1. – Introduction: The legal regime at the Cape Colony

The purpose of this paper is to consider the impact of the first (unofficial) law reports on the formation of a system of precedent in the Cape Colony in the nineteenth century. This followed the establishment of a Supreme Court on the English model in 1827. During the preceding period from 1652 to 1795, when the Cape was a Dutch possession under the rule of the Dutch East India Company1, the Raad van Justitie did not publish the reasons for its decisions, and this impeded the development of a system of judicial precedent based on the principle of stare decisis2. A further hindrance was the absence of official law reports of the cases. In 1821 a critical report by Henry Ellis, Deputy Colonial Secretary, pointed to a number of defects in the administration of justice, though he was not the first to do so3. These included the written procedure (rather than viva voce proceedings, the norm in England), the complete lack of confidence felt by the public in the members of the court and the ‘exorbitance of legal charges’4. An official Commission of Enquiry set up by the colonial authorities in London under John Thomas Bigge and William Macbean Colebrooke in 1823 underlined the inadequacies of the existing system of justice. Among the weaknesses identified by the Commission was the fact that the Court of Justice was composed of members who had little or no legal training5. No doubt this accounted for the

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fact that the court was also accused of nepotism and local partiality. This, together with the now outmodel continental procedure, caused delays in the hearing of cases. The Bigge/Colebrooke Report hastened the promulgation of a Charter of Justice in 1827. Certain pressing changes to the judicial administration were made between 1806 and 1827. These included the institution of a Vice-Admiralty Court, the founding of circuit courts, the opening of the hitherto closed doors of the court to the public and the replacement of Dutch with English as the official language of the courts. All these earlier reforms were endorsed in the Charter of Justice.

The Charter created a Supreme Court which replaced the Court of Justice. The new court was to be staffed by a Chief Justice and three puisne judges who were required to be members of the English, Scottish, Irish or Cape bars. Likewise, advocates were to be of the English, Scots, or Irish bars, or, alternatively, doctors of law of Oxford, Cambridge, or Dublin. A Second Charter of Justice extended the terms of the earlier Charter by providing that the Supreme Court was to exercise its jurisdiction according to 'the laws now in force within our said colony, and all such other laws as shall at any time hereafter be made'. But perhaps most significantly for the development of the doctrine of stare decisis at the Cape was the stipulation that both the Supreme and inferior courts were to be courts of record. The First Charter also expressly stated that there should be appointed a 'Registrar or Prothonotary and Keeper of Records' corresponding to those at Westminster. All this was in the context of the retention of the Roman-Dutch common law.

The senior puisne judge appointed to the new Supreme Court, William Menzies, was a Scots advocate with a buoyant civil and criminal practice in Edinburgh. For the purposes of this paper, he is the most important of the early appointments to the bench. He was a prominent figure in the intellectual life of Edinburgh, where he was associated professionally with other leading intellectuals who achieved political prominence and pursued outstanding legal careers. Nevertheless, at the time when he was certainly eligible for appointment to the Scots bench as a senator of the College of Justice, his Tory political sympathies jarred with the prevailing mood of the day and militated against his preferment.

10. Of 4 May 1832.
14. In accordance with the policy stated in Campbells v Hall. See footnote 66.