The reception of English and Roman-Dutch law in Africa with reference to Botswana, Lesotho and Swaziland

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I THE PHENOMENON AND THE PROBLEM

An outstanding feature of African legal systems is their dualism. This dualism, which is found in the substantive rules as well as in the structure of the courts, is the result of the introduction by the former colonising powers of their own legal system,1 while at the same time retaining for the indigenous population the already existing regime of custom. This “reception”, as it is called, is not a phenomenon unique to the African experience. A European example is the reception of Roman law in the Middle Ages, and, in this century, the adoption of extraneous systems by some countries in the Far East. However, what occurred in Africa during the latter half of the nineteenth century is not comparable with these examples. There is a difference which is crucial to the subject under discussion, namely, the authority in the receiving country of decisions emanating from the courts in the donor country. Whereas elsewhere the receiving country was autonomous and free to choose, in Africa the receiving country was not independent nor did it take the initiative. More importantly, however, it continued to be tied to the donor country, a circumstance which, in itself, constitutes a strong argument in favour of, what is termed, a “timeless” introduction.

The English law (and the Roman-Dutch law in Southern Africa) was introduced into Africa in one of two ways: by Orders in Council, either general or designed for a particular territory; or by local Ordinances. These reception laws did not attempt to itemise the rules thereby introduced, there was no inventory, merely an incorporation by reference of the whole corpus of the English law. Many of these reception instruments have, from time to time, been changed to fit altered circumstances, but with these variations we are not here concerned. It is the original reception legislation, and the purpose it was designed to serve, which is the subject of this study because, in the former High Commission Territories of Bechuanaland, Basutoland and

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1In Bechuanaland, Basutoland, Swaziland and Southern Rhodesia, Britain introduced the Roman-Dutch law brought to the Cape by the Dutch East India Company. See Burchell & Hunt South African Criminal Law and Procedure 17.
Swaziland, the proclamations incorporating the Roman-Dutch law have, in all material respects, persisted to the present day in their original form.

The original reception legislation falls roughly within the period described by historians as the "age of imperialism" wherein occurred what is called the "scramble for Africa". It is submitted, however, that these expressions distort the position so far as Britain was concerned and tend to prejudge the whole enquiry. This paper suggests that, on the available evidence, (i) there was no intention on the part of Britain to create an empire in Africa or establish any permanent presence there, (ii) with the exception of statute law, the original reception laws envisaged a timeless reception, and (iii) the law introduced was intended to apply only to the transient European population.

II THE HISTORICAL SETTING

1 The age of imperialism

Historians are in the habit of offering their subject in manageable portions so that our history comes to us, for example, in "periods", "movements" and "ages". The subject matter of this paper falls within the "age of imperialism", running roughly from 1860–1900. Some historians subdivide the period and describe the latter half as the "new imperialism", monopolistic, militarily aggressive and annexationist in character. Whether or not any such change occurred in the colonial policies of other European powers during the last two decades of the 19th century, there would appear to have been no discernible shift in British attitudes which throughout exhibited a marked reluctance to acquire large tracts of African real estate. In government departments, especially the treasury, and in parliament there was an obvious absence of imperial designs, and the prevailing ignorance and indifference shown by the British electorate was as marked as it was understandable. And yet, whatever the motives, the insistence that Britain possessed imperial designs in Africa obviously satisfies a widespread need. Even though the record shows an unbending refusal by the British Government to invest even the most meagre sums in African adventures, this is interpreted not as evidence of a lack of desire for empire but as proof of an intention to acquire such empire on the cheap.

Trade did not, as is so often asserted, follow the flag, the flag was obliged to move ever more reluctantly into the interior not only to protect existing commercial and strategic interests but also as a response to the predicament of missionaries hard put to implant a sense of sin, and the often dubious activities of the adventurers on the spot who were not above the occasional inaccurate report and who were well aware, remote as they were, of the effectiveness of the fait accompli. Unfortunately, much of the history of the time has been written through the eyes of such persons who, finding themselves in Africa, assumed the task of carving out an empire, ostensibly at any rate.

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for the government at home.

Acquired in two decades and lost in one, the British Empire in Africa lasted no more than a single life-time. Whatever benefit it may have brought to Africa, it was for Britain a financial disaster. The experience in the American colonies — that there is no necessary connection between territorial expansion and increase in trade — was repeated in British Africa. Yet the view that the loss of her empire in Africa was a traumatic experience lingers on to become part of the mythology of the period.

It is tolerably clear that the imperial dream was largely confined to the over-stimulated minds of students, academics, journalists and poets, and some contributors to The Times. That no true Englishman lay abed when Empire called is a figment of the imagination of those who pen adventure books for boys. England sought trade not territory in Africa.

In the inexorable advance of the frontier, the British government must be seen to a large extent as the victim of circumstances. “I know by experience” remarked Lord Salisbury, “that a great civilised nation in contact with barbarism is always obliged to advance.” It would have taken a far more single-minded government, backed by a determined parliament possessed of a clear policy of non-involvement, to call a halt to penetration beyond the coastal trading stations and the strategic bases in Egypt and at the Cape securing the all-important link with the empire in the East.

2 The scramble for Africa

During the last two decades of the nineteenth century the pace of Colonial acquisition in Africa perceptibly quickened. This phenomenon has been termed the “scramble for Africa”, and prestige, philanthropy, colonisation, strategy and trade have all been advanced as reasons for its appearance. It must be remembered, however, that, on the eve of the scramble, Britain was already well established in Africa and enjoyed a position virtually un-

9 Both German and French hopes of vast wealth to be drawn from the African Continent were also doomed to disappointment. It was the insignificance of the African trade as compared with commerce within Europe itself (and, additionally for England, trade with the white settlement colonies of Canada, Australia and South Africa) that African rivalries never led to war between the great powers. See Gann & Duignan 112-116. The imperial possessions in Africa were simply not worth fighting over. The facts and figures do not, however, deter some writers. Exploitation is obliged to exist. See eg Colonial Policies in Africa Chap 2.

4 The loss of the American colonies brought about a vast increase in trade with Britain. See Eric Williams Capitalism and Slavery (1964) esp at 124. Henri Brunschwig writes: “Yet the argument that expansion was profitable was nothing more than a myth. It arose, despite the evidence to the contrary — as such myths often do — under the pressure of a public opinion which refused to face facts.” See The Partition of Africa: Illusion or Necessity 213.

6 In fact, one of the main problems faced by those charged with administering the African protectorates was that of finding staff, qualified or not. Both East and West Africa were viewed as a last resort by those seeking administrative service overseas. They sought positions in the East.

6 Even Lord Salisbury, who is usually portrayed as an ardent imperialist, admitted that the British object in West Africa was “not territory but facility for trade”, and refused to authorise the acquisition of further areas because the value of the trade did not warrant it. See Robinson & Gallagher 386.
challenged throughout the Continent. The Danes had sold out on the Gold Coast, the Dutch had lost interest following the abolition of the slave trade, the Italians and Germans were both engaged in consolidating a recent national unity and, more importantly, in the aftermath of two lost wars, a new imperialist thrust from France was yet to come. Britain was content and, with her presence in Egypt and at the Cape ensuring the safety of the sea-routes, could look forward to concentrating on her important empire in the East.

Then, quite suddenly, the picture changed and from a position where no serious rivals challenged her pre-eminence, Britain found herself beset by competitors in the grip of colonial fever. In the forefront of the new wave of nationalism now sweeping the European Continent, France and Germany became determined to carve out an African empire for themselves. The French, with much damaged national pride to repair, sought grandeur and were openly envious of Britain's world-wide presence. Bismarck believed that to become a great people the map of Africa must be blue and, following what he saw as Britain's ingratitude over Egypt, deliberately embarked on a policy designed to embarrass the British government and thereby heal the breach with France. Predictably, the British answer was slow, reluctant and defensive. Those who see in it some revolutionary urge to empire indulge in the fanciful or wish to perpetuate the myth which nourishes a grievance. Britain went forward to protect her existing interests against foreign encroachment. In West, East and Southern Africa she proceeded in a spirit of anti-imperialism and financial parsimony.

West Africa was regarded as commercially expendable and climatically insupportable, and the British Government was determined to avoid commitment and to economise. As Flint points out, the only people possessed of a sense of imperial mission were educated Africans who, opposed to the traditional tribal structure, saw in British sovereignty an opportunity to take an historical short cut. The intention to assume the absolute minimum of responsibility and control compatible with the protection of her trading interests against the French, who planned an empire from the Niger to the Nile, can be seen in the machinery established for the purpose, namely, the...

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7Including the humiliation suffered as a result of Britain's single-handed intervention in Egypt. See Robinson & Gallagher 163.
8In the words of Yves Guyet in 1885: "We are jealous of that vast domain, and we want to have one like it to oppose theirs at any price. We no longer count, we listen only to passion. We want annexations, of which we see only their size, without worrying about their quality." Quoted in The Partition of Africa: Illusion or Necessity 78.
9Ibid.
10The topic of Imperialism has a particularly rich mythology much of it inspired by the political bias of commentators. Some, however, comes from Africa itself. See The Partition of Africa: Illusion or Necessity 216.
11There is a long history of attempts by the British Government to buy off French hostility with concessions in West Africa. See Robinson & Gallagher 303, 393.
12The official view is summed up in Kimberley's response to Consul Hewett's proposal that a protectorate should be established between Benin and the Cameroons. See The Partition of Africa: Illusion or Necessity 57–8. See also at 65.
13Colonialism in Africa 1870–1960 222.
14It was French activity in the area and the threat this constituted to existing trading interests which was decisive. See The Partition of Africa: Illusion or Necessity 77.
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The instrument setting up the regime for West Africa, the 1885 West African Order in Council, merely conferred upon the consul the right to establish consular courts whose jurisdiction was limited to British subjects (no jurisdiction being conferred over the indigenous inhabitants) and to regulate observance of the treaties which formed the basis of the arrangement.

The policy was much the same in East Africa. Again, there was no intention to establish direct control. The consular presence was designed to cater for the needs of British subjects, and to support those local authorities who gave evidence of being strong enough to maintain the conditions necessary for commercial activity. Even in Egypt, an area particularly vital to British interests, intervention was directed solely at restoring the Khedive’s authority, and was seen as a temporary and unwelcome expedient. It was the deteriorating situation in Egypt and the appearance on the scene of German imperialism, wrecking the plan to control the region through Zanzibar and threatening Uganda and the sources of the Nile, which forced Britain’s hand.

Finally, in Southern Africa, the British had been well satisfied with their supply station at the Cape, but, once again, circumstances conspired to draw them inland. Tribal unrest on the borders, the inability to control the movement of immigrant farmers, the setting up of two independent Afrikaner republics, the discovery of vast mineral wealth and, of course, Rhodes, were instrumental in effecting a profound alteration in the original commitment.

It is ironic that the root causes of Britain’s involvement in Africa, namely, the establishment of strategic bases in Egypt and the Cape, and her commitment, at the insistence of humanitarian groups embarked on a crusade of noble atonement, to eradication of the slave trade, should have existed long before the partition and have had nothing whatsoever to do with territorial ambitions in Africa. Nevertheless, once these steps had been taken there was no turning back, although Victorian statesmen continued to believe that their self-imposed task of conversion and civilisation would be achieved through the missionary and legitimate trade, and were determined never to rule. It was this profound conviction that imperial control was not the way to achieve economic expansion which is the key to any understanding of the policies pursued by the British government throughout tropical Africa, and which successfully gives the lie to the thesis of economic imperialism. The Victorians never doubted the superiority of ties of trade and influence over that of political possession as a means to national prosperity and international prestige. Empire, then, in the sense of formal imperial rule, meant those four great territories inhabited by Englishmen – Canada, Australasia, South Africa and the West Indian Islands. Undoubtedly, India

16Discussed infra.
18There was no new imperial thrust involved in the occupation of Egypt. Liberal policy was totally opposed to occupation either by Britain or any other Power and every possible alternative was considered and pursued. In the very same month that Wolseley overwhelmed the Egyptian army (September, 1882) the government was planning the timetable for evacuation. See Robinson & Gallagher chaps 4–6.
17See The Partition of Africa: Illusion or Necessity 13 and 139–143.
formed a fifth, but as Robinson & Gallagher explain: "Ideally, empire meant the extended family of mother country and colonial sons. By comparison the Indian empire seemed unnatural, almost improper, like some extra-marital responsibility incurred in youth. There was a strong prejudice against allowing it to happen again."

The success stories of the white settler colonies and the World-wide informal empire of commerce (which now included the once-colonial societies of the New World) compared with the lessons of India, rendered imperial rule in Africa north of the Zambezi unthinkable. The preference for settlement and free trade completely ruled out tropical Africa since it lacked all the agreed prerequisites, namely, suitable climate, productive soil or mineral wealth, facility for trade (except in slaves) and a cooperative population. And there was no pressure on the British government from either business or the general public to take such a step. British commercial enterprise looked not to hazardous tropical speculation but to the established markets in America, India, Australasia and China, and public opinion, apart from its sentimental attachment to anti-slavery movements, showed no more than a vague and intermittent interest in Africa, at least until 1898, when it became more effectively mobilised by the spread of literacy and the yellow press.

There has been some misunderstanding regarding the significance for the partition of the coming of Joseph Chamberlain to the Colonial Office in 1895. No doubt, with his policy of substituting state intervention for the old regime of imperial influence and laissez-faire, his arrival on the scene opened up a new era in tropical Africa, but in this he is the voice not of the 19th but of the 20th century. As Robinson & Gallagher remark: "But his imperialism of tropical estates for posterity came too late, it was too constrained by free trade tradition to contribute significantly to the motivation of empire in tropical Africa or to alter greatly its ultimate boundaries." Chamberlain, then, does not epitomise the age of imperialism, on the contrary, he represents the consolidation and development which is characteristic of policy after the First World War. For our purposes, he came too late: the reception of English law was already complete.

In their perceptive study of the scramble, Robinson & Gallagher perhaps lay too much stress on the single factor of strategy: that the British "moved into Africa not to build a new African empire, but to protect the old empire in India," may not be the whole story, but, nevertheless, their interpretation of the British attitude at the time as one of dislike of African entanglement is difficult to fault. In answering the question, "Did new, sustained and compelling impulses towards African empire arise in British politics and business during the 1880s?" they write: "The evidence seems unconvincing. The late-Victorians seem to have been no keener to rule and develop Africa than their fathers. The business man saw no greater future there, except in the south; the politician was as reluctant to expand

\[18\text{At 8.}\\19\text{At 408.}\\20\text{At 464.}\\21\text{At 462.}\]
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and administer a tropical African empire as the mid-Victorians had been; and plainly Parliament was no more eager to pay for it. British opinion restrained rather than prompted ministers to act in Africa."

The late-Victorians, they continue,22 "were doing no more than protecting old interests in worsening circumstances . . . They went forward as a measure of precaution, or as a way back to the saner mid-Victorian systems of informal influence." And they conclude:23

"There are good reasons for regarding the mid-Victorian period as the golden age of British expansion, and the late-Victorian as an age which saw the beginnings of contraction and decline."

Thus it was that the reception laws were not the instruments of imperial ambition but the minimum provision by a Britain moving defensively and superficially into economically valueless regions in which she had no interest.

But if doubts persist as to British intentions in Africa, the very adoption of the protectorate system, and the use of the chartered company, should dispel them. Article 35 of the Berlin Act of 1885 did no more than impose on the signatories an obligation to establish an authority on the African coastline sufficient to protect existing rights. However, with the growing competition between the European powers, "spheres of influence" no longer sufficed and some form of occupation, not only in coastal areas but also inland, became necessary in order to prevent rivals from laying claim to any particular area. Since the British Government had no intention of either assuming sovereign rights or of making any demand on the pocket of the British tax-payer, it resuscitated the Chartered Company possessed of governmental powers. All three African Chartered Companies were designed to avoid the need for any direct involvement and occupation, while at the same time forestalling the claims of other interested parties.

The declaration of protectorates served the same purpose, namely, to exclude foreign interference without assuming responsibility for the internal administration of the country. Such a declaration did not involve the assumption of any jurisdiction over the indigenous inhabitants or responsibility for the internal administration of the territory by the local rulers. Protectorates were foreign countries and the inhabitants aliens until the passing of the British Nationality Act in 1948.24 In the words of Kennedy LJ in \( R v \) Earl of Crewe Ex parte Sekgome:25

"What the idea of a Protectorate excludes, and the idea of annexation on the other hand would include is that absolute ownership which was signified by the word 'dominium' in Roman Law, and which, though perhaps not quite satisfactorily, is sometimes described as territorial sovereignty. The protected country remains in regard to the protecting country a foreign State; and, this being so, the inhabitants of a Protectorate, whether native born or immigrant settler, do not by virtue of the relationship between the protecting and the protected State become subjects of the protecting State."

So it was that, at the time the reception instruments were passed, there

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22At 465.
23At 471.
25(1910) 2 KB 576 (CA) at 619.
was no policy of empire in Africa, no thought of permanent acquisition, no desire to become responsible for the government of millions of diverse peoples inhabiting vast and little known hinterlands. The introduction of English law was, therefore, essentially personal, not territorial. It was introduced to serve the needs of the small immigrant communities - to save them the journey to Westminster, to protect their land and property, and to regulate their contacts through trade with the indigenous inhabitants. Of course, this was only to be expected - the British always took their law with them. In the case of areas set aside for settlement, such as Australia, it was an automatic consequence of such settlement. Elsewhere, some more formal act was necessary to ensure its introduction. To suggest that these comparatively small, impermanent groups, isolated in the vastness of Africa and looking towards "home", were cut adrift from the parent body to build, albeit on an English foundation, their own corpus of common law makes no sense at all. A consideration of the volume of local case law that could be expected is sufficient indication that they were intended to conduct their affairs in accordance with the current English law. The standard of law reporting in England was high even at the beginning of the 19th century and, with the appearance from 1865 of the *Law Reports*, the judgments of the English courts were readily available. As Sir William Geary tells us on his arrival in West Africa in 1894:

> "It happened at Sierra Leone the Queen's Advocate had been recalled to England and the Police Magistrate who took on his duties fell ill and was invalided; and there being no other European barrister, I was appointed Acting Queen's Advocate, with excellent Law Library, office, clerkage, and the right of private practice."

Such was the establishment over a hundred years after the founding of the Colony and one wonders how many bound volumes of local reports graced Sir William's shelves.

The amount of local litigation is important. It is generally agreed that the law received at the date of reception, usually stated as the common law, doctrines of equity and statutes of general application, is binding in the receiving country - it becomes the law of that country as if it had been laid down by the local courts and legislature. It follows that it is alterable only by local statute or within the narrow limits allowed to an appellate court to overrule its own previous decisions. This being so, in the absence of an unprecedentedly active legislature or the wholesale adoption of the declaratory theory, the implementation of a cut-off renders the possibility of any development of the law received distinctly remote. The prospect must then be faced of the law in the receiving country becoming progressively out of date. It was the reality of just such a fate which wrung from the court in *R v. Goseb* the protest:

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27It is the invariable practice of African courts to follow pre-reception decisions.
28A discussion of which judgments given by the courts of the donor country are authoritative misconceives the very nature of a reception. Obviously, the decisions of all superior courts of record are binding. Allott makes this clear, see (1968) 12 *JAL* 14. Also Elias (1955) 18 *Modern L Rev* 368.
29Discussed *infra*.
301956 2 SA 696 (SWA) at 699.
"It could in my opinion never have been the intention of the legislature to saddle this Territory [South West Africa] forever with decisions that may have been wrongly decided in the Cape of Good Hope... It was clearly in my opinion also not the intention of the legislature that the law should have remained static here in terms of the law as existing and applied in the Cape of Good Hope as at the 1st of January, 1920."

Quite simply, the court adopted 1 January 1920 (the date of the reception instrument for South West Africa), as a cut-off date, but, nevertheless, wished to follow a decision subsequent to that date at variance with earlier Cape cases. In the event, the court extricated itself by an unblushing application of the declaratory theory, a theory tailor made for the purpose of circumventing a cut-off date which proves inconvenient. Such a manoeuvre demonstrates that, in law at least, one can both have one's cake and eat it!

III THE RECEPTION LAWS

To answer the question whether or not the reception of foreign law was timeless or subject to cut-off, it is not sufficient to confine attention to the reception instruments themselves. Apart from their historical context, already discussed, there are other factors relevant to the enquiry, namely, the influence of the declaratory theory, and the imported system's area of application. These will now be considered.

1 The declaratory theory

If the view is adopted that all judgments merely declare the common law, then decisions delivered in the donor country, not only before but also after reception, must be authoritative in the receiving country. Put in another way, a post-reception decision in the donor country will relate back and automatically alter the law introduced into the receiving country. This is appreciated by Allott who writes:

"Against this view (that the date appearing in the Gold Coast Courts Ordinance applies equally to the common law and equity) it can be argued that the common law remains the same from time to time, and therefore it is not necessary to assign any date by reference to which its rules are to be ascertained. This argument is consistent with the extreme and now generally discredited view that the function of the judges is merely to expound, not to make, the common law. This view of the expository function of English judges is of great importance when we come later to assess the authority of English decisions on the common law delivered after the date of reception."

This opinion, that the declaratory theory is relevant to the question of the authority of post-reception English decisions, is queried, mistakenly it is submitted, by Roberts-Wray. Following the admission of a preference for the expository interpretation of the function of the judge, he continues:

"I am very doubtful, however, whether this controversial issue is really involved in the question whether decisions of English courts after the relevant date are binding on courts in Africa. Let us suppose that the common law in force in England on 1st January, 1900, is given legal effect in the African country; if judges do make law, then clearly an English judgment after that date cannot be binding on the courts in...

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32 Sir Kenneth Roberts-Wray (1960) 4 JAL 66 at 69.
that country; if, on the other hand, they do not make law but only interpret it, then judges in England and Africa are both entitled to give their own interpretation of what the law is and, *ex hypothesi*, what it was on the 1st January, 1900, and if the judge in the African court reaches a different conclusion from that of the judge in England on a particular point, one cannot assume that the former is wrong and the latter right, especially if the African decision is first in point of time; and it seems to follow that the English decision is not binding on the African court."

This is a difficult passage. If there is a cut-off we can all agree that a discussion of the declaratory theory is irrelevant, and for the reasons given, but, of course, it is the existence or otherwise of cut-off which is the very issue to be decided. However, proceeding on the basis that Sir Kenneth's argument does not assume a limited reception, then it is impossible to agree with his view. If the declaratory theory is applied, the reception must be timeless, and indulging in their own interpretation of the common law is precisely what the courts in the receiving country are not entitled to do. As for the conclusion that if judges do make law there has to be a cut-off, this is not explained and it is certainly not self-evident. It does not follow that the case for a timeless reception depends on an acceptance of the declaratory theory. While it is true that acceptance of the theory must lead to a timeless reception the converse is not: repudiation leaves the matter entirely open.

An African court may be seised of an issue upon which there is no authority in the donor country and to this extent divergence will occur, but this eventuality was an important justification for the presence of the Privy Council as the common court of appeal. The reason why the courts established were not placed in a structural relationship with the English courts was that reception was not envisaged as a two-way process. Post-reception decisions of the donor country were to continue to bind the courts in the receiving country, but there was no question of the decisions of the latter having authority in England. However, in order to preserve uniformity throughout the African possessions, there was a common court of appeal in the Judicial Committee of the Privy Council, whose decisions were to be authoritative not only in the country from which the appeal arose but elsewhere, provided the subject matter was governed by the same principle of law.

This question of divergence appears to be a source of some confusion. For example, in *Robins v National Trust Co*, Lord Dunedin observed: 33

"... when an appellate Court in a colony which is regulated by English law differs from an appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board."

Part of Allott's difficulty with this passage is that it is not made clear whether the reference is confined to decisions given *after* reception, but it must be assumed that this is so since, as we have seen, the decisions of all superior courts of record given prior to reception are binding on the courts of the receiving country. There is, however, a more serious problem, namely,

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33(1927) AC 515 (PC) at 519.
34See Essays in African Law 32.
that it is difficult to imagine circumstances in which the situation envisaged by the learned Lord could arise. Either the reception of the foreign system involves a cut-off or it does not. If it is a case of the former, then, with regard to post-reception decisions, it is agreed to differ. If it is the latter, then, apart from decisions given later in time by the receiving courts in those rare cases of first impression, which is not the situation contemplated by Lord Dunedin, the doctrine of binding precedent does not allow of conflict.

In the present century it is a commonplace to regard the declaratory theory as a "childish fiction". Most modern lawyers are of the opinion that, although the judges seldom admit to it, appearances are deceptive and that in reality they are constantly making new law. A great deal has been written both for and against the theory but most of the debate is not germane to this paper. What is relevant is the view of the role of the judge which prevailed during the second half of the 19th century when the reception laws were passed, and it is suggested that the best evidence of this is to be found in the utterances of the judges themselves. The Bench has in fact consistently disavowed any law making powers and it is submitted that this disclaimer is not only genuine but is, in the vast majority of cases, an accurate reflection of the position. As Park points out, the judges "do treat the common law as a pre-existing system which it is their duty to expound and administer. Occasionally they may take a rule a little further than it has been taken before, so helping to create a new common law principle, but such cases are highly exceptional, and furthermore most of the judges take a strict view of the limits within which they can make these extensions and modifications."

At the height of the reception period Lord Esher had this to say:

"There is in fact no such thing as judge-made law, for the judges do not make the law though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable."

There are also numerous dicta of more recent origin which demonstrate that this understanding of the function of the judge is not the conceit of some bygone age. Turning to Roman-Dutch jurisdictions, strong judicial support for the declaratory theory is forthcoming. In Central African Airways Corporation v Vickers-Armstrong Ltd, Claydon FJ, considering the powers of the court to attach the property of a peregrinus, declared:

"Although the law is now so settled there were conflicting decisions in the Cape Colony until 1931 ... In 1907 in Ex parte Kahn, de Villiers, C.J., refused to grant an order to an insola to attach the goods of a peregrinus in order to found jurisdiction where no other ground for exercising jurisdiction existed ... Then in Holte v Warwick, 1931 C.P.D. 233, it was held that Ex parte Kahn was wrongly decided, and the law in the Cape became settled in the form set out above."

36 The term used by Austin Jurisprudence (5 ed) II 655. Austin's view was influenced by his attitude to law as the command of the sovereign. The common law, however, reaches back to a time when the various forms of social control were undifferentiated and before the emergence of formal law. The sources of the common law rules are immemorial in the sense that they are derived from custom, morality, religion, even magic.
37 AEW Park The Sources of Nigerian Law (1963) 7.
38 Willis v Baddeley, (1892) 2 QB 324 at 326.
39 1956 (2) SA 492 (FC) at 493.
There is no doubt that the law to be applied should be that laid down in *Halse v Warwick...*  

And later:

"Although in the Cape cases the actual decision relating to the *insula* and the *peregrinus* was not given until 1907, in *Ex parte Kahn*, it is clear having regard to the remarks of de Villiers, C.J., that no decision other than that reached in *Ex parte Kahn* would have been given in 1891 [the date of the reception law in Rhodesia]. *But a practice, later shown to be erroneous, cannot be regarded as the law in force in 1891; the true law must be looked to.*"  

Similarly, in *Goseb*, Claassen JP, in holding that a post-reception decision of the Appellate Division must be read as if it were already operative at the date of reception, was clear that "a decision interpreting the common law has retrospective effect, as if the common law had always been in conformity with the later decision." Kerr's commentary on these decisions is pure declaratory theory. He writes:

"The principle to be extracted from the cases quoted above appears to be that the reception of a system of law in any country, while it marks the beginning of a new development, causes no break in the life of the common law - what was sought before whenever and wherever the common law applied was a true interpretation of that law, and this is also the aim of the courts of the country into which it has been received."

Those who reject the theory and support their argument by pointing to the comparatively rare case of first impression must take account of the difficulty adverted to by Cross that "the application of existing law to new circumstances can never be clearly distinguished from the creation of a new rule of law." In the light of this, the view expressed by Elias is highly significant. He writes:

"In order to put the matter [the authority of English decisions in the receiving country] into its proper perspective we will assume a convenient date, say, January 1, 1900, as that on which English law came into force in a colony. It is clear that all English decisions of authority as at that date bind the courts of the colony. But what about judicial decisions subsequent to 1900? Perhaps the relevant rules may be reduced into the following main propositions - (A) Post-1900 English decisions will still apply -

(i) as long as they do not involve a change of any particular common law doctrine or principle..."

On this approach, even if we assume that the common law is amenable to cut-off, a limited reception will achieve very little - the vast majority of decisions in the donor country will still come in, and, as we have seen, the declaratory theory is always available to circumvent a cut-off which proves inconvenient. However that may be, it is submitted that during the last two

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99At 493-4.  
100My emphasis.  
101' *Supra.*  
102At 699.  
104Rupert Cross *Precedent in English Law* (1968) 24.  
106My emphasis.  
107It is no coincidence that the champions of the theory are more readily found within the ranks of those members of the Bench who find no difficulty in assuming the fact of limited reception.
In the 19th century the expository function of the judge was the prevailing theory. In consequence, the common law was not viewed as amenable to cut-off at the time when the original reception instruments were passed.

2 The application of English law
(a) The Foreign Jurisdiction Acts

One cannot attempt to assess British intentions during the reception period without some mention of the Foreign Jurisdiction Acts, because it was in terms of these Acts that the reception instruments were passed.

In the 19th century a series of Acts was passed to regularise the machinery by which the Crown exercised jurisdiction in foreign countries and to subject such jurisdiction to Parliamentary control. Hitherto, the basis of such jurisdiction, so far as the subjects of the foreign country itself and of any third country were concerned, was far from clear, and the Crown’s jurisdiction over British subjects rested on allegiance.8 The first Foreign Jurisdiction Act, passed in 1843, permitted the Crown to exercise a jurisdiction acquired by “treaty, capitulation, grant, usage, sufferance, and other lawful means” in respect of British subjects who were neither under British control nor under that of the country in which they were living. For African territories what was envisaged was a consular presence to ensure observance of the treaties with the local chiefs whereby the jurisdiction had been obtained, the protection of property, and the maintenance of peace, order and good government “of British subjects according to English law”.

The development of the protectorate system by the Foreign Office brought little change. As we have seen, the intention was to control external affairs, with the presence sufficient to exclude foreign intervention continuing to be a small consular staff exercising judicial powers with the addition of a chartered company entrusted with the task of actual administration.

However, in time, alteration in the Act became necessary in order to reflect the assumption in practice of a more extensive jurisdiction by the Crown. For example, in 1878 jurisdiction was extended to those British subjects temporarily resident in countries which had no “regular government”. Further developments were also reflected in the Orders in Council issued under the Acts. For instance, the 1872 West Africa Order in Council had only conferred power to make Regulations for British subjects whereas the 1885 Order brought within its provisions not only British subjects but also British protected persons, and those of the local inhabitants whose chief had consented to such jurisdiction. In consequence, in 1888, the Foreign Office decided to consolidate the Foreign Jurisdiction Acts and issue a comprehensive Order in Council for Africa. However, the passing of the Consolidation Act was delayed, and the reason for such delay was the confusion which prevailed at the end of the 19th century regarding the powers of the Crown in protectorates with respect to persons other than British subjects. The Foreign Office was of the opinion that consent was essential.

8There was some doubt even on this score. See the opinion of the Law Officers of 29 June 1887 referred to by Palley 46 n 3.
to the exercise of jurisdiction over the indigenous population, and it was this view which prevailed. Thus the British government, on the advice of the Law Officers, continued to insist that, as a protectorate was an independent state, the protecting power was not entitled to exercise jurisdiction over anyone but British subjects in the absence of consent in terms of the relevant treaty, as far as the indigenous population was concerned, and, in the case of foreigners, through consent of their own sovereign.

As a result of this official view, the African Order in Council of 1889 (which controlled the reception into Nyasaland, Uganda and Northern Rhodesia) was limited to British subjects, consenting foreigners, and those members of the local population whose chiefly authority had consented to the exercise of Crown jurisdiction. Otherwise, the local population was not justiciable in terms of the Order. Similarly, when the consolidating Foreign Jurisdiction Act of 1890 emerged, it made no major changes to the existing position and consent remained the basis for Crown jurisdiction over all but British subjects. It was not until 1910, with the original reception period long passed, that the court in *Earl of Crewe Ex parte Sekgome* declared that the Crown had the right to legislate for and subject to its administration all the inhabitants of the protected country. Admittedly, the Colonial Office had for some time adopted a more liberal interpretation of the Foreign Jurisdiction Acts and this can be seen in the South Africa Order in Council of May 1891. This Order went a long way beyond any powers conferred by the Foreign Jurisdiction Acts, but, nevertheless, the Colonial Office was concerned that “Lobengula’s consent should, if possible, be obtained to such measures as we may deem necessary for the government of the whites” so that the necessary jurisdiction would exist for the creation of a protectorate in terms of the Act.

To summarise, until the end of the original reception period, the Crown was enabled to declare protectorates to ward off foreign competitors without having to assume responsibility for, or interfere in, the internal administration of the territories concerned. More importantly, however, for our purposes, no obligation was assumed to exercise jurisdiction over the indigenous inhabitants.

(b) Background to the reception laws

Following this account of the purpose of the Foreign Jurisdiction Acts, we are now in a position to examine the historical background to the reception instruments in West, East, Central and Southern Africa in order to decide to what extent the English law was introduced, and to consider the accuracy or otherwise of describing the reception (as is always done) as the introduction of a general or territorial law.

It was the Brazilians and Portuguese trading for slaves with the local
chiefs who gave Lagos its name. In 1849, partly to suppress the trade but also in response to a request by British merchants for protection, a British consul was appointed for the Bights of Biafra and Benin with residence on the Spanish island of Fernando Po. A consul has authority only over British subjects and is primarily appointed to watch over their commercial interests, a responsibility which, in this instance, included ensuring the observance of the treaties of commerce and amity concluded with various chiefs and which contained pledges that British subjects would not be detained on shore or molested in any way. Negotiations to end the slave trade having ended in failure, in 1851 Lagos was occupied following a naval assault, but it was ten years before annexation took place, followed in 1873 by the introduction of English law “so far as local circumstances permit”. In 1866 Lagos had been incorporated in the West African Settlements with a Governor-in-Chief residing at Sierra Leone, but in 1874 it was again separated and, together with the Gold Coast, became the Gold Coast Colony.

1874 marks an important event in the legal history of both Ghana and Nigeria. By Order in Council of August 6 of that year, the Legislative Council thereby established was given power to make ordinances for the new Colony and, accordingly, in 1876 there was enacted the Gold Coast Colony Supreme Court Ordinance which by sections 14 and 19 introduced the English law and preserved the customary law. This Ordinance was the reception instrument for both the Gold Coast and Lagos and was subsequently applied to Southern Nigeria when, in 1906, the Protectorate of Southern Nigeria was amalgamated with the Colony and Protectorate of Lagos. Sections 14 and 19 will be examined later, when it will be important to remember that in 1876 the scramble for Africa was almost a decade away and both the Gold Coast and Lagos were colonies, not protectorates, established over mere coastal strips and designed to protect Britain’s trading interests in the area.

The Gold Coast

The occupation of coastal areas to maintain trading interests is even more in evidence in the relevant history of the Gold Coast Colony. The British presence goes back to 1821 when certain trading posts or fortified depots were transferred from the Company of Merchants to the Crown and annexed to the Colony of Sierra Leone. However, for our purposes, the relevant background to the Supreme Court Ordinance of 1876 begins in 1865 when, following the depredations inflicted by three Ashanti armies, a Select Committee of the House of Commons was set up to advise on whether to deploy a large army to invade and conquer Ashanti or abandon the Gold Coast altogether. In June 1865 the Committee recommended the

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53They were Lagos, Gambia, the Gold Coast and Sierra Leone.
54By Royal Charter signed on 24 July, 1874.
55See Ordinance 1 of 1886 of the Colony of Lagos.
56The separation of Lagos from the Gold Coast Colony in 1886 did not affect the position. See Ordinance 1 of 1886 of the Colony of Lagos.
57A study of Sir William Geary’s Nigeria under British Rule indicates that at this time the British presence was confined virtually to the river mouths and the beaches.
latter course, pointing out that, outside the original four forts and those ceded by Denmark, the limits of actual British territory were "wholly indefinite and uncertain". In the view of the Committee, the Gold Coast Protectorate should be retained "while the chiefs may be as speedily as possible made to do without it," that, in the meantime, the Gold Coast should once again be joined to Sierra Leone, and that all further extension of territory in West Africa "should be peremptorily prohibited and carefully prevented". In the Report, the Judicial Assessor (a post established in 1843 to exercise jurisdiction outside the forts) was censured for superseding the authority of the chiefs instead of fulfilling his proper function, namely, assisting them to administer justice. Also, the Colonial Office dealt firmly with the local Administration when it issued a notice in 1865 declaring that all territory within cannon shot of each fort - a mere five miles - belonged to the British Crown.

The proposed amalgamation was, as we have seen, carried through but the presence of the Dutch, whose forts were intermingled with those of the British, continued to cause difficulty until 1879 when they decided to pull out, transferring their depots to Britain on payment of a fair price for stores and other movable assets. Thus Britain's presence increased contrary to the advice given by the Select Committee and, ironically, the acquisition of the Dutch fort at Elmina, claimed by the Ashantis, led to the Sixth Ashanti War and further unwelcome involvement. In January, 1873, the Ashanti army invaded across the River Pra, but a year later, with the help of reinforcements from England, the Ashantis were finally defeated and, by the Treaty of Fomena, renounced their claims to all coastal areas. Having now gained complete control along the Gold Coast, Britain decided in the face of strong opposition from those who wished to see the whole troublesome region abandoned, to separate the Gold Coast (and Lagos) from Sierra Leone and establish the Gold Coast Colony.

Nigeria

Turning to the future Nigeria, the activities of the British in the Niger Delta until 1884 have been characterised as "consul and gunboat rule" devoted exclusively to the protection of commerce and the suppression of the slave trade.

It was not until the 1870s that the Europeans moved ashore from their living quarters in hulks moored on the river and built factories on piers at the river's edge on sites leased from the local chiefs. To control this small, riverine group and for the settlement of trading disputes, the West African Order in Council was passed in 1872 authorising the consul to exercise criminal jurisdiction over British subjects. No criminal jurisdiction over the

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58 Cape Coast, Dixcove, Anomabu and Accra (Fort James).
59 Christiansborg, Augustaborg, Fredensborg, Kongensteen and Prindsensteen.
60 But "Wolseley was warned not to take measures which might bring on 'a complete break up of the King's Government and power'. He was instructed to smite them a Palmerstonian blow which would chasten the unruly, but leave their political organisation independent and intact." Per Robinson & Gallagher 31.
61 Formerly termed the Oil Rivers because of the trade in palm oil.
62 See Geary 73.
local population was conferred and, in civil matters, jurisdiction was limited to those chiefs and their subjects who continued to acquiesce in the jurisdiction of the consul and the Courts of Equity. Ideally, the British Government would have liked to rid itself of even this minimal responsibility. However, in 1885, reacting to French imperial designs and, because of Britain's insistence on the observance of legal forms which made it essential to declare a protectorate before a chartered company could be established, a protectorate was declared over the districts of the Niger, and by the West Africa Order in Council of the same year, English law was applied to British subjects, British protected persons and the subjects of local chiefs who consented to jurisdiction.

The purpose of the declaration was, as usual, to prevent other Powers from interfering with already existing British interests in the area, not an intention to administer the country. Thus "occupation" took the form now becoming familiar throughout Africa of a small and inexpensive consular staff and devolution of detailed administration to a chartered company. As imperialist-minded Geary observes, with a disappointment verging on disgust:

"But the Crown failed to set up any administration. It was a paper protectorate, only exclusive of foreign powers. There was no revenue, no government, no police force, the Consul had no executive powers. Each river was ruled by what was called a Court of Equity composed of the influential members of the mercantile community both European and Native; but their jurisdiction was in effect voluntary and mainly by way of arbitration. The system was still the old Consul and gunboat regime, whereby the lives and property of British subjects were protected by the Consul calling on the help of a naval officer ad hoc and if available."

Justice was to be administered to "Europeans and other non-natives" under the provisions of the Africa Order in Council of 1889 which replaced the Order of 1885. Finally, by Order in Council of 1899, which came into force on 1 January 1900, the southern portion of the Royal Niger Company's territory was joined to the Niger Coast Protectorate and the resultant Protectorate of Southern Nigeria emerged in the early hours of the present century.

To return to the Gold Coast Colony Supreme Court Ordinance of 1876 which introduced the English law in the trading areas along the coast. Section 14 reads:

"The common law, the doctrines of equity, and the statutes of general application which were in force in England at the date when the Colony obtained a local legislature, that is to say, on the 24th day of July, 1874, shall be in force within the jurisdiction of the Court."

Section 19 reads, in relevant part:

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64 These were informal courts which were run by the merchants and chiefs under the supervision of the Consul. The later "consular courts" represented a change in name and a formal legal basis. 65 Administration was to be in the hands of Goldie's National African Company chartered as the Royal Niger Company. 66 The Oil Rivers Protectorate later renamed the Niger Coast Protectorate. 67 See Robinson & Gallagher 180. 68 At 97.
"Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit, of any law or custom existing in the Colony, such law or custom not being repugnant to natural justice, equity, and good conscience. . . . Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives of the Colony, . . . and also in causes and matters between natives and Europeans where it may appear to the Court that substantial injustice would be done to either party by a strict adherence to the rules of English Law. No party shall be entitled to claim the benefit of any local law or custom, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transactions should be regulated exclusively by English law: . . ."

These sections have been analysed by various writers and subjected by some to allegations of obscurity and ambiguity. Taken together, however, they present a tolerably clear picture of British intentions. They introduce a dual system of law and of courts with choice of law, if it can be called that, based on ethnic origin. In terms of section 14, read with the definition of "Court" in section 2, English law is excluded from the jurisdiction of the customary tribunals. Section 19 confines English law to the non-native population but makes provision for disputes, presumably of a commercial nature, arising from contact with the indigenous peoples. In such a case, English law applied (a) where its application would not cause injustice and (b) where, through agreement or by virtue of the nature of the transaction, it was the appropriate system. Subject to the usual repugnancy clause, there was no interference with the existing regime of custom which was to continue to apply, to the exclusion of English law, in the local courts, but, of course, the Supreme Court was empowered to observe and enforce local law and custom. It was not envisaged that any non-native could voluntarily submit to customary law. The provision that no-one was to be deprived of the benefit of customary law merely ensured that the introduction of English law would not prejudice the rights of the indigenous inhabitants in terms of their own system.

East Africa

Britain had no desire to found new colonies in East Africa. British interests in Uganda were strategic. White settlement in the fertile highlands to the west of the Rift Valley (transferred to the future Kenya Colony in 1902) was a 20th century expedient adopted by a British Government, burdened by the cost of the railway and a growing grant-in-aid, to solve the
Reception of English and Roman-Dutch law

Financial problems of the Protectorate. Commercially, East Africa was a most unpromising acquisition and, added to this, was the insuperable task of setting up an effective administration over a sparse and scattered population made up of numerous small units with widely divergent customs and differences of language. With the exception of Buganda, there were no reasonably sized indigenous organisations upon which to build. In Uganda, in 1903, the economy was still essentially of the subsistence variety, internal sources of revenue were quite inadequate even to provide basic administrative needs and a grant-in-aid paid almost 84% of government expenditure. As late as 1953–5 the East Africa Royal Commission reported that one of its most vivid impressions was “the fundamental poverty which prevails in the East African territories”. Perham sums up:

“In the 1890s, especially in contrast with the satisfactorily solvent coastal dependencies on the western side, East Africa seemed an exacting acquisition. Only Zanzibar, with its cloves and its transit trade, promised solvency. A few figures will speak for themselves. In 1900 the revenue of Kenya was £64,000, the expenditure £193,000; the comparable figures for Uganda were £82,000 and £252,000. In the same year the imports of Kenya and Uganda were valued at £450,000 worth and their exports £71,000. Kenya remained dependent upon the British Treasury up to 1912 and was in the red again in some subsequent years. Between 1895 and 1913, in addition to the cost of the railway, parliamentary grants from Britain totalled £2,843,000. Uganda had a closely parallel financial history up to that time. German East Africa proved even more costly to the Germans, demanding some £10,000,000 between 1910 and 1914.”

That Britain dreamed of empire in East Africa is a notion almost as adrift from reality as that the Colonial Powers raided the East African larder. Indeed, at the height of partition in 1892, the British Government planned to evacuate Uganda but, under pressure from the Church Missionary Society and threats of resignation from Rosebery, reluctantly agreed to send Portal, the Consul-General at Zanzibar, to assess the situation and advise on future policy. Portal arrived in 1893, decided that the British Government should accept responsibility for the area, and the following year the Protectorate was established.

As previously stated, on the creation of the Protectorate, Uganda came under the 1889 Mrica Order in Council which introduced “the substance of the law for the time being in force in England”, and confined the Consul's

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73 The introduction of white settlers was seen as the only feasible way of replacing the traditional subsistence economy with one of Western type.
74 History of East Africa with introduction by Margery Perham.
75 The myth, like all myths, of the “tropical treasure house” of Africa is hard to dispel. It is discussed by Gann & Duignan chap 3. See also Perham 129–30.
76 Salisbury had done his utmost to ensure the safety of the Nile head-waters but Parliament, public opinion and business combined against him. His ministry resigned in August 1892 leaving the future of Uganda unsettled. His successor in the Foreign Office, Lord Rosebery, met much the same opposition. See Robinson & Gallagher 315–6.
77 The background to this compromise arrangement is interesting. See Robinson & Gallagher 317–20.
78 By the time the Report arrived it had already been overtaken by events which obliged Rosebery to go far beyond Portal’s recommendation of a “sphere of influence”. See Robinson & Gallagher 328–9. The reasons given were strategic not economic. In Portal’s view there were no prospects of commercial gain.
jurisdiction to British subjects, foreigners and persons enjoying Her Majesty’s protection.\textsuperscript{79} Appeal from the Consul’s Court lay to the superior court in Bombay. Finally, in 1902, an Order in Council of that year established a High Court and, in addition to the English law introduced by the 1889 Order, and which was preserved by proviso,\textsuperscript{80} brought in the civil procedure, criminal procedure and penal codes of India “except so far as might otherwise be provided by law”.

Once Britain had declared a protectorate over Uganda she was obliged to do the same in the area between the Protectorate and the coast in order to safeguard the lines of communication and to secure her presence following the collapse of the British Imperial East Africa Company. However, it is important to realise that in 1895, when the Protectorate was declared, the British presence in the future Kenya extended over no more than the islamized coastline, and isolated forts along the Uganda road. Similarly, in 1894, only a fraction of modern Uganda had experienced any British control.

That the establishment of a protectorate in the intervening territory between the coast and Uganda did not demonstrate any desire to acquire this area for its own sake is clear from the appointment of AH Hardinge\textsuperscript{81} as its first Commissioner. Hardinge was a career diplomat responsible to the Foreign Office for continuing the policy of non-involvement in the region, provided the road to Uganda was secured. It was this vital link with the coast and Zanzibar which alone motivated Salisbury,\textsuperscript{82} whose interest lay exclusively in Uganda. It was access to Uganda that counted, and the financial opposition of the Foreign Office was his instrument for restricting administrative expansion in the East Africa Protectorate beyond that required for this purpose.\textsuperscript{83} Britain’s presence in the future Kenya served larger, international designs. Salisbury was pre-occupied with more weighty matters than the running of a protectorate in a relatively obscure part of East Africa, namely, French rivalry and the growing threat from Germany.

As early as 1826\textsuperscript{84} the Foreign Office had refused to become involved. The appointment in 1841 of a British Agent and Consul at Zanzibar arose,

\textsuperscript{79}Perhaps it should be pointed out here that these did not include the local population. Such persons are, for example, defined in the East Africa Order in Council of 1897 by s 2(v) as “a person who either (a) is a native of any other Protectorate of Her Majesty, and is temporarily in the East Africa Protectorate, or (b) by virtue of The Foreign Jurisdiction Act, 1890, or otherwise enjoys Her Majesty’s protection in the Protectorate . . . ”.

\textsuperscript{80}It has been suggested that the continued application of English law under the 1902 Order was in doubt until the enactment of an amending Order of 1911. See HF Morris & James S Read Uganda, the Development of its Laws and Constitution (1966) 237–8. There would appear to be no foundation for such doubt. Any other result would have led to the Protectorate having no system of substantive civil law.

\textsuperscript{81}Later Sir Arthur Hardinge, PC, KCMG. He was also Agent and Consul-General for Zanzibar.

\textsuperscript{82}Lord Salisbury was Prime Minister (and Foreign Secretary) throughout Hardinge’s period as Commissioner.

\textsuperscript{83}It is interesting to note that Hardinge received £1 800 plus a house for his work as Consul-General, Zanzibar, and an extra £200 for his work on the mainland! See GH Mungeam British Rule in Kenya 1895–1912 (1966) 17 n 1.

\textsuperscript{84}In this year the Foreign Office refused the request of local Arabs to establish a British Protectorate at Mombasa. See Mungeam 5.
as Mungeam explains,85 "less out of concern for East Africa than from a desire to protect Britain's interests in India and to foster good relations with the Sultan, for many British India traders had set themselves up in Zanzibar, and along the coast of the East Africa mainland. At the same time Britain wished to keep on good terms with the Sultan of Zanzibar, Seyyid Said, for he was also the ruler of Oman, and thus held a strategic position on the over­land route to India." Why then did Britain in 1894 and again in 1895 proceed to declare protectorates in East Africa?

The answer is given by Mungeam:86

"The reason for this late committal to the East African mainland, after so many years of non-involvement, lay in the wider field of international diplomacy. Although the humanitarian factor of opposition to the slave trade played its part, the real key to the change in policy was to be found in Britain's strategic interests in the area of the upper Nile . . . The failure of the Company, [the Imperial British East Africa Company] and its determination to withdraw from Uganda, forced the British government into a more open position. Faced with the threat of a power vacuum on the Upper Nile and the probability of attack upon British missionaries and Baganda Christians if all support were withdrawn, Britain had little alternative but to step into the breach. The resulting Protectorate over Uganda came as the logical - if somewhat hesitant - culmination of British diplomacy, granted the failure of Mackinnon and of Britain's policy of informal Empire. Once Uganda was held, it was a relatively simple step to set up a further Protectorate over the territory between Uganda and the coast."

When Hardinge arrived in July 1895 he assumed government of no more than a "coastal society dominated by an Arab and Swahili ruling class"87 and a handful of precariously placed outposts established at strategic points along the Uganda road. That this road was maintained at all was due to the almost total lack of contact with the indigenous inhabitants, the vast majority of whom were completely untouched by the European presence.88 Those in the vicinity of the road were so accustomed to traders and travellers moving up and down that it never dawned on them that the stations set up along the route represented a more permanent arrangement. Thus it was that, at the time of the enactment of the reception law for the new Protectorate, both the country and its inhabitants were largely unknown.

Against this background it is extremely difficult to justify the argument that the legal system received represented the introduction of the general law of the land. The East Africa Order in Council89 was issued in response to a request from Hardinge for some guidance in sorting out the confused state of the legal system he had inherited. A new system of courts was set up, thus ending the old system of consular jurisdiction, but the Order proceeded to preserve the regime of personal laws then obtaining in the country. As was the case with the Uganda Order in Council of 1902, a dualism of courts and of law based on ethnic origin was imposed even more rigid than that

85 At 5-6.
86 At 7-8.
87 Mungeam 2-3.
88 Even the labour for the railway was imported from India. There were 13 000 coolies employed on its construction in December 1898. Again, in spite of the fairly high death rate from disease among European administrative staff, the expedient of employing African assistants was hardly considered.
89 Published in the London Gazette of 9 July 1897.
experienced in West Africa. In terms of section 5 read with section 51 of the Order, a “native” was “a person not subject to this Order” except in “the cases and according to the conditions specified in this Order, and not otherwise”, and was, apart from the situation where he was a co-defendant with a person subject to the Order, confined entirely to “Native Courts”.

Section 51 reads:

“Every criminal charge against a native, and every civil proceeding against a native, except a proceeding in which the native is co-defendant with a person subject to this Order, shall be heard and determined in the proper Native Court, and the Protectorate Court shall not exercise any jurisdiction therein.”

Unlike the reception instrument in West Africa, where the coastal trade brought mercantile contact with the local population, no provision was made for legal dispute between the members of the immigrant group and the indigenous peoples. The need to resort to such choice of law rules was not contemplated.

3 Conclusion

The generally accepted view of the nature and effect of the reception of English law in Africa during the 19th century is stated by Allott. He writes:

“The arrival of European colonial powers wrought a fundamental revolution in African legal arrangements, the results of which are with us to this day. The nature of the revolution varied somewhat with different colonial powers, but in general each power first introduced its own legal system or some variant of it as the fundamental and general law of its territories, and, second, permitted the regulated continuance of traditional African laws and judicial institutions except where they ran counter to the demands of colonial administration or were thought repugnant to ‘civilised’ ideas of justice and humanity.”

It is suggested that this interpretation, which portrays the introduced English law as the general or fundamental or territorial law with the indigenous system merely tolerated within prescribed limits, does not fit the facts. On the contrary, Britain’s marked aversion to any involvement beyond that dictated by strategic considerations and trade, the fact that protectorates were not envisaged as a preliminary step to fuller and more permanent occupation, and the content of the original reception instruments themselves, demonstrate that, during the relevant period, English law was introduced to serve the needs of relatively small groups of British subjects and that it was the local law which remained the general law of the land. The contrast with those territories where substantial European settlement was intended, as was the case, for example, in Australia, lends support to this view. The established practice of introducing English law at the time of settlement as the general law is adverted to by Dr Lushington with reference to the settled colony of New South Wales. “New South Wales”, he states, “is a settled colony of Great Britain and consequently amenable, according to recent authorities, to such portion of the statute law and the common law of the mother country as were

90 Except for the case of a co-defendant. See supra.
92 Catterall v Catterall (1847) 1 Rob Ecc 581.
Contrary to general belief, the introduction of English law in Africa as the general law did not take place as the result of legislative enactment during the last third of the 19th century but has been a continuing process throughout the 20th. The original reception laws introduced a clear-cut separation between the European law, applicable to British subjects, and the indigenous system, confined to the local population. It is only during this century, with the change in attitude of the British Government towards its African possessions, the marked social and economic development within the new independent countries of Africa, and the movement of increasing numbers of Africans out of the regime of custom, that some adoption and assimilation of the English law has occurred. As a result, at the present time, the questions which are now central to any study of African legal systems are those pertaining to choice of law and the “marriage” of the imported and indigenous systems. Obviously, in such drastically altered circumstances, a timeless reception of English law is no longer appropriate, but this should not blind us to the fact that, in the light of the conditions which prevailed at the time the reception instruments were enacted, the argument for a limited reception is untenable.

IV THE RECEPTION FORMULAS

The original reception laws take one of two forms: either they contain a date (or are dated by reference to the date of their commencement) or proceed to introduce the law for the time being in force in the donor country. For example, the 1876 Gold Coast Colony Supreme Court Ordinance which forms the basis of the legal system presently obtaining in modern Ghana and Nigeria, introduced:

“The common law, the doctrines of equity, and the statutes of general application which were in force in England at the date when the Colony obtained a local legislature, that is to say, on the 24th day of July, 1874...”

The East Africa Order in Council 1897 applied the law of British India as in force in Bombay and, where that system was inapplicable, the “common and statute law in England in force at the commencement of this

93My emphasis.
94The British presence throughout the 19th century was essentially negative and superficial. It is in this century that the unwelcome burden had been assumed and, with it, the change in emphasis to a policy of positive development of the resources and peoples of the Empire. Perham (at 55) writes: “Before 1914 Britain could not begin to administer in any full sense. Her scanty agents were still making their first real contacts with the tribes, putting down slave raiding here, tribal wars and cannibalism there, building roads and railways with African labourers who in some parts had never seen an axe, a spade or a wheel.”
95Eg the East Africa Order in Council 1897, for which see infra.
96The provision was extended to Lagos (Ordinance 1 of 1886) on its separation from the Gold Coast Colony and, with a substitution of 1 January 1900 for 24 July 1874, was applied to the Protectorate of Southern Nigeria. See Ordinance 17 of 1906.
97S 14.
98Art 11.
Order." Subsequently, however, the pattern established on the Gold Coast was adopted and the residual law introduced was expressed to be "the substance of the common law, the doctrines of equity, and the statutes of general application in force in England on August 12, 1897."

In the second category, the Africa Order in Council 1889 reads:

"Subject to the other provisions of this Order, the Civil and Criminal jurisdiction aforesaid shall, so far as circumstances admit, be exercised upon the principles of and in conformity with the substance of the law for the time being in force in and for England . . ."

Northern Rhodesia and Uganda originally came under this general Order in Council but, in the case of the latter, it was replaced in 1902 by the Uganda Order in Council, whilst in Northern Rhodesia, the Northern Rhodesia Order in Council made provision for the exercise of the High Court's jurisdiction

"upon the principles of and in conformity with the substance of the law for the time being in force in and for England . . . Provided that no Act passed by the Parliament of the United Kingdom after the commencement of this Order shall be deemed to apply to the said territory . . ."

1 Dated reception

The standard formula introduces the common law, the doctrines of equity, and the statutes of general application in force in England on a stated date. To which portion of the received law does the date apply? Does it apply only to the statutes of general application or does it refer back to the common law and equity as well? If the date governs only the statutes then the reception of common law and equity is timeless. Allott supports the view that the limiting date applies to all three branches of law and, writing of the Gold Coast Colony Supreme Court Ordinance, argues:

"The first problem of interpretation is whether the specified date in provisions of this type refers only to the statutes of general application, or also to the common law and equity applicable. Whilst it is possible to read (and the punctuation suggests that reading) section 83 as applying the limiting date solely to the statutes, it is submitted that by necessary intendment the date should govern the rules of common law and equity applicable as well. Had the intention of the legislature been different, the relevant words might have followed those of section 17 of the Courts Ordinance, which provided that the Gold Coast Supreme Court was to exercise matrimonial jurisdiction 'in conformity with the law and practice for the time being in force in England'. Against this view it can be argued that the common law remains the same from time to time, and therefore it is not necessary to assign any date by reference to which its

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88By the East Africa Order in Council, 1902, as amended by the East Africa Order in Council, 1911.
100Art 13.
101Also the Oil Rivers Protectorate, the Congo Free State and Nyasaland.
102Supra. An amending Order of 1911, following the pattern established on the Gold Coast, provided that, in so far as the Indian Codes did not apply, jurisdiction was to be exercised "in conformity with the substance of the common law, doctrines of equity and the statutes of general application in force in England on 11th August 1902 . . .".
103Art 21(2).
104At the present time Gambia, Sierra Leone, Federal Nigeria, Eastern Nigeria, Kenya, Uganda, Tanzania, Zambia, and Malawi closely follow the pattern given in the text.
rules are to be ascertained. This argument is consistent with the extreme and now generally discredited view that the function of the judge is merely to expound, not to make, the common law."

For a number of years this interpretation was assumed to be the correct one, but recently it has been challenged. For example, Bennion writing on the law of Ghana, observes: 108

"Dr Allott's argument by analogy with S.17 is, with respect, unconvincing since the English matrimonial jurisdiction is entirely based on statute law and S.17 intended to apply current English law whether the statutes in question were of general application or not and regardless of when they came into force. Nor can it be accepted that there was any grammatical ambiguity in the wording of S.83, quite apart from the placing of the commas. It would be necessary to insert 'the rules of' before 'the common law' in order to make the plural verb extend beyond the statutes... More serious perhaps than these arguments was the point that Dr. Allott's view appears to run counter to the line of judicial authority on S.83 and similar provisions in other territories, as he himself points out, and that, whatever view one takes of the theory that the common law exists in nubibus, whence it is garnered by the judges, the fact remains that it is unnatural to speak of the common law as in force at a particular date and that judgments are invariably given in the form of expositions of existing principles rather than as instances of quasi-legislative action."

Park 107 is of the same persuasion and, advancing similar arguments, contends that it is the current common law and doctrines of equity of England which are in force in Nigeria. In addition, he points out 108 that Nigeria 109 has resolved any ambiguity there may have been clearly in favour of a timeless reception by separating the statutes from the common law and equity in such a way as to clearly indicate that the date applies only to the former. 110

Returning to Bennion's reference to the grammar of the reception law for Ghana, it should be remarked that some reception statutes, as can be seen from the standard formula given above, omit the plural verb. However, neither this omission nor the fact, noted by some commentators, that some formulas have no comma after "equity", affect the position. It is surely the lack of any comma after "application" which suggests that the statutes alone are governed by the stated date.

Why, it may be asked, have a cut-off for statutes? The answer lies in the fact that much of the legislation of the donor country would be purely of local concern and therefore unsuitable for export. An awareness of this lack of relevance, which need not be the case where a particular branch of the law is introduced, is reflected in the qualification that only statutes of general application should be imported and then only so far as local circumstances permit.

2 The law "for the time being in force"

Little need be said regarding this type of reception formula for it is now agreed that such words introduce the English law as it may be from time to

108 At 393.
107 At 20–22.
109 At 21.
108 With the exception of the Eastern Region.
110 This has been done in other African countries. For example, for Zambia, the English Law (Extent of Application) Ordinance 4 of 1963, s 2 reads: "... (a) The common
time. As expressed by Morgan CJ in *Whyte v Commissioner of Police*111 “for the time being means current at the time the rule is to be applied”. A number of the original reception instruments adopt this formula and it is also found in provisions introducing the English law on a particular topic. For instance, in Ghana,112 section 17 of the Courts Ordinance reads:113

> “The jurisdiction hereby conferred upon the Supreme Court in Probate, Divorce and Matrimonial Causes and proceedings may, subject to this Ordinance and to Rules of Court, be exercised by the Supreme Court in conformity with the law and practice for the time being in force in England . . .”

The effect of this section is, in the words of Allott,114 to apply the current divorce law of England in Ghana. In *Taylor v Taylor*115 Kingdon CJ deliberating upon an identical provision in the Nigerian law, stated the view now universally held:

> “From this it is quite clear that in probate causes and proceedings the law and practice in Nigeria change as the law and practice in England change.”

The use of the phrase is not, of course, confined to the introduction of foreign systems of law but is found in many other areas where it bears the same meaning.

3 Conclusion

This examination of the reception formulas leaves little room for doubt that, throughout Africa, the introduction of English law was timeless. Those who would argue that some of the instruments effect a continuing reception whilst others do not must explain why this should be so. An analysis which produces such a result must be supported by evidence of the conditions prevailing in the various protectorates during the reception period, and the policy adopted towards each by the British Government of the day, in order to justify such a fundamental difference in treatment as between one African territory and another.

V BOTSWANA, LESOTHO AND SWAZILAND

1 Introduction

South of the Zambesi, the British Government exhibited the same reluctance towards the acquisition of large and costly possessions as it had shown in other parts of Africa.116 Nowhere was this lack of enthusiasm more marked than in the assumption of responsibility for Bechuanaland, Basutoland and Swaziland. The British Government felt obliged to extend jurisdiction over the three territories because, in the words of Lord Hailey,117 “it seemed essential to prevent action being taken by the Transvaal Republic or

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112 Also Sierra Leone, Zambia and Nigeria.
113 Cap 4.
116 For Rhodesia, see Palley 87–9.
Orange Free State which might menace the peace of the Cape Colony or Natal."

Britain looked forward to the day when the whole sub-continent would become a white dominion run from the Cape with the High Commission Territories forming an integral part. And so it was that a timeless reception introduced not the English but the Roman-Dutch law throughout the region. That the original reception was a continuing one is beyond dispute. All three reception instruments (Botswana and Rhodesia share the same reception instrument) carefully segregate their references to statutes and, with the exception of Swaziland, import "the law for the time being in force in the Colony of the Cape of Good Hope."

The issue, then, is not whether the original reception was timeless, indeed it is surprising that there was ever any doubt in the matter, but whether subsequent events have imposed a cut-off.

2 Botswana

When in 1885 the British Government reluctantly assumed jurisdiction over Bechuanaland it did so to end the state of anarchy on the Cape frontier and to ensure that this route to the North was not closed by the Boers. There was no interest in administering the country and the first Assistant Commissioner was instructed "not to interfere with Native Administration; the Chiefs are understood not to be desirous to part with their rights of sovereignty, nor are Her Majesty's Government by any means anxious to assume the responsibilities of it." Four years later, in May 1891, an Order in Council was issued authorising the High Commissioner to provide for "the administration of justice, the raising of revenue, and generally for the order and good government of all persons", but a dispatch accompanying the order directed that jurisdiction should be confined as far as possible to Europeans, leaving the Native Chiefs and persons living under their tribal authority almost entirely alone.

In terms of this Order, the High Commissioner issued his Proclamation of 10 June 1891, section 19 of which reads:

"Subject to the foregoing provisions of this Proclamation, in all suits, actions, or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being..."
in force in the Colony of the Cape of Good Hope: Provided that no Act passed after this date by the Parliament of the Colony of the Cape of Good Hope shall be deemed to apply to the said territory."

This timeless reception was unaffected by the amending Proclamation of December 1909124 which introduced a new section 19:

"Subject to the provisions of any Order in Council, in force in the Bechuanaland Protectorate at the date of the taking effect of this Proclamation, and to the provisions of any proclamation or regulation in force in the said Protectorate at such date . . . the laws in force in the Colony of the Cape of Good Hope on the 10th day of June, 1891, shall mutatis mutandis and so far as not inapplicable be the laws in force and to be observed in the said Protectorate, but no Statute of the Colony of the Cape of Good Hope, promulgated after the 10th day of June, 1891, shall be deemed to apply, or to have applied, to the said Protectorate unless specially applied thereto by Proclamation."

Admittedly, in the preamble to the Proclamation, the purpose of the substitution is stated to be the removal of "doubts" as to the effect of the earlier section, but it is clear from the despatches and correspondence which passed between the Secretary of State, the High Commissioner and the Resident Commissioner at Mafeking that the "doubts" had nothing whatsoever to do with the issue of timelessness.125 More importantly, the exchanges reveal that it was never present to the minds of those concerned that there was any significance to be attached to the deletion of the phrase "the law for the time being in force" and the insertion of a date in its stead.

This may suggest that any analysis of the punctuation and language of the reception laws is of little value.

Save for the promulgation in 1964 of the Penal Code,126 which expressly eliminates any further application of the substantive Roman-Dutch law of crime, the position remains unchanged.

3 Lesotho

Basutoland was annexed by Britain in 1868 in order to save the Basotho from destruction at the hands of the Boers, and shortly thereafter the territory was incorporated in the Cape Colony.127 In 1884, following dis-annexation from the Cape and the resumption of direct administrative control by the British Government,128 the High Commissioner issued a Proclamation,129 section 2 of which reads:

124 36 of 1909.
125 See Vol CO 417/481 (Southern Africa) ref 2237 at 16 et seq Public Records Office. The changes urged by the Resident Commissioner at Mafeking were the following substitutions: "be the laws in force" to replace "be the same as" and "so far as not inapplicable" to replace "as nearly as the circumstances permit." One can share Lord Crewe's difficulty in discerning any material differences. Feetham, the Legal Adviser, considered the changes unnecessary. However, the Attorney-General of Rhodesia considered that the phrase "so far as not inapplicable" altered the incidence of the onus of proof.
126 Law 2 of 1964.
127 By Act of 1871 (C).
128 By Order in Council of 2 February, 1884.
129 The General Law Proclamation 2B of 1884.
"In all suits, actions or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope; Provided, however, that in any suits, actions, or proceedings in any court, to which all the parties are Africans, and in all suits, actions or proceedings whatsoever before any Basuto Court, African law may be administered; and provided further, that the laws set out in the Schedule hereto and Acts passed after the 29th day of September, 1884, by the Parliament of the Colony of the Cape of Good Hope shall not apply to the said territory."

This provision introduces a timeless reception of the Roman-Dutch common law and, since 1884, only two developments are at all likely to have imposed a subsequent cut-off. They are, the passing of the South Africa Act; and the enactment in Lesotho of the Appeal Court and High Court Order, 1970.

However, before proceeding to these, some reference should be made to the somewhat ingenious argument that the phrase "as nearly as the circumstances of the country will permit" is wide enough to embrace circumstances external to the receiving country and therefore supplies, as it were, a built in cut-off available when relevant changes outside the receiving country occur. Some such qualification appears in almost all the reception formulas and has always been assumed to confer no more than a necessary discretion upon the courts in the receiving country. In the words of Roberts-Wray:

"This ... is a statutory edition of the ancient common law rule that English colonists, settling in a country not possessing a civilised government, take with them English law so far only as it is applicable to local conditions. This 'wise provision' as it was described by Lord Justice Denning ... in the Nyali Bridge Company v Attorney-General would enable the courts in Africa to adapt to local circumstances both written and unwritten law and, in that process, to decline to follow decisions of the English courts whether before or after the date specified."

It has never been suggested that the qualification serves any other purpose. Of course, and without the need for recourse to the reception instrument, circumstances can be envisaged which would effect such a severance. For example, disappearance of the referenced legal system, or even that its further application had become intolerable. It is submitted, however, that with the comparative political stability enjoyed in Southern Africa hitherto, no such break has occurred.

That the demise of the Cape Colony by its incorporation in the Union imposed a cut-off is an argument which can be fairly easily disposed of. An adequate answer is probably that it was not Cape law but the legal system then

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130This has always been assumed by the courts in Lesotho. There is no reported case where South African decisions have been departed from. In Regina v Klopio Leratlobi & Ors (1926–53) HCLR 320 (BHC) Willan CJ acknowledged the authoritative nature of South African decisions. See at 324 of the case. The view expressed by Benson CJ in Matomai Pholo v The Principal Chief of Mokhotlong (1963–6) HCLR 188 (BHC) at 189 is not correct.

131At 70.

132As in the case, for example, of the doctrine of frustration in the law of contract.

133The development, in South Africa, of the doctrine of Apartheid has been advanced as such a circumstance, but it cannot be said that this renders intolerable any further application of the common law.
obtaining at the Cape, namely, the Roman-Dutch law, which was received into Basutoland. Thus, the disappearance of that Colony as a separate political entity, did not extinguish the system of law applied there. In fact, it is safe to say that the Act of Union far from effecting the disappearance of Cape law proceeded to formally recognise it as the common law of South Africa. It is this fact, that at Union only formal recognition and not application was necessary, which successfully defeats an argument based on the assumption that in 1884 the law of the Cape Colony had an existence only within that Colony’s geographical boundaries. Historically, this is untrue. Some years before Cape law was received into Basutoland that system had found its way into Natal, the Transvaal and the Orange Free State. For example, in 1849 Sir Harry Smith declared the law of the Orange River Sovereignty to be “Roman-Dutch law as received and administered in the courts of the Cape Colony”. A similar phrase appears as late as 1919 in the reception instrument for South West Africa and is explained by Claasen JP:

“The common law of the Cape of Good Hope was on the 1st of January, 1920, not something separate and distinct from the common law of the rest of the Union, but part and parcel of it. In my opinion, it was in effect the South African Law as existing and applied in the Cape of Good Hope that was introduced into this Territory on the 1st January, 1920.”

In like manner, we can say that the law of the Cape Colony was on 29 May 1884 not something separate from the common law of the rest of what was to become the Union of South Africa.

Section 7(1) of the Court of Appeal and High Court Order (1970) reads:

“Nothwithstanding anything to the contrary in any other law contained there shall be no appeal (a) from any judgment or order of the Court of Appeal given on appeal from any court in Lesotho; or (b) from any judgment or order of the Court of Appeal otherwise than on appeal.”

Following the suspension of the Constitution, this Order provides for a Court of Appeal and a High Court for Lesotho and this subsection abolishes appeals to the Judicial Committee of the Privy Council. There is much speculation, therefore, concerning the purpose of subsection (2) which reads:

“Nothwithstanding anything to the contrary in any other law contained no court and no person in Lesotho shall be bound by any judgment, order, ruling or opinion given by any tribunal, court, person or authority outside Lesotho after the date of commencement of this Order. So however, that the provisions of this subsection shall not apply to any judgment, order, ruling or opinion given by the Judicial Committee of the Privy Council in connection with an appeal against a judgment or order of the Court of Appeal given or made before the 30th January, 1970.”

The reception law for Natal (Ord 12 of 1845) gave “the system, code or body of law commonly called the Roman-Dutch law, as the same has been and is accepted and administered by the legal tribunals of the Colony of the Cape of Good Hope.”

See Burchell & Hunt op cit 29-31.

At 31.

1 At 31.

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1 At 31.
It is just possible to interpret this subsection as imposing a general cut-off date for the received Roman-Dutch law (although it appears to refer to specific judgments) and the time may come when it will be so employed. Its purpose, however, was to make provision for appeals pending before the Judicial Committee at the time of enactment.

4 Swaziland

Swaziland was a dependency of the Transvaal until 1903 when its administration was taken over by Britain following the annexation of the Transvaal after the South African War. This explains the reference to the legislation of the Transvaal in the (amended) reception instrument of 1907 which reads:

("1) The Roman-Dutch common law, save in so far as the same has been herebefore or may from time to time hereafter be modified by statute, shall be the law in Swaziland;
(2) Save and except in so far as the same have been repealed or amended the statutes in force in the Transvaal on the fifteenth day of October, 1904, and the statutory regulations thereunder, shall mutatis mutandis and as far as they may be applicable be in force in Swaziland . . ."

The fact that it is the Roman-Dutch common law which is incorporated forestalls any argument for cut-off based on the Act of Union. The continuing nature of the reception is clear from the instrument itself and, furthermore, the South African decisions are habitually followed by the courts. Neither the arrival of independence nor the suspension of the Constitution in 1973 affected the position and there has been no other development which could be interpreted as imposing a subsequent cut-off.

5 Conclusion

Undoubtedly, Botswana, Lesotho and Swaziland have been extraordinarily fortunate in their inheritance. In richness of general principle and wealth and diversity of sources, the Roman-Dutch legal system has no peer. Nevertheless, with the advent of independence the time is overdue for the passage of legislation stating that henceforth the decisions of the South African courts have no more than persuasive value. The argument that a situation in which the decisions of courts in a foreign country must be followed involves no diminution of sovereignty is unconvincing.

144]By Order in Council of 1905.
145]The original reception instrument (the General Administration Act 11 of 1905) contained only the present subsection 1 and made no reference to statute law.
146]The General Law and Administration Proclamation 4 of 1907 s 3.
147]Since the authoritative nature of South African decisions is assumed, this fact is seldom articulated by the courts. However, in R v Mablabindaba Dlamini & Ors (1926-53) HCTLR 239 (SHC) their binding nature formed part of the ratio decidendi of the judgment of Harragin CJ. See at 247 of the case. The remarks of Schreiner JA in Khatala v Khatala (1963-6) HCTLR 97 (CA) at 99 and Mabujoya v The King 1971 (1) PH H73 (SCA) cannot be accepted as correct.