

THE DEVELOPMENT OF THE CAPE COMMON LAW DURING THE EARLY NINETEENTH CENTURY: WILLIAM PORTER, JAMES KENT AND JOSEPH STORY

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1. Introduction

In matters relating to equity counsel before the Supreme Court of the Cape of Good Hope placed their trust in the author Story on equity.¹ The same author was relied upon in cases of pledge.² The sources of law in the Cape Colony after the establishment of the Supreme Court³ have been depicted with a large brush. This essay attempts to add a miniature, dedicated to Laurens, the legal historian with a wide range of interests, an unlimited source of knowledge, and generous in word and deed. I hope that the description of the unexpected role of the Cape Attorney General as a driving force in the development of Cape law and his respect for Roman-Dutch law may amuse him in his Ciceronian *otium cum dignitate*.⁴

1 PJ Thomas “Did the supreme court of the colony of the Cape of Good Hope have equity jurisdiction?” (2006) 12(1) *Fundamina* 251-270 Annexure C at 267ff.

2 PJ Thomas “Die resepsie van die Romeinse reg in die Suid-Afrikaanse regstelsel: *stare decisis en curia ius novit*” (2012) 9(3) *LitNet Akademies* 237-253.

3 Charters of Justice of 1827 and 1832 created an independent Supreme Court with professional judges.

4 Cicero *Pro Sestio* 96ff; Cicero *De oratore* 2 13 57; 3 15 57; C Wirszubski “Cicero’s *cum dignitate otium*: A reconsideration” (1954) 44 *The J of Roman Studies* 1-13.

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2. Historical setting

In 1652 Van Riebeeck landed at the Cape of Good Hope to establish a refreshment station for his employer, the Dutch East India Company. It is held that this company had expressed the opinion that the law of Holland would apply in her possessions, and in consequence Van Riebeeck transplanted the law of Holland into Africa. The Napoleonic wars brought the Cape of Good Hope into the ranks of British crown colonies.⁵ In accordance with international law the substantive law of the Cape was retained.⁶ However, for practical purposes the judiciary was reorganised and English laws of procedure and evidence were introduced. The new judiciary adhered to the binding force of precedent, although the doctrine of *stare decisis* had not been part of Roman-Dutch law,⁷ nor been explicitly introduced by the Charters of Justice or other legislation.⁸ The first law reporter of the decisions of the Cape Supreme Court was Judge Menzies.⁹ Albeit published only after the judge's death,¹⁰ tradition has it that the manuscripts were circulated within legal circles and were accepted as authority for precedent.¹¹

3. The principle of judicial unpreparedness

One striking feature of English procedure, the principle of judicial unpreparedness,¹² was also adopted by the Cape Supreme Court.¹³ This principle entails that the judge

5 Anthony Trollope *South Africa* (London, 1878) vol 1 ch 1, 2 and 3.

6 In *Campbell v Hall* (1774) Cowp 204 at 209, 98 ER 1045 at 1047 Lord Mansfield incorporated the relevant rule of international law into English common law. Consequently it has also been argued that the British merely followed English precedent.

7 CJ Reid "Judicial precedent in the late eighteenth and early nineteenth centuries: A commentary on Chancellor Kent's *Commentaries*" (2007) 5 (1) *Ave Maria LR* 47-111; GR Dolezalek "*Stare Decisis*" *Persuasive Force of Precedent and Old Authority (12th-20th Century)* (University of Cape Town, 1989).

8 HR Hahlo & E Kahn *The South African Legal System and its Background* (Cape Town, 1973) at 213-301.

9 Menzies' law reports containing the decisions from 1828 to 1849.

10 R Zimmermann "Die Rechtsprechung des Supreme Court of the Cape of Good Hope am Ende der sechziger Jahre des 19. Jahrhunderts" in JV van der Westhuizen *et al Huldigungsbandel Paul van Warmelo* (Pretoria, 1984) 286-307 at 287: "Am Anfang stehen die Menzies' Reports, die aus den nachgelassenen Manuskripten von Justice W Menzies zwanzig Jahre nach dessen Tod im Jahre 1870 von James Buchanan herausgegeben wurden."

11 For example in *Meyer v Low* (1832 2 Menzies, part 1, at 12-16) Cloete, for the plaintiff, quoted *Kotze v Meyer* (7 Sep 1830). The Court was of the opinion that the principle of the decision in the case of *Kotze v Meyer* was sound. SD Girvin "The architects of the mixed legal system" in R Zimmermann & D Visser (eds) *Southern Cross. Civil Law and Common Law in South Africa* (Kenwyn, 1996) 95-139 at 98.

12 FA Mann "Fusion of the legal professions" (1977) 93 *Law Quarterly Review* 367-377 at 369.

13 Zimmermann (n 10) at 306: "(e)in System, das mit englischer Gerichtsverfassung und englischem Prozessrecht auch 'judicial unpreparedness' anstelle des 'iura novit curia' übernommen hatte."

limits himself to the legal arguments raised by the parties.¹⁴ The practical result was that the law of the Cape Colony was shaped by the Cape barristers. At the foundation of the Supreme Court the Cape bar consisted of advocates who had obtained their doctorates of laws in Holland¹⁵ and these “Dutch” advocates were admitted as advocates of the new Supreme Court. However, section 19 of the 1827 Charter of Justice and section 17 of the 1832 charter required that new advocates be admitted to the bar in England, Ireland or Scotland or had obtained a doctorate of laws at Oxford, Cambridge or Dublin. The original judges, Sir John Wylde CJ,¹⁶ Menzies,¹⁷ Burton¹⁸ and Kekewich¹⁹ JJ had all been admitted to the bar in the United Kingdom.²⁰ However, perusal of reported cases reveals an eclectic variety of sources proffered by counsel and accepted as authoritative by the court. Attention has been paid to the individual judges, but it may be argued that the authorities relied on by the advocates are equally deserving of attention. This essay will deal with William Porter, the Attorney General of the Cape, who played an important role

- 14 The *curia jus novit*-principle is unknown in the common law tradition. DV Cowen “Early years of aspiration” in DV Cowen & DP Visser (eds) *The University of Cape Town Law Faculty A History 1859-2004* (Cape Town, 2004) 1-23 at 7; Mann (n 12) at 368; Zimmermann (n 10) at 306.
- 15 IG Farlam “The origin of the Cape bar” (1988) 1(1) *Consultus* 36-40 at 36. H Cloete had studied at Leiden, Utrecht and Groningen and had been called to the English bar. Sir Christoffel Brand had also been called to the English bar and was educated at Leiden; De Wet, Hofmeyr, Joubert and Neethling had all studied at Leiden. See Cowen (n 14) at 3f citing William Bird *State of the Cape of Good Hope in 1822* (London, 1823) at 11.
- 16 Wylde had gained an LLB at Cambridge (Trinity) in 1805 and had been called to the bar during the same year. He is held to have been successful and in 1815 had been appointed Deputy Judge Advocate of New South Wales. After returning to England in 1825 he obtained his LLD, was knighted and appointed Chief Justice of the new Supreme Court of the Cape of Good Hope. RJ McKay “Wylde, Sir John (1781-1859)” *Australian Dictionary of Biography* available at (adb.anu.edu/biography/wylde-sir-john-2822) (accessed 14 Apr 2013). Girvin (n 11) at 97.
- 17 William Menzies (1795-1850) was born in Edinburgh. After graduating from Edinburgh University, Menzies was admitted to the Faculty of Advocates in 1816 and had a good practice at the Scottish Bar. Before sailing for the Cape Menzies spent time in London acquainting himself with the judicial system and law of the Cape, where he became known as a staunch defender of Roman-Dutch law. C Graham Botha “The honourable William Menzies 1795-1850 senior puisne judge of the Supreme Court of the Cape of Good Hope” (1916) 33 *SALJ* 385-404.
- 18 Burton entered at the Inner Temple in 1819 and was called to the bar in 1824. From 1826 to 1827 he was the recorder of Daventry, presided the local court of Quarter Sessions and practised as a conveyancer and special pleader. On his appointment to the Cape he went to Holland for six months to learn Dutch and study. KG Allars “Burton, Sir William Westbrook (1794-1888)” *Australian Dictionary of Biography* available at (adb.anu.edu/biography/burton-sir-william-westbrooke-1857) (accessed 11 Apr 2013); see, also, gutenberg.net.au/dictbiog/o-dict-biogBr-By.html#burton1 (accessed 14 Apr 2013). Cowen (n 14) at 7 holds that Burton’s *Observations on the Insolvent Law of the Colony of the Cape of Good Hope* (Cape Town, 1829) shows knowledge of Roman-Dutch law.
- 19 George Kekewich (1778-1862) gained his BA and MA degrees at Cambridge and was admitted as a barrister at law of the High Court of Chancery to Lincoln’s Inn in 1803. He left in 1808 for the Cape, where he became Advocate-General in 1809, surrogate judge Vice Admiralty in 1810, deputy judge Vice Admiralty in 1811, and from 1812-1820 judge and Commissary General. In 1827 he was appointed puisne judge. James Whishaw *A Synopsis of the Members of the English Bar Containing their Academical Degrees, Inns of Court, etc* (London, 1835) at 79; Girvin (n 11) at 100; Albie Sachs *Justice in South Africa* (Berkeley, 1973) at 38; archiver.rootsweb.ancestry.com/th/read/SOUTH-AFRICA/2009-02/1234120624 (accessed 13 Aug 2013).
- 20 William Menzies had been educated in Scotland (see n 17 *supra*).

in the development of the common law of the Cape of Good Hope during this formative period and attention will be drawn to his cosmopolitan selection of sources.

4. William Porter

Born in 1805 at Artikelly near Newtownlimadavy, county Kerry, Porter studied law in Dublin and London and was called to the Irish bar in 1831. He was Attorney General at the Cape of Good Hope from 1839 until his retirement in 1865. He drafted the Cape constitution in 1854 and in 1869 was elected to the Cape parliament.²¹ Better known for his role as Attorney General and his liberal politics,²² Porter had the right to private practice and was the third barrister from the United Kingdom to be admitted to the Cape bar.²³ He had practised as an advocate in Belfast, Ireland, until his appointment to the Cape. En route to Cape Town Porter had read Justinian's Institutes and Van der Linden's *Koopmanshandboek* and he quickly acquired a working knowledge of Dutch to make himself familiar with Roman-Dutch law.²⁴ Admitted as an advocate to the Supreme Court in 1839,²⁵ he was soon briefed in important civil actions. During his first ten years of private practice Porter appeared in about one hundred major civil cases and by 1862 he had the largest private practice at the bar.²⁶

Brink's Trustees v South African Bank:²⁷ In this typical insolvency case the Irish barrister found his arguments in the first textbook on Cape colonial law, namely *Burton on Insolvent Law*.²⁸ He thereafter relied on the warhorses of Roman-Dutch law: Grotius,²⁹ Van Leeuwen,³⁰ Voet,³¹ and Van der Keessel.³² It stands to reason that these authors lead

- 21 Sidney Lee (ed) *Dictionary of National Biography 1885-1900* vol 46 (London, 1903) sv "Porter, William" at 195; www.forgottenbooks.org/readbook_text/Dictionary_of_National_Biography_Pocock-Puckering_vol_46_1000489819/195 (accessed 24 Apr 2013).
- 22 JL McCracker *New Light at the Cape of Good Hope. William Porter, The Father of Cape Liberalism* (Belfast, 1993).
- 23 Farlam (n 15) at 38f.
- 24 McCracker (n 22) at 81.
- 25 McCracker (n 22) at 81f reports that Porter had a brush with Wylde CJ, who wanted him to support his application, which Porter refused, after which Wylde and Kekewich gave in.
- 26 *Idem* at 82.
- 27 1847 2 Menzies part 3 at 399-403.
- 28 WW Burton *Observations on the Insolvent Law of the Colony of the Cape of Good Hope; With an Appendix of Forms* (Cape Town, 1829). Sir William Westbooke Burton (1794-1888) was called to the English bar at the Inner Temple in 1824 and in 1827 was appointed second puisne judge at the Supreme Court of the Cape of Good Hope. Before sailing for the Cape he went to Holland for six months in order to learn the Dutch language and to study Roman-Dutch law (see n 18 *supra*). He drafted the Cape Insolvency Ordinance and published the above textbook on insolvency law.
- 29 Hugo de Groot *Inleidinge tot de Hollandsche Regsgeleertheit* ('s Gravenhage, 1631).
- 30 Simon van Leeuwen *Censura forensis theoretico practica id est totius juris civilis Romani* (Amstelodami, 1685).
- 31 Johannes Voet *Commentarius ad Pandectas* (Hagae Comitum, 1698-1704).
- 32 DG van der Keessel *Theses selectae juris Hollandici et Zelandici ad supplendam Hugonis Grotii introductorem ad jurisprudentiam Hollandicam, et definiendas celebriores juris Hollandici controversias* (Lugduni Batavorum, 1800).

him to the European *ius commune* in the persons of Carpzovius,³³ Cujacius³⁴ and Faber.³⁵ Neither is Porter's reliance on English common law³⁶ and equity³⁷ as well as Scottish law³⁸ beyond expectation. However, his reliance on budding American law is surprising³⁹ and deserves further attention as it sheds light on a source of nineteenth century Cape law yet to be investigated.

5. James Kent

James Kent (1763-1847) entered Yale College at age fourteen. After graduation in 1781 Kent started his legal career by signing an apprenticeship contract with a practitioner and worked as a clerk in a law office in Poughkeepsie, the then capital of New York State. In 1785 he was admitted to the bar of the Supreme Court of New York and practised law until he moved to New York City in 1793 on his election to the Chair of Law at Columbia College. Kent was a zealous federalist and his interest in politics led to his elections in 1788 and 1790 to the New York State Assembly. From 1794 until 1798 Kent lectured at Columbia College. In 1796 Kent was appointed Master in Chancery and in 1797 Recorder of the Major's Court of New York City. He became an associate judge of the Supreme Court of New York in 1798 and Chief Justice of this court in 1804. Kent was appointed Chancellor in 1814 and held this position at the Court of Chancery until his retirement in 1823 at age sixty.⁴⁰ After his retirement Columbia College offered him a professorship and at the age of sixty-three Kent embarked on an academic career,

- 33 Benedictus Carpzovius *Jurisprudentia forensis Romano-Saxonica secundum ordinem constitutionum D Augusti electoris Saxonix in part IV divisa* (Lipsiae, 1656).
- 34 Jacobus Cujacius *Notae solemnes in codicem Justiniani OR Operum postumorum liber quintus sive codex Justinianus, id est ad codicem Justinianum recitationes* (Lutetiae Parisiorum, 1658).
- 35 Antonius Faber (Antoine Favre (1557-1624)) *Codex Fabrianus* (Lugduni, 1610; Geneva, 1659).
- 36 The reference "Henley on Banruptcy, p. 294" can be either Robert Henley *A Practical Treatise on the Bankrupt Law As Amended by the New Act of the 6 Geo. IV. c. 16. With an Appendix of Precedents* (London, 1825); OR Robert Henley *A Digest of the Bankrupt Law, With an Appendix of Precedents Framed with Reference to the New Act of 1&2 William IV. c.56* (London, 1832); William Cooke *The Bankrupt Laws* 2 vols (8 ed, London, 1823); JW Smith *A Compendium of Mercantile Law* (London, 1834).
- 37 *Adams v Claxton* Rolls (1801) 6 Ves Jun 226, 31 ER 1024.
- 38 James Dalrymple, Viscount of Stair *The Institutions of the Law of Scotland Deduced from its Originals, and Collated with the Civil, Canon and Feudal Laws and with the Customs of Neighbouring Nations* (Edinburgh, 1681); GJ Bell *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence* (Edinburgh, 1810). George Joseph Bell (1770-1843) was a Scottish advocate and from 1821 professor of law at the University of Edinburgh.
- 39 In *Brink's Trustees* at 402 Menzies refers to *Storey on Bailments* § 305 and *Kent's Commentaries* vol 2 584.
- 40 DW Raack "To preserve the best fruits: The legal thought of Chancellor James Kent" (1989) 33(4) *American J of Legal History* 320-366 at 330ff; CF Stychin "The Commentaries of Chancellor James Kent and the development of an American common law" (1993) 37(4) *The American J of Legal History* 440-463 at 441f; DJ Hulsebosch "An empire of law: Chancellor Kent and the revolution in books in the early republic" (2009) 60(2) *Alabama LR* 377-424 at 389ff.

preparing and delivering his law lectures and subsequently publishing the text in his *Commentaries on American law*.⁴¹

6. The American Blackstone

Kent's judicial opinions as judge and chancellor were characterised by his encyclopaedic legal learning and authoritative style. His decisions were often cited and his Chancery opinions formed the basis of equity jurisdiction in the United States.⁴²

His *Commentaries on American Law* was one of the first general works on American law and Kent has been labelled the father of American jurisprudence.⁴³ In spite of the conventional narrative relating how after independence the legal culture was transformed and Americanised and that Kent and his *Commentaries* played a leading role in this process, Kent's work shows the continuing influence of English law on American legal culture.⁴⁴ Kent admired the English judiciary and considered the English common law to be the product of much wisdom and experience and the result of the application of dictates of natural reason.⁴⁵ Labelled the American Blackstone to indicate that he would have nationalised the body of law, Kent's library and *Commentaries* bear testimony to his reliance on English law. His gift for synthesis and adaptation⁴⁶ made his readers oblivious of his sources. Kent arranged conflicting and confused English law reports and created a hierarchy of authority. His readers bypassed the English law books and relied on Kent, obscuring the connection between English and American law.⁴⁷ Kent's *Commentaries*, divided in six parts and sixty-eight lectures, were filled with English and New York law but had national ambitions; they became the nation's best selling law books for decades, as before the establishment of law schools they formed most lawyers' introduction to law and their work of reference during their careers. Subsequently, they became the prescribed textbooks at many law schools.⁴⁸

41 The first volume of *Commentaries* appeared in 1826, vol 2 in 1827, vol 3 in 1828 and vol 4 in 1830. Kent revised, edited and added in subsequent editions. See Stychin (n 40) at 443.

42 Before the nineteenth century Anglo-American judges did not write opinions. Kent developed the belief in himself and others that judicial opinions should be carefully written and delivered for publication. A typical Kent opinion sifted through authorities on both sides and tried to persuade that one side was right and that a definitive answer could be expressed as a legal principle. Hulsebosch (n 40) at 401ff; Raack (n 40) at 321. GE White *The American Judicial Tradition Profiles of Leading American Judges* (New York, 1976) at 39: At his maturity Kent was a leading jurist of his day; he had single-handedly revolutionised equity practice in New York.

43 Raack (n 40) at 322 refers to Chief Justice CE Hughes, who described Kent as such in his article "James Kent: A master builder of legal institutions" (1923) 9 *American Bar Association J* 353-359 at 353; Stychin (n 40) at 443; White (n 42) at 39.

44 Hulsebosch (n 40) at 379ff.

45 Raack (n 40) at 335ff. Reid (n 7) at 48 refers to Kent's belief in natural law. Stychin (n 40) at 447 cites from *Kent's Commentaries* vol 1 at 471 where the common law is described as "the application of the dictates of natural justice and cultivated reason to particular cases".

46 Raack (n 40) at 333ff, 337.

47 Hulsebosch (n 40) at 406. English decisions did not have binding authority in America, but had persuasive authority as models for reasoning and doctrinal application.

48 Hulsebosch (n 40) at 386; Stychin (n 40) at 443.

Kent was one of the early republic's most cosmopolitan jurists and made a lasting contribution to the indigenisation of law books and nativism of legal minds. However, this imposing figure in a seminal period of American legal history has suffered from scholarly neglect, which has been based on the belief that Kent was an extreme conservative.⁴⁹

7. Story: Another American Blackstone

Joseph Story was born in Marblehead, Massachusetts, in 1779. He graduated from Harvard College in 1798. From 1799 until 1801 Story studied for the bar in the offices of Samuel Sewall and in 1801 he started to practice in Essex. In 1805 Story was elected to the State legislature of Massachusetts and in 1808 he was elected to the Congress of the United States of America. From 1811 until 1845 Story was an Associate Justice of the United States Supreme Court.⁵⁰

In 1829 Joseph Story was elected to the first chair of the Dane Professorship of Law at Harvard. From 1832 onwards Story published a series of textbooks: On bailments (1832); on constitutional law (1833); on conflict of laws (1834);⁵¹ on equity pleading (1835); on equity (1836); on the law of agency (1839); on partnership (1841); on bills of exchange (1843); and in 1845 on promissory notes.

Michael Hoeflich has addressed Story's relationship to the civil law. Albeit self-taught,⁵² it is obvious that Story was well versed in civilian scholarship and in his *Commentaries on the Law of Bailments*⁵³ he cites Domat, Pothier, Vinnius, Stair, Heineccius, Halifax, the

49 Raack (n 40) at 325; R Gordon "Recent trends in legal historiography" (1976) 69 *Law Lib J* 462-469 at 462; JT Horton *James Kent A Study in Conservatism* (New York, 1939); P Miller *The Life of the Mind in America* (New York, 1965) at 444 proposes that the American elite, represented by Story, Kent and Hoffman, through scholarship created a body of legal literature depicting a coherent and stable legal system and so forced on the unwilling population grudging acceptance of the English common law.

50 MH Hoeflich "John Austin and Joseph Story: Two nineteenth century perspectives on the utility of the civil law for the common lawyer" (1985) 29 *The American J of Legal History* 36-77 at 37, 56f; G Kegel "Joseph Story" (1979) 43 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 609-632 at 609; GT Dunne *Justice Joseph Story and the Rise of the Supreme Court* (New York, 1979 of 1970?); JT McClellan *Joseph Story and the American Constitution* (Norman, 1971).

51 Joseph Story *Commentaries on the Conflict of Laws, Foreign and Domestic, In regard to Contracts, Rights and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Cambridge, 1834), one of the first scholarly works on the topic, influenced Von Savigny. G Kegel "Story and Savigny" (1989) 37 *The American J of Comparative Law* 39-66; KH Nadelmann "Bicentennial observations on the second edition of Joseph Story's commentaries on the conflict of laws" (1980) 28 *American J of Comparative Law* 67-77. The first edition made Story famous and secured him a place in the history of the field.

52 Hoeflich (n 50) at 57. Story collected books on civil law and a supplement to the catalogue of the law library of Harvard University from 1835 listed a donation by Story of foreign law books from the sixteenth to the eighteenth century.

53 *Commentaries on the Law of Bailments With Illustrations from the Civil and the Foreign Law* (Cambridge, 1832). The book was written for both students and practising lawyers. Common law models were Sir William Jones *An Essay on the Law of Bailments* (London, 1781) and the section on bailments in Chancellor Kent's *Commentaries*.

Code Civil, the Louisiana Code of 1825, Erskine and Justinian's Institutes and Digest.⁵⁴ Hoeflich believes that Story found his inspiration from the continental legal literature in which the textbook, systematically setting out a specialised field of law, had become prevalent.⁵⁵ In his *Commentaries on the Law of Bailments: With Illustrations from the Civil and the Foreign Law*, Story addressed the difference between the continental and the English approach as one of elaborate theory versus a practical treatise containing principles laid down in cases. He endeavoured to find a happy balance between excessive theorising and a mere focus on practice. Each of his commentaries established a system of analysis, cases were placed in the footnotes and did not dictate the format of the work. Story's text is a narrative of principles and rules, while case law, as well as foreign law and Roman law, was used to illustrate these rules and principles.⁵⁶ He would cite civilian sources as analogies either to confirm and validate the universality of a common law rule or to contrast the civilian approach to the common law. Story also used Roman law and civil law as a source for filling gaps in the common law; he was unwilling to replace common law with Roman or civil law, but would draw upon these where no common law rule existed.⁵⁷

Story's *Commentaries* were the first modern American textbooks.⁵⁸ The holder of a chair at a prestigious university⁵⁹ his legal treatises were significant and made a fundamental contribution to development of Anglo-American law.⁶⁰ Story was a believer in legal science; that study and practice of law were rational endeavours and that the law had a reason and structure of its own and scientific rules dictated the process by which law was to be created.⁶¹ During his tenure Harvard Law School was the centre of academic development and innovation in legal education for the United States and teaching and study of the common law was fashioned as a science.

54 Hoeflich (n 50) at 58f. German literature was only used if translated as Story could not read German. Hoeflich states that it is clear that Story's knowledge of Roman law derived mainly from secondary sources. See, also, MH Hoeflich "Transatlantic friendships & the German influence on American law in the first half of the nineteenth century" (1987) 35(93) *American J of Comparative Law* 599-611.

55 Hoeflich (n 50) at 61, where Pothier is cited as example.

56 *Idem* at 62, 69.

57 *Idem* at 64f. Story treated Roman law as an alien system to be used if it agreed with English common law and his ideas of justice and fairness, but not on account of any inherent authority or superior rationality.

58 Kent's *Commentaries* provided a multi-volume comprehensive exposition of the law with American case annotations in the commentary format.

59 The Dane Professorship of Law at Harvard.

60 RS Kay "Book review: Supreme Court Justice Joseph Story: Statesman of the old republic by R Kent Newmyer (1985)" (1985/6) 18 *Connecticut LR* 207-219 at 208.

61 Kay (n 60) at 209. RM Stein "The path of legal education from Edward I to Langdell: A history of insular reaction" (1981) 57(2) *Chicago-Kent LR* 429-454 at 447 mentions the impact of Story in law schools founded during or after his tenure and modelled on his methods: 1833 Cincinnati; 1836 Carlyle Law School (Pennsylvania); during the 1840s Yale, Louisville (Kentucky), Lebanon Law School (Tennessee) and New Orleans; 1850 University of Pennsylvania; 1851 Albany. In 1870 the Dane chair was filled with Dean Langdell, who was neither judge nor experienced practitioner, but an innovator of teaching who introduced the case method of study.

The most striking aspect of the work of this leading American jurist has been his cosmopolitan outlook. Story suffered the same fate as Kent and has been depicted as a reactionary representative of misguided anachronistic jurisprudence during the twentieth century.⁶² Their fall from grace is mainly the result of a political bad fit.

8. Menzies, Brand and Watermeyer

It is noteworthy that advocates Brand and Watermeyer, who appeared for the defendant in the *Brink's Trustees* case also relied on the American authorities.⁶³ Menzies J reported the decision as follows: "The court for the reasons founded on by the plaintiffs gave judgment for the plaintiffs as prayed, with costs." This reflects on early Cape law reporting and stresses the absence of the *curia ius novit*-rule.⁶⁴

9. Conclusion

During the first half of the nineteenth century Cape law stood at a crossroads. Whitehall hoped quietly for a gradual assimilation between colonial and English law, but the advocates at the Cape bar relied on an eclectic selection of sources. This essay has lifted a tip of the veil and brought to light that early Cape law borrowed from early American law. Both Kent and Story were pioneers of the early days of American law. Both jurists were products of the Enlightenment and influenced by natural law; spurred on by the demands of academic teaching they turned into system builders, but their judicial careers had endowed them with cautious pragmatism. They found the material for their system in the English common law, which was known and accessible. As rationalists they were aware of the absence of system and science in the latter, but found both in the continental authorities. Porter's selection of both Kent and Story was deliberate and judicious.

Abstract

The role of William Porter, the second Attorney-General at the Cape of Good Hope in the development of Cape colonial law is investigated. Particular attention is given to his American sources, Kent and Story, and the resulting legal pluralism.

62 Kay (n 60) at 207 refers to Dunne (n 50). See, also, SP VanBurkleo "Review R Kent Newmyer *Supreme Court Justice Joseph Story Statesman of the old republic (1985)*" (1986) 3(1) *Constitutional Commentary* 244-254 at 246 who believes that progressive history writing and sociological jurisprudence had a negative judgement of Story. Holmes found him misguided in his search for legal truth. See VanBurkleo at 244: "America's Blackstone" tried to impose scientific order upon American jurisprudence (like his contemporary, Kent).

63 They relied, among others, on Kent *Commentaries* 4 176 and Story *Equity Jurisprudence* 2 248 § 1010 and 270 § 1034-1035.

64 See Cowen (n 14) at 7: "While in form our law is largely the work of judges, in great part judges simply put the stamp of the state's authority on propositions which they have found worked out for them in advance. Their creative work is often the work of intelligent selection."