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SOME OF THE VICISSITUDES OF ROMAN-DUTCH LAW IN SOUTH AFRICA

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INAUGURAL ADDRESS DELIVERED AT THE ACCEPTANCE OF THE HONOURARY CHAIR IN PRIVATE LAW AT THE UNIVERSITY OF THE NORTH ON WEDNESDAY, 29 APRIL 1981.

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Mr Vice-Chancellor, Honoured Guests, Colleagues, Ladies and Gentlemen -

Before I deliver my inaugural lecture, allow me a few preliminary remarks. Firstly, I wish to express my keen appreciation at being appointed an honorary professor in the Faculty of Law of this University. I have had the pleasure to be connected in some ways with the Faculty for several years. I am gratified to see some of my ex-students on the staff and I fully appreciate the honour of being an honorary member of this young but promising Faculty and University. I am convinced that both will go from strenth to strength and that they have a great future ahead of them. To be associated with this Faculty is indeed a pleasure and I trust that my services to it may be of some slight value.

I am to deliver an inaugural lecture. I find it somewhat surprising that I, after about thirty five years as a teacher of law, have now to give this, my very first, inaugural lecture. I am requested to do so at an age at which it may be better suited for me to pronounce my own obituary or, at the very least, to deliver a valedictory speach rather than an inaugural lecture which, by the way, I intend to deliver in a language which is not that of a considerable number of you, nor my own. I apologise.

I think that everyone here will realise that I am very nervous to have to address you on this occasion - the more so because an inaugural lecture presents some special difficulties of its own. In the first place, I was taught at an early stage that an inaugural lecture has to be delivered at the commencement of his academic career by a professor who therein states his views concerning the subject matter of his chair and that on which he is going to teach; and then also explains how he intends to go about his task. That, of course, I cannot do, and so my lecture will be of a different nature, more in accordance with what you may expect from a person coming to the end of his career and of his existence.

A second difficulty regarding an inaugural lecture consists in the question of how the lecturer is to deal with the subject matter of his lecture. I remember someone who had to give an inaugural lecture who compared his effort to a symphony: that is to say, it should have several parts, but with a theme or a thought which runs through it from the beginning to the end. The parts or movements of such a lecture, according to that authority, have to be so framed as to give something for three groups of his audience and should contain this in all four parts. One part, say twenty-five percent of the whole, should be framed and intended for those of the audience who know nothing or practically nothing of the topic which is being dealt with by the speaker; a second twenty-five percent should be directed at those who know something about the matter, but who are not fully versed

in it; the third section (and here is the crunch) should be directed to the lecturer's peers and those who know more about the matter in hand than himself. This part can only cover about ten percent of the whole, as far as I am concerned, but at the same time it may destroy the whole future of the speaker. The remaining forty percent is the fourth part and consists of what the speaker is telling himself. You will note that I heed this advice.

I now come to my lecture which is entitled

SOME OF THE VICISSITUDES OF ROMAN-DUTCH LAW IN SOUTH AFRICA.

The title may sound somewhat vague and misleading, for it is impossible for me, even if I had the ability, to deal fully with the subject in hand within the time reserved for a lecture and still hold the attention of the audience. Moreover. much of what I am going to say will be, in part, an expression of a credo - a personal belief as to what the law is, what it should be, how it has developed, favourably or unfavourably. I sometimes have the presumptiveness to call myself a legal historian and also one who believes that the law cannot and must not be divorced from society. Law is there to serve the needs of a particular society at a given stage of its development and has to attempt to regulate, to some extent, the friction which inevitably occurs between the individual members of that community. Because there is a continuous change within society, the law can never be static and has to adapt to the needs of the changing society. Nor, in my view, does the law consist merely of abstract rules and notions. Undoubtedly it does consist of abstractions and, therefore, does not have a concrete existence. But because it governs human actions and interests, it cannot be divorced from concrete reality. Furthermore, its rules and notions exist and, for reasons of clarity, they have to be reduced to a system and, obviously, theories can be deduced from them. It should, however, be avoided to fall into the trap of juggling with rules and notions or to adopt theories as ready-made and then attempt to force the law into such theories. All theories have to be deduced from the law as it stands, and the law must under no circumstances be forced or twisted to fit into a specific theory. I think, however, that there are very few lawyers who do not, to some extent, fall into the trap. Because we have to deal with abstract rules and notions, we are inclined to develop them in accordance with rules of logic. But the law is not of necessity logical; it is as illogical as the human being and human society. For the law is part and parcel of man living in a community and will be subject to human imperfections. Therefore, the lawyer has to be a realist and guard against being misled by his views, his dogma and his own theories.

Allow me to take the following examples from Roman, Roman-Dutch and present-day South African law to illustrate briefly my views on the possible conflict of fact and theory. My first example is that of the notion of *iusta causa* in relation to delivery as a mode of transfering ownership. It is well known that Roman law required this element and that it is prescribed as a requirement in numerous texts. Unfortunately, it is not clearly stated what the requirement means and there is even one notorious antinomy. Now we find that even from Byzantine times no clarity has been reached. The Byzantine lawyers, the later Glossators, the Commentators and even the Humanists were divided int heir opinions and did now know what to make of the requirement. The easiest way out was to repeat the Roman sources, frequently without changing much of the wordking and without bothering too much about the conflicts in their own explanations of the law which resulted from this method; others seem to incline to the so-called causal system, while others seem to prefer the concrete cause. Be that as it may, it was Von Savigny (no doubt influenced by Donellus), at the beginning of the previous century, who came down strongly in favour of the causal or abstract system and who interpreted the requirement of a *iusta causa* as being the requirement for a *dingliches Vertrag*, to use the prevalent German expression. he was followed by most of the Pandectists. In this way he propounded a theory, based on his interpretation of Roman sdources, which had a great influence in Germany and elsewhere. It is notorius that we in South Africa have accepted the theory, but it is also notorius that in actual practice it is sometimes difficult to implement and we have cases decided on the basis of the causal system as well as on the concrete cause. The theory, then, presents difficulties in practice. I may add that recent research has proved conclusively, at least in my opinion, that the Roman lawyers, who were hard-headed realists, had no such theory. In fact, they would have been surprised to hear of the *dingliches Vertrag*, the abstract or the concrete cause. They certainly required a *iusta causa*, but that only meant that they required a ground for delivery as a mode of transfering ownership, when that ground was of such a nature that the community considred it to be sufficient for that purpose. In other words, they made no issue of it and merely required an ele. ent which, according to the social reqruirements, was a sufficient ground to effect that delivery transferred ownership. Whether this element was one which actually had existed or had been merely putative, was of lesser importance.

The same situation arises, secondly, in regard to possession. Here again, we have a concept having its roots in Roman law. The Romans, at some stage, were prepared to grant protection to the one type of possessor if he had *corpus* and *animus* - actual physical control and a certain mental state. Unfortunately, again, the sources are not clear as to what that mental state is.

From the early stages, and even up to our Roman-Dutch law authorities, it was the habit, mainly, to repeat the sources, without being very clear as to what the requirement of *animus* actually meant. Indeed, some read it as a requirement of *animus domini*; others as that of *animus sibi habendi* or *animus possidendi*. As it happens, it was again Von Savigny who examined the question closely and decided in favour of *animus domini*. But the controvery continued to rage amongst the learned after him. More recent research has proved that the whole theory rests on sand; that the requirements of *corpus* and *animus* apply only to a certain group of possessors; that the reasoning should not be that the possessor is he who has *animus* and *corpus* and, therefore, has to be protected. The Roman reasoning was that certain possessors should be protected; of these there was a group having *corpus* as well as *animus*. Unfortunately we are even today saddled with the theory that *corpus* and *animus* are requirements for possession. We seem to forget that in our modern law the requirement of *animus* has become redundant. For since the Middle Ages, due to the influence of Canon law, harking back, in truth, to Roman law, the rule has become that every person in physical control of an object is entitled to be protected in his possession. In a word, everyone having *corpus* is to be protected. We go far beyond Roman law and the *animus* (and other factors, for that matter) have been swept aside.

Then also, I am a legal positivist, if that is of any importance to anyone. The law, as far as I am concerned, whether it is good or bad or indifferent is there and can be found in the form of what is known as customary law, in the form of legislation in the widest sense of the word and also, as far as South Africa is concerned, in certain decisions of the Courts. I am fully aware that such law can be outdated or bad or contrary to the accepted norms of justice of one or more or even a vast number of individuals within the community. The lawyer, like everybody else, has the opportunity to be critical and express his views. Because he is a lawyer, his views, when they reflect the best of his legal ability, should be of especial value; thereby he may have the law implemented and corrected, in as far as it is possible, mainly by the legislator and even by decisions of the courts. Of course, to what extent such criticism and advice will be effective is another and difficult question. It is to be hoped, however, that lawyers, by means of judicious and expert criticism and by their attempts to explain shortcomings in the law and its application, may suggest feasible improvements to the legal system. It is a fact that we have to live with, that the law will never be perfect, just as little as that man or his society will ever be perfect; it has also to be taken into account that what the one person considers to be correct and just law need not be the view of everyone. Unfortunately, we all have our own personal views of what is right and just and the views of the one need not necessarily be that of the other.

Finally, apart from being a positivist and, as far as it is possible, a realist and legal sociologist, I try to be a legal historian. I believe, therefore, that to know the law, that is, any particular rule or concept, it is necessary to look at its historical background - to see where it comes from, how it has developed or how it has changed. That may also explain the reason for such change. I am going to attempt to explain my views by taking the *lex Aquilia* as an example.

It is generally known that the *lex Aquilia* was a Roman legal measure, dating back to about three centuries before Christ, at a time when Roman society was still small and relatively unimportant and undeveloped. Briefly, the *lex Aquilia* provided in two chapters for compensation to be paid when damage was caused to the property of another. The first chapter provided for the killing by one person of the slave or domestic animal of another. He who killed the slave or animal, had to pay as compensation the highest value which the slave or animal had had during the previous year, provided that the person who killed was directly responsible for the killing and had had no justification for his act. The idea of holding a person liable for damage caused by his direct act is typical of a somewhat backward community in which people find it difficult to see and accept the relationship between cause and effect, if it becomes even slightly remote. It is easy to see the connection where the one kills the slave of the other by plunging a knife into his heart (and then, incidentally, he does so deliberately and intentionally), but when the slave dies, because he was ill and had not been treated properly by the doctor, the connection between the act of the doctor (acting not intentionally, but negligently) and the death of the slave seems to be rather tenuous for the mind of the Roman of three centuries before our era. It is, however, known that, as time went by, connections of this kind were more readily recognised and it was also felt that the person who causes the death indirectly, at least under specific circumstances, should be forced to pay compensation. This development came about casuistically and by the efforts of lawyers and praetors, but, in the final instance, the development can be summed up by stating that death caused directly or indirectly, intentionally or negligently, was covered in Roman times by the first chapter of the *lex Aquilia.*

The other chapter (the third) of the law is ambiguous. It deals with damage caused to the property of another, other than causing the death of a slave or domestic animal. Recent research proves, I believe, that the original ruling and intention of the law was also very simplistic. It prescribed that damage caused to such objects, without justification and directly, had to be compensated for. Here, too, the extention to indirect causation came in the same ways as in regard to the killing of slaves and animals. The assessment of damage was, however, regulated by saying that the highest value of the object during the proximate thirty days had to be paid. The first problem is whether the previous or succeeding thirty days were intended;

secondly, was that highest value to be paid, even if the damage caused was slight? These problems were also widely and unsatisfactorily discussed during the centuries. The most recent, and I think the correct solution, is that the act originally held in mind was that of total destruction of the object and then compensation consisted of the highest value during the thirty days preceding the destruction of the object. This solution fits well into the simplistic mind and legislation at the time the law was enacted. Of course, just as in the case of recognising indirect causation, it very soon became evident that even if there was no total destruction, compensation, due to the activities of the lawyers, was assessed more in accordance with the actual loss suffered by the owner of the object or of the wounded slave or animal.

From the several other problems occasioned by the enactment of the *lex Aquilia*, there is one more I would like to mention. It touches modern South African law as well. It is known that the *lex Aquilia* was extended casuistically in such a manner in Roman times that a claim could be instituted, under certain circumstances, where patrimonial loss was caused, but without an object being damaged or destroyed. Such was the case of loss caused by reason of medical expenses or loss or earnings, where a free person had been injured, at least, again under specific circumstances; also in the case where one person effected the loss of the property, but without actually damaging that property. In a word, the principle of patrimonal loss in general could also be brought within the framework of the *lex Aquilia.*

Since the Middle Ages, this principle was incorporated as rule of law within the law by the learned. This happened in part by reason of the influence of Canon law. The reasoning of Canon law was that to cause patrimonial loss of any kind to another was a sin, if it was caused intentionally; if it was caused negligently, it was a moral fault. The philosophers who developed the law of nature at a later stage, also reasoned that to cause patrimonial loss intentionally or negligently and without justification constituted a delict. This principle was also included in the description of positive law, and we find it stated by Grotius for Roman-Dutch law and by Pothier for the law of France. Subsequently, the principle was given force of law by being incorporated in the French Code (C.C. 1382, 1383), the Dutch Code (B.W. 1401), the German Code (B.G.B. 823), the Swiss Code (Z.G.B.28) and others. This development of a general principle being enacted as a rule or law, while the principle itself harked back to specific instances in Roman law, was mainly due to the activities of the learned in law. Unfortunately, such a general principle, when translated into practice as a rule of law, may cause grave problems of interpretation, as has become evident in some of the Codes referred to. In South Africa, as you all know, the rule of the *lex Aquilia* has been extended in the same way; as you also know the effect has been, to mention only two difficulties, that all patrimonial loss, whether caused delictually or whether out of contract or otherwise, could fall under the delict of causing patrimonial loss. The strain,

furthermore, on the notion of unjustifiably causing such loss becomes great.

I have so far stated some of my beliefs and now intend to deal with some of the vicissitudes of Roman-Dutch law.

It is trite to say that Roman-Dutch law was introduced by the Dutch in South Africa at the Cape more than three centuries ago. This system of law was then carried into the hinterland by those who came after. There is, however, no doubt that the law of then and the law of today are not one and the same.

Roman-Dutch law, as it then was, was a system primarily of customary law, as it had developed during centuries in the provinces of Holland and Zeeland. Even within these two small provinces the law was not homogenous and on minor and even major aspects differed from one region to the other. It was a system that had grown during the Middle Ages to suit the requirement of an undeveloped and almost primitive and, comparatively speaking, homogenous community. However, at some early stage, as in most European countries, Roman law appeared on the stage and was received, to a greater or lesser degree, as part and parcel of the local law. Such, indeed, was the intrinsic value of Roman law, albeit that it was not understood to the same degree as is the case today, and notwithstanding that it was used subsidiarally to be applied where the local law failed in its own rules and notions, that it became, in fact, the most important section of most legal systems; and it is no coincidence that it became customary to speak of the Dutch law as Roman-Dutch law. What is of special importance is that Roman law served as the foundation for the scientific framework of the system and the method of legal reasoning of Roman law became that of Roman-Dutch law, in the same way as it happened in all of the so-called civil legal systems. It was mainly in this way that a highly developed system of Roman-Dutch law came about to serve the needs of the developed society of the seventeenth century to approximately the year 1800. It was a system created to a very great extent by the legal writers who today are considered to be our authorities to describe Roman-Dutch law. It may be added that Roman-Dutch law, during the period mentioned, reached a high peak and that a system and science developed which to my mind, surpasses that of our own age in many ways, although, obviously, much of it has become outdated. I consider that we may be very proud of our heritage of Roman-Dutch law.

Such then, was the legal systems introduced into South Africa and from which modern South African law developed. Now it has to be borne in mind that a legal system cannot remain static and that change of some sort cannot be avoided. Furthermore, a legal system cannot be wholly kept apart from the community which it is to serve and, therefore, sociological, economic, physical, political and many other factors influence its growth, its development or even its decay. Under such conditions, then, it is obvious that the law of today cannot be the same as that which was introduced in South Africa in 1652.

Going back three hundred years ago, the community at the Cape was a small and insignificant community, composed of fairly simple people with a fairly simple way of life. It is known that they had their political and economic trials and tribulations,s but that it affected the law to any great extent seems hardly probable. Law and legal science and the practical application thereof appear to have been mainly placid and uneventful.

And so it seems to have remained up to the end of the eighteenth century. Meanwhile in Europe, there was the French Revolution of 1789 and the trend towards codification took over towards 1800. The mother country of Roman-Dutch law was also affected thereby, but Southern Africa was unaffected and retained the Roman-Dutch law of the provinces of Holland and Zeeland as it had grown up to approximately 1800. But an occurence of great importance was the advent of the British and the fact that the period of Dutch rule had passed. In fact the transfer of the Cape to become a British colony may well be considered as the starting point of modern South African law. A new era had arrived wherein, however, Roman-Dutch law was, in principle, to be retained.

In accordance with British Colonial policy, as expressed in the early days in *Calvin's case* (16) (8) 7 Coke's Reports, (1 (77) ER 377) and followed by Lord Mansfield in *Campbell v. Hall* (1774) 1 Cowper 204 (98 ER 1054) (a principle which was specifically repeated in the conditions of surrender of the Cape to the British), the law of the land was to be retained. But very soon changes were effected which introduced a typical British character in the law. Of course, the introduction of British elements into the law did not mean that Roman-Dutch law was wholly swept away. In fact, some of the staunchest supporters of Roman-Dutch law were judges introduced from England, such as one of the first judges, Justice Menzies. A glance at his law reports shows that he had a very sound knowledge of Roman-Dutch law and that it was maintained in his court in a manner which might well be followed by his fellow judges even today. But notwithstanding, gradually changes were brought about and, somewhat in the same way as it happened in the past, when Roman law was introduced into the European systems of law, a reception of British law and institutions occured which was not insignificant in its final outcome.

One of the first and most lasting changes which was introduced into the law and which gave it a typical British character was the result of the introduction of a system of administration of justice on the British model. The system of courts, the procedure to be adopted therein, the use of evidence and other matters pertaining to the administration of justice were to become British in their nature and outlook and thereby the law and the atmosphere in which it was applied changed radically from what it used to be. It has to be remembered that the

Common Law of England had grown and developed in the main in the British courts and thereby it had acquired its own specific character which distinguishes it greatly to this day from what is known as the systems of Civil law. Some of these changes must be admired; others may be regretted. Going back to the beginning of the previous century, the most striking innovation, as far as the administration of justice is concerned, is, firstly, most likely the enhanced status of the judges. They were very much aware of the fact that they were the judges of the sovereign and as such were very proud of their status and it was generally given the same high regard by practioner and public. It is a typical British approach to the court and one which lasts up to the present day; although, in South Africa, it must be admitted that today much is unfortunately done to lessen the honour of and respect for the Courts. The manner in which judgements are sometimes criticised borders on the derogatory if not on the obnoxious, whether such criticism comes from the learned in the law or from newspaper reporters, let alone the views of the general public. We are also living in an age where the administration is becoming more powerful every day and feels the need to interfere in a vast number of facets of private and public life. The executive dominates the legislation and is attempting, to an increasing degree, to lessen the powers of the judiciary, because it considers the judiciary as a possible control of the exercise of the powers of the executive. The growth of that part of the law which is known as administrative law is enormous, while its existence was hardly recognised in South Africa, say, sixty years ago. By means of the powers granted thereby to the executive, and it is always said that this is done for the benefit of the community as a whole, the executive manages to wield vast powers touching on all sections of day to day affairs.

Apart from the status of the courts, the change of procedure employed in the courts is also of great importance. The effect thereof is most noticeable, I think, as regards criminal and penal law. Going back to Roman-Dutch law of the eighteenth century, criminal law, criminal procedure and even the system of evaluating evidence had developed, in all, from the Middle Ages and was, according to modern standards, fairly primitive, notwithstanding that it was also influenced by Canon law. The French Revolution was to introduce new trends which were reflected in the codifications which were to come, albeit that such changes are considered old fashioned, according to modern and "enlightened" standards. On the other hand, British criminal law and procedure were, comparatively speaking, more enlightened and, therefore, were introduced in the Cape, where Roman-Dutch law had not undergone the changes in the law due to the enlightenment of the eighteenth century and the French Revolution. It is interesting to note that criminal law, as it is being adopted by present-day learned writers and the Courts, is again undergoing a change, bringing it more in line with the therories propagated by German and Dutch writers of the present who derive

their law and theories from their Codes. Criminal procedure has also recently been changed in part in South Africa and an attempt has been made to introduce some aspects of the so-called inquisitorial procedure which is prevalent in Europe today. Unfortunately our law of evidence, which is practically in all taken from the Anglo-American law, is archaic.

Thirdly, with the introduction of a new system of administration of justice, and with the adoption of British procedure and practice, a typical British ethic was introduced within the courts and practice which lasts up to the present day. Also, legal thought and reasonings became more and more that which has its home in England; and the Roman methods, which were perhaps the most important aspects of Roman-Dutch law, were and are pushed aside. It may be said, I think, that at the present time, the South African lawyer has not the same intellectual approach and does not reason in the manner of the Roman or Roman-Dutch lawyer, but does so in the manner of his Anglo-American counterpart. At the same time it has to be admitted that there was a return to a Roman-Dutch approach to the law from, roughly, 1880 to 1940 and at the same time the theories and methods of the German lawyers of the last centruy, the so-called Pandectists, had considerable influence on legal thought and method in South Africa from about the middle of the last century to the present day. It is interesting that the Pandectists are so highly regarded in South Africa, even today, while in their Fatherland and elsewhere they are considered to belong to History.

Last, but not least, the changes in the administration of justice introduced the British principle of *stare decisis*. Very briefly, and even incorrectly, this notion may be explained as a rule that a judge, when he has to decide a case, is bound to follow a previous judgment on a similar point of law, when the previous judgement was given in a court of the same jurisdiction or if it is one of higher jurisdiction. This bald statement has undergone many changes and adaptations and, therefore, it should not be taken too literally, but at the same time, the basic idea has remained up to the present day, in Anglo-American countries as well as in South Africa. The effect of this principle is rather curious. It may be said that in every community and not only in those influenced by the Anglo-Americal tradition, previous judgements have considerable influence on a judge who has to give a judgment on a similar point of law. In the so-called countries of civil law, however, the previous judgment has the effect of being illustrative to the manner in which the later case has to be decided; in the Anglo-American courts the previous decision has a binding effect and, in principle, the judge in the second case has to follow the previous judgement, whether it is right or wrong. The effect has been that the law has become fragmented into a vast number of detailed solutions of specific cases.

The effect has been that the law has become fragmented into a vast number of detailed solutions of specific cases, while the civil law approach of general rules (at the present time embodied in the codifications) is a system of rules of a fairly general nature, while detailed solutions, right or wrong, are not given such excessive force as in the Anglo-American method. Moreover, in South Africa the British method of deciding cases is followed, that is to say, judges give fairly extensive judgments (although the tendency today is to be more brief) while the civil law method is to be to the point. Our courts also know the method of severl judges deciding on the same case giving separate and even conflicting jugments, while the civil law method is for a single judgment to be given, emanating from the court without giving an indication of the several opinions of the several judges.

Thus, with the introduction of a new system of procedure and with the concomitant judicial approach, a new element was introduced at the Cape which profoundly affected the science of Roman-Dutch law and, at the same time, developed its contents in a manner which in some respects is to be praised, but in others to be regretted. At the same time, the practitioner became more and more orientated to the English system. Not only was English for many years to come the sole language of the law, but practitioners were either educated in an English legal atmosphere or adopted much thereof. It may be said that most of the status of the legal profession, as established and maintained by the members of the bench, the bar and side-bar, is due to an English attitude and ethic which was transferred to South Africa. Although this may not have affected the content of Roman-Dutch law to a considerable extent, it certainly has influenced and put the stamp of British Common Law upon the judicial world of South Africa. A legal tradition has come about in South Africa which owes much to British practice and British Common Law.

Looking further at South African law, it is hardly necessary to point out that our constitutional law was divorced from Roman-Dutch law from the very outset. The fact that the Cape was originally merely a settlement to supply ships sailing to and from the East, gave its position within the Dutch Commonwealth a very special character. Obviously, when the Cape became a British colony, the whole constitutional structure changed, and the development since then has had a specific South African nature, although outside influences, such as that of England, can hardly be denied.

Another branch of the law which has left much of Roman-Dutch law behind is that branch which is frequently referred to as commercial law. Indeed, at the present day much of commercial law has been influenced by administrative law, because of the involvement of the Government in finance, economics and trade. Much of commercial law has been regulated by statute and much of this law has its origins

in England . At the present time, however, the influence of American law is becoming more noticeable. Equally, the influence of other legal systems and of purely local factors are not without effect. Most of the changes, I think, have been effected by legislation. For example, company law has been codified. The law of England used to predominate legislation on this section of the law, but recently other factors have also influenced the present-day company law. Roman-Dutch law has been done away with by legislation regarding the law of insolvency, maritime law, banking law, insurance and the law of negotiable instruments. Whether this was always necessary, and to such a degree as in which it actually occurred, is another question. Roman-Dutch law, in my view, contains, as a rule all the elements to adapt to the requirements of a modern society. To say that it is outmoded or antiquated, merely shows a lack of understanding of it. That does not mean, however, that Roman-Dutch lae, as it was, would be suitable for present-day needs in all respects. But it certainly means that by judicious adaptation of the law and building on the existing foundations much could have been achieved without replacing Roman-Dutch law by foreign law to the extent to which it has been done.

Furthermore, a branch of law which may well be considered as part of commercial law, the so-called special contracts, have retained their identity, but have undergone, at least in part, important changes by means of legislation or decisions of the courts. Of such contracts legislation has introduced the most fundamental changes in the law regarding hire-purchase, sale of immovable property, letting and hiring and the service contract. The law of insurance has also developed greatly. Administrative law has also interfered considerably in the contract of sale, especially in regard to international trade, with rules and regulations on exchange control, foreign currency and taxation.

The vicissitudes and development in the field of civil (or as it is now frequently called, private) law are also interesting. This is the traditional terrain of Roman-Dutch law and has, up to the present, retained much of the past. It is, however, hardly necessary to say that much has been changed by legislation and by the decisions of the courts. Some of these changes hark back to the early stages when British Common Law made its influence felt. As an example or two, it may be recalled that in the law of succession, the Roman-Dutch notions of the legitimate and Trebellician portions disappeared and a comparatively unrestricted freedom of testamentary disposition made its appearance, due to the activity of the legislator. Roman-Dutch civil or private law has also undergone important changes by reason of the English influence which has already been noted. But of a more recent date has been the changes effected, mainly by the decisions of the courts, because of the influence of the writings of the learned in law. In more recent times they have influenced the formation of Roman-Dutch law, mainly by preaching a return to the fundamentals of the old Roman-Dutch law, but in actual fact introducing notions and

theories foreign to Roman-Dutch law. It has already been recalled that the influence of the Pandectists and of modern German law, and to some extent of modern Dutch law as well, is hardly insignificant. This last development occurred mainly by arguing that these systems are also civil law systems. That is indeed so, but they have developed within their own particular sphere which is not necessarily that of Roman-Dutch law as it was and as it is at present. If I again my expound my own view: to my mind, Roman-Dutch law as it was, contained as much if not more as foreign systems, whether it is the law of England, Germany or Dutch law; on that foundation it is possible to develop a more modern system to fit the needs of a more modern society, as we know it today, and it was by no means necessary to go to any other foreign sources to constitute modern South African law. The ultimate result, furthermore, has been, in my view, that present-day South African law, and I am referring to branches such as the civil or private law, commercial law and even criminal law, not forgetting our law of procedure and of evidence, could have become better systems than they actually are.

The reasons why the original Roman-Dutch law has not been employed fully as the foundation of modern South African law are many. It is only necessary to mention here the difficulty which the average lawyer has to consult his Roman-Dutch authorities. They are written in Latin or an antiquated Dutch which most lawyers find extremely difficult, if not impossible, to cope with. This, of course, is a problem that has become acute since the second World War and is not restricted to South Africa alone. The result is that increasing reliance is being placed on translations and such translations are becoming to be used as the authoritative source, with all the concomitant complications. Furthermore, these authorities are then looked at and cited, in so far as they may confirm a favourite viewpoint, somewhat in the manner of the British tradition, where precedents are quoted to prove a point. Also, because of the practical difficulty of the lawyer (not to mention the student) to cope with Latin, it is becoming the vogue to plead for its abolishment as a requirement for the lawyer. As elsewhere, it is becoming increasingly popular, furthermore, to demand that Roman law should disappear from the curriculum for the training of lawyers or, at least, that the requirements be reduced until they become almost non-existent. The reasoning is that Roman law is an atiquated system and nowadays the lawyer has to have a practical training.This view is gaining ground at university level as well. The student, on the one hand, finds Latin and Roman law too difficult, while the academic authorities are worried about high failure rates, on the other. Such developments are serious blows to Roman-Dutch law and its survival in South Africa. If Latin is no longer a requirement, the old authorities can only be consulted (if they are consulted) at second-hand at the best; if Roman law is to disappear from the curriculum (whether because Latin is considered redundant or for other reasons) the foundations of Roman-Dutch law are removed and the whole edifice has to collpase in time. What the future development will be, only time can tell.

Now as an epilogue to what has been said, it may be interesting to look briefly, and in the broadest outlines only, at three recent cases decided in South African courts in an attempt to illustrate how Roman and Roman-Dutch law have been changed in South Africa, mainly because of the introduction of foreign notions and reasonings, and also thanks to the results of the *stare decisis-rule*. All three cases happen to be reported in the same month (in 1977), but that, of course, is no indication at all of the extent or otherwise of such changes affecting the law *in toto*.
In the case of *Patel v Adam* 1977 (2) SA 653 (A), there was a sale of immovable property duly reduced to writing. One of the clauses referred to payment of the purchase price in instalments. This clause was so framed that it was not clear what the amount of the instalments were to be or how many instalments had to be paid. It was decided that the agreement was void for uncertainty and the sale considered to be ineffectual. In South African law, other than in Roman or Roman-Dutch law, a sale of immovable property has to be in writing, according to statute. The statute has been interpreted in such a manner that all terms essential for creating a valid contract of sale must be in writing, otherwise the whole contract is invalid. According to Roman-Dutch law it was required for a valid contract of sale that the parties were agreed (a) to buy and sell (b) a specific object (c) for a specific price. In a word, the present contract would have been valid. As regards the further agreement [*pactum adiectum*] as to the mode of payment, it would have been of effect, if it had made any sense. If it was vague (as in the present case) it would have been interpreted either as having some meaning or as having no meaning (as would be the case in the recent instance) and the sale would have been understood to be a valid agreement for a cash sale.

Secondly, there was the case of *Glaston House [Pty] Ltd v Inag [Pty] Ltd* 1977 (2) SA 846 (A). The appellant had bought a property to have the building demolished and to construct a new building. On the original building, however, there was a pediment which had been declared a national monument (in accordance with a statutory provision) which had as effect that virtually the building could not be demolished. The seller was aware of the facts. He deliberately did not disclose them to the purchaser. The purchaser instituted proceedings and it was found that the fact that the pediment was declared a national monument constituted a latent defect and by a majority judgment a certain amount of money was allowed as damages. This amount was allowed, because the seller's failure to disclose was tantamount to fraud and, therefore, the buyer's claim was founded on delict.

It is submitted that in Roman or in Roman-Dutch law, no latent defect would have been construed on the facts. A defect would have been interpreted as some element present or lacking in the object of sale whereby its value was reduced, but than as some material element.

Unfortunately the definition of a defect in Roman as well as Roman-Dutch law is wanting and, therefore, it is a somewhat vague notion. However that may be, the fraudulent non-disclosure of the facts in the case would have made the seller contractually liable for all damages (*lucrum cessans, damnum emergens*) resulting from his fraud. For a sale is a transaction based on good faith, which required the parties to refrain from fraudulent acts and, thereby, made them contractually liable if they acted fraudulently. The delictual action on fraud was only used, if there was no other remedy available.

Lastly in the case of *Ranger v Wyker and another, 1977 [2] SA 976 [A]*, R purchased a property from W which had a swimming pool. The pool had been neglected, but the seller had assured the purchaser that the pool was structurally sound and in good condition. In fact, it leaked, and the purchaser had to pay R1 250 to have it repaired. This amount was claimed, but was reduced to R1 000 by the court. In this case it was held that the fraudulent misrepresentation gave rise to an action on contract, but there was disagreement and so it was also held that the action was founded on delict. In Roman or Roman-Dutch law, is is submitted, the purchaser would have had several options. If it were proved that there was a fraudulent misrepresentation, the purchaser could have claimed damages by means of the action on the contract, because of the fraud, as was remarked with regard to the previous case. But because of the *dictum* (seriously made and notwithstanding that it was an intentional misrepresentation or otherwise) the purchaser could have instituted the aedilitian actions (or the action on sale for that matter) and had the option either to ask for restitution (*action redhibitoria*] or for a reduction of the purchase price (*actio quanti minoris*), as he thought fit. Of course, he could have argued that a latent defect was present and could have obtained exactly the same relief, that is to say, restitution or a reduction in price. If fraud was proved (as in this case) he could have claimed by means of the action on the contract that damages be paid.

Finally, I now return to my credo. I do not wish to repeat what I have said at the beginning, but I wish to add one or two further points. Firstly, as regards the training of lawyers, no matter whether they are to become attorneys, advocates, members of the Bench, civil servants or even teachers, I think they require a training of the highest standard. It is the duty of the faculties of law to deliver graduates with the best training who have been tested rigorously before gaining their degrees, for such graduates are going to become members of a profession and are going to serve the public in that capacity. Everyone of the public who approaches a lawyer of whatever category, is a person with a problem and is a person who requires some form of assistance. Such help required should be good, otherwise such a client, who has to pay for the services, is going to be cheated out of his money. We are all members of a profession, and that means we have to serve and be able to render good services. A concomitant to

this is that the professional man or woman is not there just to earn money; also he or she must observe the highest degree of integrity and be fully aware of the ethics of his or her profession and of his or her responsibilities.

Furthermore, I believe that the lawyer, to be a good lawyer, cannot be expected to know the law and all of the law. That is an impossibility. The ramifications of the law are so wide-spread that he who believes he fully knows the law is making a very foolish mistake. But what may be required of a lawyer is that he is able to find his law by diligent search and, therefore, he must be able to go into the background of the law as well as the present-day position of the law pertaining to the facts with which he has to deal. The law is a hard task master and an exceedingly difficult field of human knowledge. It is not easy to understand the law, for we have to do with abstract rules, concepts and notions. Such abstractions have to be applied to facts, for everything which has to deal with real life, is either directly or indirectly subject to legal rules and notions. But to apply the correct abstract rules and notions to concrete reality is a much more difficult task than one would imagine at a first glance. I repeat that the law is there to serve the human being living in society and, therefore, it affects every living person. That is why, as I have said, I am a positivist and put theory and dogma in the second place. I believe, however, that we as trained lawyers should adopt an idealistic attitude towards the law and serve the law to the best of our ability, each in his own field and each in his own small way, in accordance with his conscience, for the benefit of society as a whole. Dixi.

Mr Vice-Chancellor, with this lecture I accept the honourary chair in Private Law and pledge to give my best and undivided assistance in the development of this Faculty and University.

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Republiek van Suid-Afrika

1982

SERIES/REEKS C73

ISBN 0 907986 02 1