, the basic pattern of South Africa's criminal law is surprisingly similar. It may perhaps be said that in South Africa the emphasis on *mens rea* is greater. It is a very moot question, for example, whether a mistake of fact, to operate as a defense, need be reasonable as well as honest. Its unreasonableness is often regarded as merely a factor going to establish that it was not honestly entertained. Insistence on *mens rea*, though, cuts both ways. A defendant may well be convicted in South Africa as having the requisite guilty intent where at common law he might escape punishment on a technicality.⁹

Though the courts are aware of a distinction between theft and false pretenses, many of the refinements of the common law arising from the rule that without a trespassory taking of possession the crime cannot be larceny have been avoided.¹⁰ In a way favored by American legislatures, South African law classifies all crimes of this nature as theft. But false pretenses, cheating, false personation, and forgery also fall under another general classification, "*falsiteit*" (fraud). Some overlapping is inevitable.¹¹

⁹ See, for example, *Regina v. Maserow*, [1942] So. Afr. L.R. 164 (A.D.), affirming a conviction for receiving stolen property though the goods had been recovered by the police and redelivered to the thief to trap the defendant, since the latter had the requisite guilty intent.

¹⁰ Appropriation by a bailee is theft.

¹¹ See *Regina v. Coovadia*, [1957 (3)] So. Afr. L.R. 611 (N), holding that where a complainant voluntarily gives up possession of property because of what the defendant has pretended to him, the crime, though properly chargeable as theft, is more closely related to fraud than to simple theft, and that the indictment, if it is to be supported by evidence of this nature, must give the defendant particulars reasonably sufficient to enable him to know the precise case against him.

If a person is defrauded into handing over goods, the crime is theft. If he is threatened into so doing, it is robbery.¹²

A few miscellaneous points of interest. The death penalty can be imposed for treason, rape, robbery or housebreaking, or an attempt to commit any such crime, if aggravating circumstances are present. Entrapment, though frowned upon, is not a defense. Crimes cannot ordinarily be prosecuted after a period of twenty years has elapsed. Roman Dutch law recognizes that those who are "defective in understanding and will" cannot be held responsible for crime.

The Law of Persons

Infants, guardianship, and the relations between spouses are governed almost exclusively by the Roman Dutch law, though English precedents not infrequently add their voice in resolving uncertainties.¹³ As to the status of married women, South Africa, though it has scrapped one gross anachronism¹⁴ retains another. Unless, before marriage, the spouses have executed an antenuptial contract and registered it with the Registrar of Deeds, the marriage is in community of property. This means that everything owned by either spouse, as well as any acquisitions of either spouse after the marriage, falls, with very few exceptions, into the common estate. This estate is administered solely by the husband. The wife, therefore, has an extremely limited contractual capacity. She may bind the community in respect of contracts for necessities, and carry on a business with the consent of her husband, and very little else.

Post-nuptial registration of an antenuptial contract may be authorized by the courts only in exceptional circumstances, as where the spouses are able to establish that they had fully intended to marry out of community, but were through no fault of their own unable to execute and register the contract.

In addition to excluding the community property, antenuptial contracts almost invariably provide for the exclusion of the marital power of the husband (the wife thereby retaining her contractual capacity) and for a settlement by the husband on the wife. This latter provision is of course for the protection of the homestead in the event of the husband's bankruptcy.

¹² *Min. of Justice v. De Jongh*, [1959 (1)] So. Afr. L.R. 234 (A.D.).

¹³ See, for example, *Schroeder v. Schroeder*, [1959 (2)] So. Afr. L.R. 6 (N), holding to be "peculiarly applicable to South African law" the rule that to permit marital relations after an act of desertion does not constitute condonation, though it does preclude divorce on the ground of adultery.

¹⁴ The right of a husband to administer moderate chastisement is declared to have become obsolete in South Africa.

Succession

South African law has direct roots in the Roman Dutch law of Holland, though a number of modifications bring it more into line with common law. The universal successor, or "heir" of the Roman law, no longer has the burden of liquidating and distributing the assets. He is for this purpose replaced by the executor dative (English administrator on intestacy) or testamentary (English executor). The executor has no right of retainer in respect of debts due to him by the decedent.

Corresponding with, though not identical with, the doctrine of hotchpot, the South African descendant, whether he inherits under will or on intestacy, must bring into account any gifts he has received or any debt he owes to the decedent unless the testator has expressed a contrary intent.

The formalities surrounding the execution of wills, now governed by statute, closely follow the English pattern.

The doctrine of the earlier law, that a testator was bound to leave a "legitimate portion" to each of his descendants, has been abrogated by statute. But since the duty of maintaining the decedent's dependents passes to the heirs of a deceased testator, this works little if any hardship.

As to the order of succession on intestacy, enough to note in passing the primary rules. 1. The property goes to direct descendants per stirpes (by representation) ad infinitum. 2. Failing direct descendants, it goes back to the surviving parents in equal shares. 3. If one parent alone survives, half the estate goes to that parent and the other half is divided among the brothers and sisters of the decedent (or their descendants, the distribution here too being per stirpes). 4. If both parents are dead, the estate is divided among the decedent's brothers and sisters or their descendants per stirpes.

There is a statutory modification of these rules for the protection of a surviving spouse on intestacy.

Property

South Africa has never been bewildered by the common law's distinctions, in reality, between estates in fee simple, estates at will, estates in tail, and the like. A person either has ownership or he has not. Principal among the "rights less than ownership" are servitudes, real as well as personal, and mortgages. Important among the former is the usufruct (which has been classified as a personal servitude). This serves much the same purpose as the life tenancy of the common law, and is usually created by will. The mortgages and pledges known to the common law are, in Roman Dutch law, classified as "conventional mortgages." Many of the possessory liens known to the common law, such as the lien of a workman for materials and labor, fall under the rubric of "legal mortgages" or "tacit hypothecs."

Many of the difficulties of the common law system, embracing the need for "constructive trusts" and "resulting trusts," are avoided by the country-wide system of land registration—similar to, though far earlier in origin than, the Torrens system. The general rule is that rights in land are created and transferred only by registration against title.

Rights in movables (the terminology is "movables" and "immovables," not "realty" and "personalty") are created and transferred by delivery of possession. In a sale of goods, though the risk of loss passes on completion of the contract, title does not pass until delivery. Incorporeal rights are transferred or encumbered by an instrument of cession; but if the right is an "immovable"—for example, a real servitude—the transaction must be registered against the title deed.

Equity

The need for separate courts of equity arose in England as a result of the formalism of the common law and the existence of situations where justice demanded a remedy but the law offered none. South African law does not require such a machine. The courts are there to administer justice, and in so doing make frequent use of the term "equity" in its broader sense. The "golden doctrine of unjust enrichment," for example, is freely employed to allow compensation to a bona fide possessor for improvements, or to remedy the lot of a contractor who has not completely performed his obligation.

The functions of equity, that is, are performed by the courts as a matter of course. Thus where there has been a trade name infringement, injunctive relief (possibly a "rule nisi, operating as a temporary interdict") will lie without any showing of the non-existence of an "adequate legal remedy."¹⁵

Specific performance of contract is well rooted in the Roman Dutch law. The main difference between the South African doctrine and the doctrine as evolved in English equity lies in the emphasis on the court's discretion. In South Africa the court has a discretion, not to grant the remedy, but *to refuse it* in a proper case.

To say that there is no room for English equity jurisprudence in South

¹⁵ Last year, *Slenderella* of the United States was denied protection of its trade name in South Africa. The reasoning is interesting. "The action for 'passing off' . . . is based on a type of delict which consists of a representation that the defendant's . . . business or goods, or both, are those of the plaintiff The court will protect the right of property existing in another in regard to the name or goodwill. That right of property may be enjoyed by a peregrinus (foreigner) but only, it would seem, where (he) has a right of property in regard to his name or goods within the jurisdiction of the court."

This insistence on the requirement that a property right be involved, though clearly borrowed from English equity, is quite consistent with the South African theory of tort. *Slenderella Systems, Inc. of America v. Hawkins*, [1959 (1)] So. Afr. L.R. 519.

Africa is not to say that that body of doctrine has not left its mark in the Union. For example: the *cy pres* doctrine, employed to determine the fate of a charitable trust which has failed, has found its way into South African courts.¹⁶ But the judges will not adopt doctrines of English equity when these are alien to Roman Dutch legal theory.¹⁷

Although the theoretical differences between the trust of English equity and the Roman *fideicommissum* are fundamental¹⁸ in South Africa testamentary dispositions phrased in terms of trusts are, thanks to the elasticity of the concept of *fidei commissum*, given effect to without violence to Roman Dutch theory.

Contracts

In the field of contracts, the influence of the common law has been spectacular. Though special contracts, notably that of sale, have their own Roman Dutch coloring, any leading South African precedent on the basic elements of contract will be found to cite the familiar, casebook principles of the common law. But here again, this "reception" does not go to the extent of doing violence to established principles of Roman Dutch law. Thus the courts have rejected the doctrine that consideration is necessary to support a contract. The civil law requires merely "*causa*"—some reasonable cause or motive—the exact juristic nature of which is a question which has agitated the minds of lawyers both in and out of South Africa.¹⁹ The right of a third party to sue on a contract made for his benefit—a vexed question in both legal systems—is recognized in the Union.

¹⁶ *Ex parte* Bosman, [1916] T.P.D. 404. See 52 S.A.L.J. 289. In *Marks v. Estate Gluckman*, [1945] So. Afr. L.R. 289 (A.D.) it fell to the court to determine the validity of a testamentary trust for educational purposes which required the recipient to be a Jew (not converted) and expressed a desire that the administrator cancel any award "if the grantee prove religiously inclined." After discussion of the Roman and Roman Dutch law of legacies *ad pias causas* the court decided, much in line with Anglo-American doctrine, that the instrument would not fail for indefiniteness and anti-religious tendencies, the bequest being one for educational purposes of a public nature. Though the decision was based on Roman Dutch theory, the fact that "charitable uses" in England embraces trusts for the advancement of education was accorded due weight.

¹⁷ See *Standard Bank of S.A. Ltd. v. Betts Brown*, [1958 (3)] So. Afr. L.R. 713 (N), where the court declined counsel's invitation to abandon the "uncharted seas of Roman Dutch law" as to charitable trusts for the "safe anchorages" of English law, stating that it could see no reason for abandoning the South African principles relating to bequests *ad pias causas* nor any insuperable difficulty in applying them.

¹⁸ One major difference is that in trusts the interest of the trustee and that of the *cestui que trust* are coexistent; in the *fideicommissum* they are successive. See SCHLESINGER, *COMPARATIVE LAW* 408 n. 1 (2d ed. 1959).

¹⁹ See LEE, *INTRODUCTION TO ROMAN DUTCH LAW* (5th ed. 1953); Appendix F. Lorenzen, *Causa and Consideration*, 28 *YALE L.J.* 621 (1919).

Tort

The common law, as we know, evolved from a number of independent actionable wrongs—assault, trespass, and the like. In South Africa on the other hand the courts, without much regard for classifications put forward by the Dutch jurists, have drawn on two of the delicts known to the Roman law to construct a foundation for a broad general theory of liability in tort. These two delicts are (1) *damnum injuria datum* and (2) *injuria*. The result, in broad terms, is that (1) one who has intentionally or negligently caused patrimonial (pecuniary) loss to another is liable therefor and (2) one is liable for wilful aggression on another's right. Liability for negligence, then, rests on a somewhat sweeping general basis, requiring only proof of loss proximately caused by defendant's negligence. There has been no need to cultivate distinctions between the duty of care owed to an invitee, a licensee or a trespasser. As to *injuria*, which has no recognized counterpart in the common law, this wrong embraces such acts as assault where insult is the chief feature, defamation, malicious arrest and malicious prosecution. This makes possible the recognition of a right of privacy, which the common law was late in protecting.

However, notwithstanding a basic difference in approach, the courts of South Africa have drawn freely on the common law, taking over, for example, the whole doctrine of contributory negligence. (Though South Africa, like England, has now by statute substituted a more equitable doctrine of apportionment of the blame.) Sometimes, for example in applying the law of defamation and of malicious prosecution, it may be doubted whether, in this borrowing of doctrine from an alien jurisprudence, violence has not been done to the essential subjective requirements of liability under Roman Dutch theory.²⁰

What of strict liability? The Roman doctrine here was very limited, and the Dutch authorities show little unanimity. Hence South African courts had little hesitation in adopting the common law rule that a master is liable for the torts of a servant committed in the course of his employment. And, with the noteworthy exception of the doctrine of common employment, which South Africa rejects, in applying this rule they adhere closely to British precedent.

However, notwithstanding a contrary holding by the former highest court of appeal, the English Privy Council, the courts consider there is to be little room in Roman Dutch theory for the doctrine of absolute liability first announced in *Rylands v. Fletcher*.

On the question of liability for a mere failure to act, a recent appellate

²⁰ See, for example, [1916] T.P.D. 723; [1925] T.P.D. 857, as to the non-necessity of a showing of *animus injuriandi* in a suit for defamation.

decision is of interest. One of the crew of a fishing vessel was drowned. He stood in no contractual privity to the defendant, who owned a fleet of vessels and had leased the one which was wrecked. Defendant had, however, the means of rescue and knew the vessel was in difficulties. The court, exhaustively reviewing Roman and Roman Dutch authorities, acknowledged that mere omission to act did not constitute culpa unless connected with prior conduct and held that whether or not the circumstances gave rise to a legal duty to act is one for the court to decide. In this case the court, expressing accord with the American *Restatement*²¹ held that a cause of action for damages was stated.²²

The Judicial Process

It is in the elasticity of their approach to the sources that the South African courts are unique. Unlike the judges administering the law under one of the modern European codes,²³ they do not hesitate, if the Roman Dutch writers have no answer, to examine the spirit and the texts of the Roman law for an answer.²⁴ In a recent decision, for example, involving the construction of a grant of the right to prospect for diamonds in what is probably the richest source of that commodity known to the world, recourse was freely had to the Roman doctrines as to the seashore as *publici juris*.²⁵ Further, they do not apply *stare decisis* with the rigidity with which it is applied in England. "It is stating the doctrine somewhat too widely," said a South African court as long ago as 1904, "to say that it is illegal or impossible for a court to reverse its own findings on a question of law . . . the statement that any court is bound by its own decisions can never mean more than that it is a rule of practice of such court to follow its previous decisions."²⁶ On occasion, thanks perhaps to a closer working relationship with Roman maxims than have the judges of England, South

²¹ RESTATEMENT, TRUSTS § 321, stating the rule that where A lends a car to B, and later is told by his chauffeur that the steering gear is defective, and A could have, but did not, inform B of this defect, A is liable to a third party involved in an accident when riding with B in the car.

²² *Silva's Fishing Corp. v. Mawege*, [1957 (2)] So. Afr. L.R. 263 (A.D.).

²³ See SCHLESINGER, *COMPARATIVE LAW* 174 (2d ed. 1959), ("The Codes' Break with the Past.")

²⁴ See, to cite a random example, *Morrison v. Standard Building Society*, [1932] So. Afr. L.R. 229 (A.D.), where the court considered the Roman law to assist it in determining whether an unincorporated building society can sue in its own name.

²⁵ *Consolidated Diamond Mines v. Administrator, SWA*, [1958 (4)] So. Afr. L.R. 572 (A.D.), where one of the many issues was the extent to which the rights of the public preclude the sovereign from granting to others rights which do not interfere with the ordinary user by the public of the beaches.

²⁶ *Habib Motan v. Union Government*, [1904] T.S. 413.

African courts are able to resolve contradictions or inconsistencies in the English decisions which have baffled the English themselves.²⁷

South African law is "universal in the sense that there is virtually no limitation to the reservoir of legal knowledge from which its principles may be drawn. It is reasonable both in its broad equitable spirit, which refuses to be cramped by a soulless and rigid legality, and thereby forced into situations at which common sense rebels, and also in its practical treatment of authorities, drawing from them the germ and rejecting the chaff."²⁸

Conclusion

In the reports of recent appearance are rules of law, as old as the Roman Colosseum, which form part of the modern South African law of sale; a decision following American law as to the liability of a master where his servant temporarily abandons his service and then resumes it to cause damage to another; another where, on Roman law principles, it accepts the rule of the Restatement as to the position when a promissor himself brings about a condition subsequent that is, in terms of the contract, to terminate it; another where the Anglo-American law as to c.i.f. contracts is followed; another where the court cites Voet as well as Wigmore in ruling as to the conclusiveness of a judicial admission; yet another discussing the validity of a polygamous marriage; and finally, there are cases which raise questions as remote from the United States as from Roman law, such as the effect of disobedience by a tribal native of a lawful order of his chief who was not appointed by the Governor-General; the regard to be had, in punishing one convicted of the crime of imputing witchcraft to another, to the fact that the imputation has driven that other to suicide; and the criminality of an utterance, "with intent to promote feelings of hostility between Africans and Europeans" to the effect that the African people are like an elephant being beaten or driven by a small man, not realizing they had the power to overcome him.

South Africa looks backwards, to Rome, to seventeenth century Holland; it looks sideways, to England and America; it does not regard itself as irrevocably committed to either. In adopting this approach to a solution of the problems of today it presents a fruitful and fascinating field for the comparative lawyer.

²⁷ See, for example, *Jajbhay v. Cassim*, [1939] So. Afr. L.R. 537 (A.D.), where the court, discussing the English precedents involving the rule that no cause of action can be based on an illegal transaction, suggests that the contradictory results are due to a failure to distinguish two separate principles, namely, *ex turpi causa non oritur actio* (which admits of no exceptions) and, *in pari delicto potior est conditio defendantis/possidentis* (which does admit of exceptions).

²⁸ Price, *Future of Roman Dutch Law in South Africa*, 64 S.A.L.J. 494 (1947).