

ARTICLES

“I ALSO AM A BAROLONG”: *RE BETHELL* AND SHAPING OF MARRIAGE LAW AND CONFLICT OF LAWS DOCTRINE

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ABSTRACT

Re Bethell was a judgement of the Chancery Division in London, decided in February 1888. The case considered the validity of the marriage between an English aristocrat and a Rolong woman concluded in terms of Rolong customary law. The judgement was enormously influential as the catalyst case that secured the “legal definition of marriage” as “the voluntary union for life of one man and one woman, to the exclusion of all others”. The article looks in detail at the historical context of the *Bethell* case and argues that the ruling was influenced by a desire to protect

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the Bethell family's standing and reputation. The case can also be understood as a building block in the formation and consolidation of what would become the British Empire. Law was an important constituent element in the formation of Empire. Law was used to identify and legitimate colonial authority. Law created boundaries, both political and cultural. The article examines the *Bethell* case as an example of these dynamics.

Keywords: Marriage; customary law; conflict of laws; legal pluralism; colonisation; Rolong; *Hyde v Hyde*; *Seedat's Executors v The Master* (Natal)

1 Introduction

In February 1888, the Chancery Division in London gave judgement in *Bethell, re; Bethell v Hildyard* (hereafter *Bethell*).¹ At its core, this was a narrow dispute concerning an inheritance: who should inherit the considerable fortune bequeathed to the late Christopher Bethell – his daughter or his brother? The court chose the brother.

However, the *Bethell* case is not remembered for the inheritance ruling. The case became jurisprudentially influential for its subsidiary reasoning. This relied on assessment of the validity of Christopher Bethell's marriage, concluded in terms of Rolong customary law. Bethell had married only one wife, a Rolong woman, born Tepo Baobile.² The court classified the marriage as "polygamous" and thus invalid under English law. Here the court relied on the 1866 decision of *Hyde v Hyde and Woodmansee*, which had defined marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others".³ The *Hyde* definition of marriage was ignored until *Bethell* came before the Chancery Division (*Hyde* had never been cited in the twenty-two years since the ruling).⁴ *Bethell* had important jurisprudential impact as the "catalyst case" that enabled the (now) more famous *Hyde* case to exert a powerful precedent for the invalidity of potentially polygamous marriages. It was *Bethell's* endorsement of the *Hyde* judgement that gave *Hyde* the power to define "marriage" for more than a century.⁵ Indeed, the *Hyde* wording is still used today in contemporary family law textbooks.⁶

The *Bethell* case was also instrumental in the development of conflict of laws jurisprudence. Oppong has argued that "like many aspects of colonial law, private

1 *Bethell, re; Bethell v Hildyard* (1888) 38 Ch D 220.

2 Bethell's wife was referred to as Teepe in the Chancery judgement. The correct spelling of her name has been sourced from Molema 1966: 104.

3 *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130 at 133.

4 Probert 2007: 331.

5 See, for example, the discussion in *idem* at 331.

6 See, for example, Heaton & Kruger 2015: 13; Herring 2016: 76.

international law was politically employed to serve a colonial end"⁷ By the late nineteenth century, conflict of laws doctrine was confronted by an increasing number of matters that arose in the expanding British Empire. *Bethell* must be understood within the context of its time. This was not just a question of inheritance. This was a question of whether Rolong law should be recognised in an English court – could the Rolong join the community of nations that contributed to the growing body of private international law rules? Dicey used *Bethell* to illustrate the principle that the courts of civilised nations would not recognise or give effect to laws emanating from “non-civilised” peoples.⁸ This distinction between “civilised” and “barbarous”⁹ or between “us” and “them” was also fundamental in the development of public international law jurisprudence, particularly its willingness to recognise certain kinds of polities as potential participants in the global community of nations while denying such recognition to others.¹⁰

Bethell can be understood as one of the many building blocks that contributed to the formation and consolidation of what would become the British Empire. As Nasson has observed, the British Empire was not created according to a master plan – British authorities did not know in advance how an empire should (or could) be formed, managed and ruled. Instead, Britain’s vast Empire was “a peculiarly mangled creation, seemingly pieced together almost accidentally”.¹¹ In retrospect, it is clear that law was an important constitutive element for successful Empire.¹² Law was used to identify and legitimate colonial authority.¹³ Law created boundaries, both political and cultural.¹⁴ In retrospect, it seems unsurprising that a British court would refuse to recognise Bethell’s Rolong marriage. However, this outcome was not certain or foreseen by the participants in the matter. With the benefit of hindsight, we know that the apparent “sovereignty” of role-players, such as Rolong Chief Montshiwa, was merely a vaguely defined “quasi sovereignty” that would always be subordinate to colonial authority.¹⁵ But this, too, was unknown at the time of the *Bethell* events. Britain’s hegemony was not preordained or inevitable. It was still uncertain how the British Empire would look. The particular contours of British imperial power were created through a series of disparate events,¹⁶ of which the *Bethell* case was one.

7 Oppong 2007: 695.

8 Dicey 1896: 30, 723-724.

9 The wording used in *Bethell* (n 1) at 232.

10 For discussion of this history, see, for example, Anghie 2005; Koskenniemi 2002; and Gong 1984.

11 Nasson 2006: 14.

12 See, generally, the argument advanced by Benton 2002.

13 *Idem* at 2.

14 *Ibid.*

15 Anghie 2005: 100-107. Benton 2008 uses the term “quasi-sovereignty”.

16 Benton 2002: 9.

This article examines the *Bethell* case through a detailed discussion of its facts and its historical context, and argues that the decision was a response to Bethell's unique circumstances at a particular moment in Britain's domestic and imperial history.

2 The case

Bethell concerned the will of William Froggatt Bethell, who had died in 1879. William Bethell had been a wealthy man. He had owned significant property holdings in Yorkshire and in Lancashire. He was able to provide generously for each of his ten children.¹⁷ *Bethell* concerned the bequest in favour of Christopher Bethell: two substantial Yorkshire estates at Burnhill and Hallatreeholme.¹⁸ Initially, William had bequeathed the estates to Christopher outright, but he revoked the bequest through codicil in March 1878.¹⁹ In terms of the amended bequest, the estates would be held in trust, and the rent raised from the lands would be paid to Christopher during his lifetime. Should Christopher die leaving any child or children surviving him, the trustees had to sell the property and distribute the funds thus raised among Christopher's children. Should Christopher die without leaving any child surviving him, the estates were bequeathed to William Bethell (the eldest son).²⁰ Christopher died in July 1884. His only child, Grace, was born ten days after his death.²¹

The plaintiff in the *Bethell* case was the testator's eldest son, William Bethell. He claimed the estates at Burnhill and Hallatreeholme on the grounds that Christopher was not survived by any child who could inherit in terms of the will. William argued that Christopher's child was illegitimate under English law and therefore excluded from the inheritance.

3 The marriage ruling

The court focused on the validity of Christopher's marriage to Tepo (who called herself Tepo Bethell after the wedding).²² The parties had married in Bechuanaland in terms of Rolong customary law. The established conflict of laws rule was that the validity of a foreign marriage should be assessed in terms of the *lex loci celebrationis* (the law of the place where the marriage was concluded). The infant's counsel cited several English precedents in support of this rule,²³ but Stirling J replied from the

17 "Funeral of the late Mr Bethell of Rise" 14 Mar 1879 *The Hull Packet and East Riding Times* at 5.

18 *Bethell* (n 1) at 220.

19 This becomes clear from the facts of another case involving Christopher Bethell: *In re Bethell; Bethell v Bethell* (1887) 34 Ch D 561. That case concerned Christopher's unpaid gambling debts.

20 *Bethell* (n 1) at 220-221.

21 The facts of the matter appear in *Bethell* (n 1).

22 Manson 1998: 501.

23 *Bethell* (n 1) at 225, citing *Dalrymple v Dalrymple* (1811) 2 Hag Con 54, 161 ER 665; *Brook v Brook* (1861) 9 HLC 193, 11 ER 703; and *Herbert v Herbert* (1819) 2 Hag Con 263, 161 ER 737.

bench: "The question is whether the relationship as described by the chief of the tribe is a marriage at all."²⁴ In the end, the court ruled that the relationship between Christopher and Tepo could not be recognised as a "marriage" in terms of English law.

Christopher Bethell had had only one wife. However, it seemed that the Rolong practised polygamy – men were permitted to have more than one wife. The court thus ruled that Christopher's marriage was polygamous in its essence. This classification of a de facto monogamous marriage as "polygamous" followed the ruling in *Hyde v Hyde and Woodmansee*.²⁵ Mr Hyde had concluded a Mormon marriage in Utah. The court noted that the Mormons practised polygamy, and Mr Hyde's marriage had therefore been deemed "polygamous" even though he had had only one wife. In *Hyde*, the court had ruled that in England, and indeed "throughout Christendom", a marriage was the union for life of one man and one woman.²⁶ Any marriage that had the inherent potential to become something different (*in casu*, through marrying a second wife) was a fundamentally different form of union – crucially, *it was not a "marriage"* as defined and recognised by English law. *Bethell* followed *Hyde* in ruling that a potentially polygamous marriage was not a marriage at all – even if, in reality, there was only one wife.

The *Hyde* and *Bethell* precedents were followed in several parts of the British Empire. In South Africa, for example, all Muslim marriages were deemed invalid on the ground that they were inherently polygamous.²⁷ In the 1913 case of *In re Kulsum Bibi*,²⁸ the Natal Provincial Division referred to both *Hyde* and "the well-known case of *Bethell*" in reaching the conclusion that a potentially polygamous Muslim marriage would not be recognised even where the husband had only one wife.²⁹ The court referred to several other South African judgements that had relied on *Bethell* to reach similar conclusions in the context of both customary and Muslim marriages.³⁰ The Appellate Division reached the same conclusion in the 1917 case of *Seedat's Executors v The Master (Natal)*.³¹ The court relied on cases that had themselves relied on *Bethell* or *Hyde* when ruling that marriage is the union for life of one man and one woman, and that potentially polygamous marriages were invalid.³² This Appellate

24 *Bethell* (n 1) at 232.

25 *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130.

26 *Idem* at 133.

27 *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 307.

28 (1913) 34 NPD 437.

29 *Idem* at 440. See, also, *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 308.

30 The court referred to *Nalana v Rex* 1907 TS 407; *Rex v Mboko* 1910 TS 445; *Kaba v Ntela* 1910 TS 964; and *Mashia Ebrahim v Mahomed Essop* 1905 TS 59. See, also, *HJ Dunn v Rex* (1907) 28 NLR 56, where the Natal Supreme Court relied on both *Hyde* and *Bethell* when concluding that an Englishman married to a Zulu woman by Zulu customary law was not validly married and that his son was illegitimate (at 58).

31 1917 AD 302.

32 *Idem* at 308.

Division endorsement of the *Hyde* and *Bethell* approach has been cited in numerous South African judgements, including the 2018 challenge to the non-recognition of Muslim marriages in *Women's Legal Centre Trust v President of the Republic of South Africa*.³³

However, the *Hyde* interpretation of polygamy was not adopted everywhere. Some jurisdictions in the United States and Canada treated de facto monogamous unions as monogamous marriages, even if concluded in terms of a legal system that recognised polygamy. In *Wall v Williamson*,³⁴ for example, the Alabama court had recognised a Choctaw marriage between a white man and a Choctaw woman. The marriage had been concluded in Choctaw country according to Choctaw custom, which allowed for polygamy. The court recognised the marriage on the grounds that it was valid in terms of the *lex loci celebrationis*.³⁵ The court cited the English case of *Warrender v Warrender*³⁶ (which had refused to recognise a polygamous marriage), but distinguished the Choctaw case from *Warrender* on the grounds that the Choctaw marriage was monogamous in practice.³⁷ In *Morgan v M'Ghee*,³⁸ the Tennessee court reached a similar conclusion about a Cherokee marriage between a white man and a Cherokee woman, which was monogamous in practice. In the Canadian case of *Connolly v Woolrich*,³⁹ the court recognised a de facto monogamous marriage between a white man and a Cree woman that had been concluded according to Cree custom (which provided for polygamy).

In some jurisdictions, the courts distinguished between a first marriage and subsequent additional marriages. In 1863, the Natal Supreme Court recognised a first marriage between an Englishman and a Zulu woman concluded in terms of Zulu customary law, and deemed this marriage to be in community of property.⁴⁰ In some jurisdictions, additional marriages were deemed as bigamy if they purported to be legal marriages.⁴¹ The alternative was to view the first marriage as the only legal marriage and to view additional wives as “concubines” of some kind. It seemed that the English courts could recognise a first marriage as a valid marriage where the legal system concerned recognised subsequent partners as legal concubines.⁴² Two

33 2018 (6) SA 598 (WCC).

34 8 Ala 48 (1845).

35 *Idem* at 51.

36 (1835) 2 Cl & Fin 488, 6 ER 1239.

37 *Wall v Williamson* 8 Ala 48 (1845) at 52.

38 24 Tenn 13 (1844).

39 (1867) 11 LCJ 197.

40 *Ogle v Buchanan* Natal Law Reports Digest, 3 March 1863 as discussed in *HJ Dunn v Rex* (1907) 28 NLR 56 at 58.

41 See, for example, the Canadian case of *R v Nan-E-Quis-A-Ka* (1889), 1 Terr LR 211, 1889 CarswellNWT 14 (WL Can) (NWT CA), which in fact distinguished its ruling from *Bethell* on the grounds that polygamy was illegal in the North-West Territory while it was apparently legal in Rolong territory (at 357).

42 See the discussion in Morris 1953: 961-1012 regarding the case of *Cheang Thye Phin v Tan Ah Loy* [1920] AC 369, which concerned a Chinese marriage.

years after the *Bethell* case, in *Brinkley v Attorney General*,⁴³ the Chancery itself recognised a Japanese marriage. There was only one wife, but at that time, Japanese law recognised subsequent partners as legal concubines.⁴⁴

These approaches were available to the *Bethell* court. Tepo was the only wife, and the marriage was monogamous in practice. Stirling J could have recognised the marriage as a de facto monogamous marriage based on evidence presented that Christopher had never intended to take a second wife, and that both Christopher and Tepo were Protestants (rather than Mormons).⁴⁵ Furthermore, Chief Montshiwa had provided evidence that in terms of Rolong law, the first wife was the "great wife" who had a different and superior status from any other subsequent wives. Indeed, some of the witnesses described the subsequent wives as "concubines".⁴⁶ This made Rolong custom materially different from Mormon practice, where all wives had equal status. Judge Stirling could have ruled that Tepo was Christopher's only "great wife" and that a first Rolong marriage would have legal consequences, even if subsequent marriages would not be recognised.

The ruling on the invalidity of the marriage was a possible conclusion – based on *Hyde* – but not an inevitable one, because the *Bethell* facts were distinguishable. In any event, the Chancery Division was not strictly bound by the *Hyde* precedent, because *Hyde* was decided in the new Court for Divorce and Matrimonial Causes, and this was not a superior court to the Chancery.

However, if we consider the marriage in the context of the Bethell family and the specific colonial context, we can understand why the court was inclined to rule against the validity of the marriage.

4 The context of the case

4 1 Christopher Bethell of Rise Hall

To understand the *Bethell* case, it is necessary to understand Christopher Bethell of Rise Hall, Yorkshire. Christopher was born into the English aristocracy in March 1856.⁴⁷ It is significant that the case concerned the marriage of a member of a prominent family.

During the latter part of the nineteenth century, the English landed gentry still held their position as powerful and influential leaders of society. Members of this

43 (1890) 15 PD 76.

44 Morris 1953: 974.

45 *Re Bethell Deposition Papers* held by the National Archives, Kew. Records of the Supreme Court of Judicature. High Court of Justice, Chancery, King's Bench Division. Depositions. A-B. 1886 April-June [BNA J17/101].

46 *Ibid.*

47 30 Dec 1864 *Hull Packet and East Riding Times* at 5.

class “accepted, implicitly and absolutely, an unequal and hierarchical society, in which their place was undisputedly at the top”.⁴⁸ This elite owned most of the land in England.⁴⁹ They comprised the majority of members of Parliament,⁵⁰ the judiciary,⁵¹ the magistracy⁵² and the military officer ranks.⁵³ The group exercised enormous power, both formal and informal. Membership of this elite depended primarily upon landownership and pedigree.⁵⁴

The Bethell family of Rise Hall and Watton Abbey had a long Yorkshire pedigree dating back to the sixteenth century. Bethells had occupied the property at Rise since 1570.⁵⁵ Sir Hugh Bethell, the first Bethell to occupy the property, was knighted by Queen Elizabeth I.⁵⁶ Over the centuries, the Bethells of Rise Hall had been the magistrates,⁵⁷ members of Parliament,⁵⁸ members of the Crown Court at York,⁵⁹ and had held the office of Sherriff of Yorkshire.⁶⁰ The Bethells were one of the leading landholders in Yorkshire, with 13 400 acres in East Riding alone.⁶¹ There were only 200 landowners of 13 400 acres or more in all of England at that time,⁶² and the Bethells belonged to this elite group. Most of the great English landowners were members of the peerage,⁶³ and William Bethell might have wondered why he was consistently overlooked when new peers were created every year.⁶⁴

Membership of the elite also required compliance with the codes of conduct for members of this class.⁶⁵ It was essential to preserve family honour and reputation.⁶⁶ It was essential to follow a path that would benefit the family, for example by following an honourable career in politics, law or the military, or by concluding an advantageous marriage with another ruling class family.⁶⁷

48 Cannadine 1990: 13.

49 Beckett 1986: 51.

50 Stone & Fawtier-Stone 1984: 274.

51 Cannadine 1990: 250.

52 Thompson 1963: 136.

53 Cannadine 1990: 265.

54 Beckett 1986: 3.

55 Allison et al 2002: 330-340.

56 Casey 2009.

57 See, for example, “Sessions business” 1 May 1824 *Yorkshire Gazette* at 3.

58 For example, Hugh Bethell, member for Beverley (1768-1772) and Richard Bethell, member for Yorkshire (1830-1831) and Yorkshire East Riding (1832-1841). See Casey 2009: 1.

59 See, for example, “Castle of York – Crown Court, Monday March 22” 27 Mar 1824 *Yorkshire Gazette* at 4.

60 See Casey 2009: 1, where he provides three examples.

61 Bateman 1876: 17.

62 Calculated by tallying up the entries in Bateman 1876.

63 In 1870, at least two thirds of landowners with more than 10 000 acres were peers or baronets (Beckett 1986: 42).

64 It seems that the size of the landholding was an important element in this process (see *idem* at 46).

65 Stone & Fawtier-Stone 1984: 267.

66 *Ibid.* See, also, Appiah 2010: 17-18.

67 Thompson 1963: 19.

Most members of the Bethell family performed the roles expected of the English landed gentry. Christopher Bethell's eldest brother, William, was groomed as heir to the family seat at Rise Hall. William was educated at Eton and Oxford.⁶⁸ He married a suitable partner, Elizabeth, youngest daughter of Henry, the eighth Baron Middleton.⁶⁹ Christopher's younger brothers, George and Alfred, became officers in the British armed forces, and served as members of Parliament.⁷⁰

But Christopher was different, even as a child. In a letter, his uncle, Edmund Beckett (first Baron Grimthorpe), reported that rheumatic fever had spoilt Christopher's early education, "and consequently much of his life".⁷¹ He wrote that Christopher might have had a successful career at the Bar or as an engineer, "but he had an early taste for roving and could not and would not take to literature, either at Cambridge or in London: and so his father let him go to South Africa, where he became a new man, as we have heard from several of his friends, and gradually, very useful to the Government".⁷²

Beckett's letter hints at some of the ways in which Christopher had been a difficult member of the Bethell-Beckett clan. In March 1878, Christopher himself reported that he had been "bundled off to the Cape for a year on the shortest notice by an infuriated parent".⁷³ The same month, Christopher's father, William, amended his will, revoking the land-bequests previously made in favour of Christopher, and directing that the estates instead be held in trust.⁷⁴ It appears that young Christopher (then twenty-one years of age) had a taste for gambling, and had already accrued considerable debt that he was unable to pay.⁷⁵ The gambling debt was a threat to the family honour, exacerbated by vague rumours that Christopher had been expelled from a London club for cheating at cards.⁷⁶

Christopher was delivered into the care of a kinsman,⁷⁷ Colonel Charles Warren (later, General Sir Charles Warren, "a famous fighting general").⁷⁸ Bethell served as Warren's orderly during Warren's 1878 campaigns in Griqualand and Bechuanaland.⁷⁹ Bethell impressed Warren with his "intrepid conduct under fire" and Warren

68 "Funeral of the Late Mr Bethell of Rise" 14 Mar 1879 *The Hull Packet and East Riding Times* at 5.

69 "Death of the Hon Mrs Bethell" 14 Nov 1900 *Daily Gazette for Middlesbrough* at 3.

70 See, for example, "Death of Captain GR Bethell: Sailor and politician" 5 Dec 1919 *Yorkshire Post* at 6.

71 See the letter by Edmund Beckett dated 19 Sept 1884, published as "Mr Bethell's murder by the Boer – To the Editor of the *Morning Post*" 20 Sept 1884 *Morning Post* (London) at 3.

72 *Ibid.*

73 *In re Bethell; Bethell v Bethell* (1887) 34 Ch D 561 at 562.

74 *Bethell* (n 1) at 220.

75 This emerges from the facts of *In re Bethell; Bethell v Bethell* (1887) 34 Ch D 561.

76 On the honour code, see Appiah 2010: 17-18. For the disapproval of gambling and debt in general, see Stone & Fawtier-Stone 1984: 267. For rumours of cheating, see Sillery 1971: 109.

77 Warren was related to Bethell's mother through marriage. See Manson 1998: 487.

78 "Death of famous fighting General" 22 Jan 1927 *Yorkshire Evening Post* at 8.

79 *Reports by Colonel Warren and Captain Harrell of the Affairs of Bechuanaland, Dated April 3rd 1879 and April 27th 1880* House of Commons Sessional Papers (HCSP) 49:169 (1883) Command Paper 3635 at 3.

promoted him to the rank of lieutenant in charge of the Intelligence Department.⁸⁰ Christopher's involvement with Warren seemed to have been a successful solution for this "problem member" of the Bethell family. It seemed that Christopher could have a successful military career and bring honour to his family.

4 2 Christopher Bethell of Bechuanaland

Warren's 1878 to 1879 campaign in Bechuanaland was intended to secure British economic interests, primarily the diamond fields and surrounding regions.⁸¹ This area was extremely unstable during the period. The British had tried to resolve competing claims to the diamond fields through the Keate Award in 1871.⁸² The British were particularly concerned to deny Boer claims in the district, and the Keate Award thus recognised many of the territorial claims made by the Rolong and Tlhaping who lived in the region, in order to create a buffer zone between the Transvaal Boers and the diamond fields.⁸³ The Boers were required to remain to the east and south of the Keate boundary lines.⁸⁴

Chief Montshiwa of the Tshidi Rolong claimed sovereign authority over a large area from the Harts River in the south, to the Setlagole River in the west, and to the Ramatlabama River in the north. This claim included the Molopo River basin.⁸⁵ Some of Montshiwa's claims⁸⁶ were recognised by Britain in the Keate Award, but during the years that followed the Keate order, Chief Montshiwa frequently complained about Boer incursions into his territory. He complained that the Boers (and their Ratlou allies) crossed the Keate boundary, took control of important water sources, and stole cattle and wheat. He appealed to the British to send a British Resident who could contain the Boers beyond the boundary.⁸⁷

The British had always regarded Montshiwa as an important ally.⁸⁸ Montshiwa had supported the British in various skirmishes between the British and the Boers

80 See the letter by Charles Warren dated 19 Aug 1884, published as "The late Mr Christopher Bethell – To the Editor of *The Times*" 21 Aug 1884 *The Times* (London) at 12.

81 For an account of Warren's activities in the region from 1878 to 1879, see *Reports by Colonel Warren and Captain Harrell of the Affairs of Bechuanaland, Dated April 3rd 1879 and April 27th 1880* HCSP 49:169 (1883) Command Paper 3635 at 3-8.

82 Shillington 2011: 63.

83 *Ibid*; Comaroff & Comaroff 1991: 284.

84 See the detailed reports in *Report of the Commissioners Appointed to Inquire into and Report upon All Matters Relating to the Settlement of the Transvaal Territory (1882)* HCSP 28:493 (1882) Command Paper 3114 at 73-89.

85 Montshiwa's claim is marked on the Map of the Keate Award Territory, Nov 1880 appended to *idem*.

86 The 1871 Keate Award recognised and endorsed a Tshidi Rolong area of more 5 000 square miles. However, Chief Montshiwa claimed additional territory. See, for example, *idem* at 23.

87 See "Minutes of 9th February 1877, subsequent interview accorded to Chief Montsioa [Montshiwa]" enclosed in *Correspondence Respecting War between Transvaal Republic and Neighbouring Native Tribes, and Native Affairs in South Africa* HCSP 60:545 (1877) Command Paper 1883 at 95-96.

88 Shillington 2011: 114. See, also, Molema 1966: 78.

leading up to the British annexation of the Transvaal in 1877.⁸⁹ Thus Warren's Bechuanaland campaign specifically included assistance to Montshiwa in his troubles with the Boers.⁹⁰ Christopher Bethell played an active role in the campaign. Warren sent Bethell to assist Chief Montshiwa at his capital Sechuba, where Bethell led Warren's forces against the Boers who threatened the Tshidi Rolong.⁹¹ In 1879, Warren placed Bethell in command of a force comprising Tshidi Rolong when they advanced against Boer and Ratlou insurgents.⁹²

However, Britain's willingness to offer military assistance to Chief Montshiwa lessened considerably following a change in British colonial policy. After Gladstone's Liberals took office in 1880, British policy became decidedly non-interventionist.⁹³ In 1880, the British withdrew official military support to Montshiwa.⁹⁴

Bethell, however, decided to stay at Sechuba, and he entered into Chief Montshiwa's service. Bethell's decision to remain in Montshiwa's service in defiance of official policy was controversial in Whitehall. South African colonial officials, including the British High Commissioner, Sir Hercules Robinson, were also dismayed by Bethell's activities, which included active military service leading out Montshiwa's legions against the Boers.⁹⁵ Certainly, Bethell was involved in the illegal purchase of arms for Montshiwa's army.⁹⁶ These matters were discussed in the British House of Commons,⁹⁷ and reported in the British press.⁹⁸ It was clear that the authorities did not always approve of Mr Bethell.⁹⁹

During this period, Britain and the Transvaal were involved in open warfare, culminating in the British defeat at Majuba in February 1881.¹⁰⁰ British authorities

89 For examples of the British attitude to Chief Montshiwa as an important ally, see the correspondences enclosed in *Correspondence Respecting the War between the Transvaal Republic and Neighbouring Native Tribes, and Generally with Reference to Native Affairs in South Africa* HCSP 60:353 (1877) Command Paper 1748. See, also, Molema 1966: 78.

90 For an account of Warren's activities in the region between 1878 and 1879, see *Reports by Colonel Warren and Captain Harrell of the Affairs of Bechuanaland, Dated April 3rd 1879 and April 27th 1880* HCSP 49:169 (1883) Command Paper 3635 at 3-8.

91 See the letter by Warren (n 80) at 12.

92 *Ibid.* The context of this campaign is explained in Shillington 2011: 115-117.

93 Shillington 2011: 124; Sillery 1971: 62.

94 Letter by Warren (n 80) at 12. By this time, Warren himself had left South Africa after sustaining a riding accident (Sillery 1971: 47).

95 See Enclosures 29 and 30 to *Further Correspondence Respecting the Affairs of the Transvaal and Adjacent Territories* HCSP 47:951 (1882) Command Paper 3419.

96 Manson 1998: 497.

97 See, for example, *Hansard UK House of Commons Debates* no 268 (Commons Sitting 24 Apr 1882) cols 1268-1269; and no 281 (Commons Sitting 12 Jul 1883) col 1214.

98 See, for example, "The Bechuanaland Troubles" 10 Aug 1883 *Morning Post* (London) at 2; "Bechuanaland" 10 Aug 1883 *Leeds Mercury* at 7.

99 Enclosures 29 and 30 to *Further Correspondence Respecting the Affairs of the Transvaal and Adjacent Territories* HCSP 47:951 (1882) Command Paper 3419.

100 Davenport & Saunders 2000: 208-209.

tried to maintain cordial relations with the South African Republic thereafter. They were annoyed when Bethell antagonised the Boers through his correspondence with the Volksraad in Pretoria.¹⁰¹

Some of Bethell's complaints to Pretoria (and Cape Town and London) were specifically about the Boers who had established a new state, called Goshen, near Mahikeng in the heart of Montshiwa's territory.¹⁰² Goshen was one of two renegade Boer Republics. The other new "Boer state" was called Stellaland (with its town Vryburg) and was in the heart of Tlhaping territory as recognised by the Keate document.¹⁰³

In February 1884, as the Goshen and Stellaland Boers became increasingly difficult to control, the British government agreed to intervene in southern Bechuanaland. Reverend John Mackenzie of the London Missionary Society was appointed as Deputy Commissioner to Bechuanaland.¹⁰⁴ Mackenzie appointed Bethell as Chief of the Frontier Police.¹⁰⁵ Bethell and the Rolong people welcomed this indication of British protection.¹⁰⁶

The Boer renegades at Goshen were unhappy about the turn of events, however, and responded by deliberately provoking the Tshidi Rolong. On 31 July 1884, the Goshen Boers rode onto Rolong land, stole Rolong cattle and deliberately drove the stolen cattle within sight of Montshiwa's capital at Sechuba. The Rolong responded. It was later reported to the British High Commissioner by Commander Bower that Christopher Bethell, Israel Molema (Montshiwa's nephew and heir) and about 300 Rolong men had pursued the Boers. There was a significant skirmish, during which about 100 Rolong fighters were killed. Both Bethell and Molema were wounded. Bethell had been shot in the face and had lost an eye. Bethell then gave his rifle to Molema and said: "Fight for me, I am wounded." Molema replied that he could not since he was wounded himself and ammunition was running short. Molema's horse had run off, and Bethell urged Molema to take his horse and make his escape. However, Molema was too seriously injured to do so. When dusk fell and the firing stopped, some Boers approached Bethell and Molema. At this point, Molema feigned death. The Boers spoke to Bethell, however, and said: "Do you wish to live or die?" Bethell was eager to distract the Boers from Molema and said "I wish to die". At this

101 This is evident in the official communications between British officials and the Transvaal Government. (See Manson 1998: 492-493, citing papers from the Transvaal Archives in Pretoria.)

102 Shillington 2011: 136.

103 *Ibid.*

104 Shillington 1985: 150.

105 Reported in a letter from William Bethell to the Colonial Office, enclosed in *Further Correspondence Respecting the Affairs of the Transvaal and Adjacent Territories* HCSP 57:205 (1884-85) Command Paper 4252 at 11.

106 Mackenzie 1887: 227.

point, the Boers shot Bethell, and after he was dead, they crowed "Now, Bethell, come and fight us!"¹⁰⁷

It was a version of this story that first appeared in the newspapers in late 1884 as the news reached England. Christopher Bethell's "savage murder by the Boers" was reported widely for several months.¹⁰⁸ The Bethell and Beckett families took steps to ensure that the matter received considerable positive publicity. Christopher's brothers, George and Alfred, wrote letters to the newspapers,¹⁰⁹ as did Christopher's uncle, Edmund Beckett,¹¹⁰ and his kinsman, Charles Warren.¹¹¹ Christopher's uncles in the House of Commons spoke of the death in the House.¹¹²

The Bethell and Beckett families were concerned about family reputation. Those who knew Christopher's history in Bechuanaland had previously described him as hot-headed, impulsive and irresponsible. It was not always clear whether Christopher's actions had official sanction or approval. It was sometimes doubtful whether Christopher's loyalty lay with British interests – Christopher acted on behalf of the Tshidi Rolong, regardless of whether Britain approved or not.¹¹³

The family wanted to ensure that Christopher emerged as an honourable British loyalist who had died a hero. In the end, it became clear that Bethell's death could be understood as the murder of a British officer who died in service of his country. A full military funeral was arranged in Bethell's honour.¹¹⁴ Bethell as the loyal English patriot became the dominant narrative in Parliament and in the press. Family honour was secured.

107 This report is contained in "Memorandum from Commander Bower, R.N. to High Commissioner" Sept 20 1884, Enclosure no 82 to *Further Correspondence Respecting the Affairs of the Transvaal and Adjacent Territories* HCSP 57:161 (1884-85) Command Paper 4213 at 135-136. The incident regarding the horse is reported in a letter from Assistant Commissioner Wright to Mr GR Bethell (Christopher's brother), which is enclosed in the same Command Paper 4213 at 145.

108 See, for example, "The murder of Mr C Bethell" 28 Oct 1884 *The Times* (London) at 6; "The murder of Mr Charles [sic] Bethell by Boers" 18 Sept 1884 *Morning Post* at 6.

109 See, for example, the letter from Alfred Bethell, published in 25 Sept 1884 *Standard* at 6; and the letter from George Bethell, published in 25 Oct 1884 *Standard* at 3.

110 See Beckett's letter (n 71) at 3.

111 See Warren's letter (n 80) at 12.

112 See, for example, the reports in 28 Sept 1884 *Yorkshire Gazette* at 4; and 30 Oct 1884 *York Herald* at 5. The death of Christopher Bethell and the possible reprisals against those responsible was debated extensively and frequently in both the House of Commons and the House of Lords over a period of several months. See, for example, *Hansard UK House of Commons Debates* no 293 (Commons Sitting 27 Oct 1884) cols 246-250; *idem* (Commons Sitting 28 Oct 1884) cols 343-346; *idem* (Commons Sitting 29 Oct 1884) cols 441-514; *Hansard UK House of Commons Debates* no 296 (Commons Sitting 30 Jul 1885) col 534; and *idem* (Lords Sitting 26 Mar 1885) col 621.

113 See Enclosures 29 and 30 to *Further Correspondence Respecting the Affairs of the Transvaal and Adjacent Territories* HCSP 47:951 (1882) Command Paper 3419. See, also, Sillery 1971: 109.

114 "Military funeral accorded to remains of late Mr Bethell" 17 Mar 1885 *Port Elizabeth Telegraph* at 2-3.

Family honour would be threatened three years later, however, when the *Bethell* case reached the Chancery and Christopher's Rolong marriage became the news of the day.

5 The court's approach to the evidence

When the Chancery court examined Christopher Bethell's Rolong marriage, the court was already familiar with some of Christopher's history. It knew that Christopher was a member of a prominent Yorkshire family who had been sent to South Africa in disgrace (Stirling J himself had given judgement on the gambling debt in January 1887).¹¹⁵ The court would also have been aware of the ongoing press coverage of Christopher's death. The Bethell family had ensured that the family name emerged with its reputation enhanced: Christopher had died a hero, an English officer and gentleman, defending the interests of important British allies from the unscrupulous dealings of Boer renegades.

Despite the ongoing investigations into Christopher's death in Bechuanaland and the extensive publicity that followed, it seems that Christopher's marriage remained hidden. The news of the marriage now made a sensational story: "The romantic marriage of the late Mr C Bethell";¹¹⁶ "A romance in real life – the late Commander Bethell and his African bride";¹¹⁷ "The extraordinary marriage romance";¹¹⁸ "Romantic marriage story";¹¹⁹ "Bethell marriage romance";¹²⁰ "Commander Bethell's marriage with an African girl – a romance of the law courts".¹²¹ The newspapers reminded readers that Bethell had made headlines three years earlier when he had died an honourable British officer savagely murdered by renegade Boers.¹²²

Press coverage was not unsympathetic to Christopher and his bride, but the press also expressed grave doubts about whether Christopher's widow and daughter could take up their places as members of the English gentry. The *Standard* remarked that many readers might be sympathetic to Tepo and her child, but in practice, the marriage would have ramifications that would not be evident to readers with no personal acquaintance with tribal Africans: "A sensible man who has travelled – with his eyes open – among [tribal peoples] cannot regard the prospects of that child without dismay. Granting that Teepoo, or Mrs Bethell, be as good a woman as they make them among the Barolongs," she would never be suitable for membership of the Yorkshire gentry: Tepo was "too old to be civilised – to be taught those ways

115 *In re Bethell; Bethell v Bethell* (1887) 34 Ch D 561.

116 21 Dec 1887 *York Herald* at 6.

117 16 Dec 1887 *Daily Gazette for Middlesbrough* at 4.

118 21 Dec 1887 *Yorkshire Post* at 6.

119 17 Dec 1887 *Yorkshire Gazette* at 10.

120 16 Feb 1888 *South Wales Echo* at 3.

121 16 Dec 1887 *Northern Echo (Durham)* at 3.

122 See, for example, *ibid*; and "Mr Christopher Bethell's marriage" 21 Dec 1887 *Leeds Mercury* at 7.

of thinking which should be instilled into a girl entitled to considerable property in Yorkshire".¹²³

The Bethell family were concerned about the family's standing and reputation. These might be threatened if Christopher's widow or daughter had legal claims to membership of the family. William Bethell held extensive estates in Yorkshire and elsewhere, and the potential loss of the Burnhill and Hallatreeholme estates would not have been significant. Indeed, William Bethell's counsel made it clear that the suit was "not a money matter" – it was about protecting the family. Generous financial provision would be made for the infant child.¹²⁴ William's objective was to ensure that neither the daughter Grace, nor the wife Tepo had any claim to legal recognition as members of the Bethell family. The family required a ruling that the Rolong marriage was not really a marriage and could not be recognised in England.

The court arranged for evidence to be collected from Bechuanaland so as to understand the precise circumstances of the marriage.¹²⁵ Close examination of the original depositions reveals the concerns of those who were asking the questions. It also reveals that the court was somewhat selective in the evidence chosen for incorporation into the judgement. This selectivity sheds some light on the court's interpretation of the evidence.

Witnesses were asked whether Christopher and Tepo had an exclusive relationship and whether Christopher was likely to take additional wives. The court did not rely on this evidence in its judgement. The court chose to quote from the deposition taken from John Wright (clerk to the Resident Magistrate at Mahikeng), who reported that Bethell had not told him he was married, but had referred to Tepo as "that girl of mine".¹²⁶ However, the court did not consider the evidence of Edgar Rowland (storekeeper at Mahikeng), who reported that Bethell was married to Tepo. Asked if Bethell intended to take any additional wives, Rowland replied "No. Certainly not".¹²⁷ A local trader, Alfred Marsden, agreed with Rowland's evidence.¹²⁸

In fact, it would not have been unusual for the marriage to have remained monogamous. Polygamy rates had probably never been high among the Rolong,¹²⁹ and polygamy rates fell even further with the spread of Christianity.¹³⁰ While Chief Montshiwa himself had refused to convert to Christianity,¹³¹ many of the Rolong

123 "Domestic difficulty" published by the *Standard* and reprinted in 24 Dec 1887 *Yorkshire Gazette* at 7. Similar concerns were raised elsewhere, for example in "The romantic marriage of the late Mr C Bethell" 21 Dec 1887 *York Herald* at 6.

124 "The law courts" 2 Feb 1888 *London Evening Standard* at 2.

125 *Re Bethell Deposition Papers* (n 45).

126 *Idem*, Deposition of John Wright.

127 *Idem*, Deposition of Edgar Rowland.

128 *Idem*, Deposition of Alfred Marsden.

129 See Delius & Glaser 2004: 86, reporting that polygamy rates in Sotho and Tswana communities were well under 50 per cent in the mid-nineteenth century and had fallen to about 12 per cent by the early twentieth century.

130 *Idem* at 95.

131 Comaroff & Comaroff 1991: 262.

had been baptised and attended services regularly. The Christian converts included prominent members of the Tshidi Rolong clan, including Chief Montshiwa's half-brother, Isaac Molema, and his nephew, Israel.¹³² It seems that Christopher's wife and her parents were Christians. Montshiwa reported that plans had been made for the baptism of Christopher's infant daughter, Grace.¹³³ The various depositions suggest rather strongly that the marriage of Christopher and Tepo was intended to remain monogamous.

Christopher's refusal to marry in a church was material to the court's decision. He had the option of concluding a marriage that would be legally recognised in England. According to Montshiwa's deposition, Christopher had deliberately chosen to reject a church wedding and had chosen the Rolong marriage customs instead. The core evidence in this regard was the conversation below recorded in the chief's deposition and quoted (in part) in the judgement. When Bethell informed the chief that he wished to marry:

I said to him 'You know we Barolong have a different custom to other tribes. The custom is that during courtship and after marriage, the man when he kills an ox sends the head to the girl's mother, so if you do this mother will know your intentions are honourable.' Bethell said: 'Well I want to marry a Barolong and I will do so according to Barolong custom. I also am a Barolong.' I said: 'Will you not marry her in Church?' He said: 'No. I am a Barolong. Did you marry your wives in church? Did you not also marry in the custom I am about to do?'¹³⁴

I also am a Barolong.

It is interesting to note that this part of the deposed evidence was changed slightly in the reported judgement. The original (as quoted above) creates an impression that Bethell was saying that he wished to marry according to Rolong custom *because* "I also am a Barolong". This causal relationship is lost in the reported case, which quotes the evidence as: "Well, I want to marry a Baralong, and I will do so according to Baralong custom"; also "I am a Baralong".¹³⁵

Montshiwa agreed to the marriage and Bethell duly slaughtered an ox and sent the head to his proposed bride's mother. Montshiwa then approached the mother and said: "Give your daughter to Bethell. You see he really means it. See he has sent you the head." The mother agreed to the marriage, and according to the chief, Bethell then "married her exactly in accordance with our customs. There is no other ceremony except taking the girl".¹³⁶

132 *Ibid.*

133 *Re Bethell Deposition Papers* (n 45), Deposition of Chief Montshiwa.

134 *Ibid.*

135 *Bethell* (n 1) at 222.

136 *Re Bethell Deposition Papers* (n 45), Deposition of Chief Montshiwa.

"I ALSO AM A BAROLONG"

The court's interpretation of Christopher's refusal to conclude a church wedding was that Christopher had not intended his marriage to Tepo to have legal consequences in England, that Christopher had not viewed his union with Tepo as a "real marriage", but merely as a legally inconsequential "marriage in the Rolong sense". The Bethell family supported this interpretation. The family presented evidence that Christopher had never informed them of the marriage,¹³⁷ thus suggesting that he did not really consider Tepo as his "wife" as understood in English law.

Historians have remarked on how the creation of the British Empire provided sexual opportunity and freedom to young Englishmen.¹³⁸ Once away in the colonies, they were released from the strictures and expectations of English society at home. There were plenty of women who, according to stereotype, were sexually adventurous, and would welcome the attentions of an Englishman.¹³⁹ Often, the colonial authorities condoned sexual liaisons between European colonists and local women. Indeed, they had encouraged such relationships in the early phases of Empire.¹⁴⁰ It was not uncommon for British colonial officials to cohabit with local concubines.¹⁴¹ Sometimes, there would even be a marriage of sorts according to local custom.¹⁴² Usually, the men returned to Britain having merely abandoned the women involved, although in some cases the men made financial provision for the women and any children whom they had fathered.¹⁴³

Christopher Bethell's relationship with Tepo might have been of this nature. Of course this interpretation might also threaten family reputation. It suggested that Christopher had taken advantage of Tepo, that he had been insincere and uncommitted, and that he had misled her when he married her. Counsel for the defence argued that it would be disrespectful to Christopher's memory to suggest that he was a man of so little honour that he would pretend to Tepo that he was taking her as a wife, while intending to abandon her and returning to England.¹⁴⁴ However, the Bethell family must have decided that this interpretation of the relationship was preferable to the alternative prospect of incorporating Christopher's Rolong widow and daughter into the Bethell family.

From the family's perspective, another threat to family honour was Christopher's statement "I also am a Barolong". In order to maintain their position as a leading Yorkshire family, it was essential that Christopher be regarded as a patriotic Englishman who remained so throughout his time in Bechuanaland. Family reputation might be tarnished if Christopher had become more Rolong than English.

137 *Bethell* (n 1) at 233.

138 See, for example, Hyam 1990: 88.

139 *Ibid.*

140 Ghosh 2006: 1.

141 *Idem* at 29.

142 Hyam 1990: 107.

143 *Ibid.*

144 *Bethell* (n 1) at 228.

The family had taken significant steps to ensure that Christopher would be remembered as a loyal British patriot who died protecting British interests, rather than in advancing the Rolong cause. However, one interpretation of Christopher's history in Bechuanaland was that Christopher had abandoned his English identity altogether, much like the notorious "White Zulu Chief", John Dunn. Dunn had lived in Zululand for many years and considered himself an important member of the Zulu tribe. He had forty-seven wives whom he had married under Zulu customary law.¹⁴⁵ Colonial officials often tolerated Europeans who had become fully incorporated into the local community.¹⁴⁶ They were no longer representative of Britain or her interests, and could merely be classified and dealt with as any other member of the "native community". John Dunn had, in fact, received official recognition as a Zulu chief by both English and Zulu authorities.¹⁴⁷

From the Bethell family's perspective, it was essential that the litigation did not conclude that Christopher had become incorporated into the Rolong community in the same way as John Dunn had become Zulu.

Did Bethell's conduct suggest that he had abandoned his English identity? Bethell had used the words "I am a Barolong" and his behaviour was consistent with a sincere commitment to the Rolong people and their way of life. Yet he had been an English officer when he died, and thus, unlike John Dunn, he had not abandoned his colonial heritage entirely. Furthermore, Bethell was unlike John Dunn in another way: Bethell was from the English landed gentry and had much to lose by abandoning England; Dunn was from a settler family who had abandoned their British connections generations ago.¹⁴⁸

Indeed, Bethell's aristocratic roots would also have been a factor in the court's reasoning. While so-called "low life"¹⁴⁹ Europeans might be permitted to consort with local women, imperial authorities disapproved of such conduct in the case of the ruling elite. The "maintenance of a proper distance" between the rulers and the local populace "seemed not only socially appropriate but politically necessary"¹⁵⁰ and a marriage between an English aristocrat and a Rolong woman was greatly threatening to these boundaries. It undermined the "authority of the ruling elite and the prestige of the ruling race".¹⁵¹

The court was able to resolve the various dilemmas by relying on the *Hyde* precedent. Christopher's Rolong marriage could not be recognised as a marriage in terms of the *Hyde* definition. This definition was adopted for the specific purpose

145 Hurwitz 1947: 61.

146 Rukavina 1951: 18.

147 *HJ Dunn v Rex* (1907) 28 NLR 56 at 61.

148 Ballard 1980: 77; Hurwitz 1947: 59.

149 Ballhatchet 1980: 139.

150 *Idem* at 121-122.

151 *Idem* at 144.

of excluding certain types of relationships from the ambit of the legal marriage. If Christopher and Tepo's relationship was thus excluded, this would have the inevitable consequence that Tepo herself (and the infant Grace) were excluded from the Bethell family. When adopting this approach, the court could ignore the implications of Christopher's statement "I also am a Barolong". The statement became irrelevant to the court's reasoning.

Adoption of the *Hyde* definition of marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others"¹⁵² was deliberately exclusionary. The court was not merely describing the legal institution of marriage – it was consciously drawing a clear boundary in order to exclude a potentially threatening relationship from legitimation and endorsement. The *Bethell* case can be understood as one of the many encounters between the colonial power and the colonised that was concerned with drawing clear boundaries between ruler and subaltern, and shaping the legitimacy and hegemony of the ruler's laws. The ruling also emphasised the boundary between Bethell and the Rolong: Bethell remained part of his English family and part of the English ruling elite.

6 Impact on conflict of laws jurisprudence

Dicey published the first edition of his influential *Conflict of Laws* eight years after the *Bethell* decision.¹⁵³ He used both *Hyde* and *Bethell* to illustrate the principle that ordinary conflict of laws principles will apply only if the foreign country concerned has "reached a similar stage of civilisation".¹⁵⁴

That English Courts will recognise rights acquired under the law of Italy or of France is certain. That English Courts will recognise rights acquired under the law of China, under the peculiar legislation or customs of the Territory of Utah, or under the customary law of Bechuanaland, is, to say the least, uncertain.¹⁵⁵

Bartholomew has pointed out that there was an important difference between "the customs of the Territory of Utah" mentioned in conjunction with *Hyde*, and the law of Bechuanaland mentioned in conjunction with *Bethell*. The Mormons in Utah did not have sovereignty or law-making capacity at any time, and certainly not in April 1853,¹⁵⁶ when the Hydes married in terms of Mormon doctrine. The territory had been ceded by the Republic of Mexico in 1848, but Mexican law continued to apply until Utah was incorporated into the United States.¹⁵⁷ Thus, the law in force when the Hydes married was Mexican civil law, which did not recognise polygamy.¹⁵⁸

152 *Hyde v Hyde and Woodmansee* (1866) LR1 P & D 130 at 133.

153 Dicey 1896: *passim*.

154 *Idem* at 29.

155 *Idem* at 29-30.

156 *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130 at 130.

157 Bartholomew 1964: 1025, citing *Hatch v Hatch* (1915) 46 Utah 116.

158 *Ibid*.

In Bartholomew's view, the law-making capacity and sovereignty of the Rolong of Bechuanaland was less certain at the time of the Bethell wedding (in October 1883).¹⁵⁹ In practice, it was cases like *Bethell* that undermined recognition of the law-making capacity and sovereignty of African polities that had retained political independence. At the time of the Bethell marriage, Chief Montshiwa and the Tshidi Rolong were desperately trying to maintain their independence as a sovereign polity – a fact that would have been known to the *Bethell* court, because Christopher Bethell had died in furtherance of this objective. The Bechuanaland question had been discussed in Parliament on many occasions, and was often reported in the British press.¹⁶⁰

At the time of the *Bethell* events, Chief Montshiwa of the Boratshidi Barolong identified as the sovereign leader of this group.¹⁶¹ As he put it: "I am Chief of my own people in my own country. My territory is on the Molopo River."¹⁶² The British had recognised Montshiwa as an "independent chief" when drawing up the Keate Award in 1871. In terms of the Pretoria Convention of August 1881, the new Transvaal State was obliged to remain within its borders and Boers were not to encroach upon territory outside of the Transvaal boundaries recognised in that document.¹⁶³ In correspondence with Montshiwa in February 1883, the British authorities confirmed that they continued to recognise his independence as set out in the Pretoria Convention.¹⁶⁴

It appears that the Chancery Division was prepared to acknowledge Chief Montshiwa as an independent sovereign within his territory. The court arranged to have evidenced deposed from the chief on Rolong law and custom. Potentially, the court could have used this evidence to support a conclusion that the usual *lex loci celebrationis* rule would apply.

The court's use of the available evidence illustrates how the court's deliberations drew a boundary between the "civilised" and what the court described as "barbarous or semi-barbarous".¹⁶⁵ Here the court focused on the obvious cultural differences

159 *Idem* at 1052.

160 See, for example, the *Times* (London) reports of the House of Commons debates on Bechuanaland during the periods when Montshiwa tried to defend his territories against the Boers. There are detailed reports of the Commons debates from March to May 1883 (the year of the wedding) and of the debates in March, April, June and September 1887 (the year of the trial).

161 *Re Bethell Deposition Papers* (n 45), Deposition of Chief Montshiwa in the *Bethell* matter, 9 Apr 1886.

162 As reported in the "Minutes of an interview granted to the Chief Montsioa [Montshiwa] and Councillors by his Excellency the Administrator of Griqualand West", Kimberley, 3 Feb 1877. Enclosed in *Correspondence Respecting War between Transvaal Republic and Neighbouring Native Tribes, and Native Affairs in South Africa* HCSP 60:545 (1877) Command Paper 1883 at 94-95. The transcript uses the spelling "Molappo River".

163 Article 20 of The Convention of Pretoria, "Convention" for the Settlement of the Transvaal Territory, 3 Aug 1881 available at <https://www.sahistory.org.za/archive/>.

164 *Further Correspondence Respecting the Affairs of the Transvaal and Adjacent Territories* HCSP 49:195 (1883) Command Paper 3486.

165 This is the court's wording in *Bethell* (n 1) at 232.

between the Rolong and the English. It was obvious that marriage rituals, such as slaughtering an ox, presenting its head to the bride's family and ploughing the mother-in-law's garden, were very different from an English wedding, with a white satin bridal gown, nine bridesmaids and expensive wedding presents (as in Christopher's brother Alfred's wedding celebrated shortly before the *Bethell* hearing).¹⁶⁶ This is an excellent example of how the colonial authorities endorsed and reinforced cultural hierarchies.¹⁶⁷

Montshiwa's evidence on the marriage rituals is described accurately in the reported case. However, the judgement does not include Montshiwa's other evidence that "Bethell lived with her as man and wife until his death. The day he was killed he left her in the house. Up to the day of his death he conformed to all the native customs of acknowledging her as his wife".¹⁶⁸ The suggestion of commitment and homely domesticity is reminiscent of an English marriage.

The court's decision to focus on what was different, rather than on what was similar, is an example of how cases like *Bethell* defined and ordered difference in a way that undermined the legitimacy of Rolong law and custom and shaped the hegemony of the colonial power.¹⁶⁹ The *Bethell* ruling enabled influential scholars, such as Dicey, to develop their theory that the customs of "non-civilised peoples" would not be recognised as law in the context of private international law.

7 Impact on the status and sovereignty of indigenous rulers

The imposition of British colonial power was an uneven and gradual process. At the time of the *Bethell* case, the legal status of independent, never-conquered chiefs, such as Montshiwa, remained unsettled. However, the *Bethell* case foreshadowed and contributed to some of the devices that would eventually consolidate imperial power.

Montshiwa and the Rolong would eventually be incorporated into the Cape Colony, where the Prime Minister, Cecil John Rhodes, took the steps necessary to ensure the proletarianisation of the Rolong for the purposes of his mining enterprises.¹⁷⁰ Other chiefs would remain nominally sovereign within their polities, notably Chief Mosheshwe of the Basotho¹⁷¹ and King Khama of the Ngwato.¹⁷²

The *Bethell* case foreshadowed some of the dynamics of so-called "quasi-sovereign" polities within the colonial order. Nominally independent chiefs could

166 "Marriage of Mr AJ Bethell and Miss Bower" 3 Sept 1887 *Driffield Times and General Advertiser* at 2.

167 See the comments in Benton 2002: 2.

168 *Re Bethell Deposition Papers* (n 45), Deposition of Chief Montshiwa.

169 Benton 2002: at 2.

170 Parsons 1998: 188.

171 Davenport & Saunders 2000: 198.

172 Parsons 1998: *passim*.

make law that would be applicable to their “own people”.¹⁷³ However, the law administered by the independent chiefs would not bind outsiders, such as Bethell.¹⁷⁴ Bethell had demonstrated that he recognised the authority of Chief Montshiwa: he asked the chief’s permission to marry and then performed the rituals prescribed by the chief. Despite this, the chief’s law did not really bind Bethell – Bethell remained unmarried in the eyes of an English court. As the British colonial power clarified the global structure of the various laws of the Empire, this case illustrates the emergence of a system of legal pluralism in terms of which some systems of law were insulated from others, and in terms of which some systems of law were superior to others in a hierarchical structure that placed the law of coloniser at its apex.¹⁷⁵

8 Bethell’s legacy

Dicey’s Conflict of Laws retained the distinction between the laws of the “civilised” versus the laws of the “non-civilised” until publication of the sixth edition in 1949,¹⁷⁶ whereafter the distinction became politically unsustainable in the context of private international law¹⁷⁷ (although the reference to “civilised states” persists in the context of public international law).¹⁷⁸

However, *Bethell’s* popularisation of the *Hyde* definition of marriage as “the voluntary union for life of one man and one woman, to the exclusion of all others”¹⁷⁹ continues to cast a shadow on contemporary jurisprudence. The wording is still used as an established legal definition of marriage.¹⁸⁰ We should bear in mind that the definition was deliberately intended to exclude potentially polygamous unions from the definition of marriage. In *Bethell’s* case, the definition was employed to secure the honour of a prominent English family, and to establish firm boundaries between the coloniser and the colonised.

In recent years, the definition has been quoted in order to exclude same-sex marriages. Thus it is used in a novel context, but with the same deliberate exclusionary intentions.¹⁸¹ It is worth remembering that the ultimate source of the definition is Christian canon law. Both *Hyde* and *Bethell* refer specifically to a “Christian marriage”. The definition has no secular source in either common law or civil law, and we should

173 Benton 2002: 6.

174 For an example of this dynamic in colonial Bechuanaland, see Crowder 1988: 6.

175 Benton 2002: 127.

176 Morris 1949: 15-16.

177 Morris 1958: 10-11, discussing Dicey’s reliance on the term “civilised” in earlier editions of the work, but arguing that this is not a useful distinction in private international law.

178 Fitzmaurice 2017: 359.

179 *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130 at 133.

180 See, for example, Heaton & Kruger 2015: 13.

181 See, for example, the discussion in *Bull v Hall* [2014] 1 All ER 919.

be cautious before we continue to use the definition as a "legal definition of marriage" in a secular context.

Life continued for Bethell's South African family after the judgement. Tepo remarried a few years later and moved to the Bechuanaland Protectorate (which became Botswana).¹⁸² Grace enrolled at Lovedale College in the Eastern Cape. She married an Englishman and moved to Bulawayo in 1910.¹⁸³

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A BIBLIOMETRIC ANALYSIS OF SCHULZ, KOSCHAKER, PRINGSHEIM, WIEACKER AND COING*

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ABSTRACT

This article uses citation analysis to track the citation patterns of works by Fritz Schulz, Paul Koschaker, Fritz Pringsheim, Franz Wieacker and Helmut Coing – key figures in the field of Roman law – and to see whether databases, such as Google Scholar and Web of Science, provide meaningful data that accurately reflects the popularity and influence of these works. The article also takes into account those limitations regarding the availability of the material, which include the language of the publications, as well as the research field.

Keywords: Bibliometrics; scientometrics; citation analysis; Roman law; legal history; reception of Roman law

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1 Introduction

Bibliometrics – the quantitative study of publications and citations – can be a useful resource to social sciences and humanities research beyond its role in research evaluations and in funding schemes.¹ From the sociology of science perspective, it enables us to understand not only the size and growth of disciplines in terms of the number of publications and researchers, but also changes in the dissemination and citation patterns.² On the other hand, bibliometrics can be used to study the intellectual base, development and exchange of ideas within and between disciplines, and so to enlighten and address also discipline-specific historiographical questions.³

In the field of law, legal citations have traditionally been analysed to trace and determine the impact of juristic opinion on judicial decision-making.⁴ Indexing of legal citations has also inspired the development of citation indexes of academic/scholarly journal literature since the 1960s.⁵ It is well known, however, that the currently available international citation databases, Web of Science and Scopus, offer only a limited coverage of the social sciences and humanities publications, because their data is based on articles from an exclusive set of international journals published mainly in English.⁶ Google Scholar indexes publication and citation data from a wider range of documents available online, but its documentation and structure of data are relatively poor when compared to that of Web of Science and Scopus.⁷ These limitations specifically concern those fields – such as ancient history or Roman law – where national journals, articles in books and monographs, as well as several European languages, still play an important role in the dissemination of research results.

So far, only a limited use has been made of bibliometric methods and resources in fields of ancient history in general, and of Roman law in particular. Walter Scheidel has explored the development of classical scholarship between 1924 and 1992 on the basis of bibliographic information from *L'année Philologique*. He found that “the share of studies in ancient law has dropped from around three per cent before the war to about half that rate in recent years, and the subject must therefore be designated a net loser”.⁸ In a series of working papers, Scheidel has also used Web of Science data to analyse the scholarly impact of Moses Finley’s work,⁹ and to compare citation

1 Moed 2005; Scharnhorst & Garfield 2010: 1-33; Cronin & Sugimoto 2014.

2 De Solla Price 1963; Bourdieu 2004; De Bellis 2009.

3 Hammarfelt 2011a: 819-830; Hammarfelt 2011b: 705-725; Hammarfelt 2012.

4 Wagner-Döbler 1994: 15-26; Duxbury 2001.

5 Shapiro 1992: 337-339.

6 Kulczycki 2018: 463-486.

7 Martín-Martin 2018: 1160-1177.

8 Scheidel 1997: 280.

9 Scheidel 2013.

scores of US based ancient historians.¹⁰ Citation analysis of Roman law literature has relied only on other data sources. For example, an historical-bibliometric study by Thomas Finkenauer and Andreas Herrmann regarding the influence of Nazi policies on citing the works of Jewish authors at the *Savigny-Zeitschrift* is based on the manual counting of citations from papers published in that journal.¹¹ Overall, the coverage of the citation databases and the feasibility of bibliometric methods in the field of Roman law studies have not been properly investigated.

2 Aims and purpose

This article explores data from Web of Science and Google Scholar to track the citation patterns of some key articles and monographs in the field of Roman law. These are Fritz Schulz's *Prinzipien des römischen Rechts* (1934, published in English as *Principles of Roman Law* in 1936); Paul Koschaker's *Europa und das Römische Recht* (1947); Fritz Pringsheim's "The legal policy and reforms of Hadrian" (1934) (and for comparison, his *Greek Law of Sale* (1950)); Franz Wieacker's *Privatrechtsgeschichte der Neuzeit* (originally published in 1952) and *Römische Rechtsgeschichte* (originally published in 1988); and Helmut Coing's *Römisches Recht in Deutschland* (1964) and *Europäisches Privatrecht* (1985–1989).¹²

The five authors of the above-mentioned works – Schulz, Koschaker, Pringsheim, Wieacker and Coing – were the focus of the research project *Reinventing the Foundations of European Legal Culture 1934–1964*, which was hosted by the University of Helsinki from 2013 to 2018. The works of this group of German-speaking legal scholars were selected for this bibliometric study because their works were integral to the birth of the idea of a shared European legal past. All of their professional and private lives were also impacted by Nazi Germany and the Second World War. Fritz Schulz (1879–1957) and Fritz Pringsheim (1882–1967) left Nazi Germany due to persecution and were exiled to Britain, while Paul Koschaker (1878–1951) was ousted from his post in Berlin in 1941.¹³ Both Franz Wieacker (1908–1994), who was Pringsheim's pupil, and Helmut Coing (1912–2000) stayed in Germany during the Nazi regime.

The article seeks to examine whether databases, such as Google Scholar and Web of Science, provide meaningful data for the study of the popularity and influence of the selected authors and their works. We examine not only the impact of these works from their publication dates, but also their continued impact in terms of citations up to 2016.

10 Scheidel 2008; Scheidel 2011.

11 Finkenauer & Herrmann 2017: 1–48.

12 A similar approach was utilized by Hammarfelt (2011a). In addition, Hammarfelt used page citation analysis, focusing on which specific pages of the work studied had been cited the most. See, also, Broady & Persson 1989: 54–73; and Hérubel & Goedecken 2000: 51–68.

13 Beggio 2018: 84, 111.

3 Data and methodology

The primary method employed in this article is simple citation analysis, taking into account only the number of citations of each work. We do not utilise page citation analysis¹⁴ or citation analysis that takes into account the context of the citation.¹⁵ The works studied in this paper include one journal article and seven monographs. Reprints and new editions of citing works are omitted so that only the citation from the original publication counts as such. To track the citations, we use Google Scholar (GS) through Publish or Perish (PoP),¹⁶ as well as Web of Science (WoS), including citations to both source and non-source items. For Pringsheim's article, "The legal policy and reforms of Hadrian", we also searched citations from Scopus – this option is not available for the monographs. Duplicate citing works from GS, WoS and Scopus were removed.

The citation histories are not only compared between the eight works, but are related also to the estimated number and growth of Roman law publications from the early 1900s to the present. This is based on a separate GS dataset containing 12 300 records of publications from 1725 to 2016 with the words "Roman law", "diritto romano", "derecho romano", "droit romain" or "römische Recht/römisches Recht/römisches Recht/römischen Rechts" appearing in the title.¹⁷

Google Ngram¹⁸ is used in passing when looking at the appearance and development of concepts on a general level.

4 The works and impact of Fritz Schulz (1879–1957)

The idea that there were fundamental principles behind the way legal systems functioned, began to surface in the English corpus in the eighteenth century (with the first mention of "principles of tax law" already around 1600) and in the German

14 Like Hammarfelt 2011a.

15 Cf. Russell 1997.

16 Harzing 2007.

17 The method and data is described in Pölönen & Hammarfelt 2019. The total number of Roman law publications is 1 390 in 1925–1949; 2 319 in 1950–1974; 2 915 in 1975–1999; and 4 070 in 2000–2016. During this period, the annual average number of Roman law publication increased from 56 in 1925–1949 to 93 in 1950–1974; to 116 in 1975–1999; and to 239 in 2000–2016.

18 Google Ngram normalises the data at a relative level (because the number of books published annually fluctuates and increases with time) and the search results show the percentage of published material that the searched-for word or phrase occurs in. Only ngrams that occur in at least forty books are taken into account. Google Ngram shows how a word or phrase (and its different spellings/capitalisations) becomes more common or rare over time, but does not show in which books or in which context it appears. The material skews towards scientific literature. It does not show whether terms searched for together appear together in the same publications, but only the separate graphs for each term. One can look for correlation, but not for co-occurrence of terms.

corpus in the 1810s.¹⁹ In his *Prinzipien des römischen Rechts*, originally presented as a series of lectures in 1933 and published in 1934,²⁰ Schulz sought to isolate these functional principles behind Roman law²¹ – even though such principles were not laid out by any actual Roman lawyers. This is because Roman law is casuistic and codification attempts, such as the Digest of Justinian, are little more than lists of decisions reached in different cases. The citations to all editions of the German original²² and the translations into English (*Principles of Roman Law*, 1936),²³ Spanish (*Principios del derecho romano*, 1980) and Italian (*I principii del diritto romano*, 1946)²⁴ are tracked by year in Figure 1.

The citations of Schulz's *Prinzipien* remain mostly in the single figures per year. In the citation numbers, there is not a lot of fluctuation, and, as one would expect, after a publication spike in one year, the next year has fewer citations. The steady growth in the number of citations (ten to twenty citations every year, starting from 2010) is in line with the growing average rate of Roman law publications.

5 The works and impact of Paul Koschaker (1879–1951)

Paul Koschaker published his *magnum opus*, *Europa und das römische Recht*, in 1947.²⁵ The citations of this work are broken down by year, regardless of language and edition (Figure 1).²⁶ The conclusions we can draw are similar to those with regard to the citation history of Schulz's *Prinzipien*: they remain mostly in the single digits per year, and indicates growth in the 2010s, keeping in line with the generally growing publishing rates.

It may be useful to look closer at how the citations are divided by language. As of June 2017, *Europa und das römische Recht* has been cited 921 times, according to GS. After the publication language was manually detected, the data shows that the

19 Data gathered through Google Ngram in April 2017.

20 This lecture series eventually led to Schulz's dismissal from his position at the University of Berlin in Apr 1933 (see Ernst 2004: 123-124). Friedrich Mann (1907–1991) noted that “[Schulz's] last achievement in Germany had been a course of lectures on Principles of Roman law, which in truth and substance was nothing but a veiled attack on Nazi despotism and lawlessness” (quote cited from Ernst *supra*: 123).

21 Giltaij 2016: 3-4. On Schulz, see also Giltaij 2019: 73-92.

22 Data gathered through GS and WoS (all databases) in August 2017. Duplicates were removed and two results were omitted.

23 The data was gathered through GS and WoS (all databases) in Aug 2017. Duplicates were removed and three results were omitted.

24 The data was gathered through GS and WoS (all databases) in Aug 2017. Duplicates were removed.

25 On Koschaker, see Beggio 2018: 291-326; Beggio 2019: 159-180.

26 Data gathered from GS and WoS (all databases) in August 2017. Duplicates removed and four results omitted, because the year could not be verified.

work is cited 766 times in German, English, Spanish, Italian and French scholarly literature indexed by GS. Of these citations, 51 per cent are in German language publications, while 31 per cent are in English, 6 per cent in Spanish, 6 per cent in Italian and 5 per cent in French publications.²⁷

6 The works and impact of Fritz Pringsheim (1882–1967)

Fritz Pringsheim's article, "The legal policy and reforms of Hadrian", was published in *Journal of Roman Studies* in 1934.²⁸ The citation history of the article is broken down by year (Figure 1).²⁹ For most of the years during this period there are no citations to this article at all. When the data from WoS and GS are combined, it turns up a total of twenty citations. These are divided by language: eleven in English, three in German, one each in French, Italian, Russian and Ukrainian, and two in Spanish.

A search in Scopus for citations of Pringsheim's "Hadrian" article turns up five additional citations: one in 1995, one in 2007 and three in 2012.³⁰ None of these are the same as those in WoS and GS. It is quite interesting to note that here, the coverage of Scopus does not overlap with that of WoS and GS at all.

While Pringsheim's book, *Greek Law of Sale* (1950), does not deal with Roman law, we include it in this analysis to act as a comparison to his "Hadrian" article. Since in terms of citation counts, Pringsheim's "Hadrian" article does not seem to have enjoyed great popularity, it may be relevant to ask whether Pringsheim is simply a relatively unknown author, or whether "Hadrian" is a relatively sparsely cited article. Citation analysis shows that *Greek Law of Sale* has a total of 244 citations and a much more consistent citation history (Figure 1).³¹

27 Data gathered from GS in Jun 2017.

28 Pringsheim 1934: 141-153. On the importance of this article, see Tuori 2017: 470-486 (note that while Tuori's article obviously cites Pringsheim's "Hadrian", it is excluded from the analysis as the article was published in 2017 and our analysis only extends to 2016). The next year, Pringsheim was dismissed from his position at the Albert-Ludwigs University at Freiburg im Breisgau (see Honoré 2004: 218).

29 Data gathered from GS and WoS (all databases) in Jul and Aug 2017. Duplicates were removed.

30 As of 5 Dec 2017.

31 Data gathered from GS and WoS (all databases) in Jul and Aug 2017. Duplicates were removed and four results omitted, because GS dated them earlier than 1950 and the publication year could not be confirmed.

7 The works and impact of Franz Wieacker (1908–1994)

Franz Wieacker's impact³² is studied through references to his *Privatrechtsgeschichte der Neuzeit*³³ (originally published in 1952)³⁴ and his *Römische Rechtsgeschichte*³⁵ (originally published in 1988) (both in Figure 1). Wieacker's *Privatrechtsgeschichte* has, overall, more citations than the works of Schulz or Koschaker, and there is more fluctuation per year. Noticeable peaks are 1968, 1983, 1990, 2000, 2010 and 2014. His *Römische Rechtsgeschichte* is cited less, with such citations mainly in the single digits per year. The rise in the number of citations of both works after 2010 is again in line with the growing rate of Roman law publications in general.

8 The works and impact of Helmut Coing (1912–2000)

Helmut Coing's main works are *Römisches Recht in Deutschland*³⁶ (1964) and *Europäisches Privatrecht*³⁷ (originally published in 1985). Their impact can be studied through their citation histories, both seen in Figure 1. The citation history of *Römisches Recht in Deutschland* is noticeably sparser than that of *Europäisches Privatrecht*. Whereas citations of *Europäisches Privatrecht* start rising in the 2000s, references to *Römisches Recht in Deutschland* do not – they remain between zero and three citations per year.

9 The development of citations to works of Schulz, Koschaker, Pringsheim, Wieacker and Coing

All the results of this bibliometric analysis are presented in Figure 1, which shows the number of annual citations to these eight works during the period from 1935 to 2016. Overall, it can be observed that the annual number of citations is increasing. Among the eight works studied in this paper, Franz Wieacker's *Privatrechtsgeschichte der Neuzeit* has the strongest citation history recorded in the bibliometric data sources used in this study. Five other works (Schulz's *Prinzipien*, Koschaker's *Europa*, Pringsheim's *Greek Law*, Wieacker's *Römische Rechtsgeschichte*, and Coing's

32 Wieacker has been recently studied in depth by Ville Erkkilä; see Erkkilä 2019a: 201–220; Erkkilä 2019b; Erkkilä 2017.

33 The data was gathered through GS and WoS (all databases) in Aug 2017.

34 The book was subsequently translated into Italian (*Storia del diritto privato moderno con particolare riguardo alla Germania*, 1980), English (*A History of Private Law in Europe*, 1995), Spanish (*Historia del derecho privado de la edad moderna*, 2000), and Portuguese (*História do direito privado moderno*, 2004).

35 The data was gathered through GS and WoS (all databases) in Aug 2017. Duplicates were removed and one result was omitted, because the year could not be verified.

36 The data was gathered through GS and WoS (Core Collection) in Jul 2017.

37 The data was gathered through GS and WoS (Core Collection) in Aug 2017.

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Europäisches Privatrecht) also show a consistent increase in the record of citations. Pringsheim's "Hadrian" and Coing's *Römisches Recht in Deutschland* remain less frequently cited than the other works.

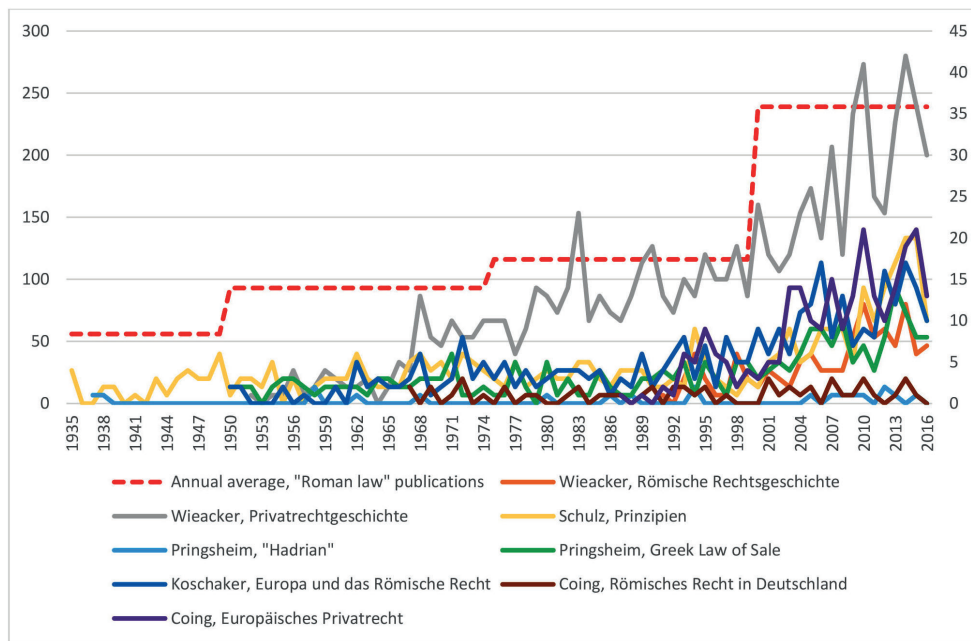


Figure 1: References to Schulz, Koschaker, Pringsheim, Wieacker and Coing 1935–2016 (on the right y axis) with the annual average of “Roman law” publications (on the left y axis) (see n 17).

10 Discussion and conclusions

Two works rise above the others in popularity as measured in the total number of citations: Schulz's *Prinzipien des römischen Rechts* – which shows a strong citation history since its publication in 1934 – and Koschaker's *Europa und das Römische Recht*. The citations of most of the works reviewed in this article fluctuate little, remaining in the single digits per year for most of the time. A noticeable exception is Wieacker's *Privatrechtsgeschichte der Neuzeit*, which rose above the other works in popularity in the late 1960s. In addition, Schulz's *Prinzipien*, Koschaker's *Europa*, Pringsheim's *Greek Law*, Wieacker's *Römische Rechtsgeschichte* and Coing's *Europäisches Privatrecht* show considerable increase in annual citation rates since the late 1990s.

The growth in citations since 2000 could be related to the growth in the number of Roman law publications. An analysis of GS publications with the words “Roman

law”, “diritto romano”, “derecho romano”, “droit romain” or “römische Recht/römischen Recht/römisches Recht/römischen Rechts” in the title indeed suggests that the frequency of so-called Roman law publications has increased considerably.³⁸ Therefore, the growth of the citation rate to the eight works studied in this paper does not differ greatly from the general trend in publishing rates in this field. At the time of new publication, citations are often high at first with initial interest in the new work, but then taper off unless the book becomes a classic cornerstone of its field. The works studied here show consistent citation histories, even though the number of citations per year might not be particularly high.

There are two important limitations to the availability of material to consider. One concerns the language of the publications, and the second concerns the research field.

The first limitation is that of language: publications in English are best represented, especially in structured databases, such as WoS and Scopus, diminishing the relative importance of publications in other languages. Therefore, an interesting question regarding the relationship between the publishing language and the level of recognition remains unanswered. When Schulz and Pringsheim were exiled in Britain, they had to change the language of their publications from German to English. Did they therefore gain a relative advantage over those authors who remained in Germany and continued to publish in German (such as Wieacker and Coing)? Unfortunately this question cannot be answered on the basis of citations of these works in GS and WoS/Scopus, because the material indexed in GS and the content of structured databases, such as WoS and Scopus, skews so heavily towards English anyway.

The second limitation is that structured international databases (such as WoS and Scopus) offer a limited coverage of humanities and social science publications and citations, especially in books and languages other than English.³⁹ For example, when comparing citations of Schulz’s *Principles of Roman Law*, GS gives 208 citations, whereas WoS (Core Collection) gives 23 (as of June 2017). Several studies comparing the international database coverage with comprehensive national publication data drawn from the institutional research information systems show that law is among the least covered fields. This is because in law, articles in books and monographs, as well as national languages, play an important role in the dissemination of research results. GS indexes publication data from a wider range of documents available online, but the data is poorly structured and its coverage is weakly documented.

The authors’ suggestions for possible future avenues for research of this subject are for a more detailed analysis detailing from how many different authors these citations originate, and whether they appear mainly in journal articles or in monographs.

38 Pölönen & Hammarfelt 2019.

39 For a comparison between different mapping tools, see Cobo 2011: 1382-1402.

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THE POWER TO REMOVE COMPANY DIRECTORS FROM OFFICE: HISTORICAL AND PHILOSOPHICAL ROOTS

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ABSTRACT

The Companies Act 71 of 2008 introduced into South African law a provision that, for the first time, empowers the board of directors to remove a director from office. This article contends that the novel power conferred on the board to remove a director from office represents a fundamental shift in the balance of power between shareholders and directors. This article traces the historical division of powers between the board and shareholders in South African law, as well as in the United Kingdom, Australia and the United States of America. It also explores the historical reasons and underpinning philosophy as to why the shareholders acting in a shareholders' meeting have been conferred the right, by means of an ordinary resolution, to remove directors from office in these jurisdictions. The article further explores the full implications of this new power granted under the Companies Act 71 of 2008. It is further significant that section 66(1) of the Companies Act 71 of 2008 represents the first instance in South Africa's company law history of statutorily conferring original powers of management on the board. It is argued that, despite the qualifications attached to it, this power of removal conferred on the board of directors has significantly shifted

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the balance of power and dynamics not only between the board of directors and the shareholders, but also between the shareholders themselves, and even between the directors *inter se*. Some suggestions are made with regard to containing the shift in the balance of power between directors and shareholders.

Keywords: Division of powers between directors and shareholders; separation of ownership and control; balance of powers between directors and shareholders; removal of directors from office; corporate democracy

1 Introduction

The Companies Act 71 of 2008 (“the Companies Act”) came into force on 1 May 2011. It introduced into South African law a provision that, for the first time, empowers the board of directors to remove a director from office. This provision is contained in section 71(3), and it permits the board, on certain grounds and subject to a right of review,¹ to remove a director from office in certain instances.² Previously, under the repealed Companies Act 61 of 1973, only the shareholders acting in a shareholders’ meeting – and not the board of directors – were statutorily empowered to remove a director from office.³ This article contends that the novel power, conferred by section 71(3) of the Companies Act on the board to remove a director from office, represents a fundamental shift in the balance of power between shareholders and directors. It is further significant that section 66(1) of the Companies Act represents the first instance in South Africa’s company law history of statutorily conferring original powers of management on the board.

This article traces the historical division of powers between the board and the shareholders in both South African law and the law of the United Kingdom (“UK”), which has always had a strong influence on South African company law. The legal position in Australia and in the United States of America (“USA”) is also discussed. In addition, this article explores the historical reasons and the underpinning philosophy

- 1 See s 71(5) of the Companies Act, which allows a director who has been removed from office by the board of directors, or a person who appointed that director as contemplated in s 66(4)(a)(i) of the Companies Act, to apply to a court, within twenty business days, to review the decision of the board.
- 2 These instances are where a shareholder or director has alleged that a director of the company has become ineligible, disqualified, incapacitated, or has neglected or been derelict in the performance of the functions of director.
- 3 It is noteworthy that under s 219(1) of the Companies Act 61 of 1973, a court was empowered to make an order in certain circumstances directing that, for the period specified in the order, a director could not, without the leave of the court, be a director or in any way be concerned with or take part in the management of a company. It was observed by Cilliers & Benade 2002: 126 that s 219 of the Companies Act 61 of 1973 was in “disuse” in South Africa and that there were no reported cases regarding that provision.

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as to why the shareholders, acting formally and collectively, were granted the right to remove one or more directors from office in these jurisdictions. The full implications of the new power conferred by the Companies Act are explored. It is argued that this power has significantly shifted the balance of power and dynamics, not only between the board of directors and the shareholders acting in a shareholders' meeting, but also between the shareholders themselves, and even between the directors *inter se*. Some suggestions are made with regard to containing the shift in the balance of power between directors and shareholders. While a director has a right to challenge his or her removal from office under section 71(4)(b)⁴ of the Companies Act or to apply, under section 71(5) of the Companies Act, for a review of the board's decision to remove him or her from office, and further may have a right to claim damages or other compensation for loss of office under section 71(9) of the Companies Act,⁵ the focus of this article is not on these rights or remedies. Instead, the focus of this article is on the implications of the new power conferred on the board of directors to remove fellow directors from office.

2 The division of powers between directors and shareholders

The common-law division of powers between the board of directors and the shareholders in a general meeting (now called "a shareholders' meeting") must be distinguished from the statutory division of powers. This is discussed below.

2.1 The common-law division of powers

The powers of a company are divided between the board of directors and the shareholders in a shareholders' meeting, and each organ has its own separate sphere of power.⁶ Until the end of the nineteenth century, it was generally accepted that the general meeting was the personification of the company and the supreme organ

4 Section 71(4)(b) of the Companies Act gives the director a reasonable opportunity to make a presentation, in person or through a representative, to the board meeting before the resolution for his or her removal is put to the vote by the board of directors.

5 Section 71(9) confers on a director, who is removed from office under s 71 of the Companies Act, a right to apply to a court for damages or other compensation for loss of office as a director, or for loss of any other office as a consequence of being removed as a director.

6 *Automatic Self-cleansing Filter Syndicate Company Limited v Cuninghame* [1906] 2 Ch 34 (CA); *The Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89 (CA); *Salmon v Quin and Axtens Ltd* [1909] 1 Ch 311 (CA); *John Shaw & Sons (Salford) Ltd v Peter Shaw & John Shaw* [1935] 2 KB 113 (CA) at 134; *Scott v Scott* [1943] 1 All ER 582 (ChD); *Cape United Sick Fund Society v Forrest* 1956 (4) SA 519 (A); *Wessels & Smith v Vanugo Construction (Pty) Ltd* 1964 (1) SA 635 (O) at 637; *Van Tonder v Pienaar* 1982 (2) SA 336 (SE) at 341; *Breckland Group Holdings Ltd v London & Suffolk Properties Ltd* [1989] BCLC 100 (ChD); *Ben-Tovim v Ben-Tovim* 2001 (3) SA 1074 (C) at 1085-1086; *Massey v Wales* (2003) 177 FLR 1 (Austl) at 12.

of the company, and that the directors were simply agents subject to the control of the company (i.e. the shareholders) in general meeting.⁷ Since the powers conferred upon the directors (as the agents) were thought of as having been conferred upon them by the shareholders (as the principals), it was deduced that the directors were subject to the control of the shareholders in general meeting.⁸ The implication was that the shareholders could at any time by ordinary resolution give the directors instructions on how they were to exercise their powers of management.⁹

This view of the superiority of the shareholders appears to be derived from the influence of elements of the law of partnership.¹⁰ Historically, in 1837, there were two principal vehicles used to conduct businesses on a large scale – the corporation and the joint stock company.¹¹ The corporation existed in terms of a Royal Charter¹² or an Act of Parliament¹³ and had a separate legal existence, while the joint stock company was simply a large partnership and did not enjoy a separate legal existence.¹⁴ Joint stock companies were economically the more important vehicle and courts applied the principles of partnership in regulating them.¹⁵ The application of partnership principles to joint stock companies, however, posed difficulties, because typical joint stock companies had hundreds of members, and it was clear that there was no personal relationship between the members, as is the case in a partnership.¹⁶ In order to address these problems, the Joint Stock Companies Act, 1844¹⁷ was enacted. This was the first Companies Act to provide for incorporation by registration, and it empowered the Registrar of Joint Stock Companies to incorporate a company whose documents were registered with him or her.¹⁸ This Act limited the size of partnerships, thus forcing large joint stock ventures to adopt a corporate form.¹⁹ Nevertheless, the courts continued to invoke partnership principles to resolve company law matters

7 *Isle of Wight Railway Co v Tahourdin* (1883) 25 ChD 320 (CA); Cilliers & Benade 2002: 85; Keay 2007: 657; Davies & Worthington 2016: 358.

8 Aickin 1967: 449.

9 Davies & Worthington 2016: 358-359.

10 Aickin 1967: 449.

11 See Grantham 1998: 557, where these two vehicles are discussed.

12 Companies incorporated by a Royal Charter were known as “chartered companies”. The members contributed capital to form the companies’ “joint stock”, which was then managed by governors or directors appointed by the members (see French, Mayson & Ryan 2015: 7).

13 Parliament could create a body corporate by an enactment that referred specifically to that body corporate (French, Mayson & Ryan 2015: 7).

14 Grantham 1998: 557-558; French, Mayson & Ryan 2015: 7.

15 Grantham 1998: 558.

16 *Ibid.*

17 7 & 8 Vict c 110.

18 Kershaw 2012: 489. Registration took place in two stages, namely a provisional registration and a complete registration. The system was revised by the Joint Stock Companies Act of 1856, which introduced a single-stage registration system (see French, Mayson & Ryan 2015: 8).

19 Grantham 1998: 558.

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and a company was still regarded as a peculiar kind of partnership.²⁰ The status of shareholders in company law at the time was that they were the ultimate proprietors of the company, and entailed that they had the right to manage the company and to have the company run for their exclusive benefit.²¹

The superiority of the shareholders was enunciated in one of the first cases dealing with the relative positions of the general meeting and the directors, namely *Isle of Wight Railway Co v Tahourdin*.²² In this case, the directors called a shareholders' meeting on a requisition by the shareholders, but the notice of the meeting issued by the directors did not provide for all the objects of the requisitionists. The requisitionists notified the directors that they would not attend the shareholders' meeting called by the directors, and subsequently issued a notice calling their own meeting. The directors applied for an injunction restraining the requisitionists from calling their own meeting. The court *a quo* granted the injunction, but the UK Court of Appeal reversed the decision, and discharged the injunction. The latter court, per Cotton LJ, held that the company's shareholders in general meeting "undoubtedly [had] a power to direct and control the board in the management of the affairs of the company".²³

*Isle of Wight Railway Co v Tahourdin*²⁴ concerned a company established by an Act of Parliament and subject to the provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict c 16). Section 90 of that Act provided that the directors had powers of management and superintendence of the affairs of the company and that the exercise of such powers was subject to the control and regulation of any general meeting specially convened.²⁵ It follows that the above-quoted statement by Cotton LJ was a reference not to the powers of the general meeting, but to the powers of control expressly conferred on the shareholders by the Companies Clauses Consolidation Act, 1845. Nevertheless, on the strength of *Isle of Wight Railway Co v Tahourdin*,²⁶ the view was held that in relation to all companies, including those incorporated under the then Companies Act, 1862, the position was the same as that prevailing under the Company Clauses Consolidation Act, 1845 and

20 See, for example, *In re Yenidje Tobacco Company Ltd* [1916] 2 Ch 426 (CA), where the UK Court of Appeal, in deciding whether it was just and equitable that a private company be wound up, decided the matter on the basis of the principles that apply to a partnership. The court rationalised its approach on the ground that the company was in substance a partnership in the guise of a private company (at 431-432). See, further, Hill 2000: 42-43 for a discussion of the partnership model of the corporation in the nineteenth century.

21 Grantham 1998: 559; Hill 2000: 42-43.

22 (1883) 25 ChD 320 (CA).

23 *Idem* at 331-332.

24 *Ibid.*

25 See, further, *Automatic Self-cleansing Filter Syndicate Company Limited v Cuninghame* [1906] 2 Ch 34 (CA) at 46, where the Chancery Division discussed s 90 of the Companies Clauses Consolidation Act of 1845.

26 (1883) 25 ChD 320 (CA).

that a company in a general meeting had the power to direct and control the board of directors in relation to the conduct of the company's affairs.²⁷

After the nineteenth century, however, there was a fundamental shift in the perception of the relationship between the general meeting and the directors. The notions that shareholders had the right to override decisions of management, or that the company was conducted for the exclusive benefit of the shareholders, were rejected.²⁸ The general rule developed to rather provide that, unless expressly empowered to do so by the constitution of the company, the shareholders in general meeting could not control the directors' exercise of their powers, nor exercise the powers conferred on the directors.²⁹ Insofar as *Isle of Wight Railway Co v Tahourdin*³⁰ held that the directors are bound by the instructions of the shareholders' meeting in carrying out their functions, this decision was no longer regarded as good law.³¹

In the seminal case of *Automatic Self-cleansing Filter Syndicate Company Limited v Cuninghame*,³² the question before the UK Court of Appeal was whether the shareholders acting in a shareholders' meeting had the power to direct the course of action to be pursued by the directors (*in casu*, that certain assets of the company be sold) or whether the directors could refuse to do what the shareholders in a shareholders' meeting directed them to do. The constitution of the Automatic Self-cleansing Filter Syndicate Company Limited empowered the company to sell its undertaking to another company having similar objects. The directors of the former company were empowered to sell or otherwise deal with any of the company's property on such terms as they might think fit. A resolution was passed by the shareholders of the company for the sale of the company's assets on certain terms to a new company formed for the purpose of acquiring such assets, and directing the directors to carry the sale into effect. The directors were of the opinion that the sale of the company's assets on the proposed terms would not benefit the company. The directors accordingly refused to carry the sale into effect. The UK Court of Appeal held that, on the construction of the constitution of the company itself, which provided that the management of the business and control of the company was vested

27 See Aickin 1967: 451.

28 See Grantham 1998: 560-578, where the gradual attenuation of the rights of shareholders is traced in detail.

29 *Automatic Self-cleansing Filter Syndicate Company Limited v Cuninghame* [1906] 2 Ch 34 (CA); *The Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89(CA); *Salmon v Quin and Axtens Ltd* [1909] 1 Ch 311 (CA); *John Shaw & Sons (Salford) Ltd v Peter Shaw & John Shaw* [1935] 2 KB 113 (CA) at 134; *Scott v Scott* [1943] 1 All ER 582 (ChD); *Breckland Group Holdings Ltd v London & Suffolk Properties Ltd* [1989] BCLC 100 (ChD); Goldberg 1970: 177; Blackman 1975: 286; Sullivan 1977: 569.

30 (1883) 25 ChD 320 (CA).

31 See Cilliers & Benade 2002: 85.

32 [1906] 2 Ch 34 (CA).

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in the directors, the directors could not be compelled to comply with the resolution of the shareholders.³³ The UK Court of Appeal distinguished this case from *Isle of Wight Railway Co v Tahourdin*³⁴ on the basis that the Companies Clauses Act, 1845 was not applicable to the case before it and held that it was therefore not bound by the dictum of this case.³⁵ The court emphatically rejected the notion that directors are merely agents of the general meeting, susceptible to direction by the general meeting on any matter.³⁶

In *The Gramophone & Typewriter Ltd v Stanley*,³⁷ the UK Court of Appeal approved the dictum in *Automatic Self-cleansing Filter Syndicate Company Limited v Cuninghame*³⁸ and asserted that shareholders could not, even by a majority at a general meeting, interfere with the exercise of powers placed in the hands of the directors by the constitution of the company. Buckley LJ stressed that directors are not servants to obey directions given by the shareholders and that they are not agents appointed by and bound to serve the shareholders as their principals.³⁹ To the contrary, Buckley LJ held that directors are persons who may, by the regulations, be entrusted with the control of the business and who may be dispossessed of that control only by the alteration of the company's constitution.⁴⁰

Despite these authorities, the matter was not fully settled. In *Marshall's Valve Gear Co Ltd v Manning, Wardle & Co Ltd*,⁴¹ a different view was adopted. The Chancery Division, per Neville J, asserted that the prevailing principle was that, in the absence of any contract to the contrary, the majority of the shareholders in a company had the ultimate control of its affairs and could assert their rights in a shareholders' meeting.⁴² In spite of this judgement, the UK Court of Appeal in *Salmon v Quin and Axtens Ltd*,⁴³ reverted to the position that it had previously held and adopted the view enunciated in *The Gramophone & Typewriter Ltd v Stanley*,⁴⁴ namely that directors are persons who may – by the regulations – be entrusted with the control of the business and who may be dispossessed of that control only by the alteration of the company's constitution. The UK Court of Appeal, in *Salmon v Quin and Axtens Ltd*,⁴⁵ stated that any other construction would be disastrous, because it

33 *Idem* at 45.

34 (1883) 25 ChD 320 (CA).

35 *Automatic Self-cleansing Filter Syndicate Company Limited v Cuninghame* [1906] 2 Ch 34 (CA) at 46.

36 *Idem* at 42-43.

37 [1908] 2 KB 89 (CA) at 98.

38 [1906] 2 Ch 34 (CA).

39 *The Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89 (CA) at 105-106.

40 *Idem* at 106.

41 [1909] 78 LJ Ch 46 (ChD).

42 *Idem* at 49.

43 [1909] 1 Ch 311 (CA) at 319.

44 [1908] 2 KB 89 (CA) at 106.

45 [1909] 1 Ch 311 (CA) at 319-320.

“might lead to an interference by a bare majority very inimical to the interests of the minority who had come into the company on the footing that the business should be managed by the board of directors”. The dictum in *Marshall’s Valve Gear Co Ltd v Manning, Wardle & Co Ltd*⁴⁶ was not referred to in *Salmon v Quin and Axtens Ltd*,⁴⁷ but counsel for the plaintiff criticised the latter decision as being inconsistent with the principles established in *Automatic Self-cleansing Filter Syndicate Company Limited v Cuninghame*⁴⁸ and *The Gramophone & Typewriter Ltd v Stanley*.⁴⁹

Thereafter, the relationship between the board of directors and the general meeting was regarded as having been settled by the UK Court of Appeal.⁵⁰ The relationship between directors and shareholders is succinctly expressed by the UK Court of Appeal in *John Shaw & Sons (Salford) Ltd v Peter Shaw & John Shaw*⁵¹ as follows:

If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove.

In *Scott v Scott*,⁵² the Chancery Division said that the division of powers between the shareholders and directors is important even in the case of family companies. That court held that a resolution of shareholders purporting to interfere with the management of directors was invalid.⁵³ The Privy Council emphasised in *Howard Smith Ltd v Ampol Petroleum Ltd*⁵⁴ that the majority of shareholders cannot control directors in the exercise of their management powers while they remain in office. In *Breckland Group Holdings Ltd v London & Suffolk Properties Ltd*,⁵⁵ the Chancery Division held that the jurisdiction to conduct the business of the company was vested in the board of directors, and that the shareholders in a shareholders’ meeting could not intervene in such matters.

46 [1909] 78 LJ Ch 46 (ChD).

47 [1909] 1 Ch 311 (CA).

48 [1906] 2 Ch 34 (CA).

49 [1908] 2 KB 89 (CA). See *Salmon v Quin and Axtens Ltd* [1909] 1 Ch 311 (CA) at 315.

50 See Aickin 1967: 458.

51 [1935] 2 KB 113 (CA) at 134. See *James North (Zimbabwe) (Pvt) Ltd v Mattinson* 1990 (2) SA 229 (ZH) at 237, where the Zimbabwe High Court approved of this dictum.

52 [1943] 1 All ER 582 (ChD).

53 *Idem* at 584-585. For an analysis of the relationship between the board of directors and the general meeting and for a defence of the dictum in *Marshall’s Valve Gear Co Ltd v Manning, Wardle & Co Ltd* [1909] 78 LJ Ch 46(ChD), see Goldberg 1970: 177 and Sullivan 1977: 569. See, also, Blackman 1975: 286-290 for a further analysis of the distribution of powers in a company.

54 [1974] AC 821 (PC) at 837.

55 [1989] BCLC 100 (ChD) at 106.

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The distribution of power between the board of directors and the shareholders in South African law has been influenced by the position adopted by the UK courts. For instance, with regard to a friendly association endowed with legal personality under the common law, the Appellate Division in *Cape United Sick Fund Society v Forrest*⁵⁶ approved and applied the principle of the division of powers between managing bodies and a meeting of members. The Appellate Division further approved the principles established in *Salmon v Quin and Axtens Ltd*⁵⁷ and *John Shaw & Sons (Salford) Ltd v Peter Shaw & John Shaw*.⁵⁸ In *Wessels & Smith v Vanugo Construction (Pty) Ltd*,⁵⁹ the Orange Free State High Court stated, with reference to and with approval of the decision in *Scott v Scott*,⁶⁰ that it had already been held that an article in the constitution of a company, which provided that the business of the company shall be managed by the directors, entailed that the entire management of the company rests solely in the hands of the directors. The court consequently stated that any resolution by the company in a shareholders' meeting purporting to interfere with this management, was invalid.⁶¹ In *Van Tonder v Pienaar*,⁶² the South-Eastern Cape High Court relied on and agreed with *John Shaw & Sons (Salford) Ltd v Peter Shaw & John Shaw*⁶³ that if powers of management are vested in the directors, they and they alone can exercise those powers.

More recently, in *LSA UK Ltd (formerly Curtin Ltd) v Impala Platinum Holdings Ltd*,⁶⁴ the Supreme Court of Appeal ("SCA") affirmed the general position enunciated in *John Shaw & Sons (Salford) Ltd v Peter Shaw & John Shaw*.⁶⁵ The

56 1956 (4) SA 519 (A). The members of the Cape United Sick Fund Society had requested the board of management of the society to convene a special general meeting to consider certain resolutions that had the effect of conferring power on a body other than the board of management, of empowering a body other than the board of management to obtain legal advice, and of suspending the payment of *honoraria* to members of the board of management. The board of management refused to convene such a meeting. The members of the society issued a declaration claiming an order directing the board to convene such a meeting or alternatively authorising the members to call the meeting in the name of the society. The society and the members of the board excepted to the declaration as disclosing no cause of action in that under the society's constitution it would not be competent for the special general meeting to pass the proposed resolution, or, if the resolutions were passed, they would have no force or effect. The Appellate Division held that all the resolutions proposed to be moved would be *ultra vires* the constitution of the society, and that the board was accordingly entitled to refuse to convene the meeting.

57 [1909] 1 Ch 311 (CA) at 319.

58 [1935] 2 KB 113 (CA) at 134. See *Cape United Sick Fund Society v Forrest* 1956 (4) SA 519 (A) at 540.

59 1964 (1) SA 635 (O) at 637.

60 [1943] 1 All ER 582 (ChD).

61 *Wessels & Smith v Vanugo Construction (Pty) Ltd* 1964 (1) SA 635 (O) at 637.

62 1982 (2) SA 336 (SE) at 341.

63 [1935] 2 KB 113 (CA) at 134.

64 2000 JDR 0187 (SCA).

65 [1935] 2 KB 113 (CA) at 134.

court affirmed that the board of directors and the general meeting are both organs of the company, each having its own original powers, and that the directors do not receive their powers as agents of the company.⁶⁶ Accordingly, the court held, in the absence of a contrary provision in the constitution of the company, that even a unanimous resolution of the general meeting does not override the directors' powers.⁶⁷ The SCA said that it is possible for the board and the general meeting to have concurrent powers, but stated that courts are disinclined to treat managerial and executive powers as concurrent and that, unless the constitution provides otherwise, these powers are exercisable exclusively by the directors.⁶⁸ In *Ben-Tovim v Ben-Tovim*,⁶⁹ the Cape High Court acknowledged that the "pendulum of the division of powers between the general meeting and the board of directors has through the years swung from the general meeting as the supreme organ to prominence of the articles of association".

2 2 The statutory division of powers

Under neither the Companies Act 46 of 1926,⁷⁰ nor the Companies Act 61 of 1973, did directors have original powers. Their powers were delegated to them by the shareholders in the then articles of association of the company. A typical provision in the articles of association under the Companies Act 61 of 1973 adopted article 59 of Table A (articles for a public company having a share capital) or article 60 of Table B (articles for a private company having a share capital), which reads as follows:

The business of the company shall be managed by the directors who may pay all expenses incurred in promoting and incorporating the company, and may exercise all such powers of the company as are not by the Act, or by these articles, required to be exercised by the company in general meeting, subject to these articles, to the provisions of the Act, and to such regulations, not inconsistent with the aforesaid articles or provisions, as may be prescribed by the company in general meeting, but no regulation prescribed by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

It is evident from the above provision that, under the Companies Act 61 of 1973, the power to manage the company's affairs had to be delegated to the board of directors by the shareholders in general meeting or by the articles of association of the company. If no powers were granted to the board of directors by the articles of

⁶⁶ *LSA UK Ltd (formerly Curtainz Ltd) v Impala Platinum Holdings Ltd* 2000 JDR 0187 (SCA) at 38.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ 2001 (3) SA 1074 (C) at 1085-1086.

⁷⁰ See art 83 of Table A (Regulations for Management of a Company Limited by Shares) contained in Schedule 1 of the Companies Act 46 of 1926.

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association, the board would be powerless to act and the company could act only through its shareholders.⁷¹

Section 66(1) of the current Companies Act represents a fundamental change in the philosophy of the balance of power between the directors and shareholders. The section provides as follows:

The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

With the enactment of section 66(1) of the Companies Act, original power to manage the business and affairs of the company has, for the first time, been statutorily granted to the board of directors.⁷² As the Western Cape High Court in *Pretorius v PB Meat (Pty) Ltd*,⁷³ *Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd*⁷⁴ and *Kaimowitz v Delahunt*⁷⁵ affirmed, in terms of the Companies Act, the “ultimate” power to manage the affairs of a company resides with the board of directors, and not with the shareholders (unless otherwise provided in the Companies Act or the Memorandum of Incorporation of the company). Since the board's power of management is derived from statute and not from the constitution of the company, as was previously the case, it is now to a lesser extent subject to shareholder control.⁷⁶

In contrast, the UK's Companies Act, 2006 does not contain a provision conferring management power on the board of directors. Instead, the distribution of decision-making power between the board of directors and the shareholders is determined by the constitution of the company. Article 3 of the Model Articles for Private Companies Limited by Shares and article 3 of the Model Articles for Public Companies state that “[s]ubject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company”. Article 4 of both Model Articles for private and public companies confers on shareholders the power, “by special resolution, to direct the directors to take, or refrain from taking, specified action”. In UK company law, the regulation of the internal affairs of the company by means of rules laid down in the company's constitution is known as the contractarian model, as “English

71 See Kershaw 2012: 191-192.

72 *Pretorius v PB Meat (Pty) Ltd* [2013] ZAWCHC 89 para 25. See, further, on s 66(1) of the Companies Act: *Kaimowitz v Delahunt* 2017 (3) SA 201 (WCC) paras 12-13; Delpont 2011: 250(1)–262(5); Havenga 2013: 262; Esser & Delpont 2016: 8-10; and Oosthuizen & Delpont 2017: 244.

73 [2013] ZAWCHC 89 para 25.

74 [2014] JOL 32101 (WCC) para 31.

75 2017 (3) SA 201 (WCC) para 12.

76 Havenga 2013: 262.

model companies” or as the “memorandum and articles” model of companies.⁷⁷ The constitution of this type of corporation is regarded as a contract between all of the shareholders and the company itself.⁷⁸ The fact that it is left to the articles of association to determine the distribution of decision-making power between the board of directors and the shareholders, indicates that, in the UK, the originating power of the company lies with the shareholders acting in general meeting, and not with the directors, and it is, accordingly, a shareholder-centric approach.⁷⁹ The directors are not granted managerial powers by statute, but such powers must come from the shareholders by way of a delegation of authority.⁸⁰ The shareholders may alter the initial distribution of power, which was delegated to the board of directors by the articles of association, by passing a special resolution to amend such articles of association.⁸¹ This swings the balance of power in the UK in favour of the shareholders, rather than of the board of directors.

The South African Companies Act of 2008 has clearly moved away from the approach regarding the distribution of power to the board of directors adopted by the Companies Act 61 of 1973 and by the UK. Instead, it now follows the approach adopted in the USA. A long-standing principle of corporate law in the USA is that the power to manage the company is conferred on the board of directors by statute. Section 8.01(b) of the Revised Model Business Corporation Act of 1984 (“MBCA”) states that corporate powers are exercised by, or under the authority of, the board of directors, and that the business and affairs of the corporation are managed by, or under the direction of, its board of directors. This approach is director-centric and is known as the division of powers model, because the statute explicitly divides powers between shareholders and directors.⁸² This approach does, however, retain flexibility in that default rules may be changed by the company’s constitution.⁸³ Likewise, section 141(a) of the Delaware General Corporation Law (Title 8, Chapter 1 of the

77 Kershaw 2012: 85-93; Bruner 2013: 35-36; Davies & Worthington 2016: 65; Oosthuizen & Delpont 2017: 232-233.

78 See s 33(1) of the UK’s Companies Act, 2006, which states that the provisions of a company’s constitution bind the company and its members to the same extent as if they were covenants on the part of the company and of each member to observe those provisions.

79 Cools 2005: 738-739; Kershaw 2012: 191; Bruner 2013: 32; Oosthuizen & Delpont 2017: 232-233.

80 Kershaw 2012: 191-192; Bruner 2013: 36.

81 See s 21 of the UK’s Companies Act, 2006, which states that a company may amend its articles of association by special resolution.

82 See Bruner 2013: 36-65; and Davies & Worthington 2016: 59 for a further discussion of this model.

83 The default rules may be changed in terms of an agreement authorised under s 7.32 of the MBCA or in terms of any limitation in the articles of incorporation permitted by s 2.02(b) of the MBCA. Section 7.32 of the MBCA deals with shareholder agreements and permits such agreements to restrict the discretion or powers of the board of directors. In terms of s 2.02(b)(iii) of the MBCA, the articles of incorporation may set forth provisions not inconsistent with the law on defining, limiting and regulating the powers of the corporation, its board of directors and its shareholders.

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Delaware Code) (“DGCL”) states that the business and affairs of every corporation shall be managed by, or under the direction of, a board of directors (except as otherwise provided in its certificate of incorporation). In *Aronson v Lewis*,⁸⁴ the Supreme Court of Delaware emphasised that a cardinal precept of the DGCL is that directors, rather than shareholders, manage the business and affairs of the corporation.

Under the Corporations Act 2001 of Australia, the management of the business of a company is a matter for the company’s directors, and shareholders do not possess the power to make management decisions.⁸⁵ Section 198A(1) of that Act states that the “business of a company is to be managed by or under the direction of the directors”.⁸⁶ It should be noted, however, that section 198A is a replaceable rule, meaning that it may be ousted or modified by the constitution of the company.⁸⁷ In terms of section 198A(2) of the same Act, the powers of the directors may be curtailed by the Australian Corporations Act of 2001 or by the company’s constitution.⁸⁸

In accordance with the approach adopted by section 8.01(b) of the MBCA and section 198A(2) of the Australian Corporations Act of 2001, the powers conferred on directors by section 66(1) of the South African Companies Act of 2008 may be curtailed by the latter Act or by the Memorandum of Incorporation of the company. The shareholders may amend the Memorandum of Incorporation by means of a special resolution or by means of any other requirements set out therein.⁸⁹ The shareholders are thus not without power and are able to curtail the powers of the board of directors in the Memorandum of Incorporation, and to amend it by means of a special resolution or by complying with any other requirements set out in the Memorandum of Incorporation regarding its amendment. There are, however, limitations to the exercise of this power by the shareholders in that (i) a special resolution to amend the Memorandum of Incorporation must be proposed by shareholders entitled to exercise at least 10 per cent of the voting rights that may be exercised on the resolution;⁹⁰ (ii) the threshold for passing a special resolution

84 473 A 2d 805 (Del 1984) at 811.

85 See, further, *Massey v Wales* (2003) 177 FLR 1 (Austl) at 12.

86 Despite the presence of s 198A(1) in the Australian Corporations Act of 2001, this statute is shareholder-centric to a large degree, as is the position under the company law in the UK, on which Australian company law is historically rooted. For a further discussion of the approach adopted in Australia, see Bruner 2013: 66-77; and Austin & Ramsay 2015: 1-2.

87 See s 135 of the Australian Corporations Act of 2001 on replaceable rules. In terms of s 135(2), a provision of a section or of a subsection that applies to a company as a replaceable rule may be displaced or modified by the company’s constitution.

88 Section 198A(2) of the Australian Corporations Act of 2001 states as follows: “The directors may exercise all the powers of the company except any powers that this Act or the company’s constitution (if any) requires the company to exercise in general meeting.”

89 See s 16(1) of the Companies Act of 2008.

90 *Idem* s 16(1)(c)(i)(bb).

may be increased in terms of section 65(10) of the Companies Act;⁹¹ and (iii) in terms of section 16(2) of the Companies Act, more onerous requirements to amend a company's Memorandum of Incorporation than that set out in section 16(1)(c)(i) may be specified in the company's Memorandum of Incorporation. Thus, while the shareholders have the power to curtail the powers of the board of directors in the Memorandum of Incorporation and to amend the Memorandum of Incorporation in order to do so, there are some important limitations to the exercise of this power by the shareholders.

To summarise, since the Companies Act of 2008 determines that the power to manage the business and affairs of the company is derived from statute and not from the constitution of the company and that this power no longer needs to be delegated to the board of directors by the shareholders, the power of the directors is subject to shareholder control to a much lesser extent than was the case under the Companies Act 61 of 1973. The new Companies Act has moved away from the contractarian model adopted in the UK, to the division-of-powers model adopted in the USA and Australia in that the allocation of powers is sourced in legislation, save where it is changed by the constitution of the company. It is evident that under the Companies Act, the balance of power has shifted away from the shareholders and that it now lies in favour of the board of directors.

3 The separation of ownership and control

In many small private companies the directors and the shareholders are often the same persons. In larger companies though, as famously documented by Berle and Means in their landmark study in 1932,⁹² ownership and control of companies do not vest in the same persons. Berle and Means argue that ownership and control of a large company are split, in that the control of a company vests in the hands of the managers of the company – being the board of directors – while “ownership” of the company vests in the shareholders.⁹³ The effect of the split in ownership and control is that a large body of shareholders has been created who exercise virtually no control over the wealth that they have contributed to the enterprise, while the ownership

91 Under s 65(10) of the Companies Act, a company's Memorandum of Incorporation may permit a different percentage of voting rights to approve any special resolution or one or more different percentages of voting rights to approve special resolutions concerning one or more particular matters.

92 Berle & Means 1947.

93 *Idem* at 4. The divorce of ownership from control is the central theme in this classic work of Berle and Means. Written in 1932, Berle and Means envisaged that, over time, there would be an increase in the size of the modern corporation and in the concentration of the economy, leading to a growing dispersion of share ownership and an exaggerated separation of ownership and control. See, further, Hill 2000: 39; Esser & Havenga 2008: 74; Steyn & Stainbank 2013: 316; French, Mayson & Ryan 2015: 433-434; Austin & Ramsay 2015: 238; and Davies & Worthington 2016: 412-413.

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interest held by the controlling group, being the directors, is only a decidedly small fraction of the total ownership of the company.⁹⁴

It is important to note at the outset that it is misleading to describe the shareholders as the “owners” of the corporation. Shareholders do not “own” a company; instead, they own shares in the company, which gives them certain legal rights. The property and assets of the company belong to the company itself and not to the shareholders.⁹⁵ While a shareholder may be financially interested in the success or failure of a company because he or she is entitled to a share in the distribution of the surplus assets when a company is liquidated, this does not mean that he or she has any legal right or title to any assets of the company.⁹⁶ It may be that in small private companies where one shareholder or a restricted number of shareholders hold the shares in the company, such shareholders would exercise more control over the company compared to a public company, in which the shareholding is widely dispersed. It would nonetheless be both factually and legally incorrect to refer even to these shareholders as “owners of a company”.⁹⁷ The “shareholder/ownership” model was the basis of Berle and Means’ work and much of the work that succeeded it, and continues to command much support in practice.⁹⁸ For purposes of this article, the metaphor of shareholders as the “owners” of the company will be used. However, one must bear in mind that this metaphor is not legally or factually accurate, because the owners of the *capital* of the company are not the owners of the *company* itself.

For decades, large public companies have issued increasing numbers of shares in order to raise capital for growth and expansion. This has had the effect of causing fragmentation of share ownership in public companies. Shareholders in large public companies have also become widely dispersed or geographically scattered. In

94 Berle & Means 1947: 5. On the separation of ownership and control, see, generally, Sullivan 1977: 579; Fama & Jensen 1983: 301; Pinto 1998: 317-346; Hill 2000: 39; Mongalo 2003: 179-186; Esser & Havenga 2008: 74; Steyn & Stainbank 2013: 316; Austin & Ramsay 2015: 238; French, Mayson & Ryan 2015: 433-434; Hannigan 2016: 183-186; and Esser & Delport 2016: 8-10.

95 *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550-551; *Macaura v Northern Assurance Co Ltd* [1925] AC 619 (HL (Ir)); *Stellenbosch Farmers’ Winery Ltd v Distillers Corporation (SA) Ltd* 1962 (1) SA 458 (A) at 471-472; *The Maritime Trader* [1981] 2 Lloyd’s Rep 153 (Adm); *Francis George Hill Family Trust v South African Reserve Bank* 1992 (3) SA 91 (A) at 102; *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 (1) SA 550 (A) at 565-566; *Hughes v Ridley* 2010 (1) SA 381 (KZP) para 22; *Prest v Prest* [2013] 1 All ER 795 (CA) para 101.

96 *Stellenbosch Farmers’ Winery Ltd v Distillers Corporation (SA) Ltd* 1962 (1) SA 458 (A) at 471-472.

97 Stout 2007: 804; Mongalo 2004: 98.

98 Ferran 1999: 131-132. See, generally, Stigler & Friedland 1982: 237; Hill 2000: 39; Bratton 2001: 737-741; Mongalo 2003: 184-186; Esser & Havenga 2008: 74; Steyn & Stainbank 2013: 316; French, Mayson & Ryan 2015: 433-434; Austin & Ramsay 2015: 239; and Davies & Worthington 2016: 412-413.

general, the larger the company, the greater the probability that its ownership will be diffused among a multitude of individuals.⁹⁹ Thus ownership and wealth have come to reside less and less in one person.¹⁰⁰

As Berle and Means explain, ownership of wealth without appreciable control, and control of wealth without appreciable ownership, appear to be the logical outcome of corporate development.¹⁰¹ This has the effect that no single shareholder or group of shareholders is able to exercise effective control over the directors. In a large public company, and particularly in a listed company, each shareholder usually owns only a minute fraction of the shares in a company, which means that no one shareholder is in a position to exert control of the company by way of voting in shareholders' meetings.¹⁰² Thus the power and responsibility of ownership is in effect transferred to a separate group who, in reality, have true control.¹⁰³

The separation of ownership and control creates a potential divergence between the interests of the shareholders and the directors, and leads to the problem that the directors do not necessarily act in the best interests of the shareholders when they manage a company.¹⁰⁴ This goal-divergence problem is referred to as the "agency problem" or as "agency costs".¹⁰⁵ In large companies, the principals are not capable of exercising day-to-day control over the affairs of the company. Accordingly, they appoint directors to act as their agents, but, because the ownership of a company is separated from its control, the interests of the principals and the agents are not identical. The directors may well pursue activities that benefit themselves rather than the shareholders of the company. In order to limit the activities of the agent that serve to favour his or her own interests, the principal will establish appropriate incentives for the agent, and incur monitoring costs, which are aimed at limiting the aberrant activities of the agent.¹⁰⁶

99 Berle & Means 1947: 52.

100 *Idem* at 69.

101 *Ibid.*

102 Mongalo 2003: 184.

103 Berle & Means 1947: 68.

104 Esser & Havenga 2008: 76.

105 From an economic perspective, shareholders are regarded as the "principals" and directors are regarded as the "agents". From a legal perspective, although the relationship of a director to a company is, in some respects, analogous to that of an agent, this description is not entirely accurate in law. Directors are analogous to agents in that they act for the benefit of another person, being the company, and when they contract on behalf of the company they do not incur liability unless they act outside their power, or expressly or impliedly assume liability. In *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 216-217, the then Appellate Division stated that while it is true that the board of directors is the agent of the company to manage its affairs, each individual director is not as such an agent of the company. See, further, on the agency problem, Jensen & Meckling 1976: 309; Fama & Jensen 1983: 301; Roach 2001: 11; Mongalo 2003: 186; Kershaw 2012: 171-188; Steyn & Stainbank 2013: 317; Austin & Ramsay 2015: 239.

106 Jensen & Meckling 1976: 308.

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The concept of separation of ownership and control, as advocated by Berle and Means in 1932, has been strongly influential in analysing the structure and inner workings of a company. However, in modern times, certain qualifications to this concept may be required. For instance, it may be too simplistic to assume that there is necessarily complete separation of ownership and control in all large public companies, such as where the founders of a company retain a large proportion of the company's share capital after the company has been listed and are thus still able to exercise effective control over the company in their capacity as shareholders.¹⁰⁷ Herman argues that Berle and Means overstated the loss of power of the shareholders and the separation and discretion of managers.¹⁰⁸

A further qualification to Berle and Means' thesis is the fact that not all shareholders today are small private investors. There has been a significant increase in the number of institutional investors. Institutional investors may hold a sufficiently large shareholding in a company to be able to influence directors directly, and therefore to have a potentially strong monitoring role.¹⁰⁹ If institutional investors were to act together and share agency costs, they would be a powerful monitor of the performance of directors.¹¹⁰ Nonetheless, institutional investors may not be as influential as one might hope, because, in an attempt to diversify their share portfolio and obtain quick financial gains, institutional shareholders generally own shares in a large number of companies and are thus not able to wield real control in any one of the companies in which they invest.¹¹¹

It must be conceded that shareholders in modern times are no longer as powerless as they were during the time of Berle and Means. For instance, individual shareholders in the 1930s did not have an instantaneous means of communication with each other, but in present times, with modern technology, shareholders are able to communicate with each other faster, easier and with less expense, and consequently to act together to exert influence on boards of directors.¹¹² For example, under section 63(2) of the Companies Act, unless prohibited by its Memorandum of Incorporation, a company may provide for a shareholders' meeting to be conducted entirely by electronic communication or for one or more shareholders or proxies for shareholders to participate by electronic communication in a shareholders' meeting that is being held in person. Under section 61(10) of the Companies Act, every shareholders' meeting of a public company must be reasonably accessible within South Africa for electronic participation by shareholders in the manner contemplated

107 Ferran 1999: 117-118.

108 Herman 1981: 258.

109 Austin & Ramsay 2015: 239.

110 *Ibid.*

111 Mongalo 2004: 99; Keay 2007: 665.

112 Stout 2007: 807.

in section 63(2) of the same Act, irrespective of whether the meeting is held in South Africa or elsewhere.¹¹³

The qualifications to the concept of separation of ownership and control as propounded by Berle and Means do not detract from the fact that, in general, and particularly in large companies, there still remains a separation of ownership and control between directors and shareholders. The degree of separation of the ownership and control between directors and shareholders varies from company to company.

4 Shareholders' power to remove directors from office

In 1945, the Cohen Committee recommended that shareholders be given "greater powers to remove directors with whom they are dissatisfied".¹¹⁴ This recommendation formed the underlying rationale of section 184 of the UK's Companies Act, 1948.¹¹⁵ The purpose of that provision was to strengthen shareholder control over management by conferring the power on the shareholders to remove a director from office by means of an ordinary resolution, notwithstanding any provisions in the constitution of the company.¹¹⁶

In a similar vein, in order to promote the policy of giving shareholders a greater say in the management of a company and to increase the control that shareholders could exercise over directors, section 69*ter* of the SA Companies Act 46 of 1926, in 1952, in an amendment to that Act, conferred on shareholders the power to remove directors from a company.¹¹⁷ This latter provision was based on section 184 of the UK's Companies Act, 1948.¹¹⁸ The SA Companies Act 61 of 1973, in section 220,

113 Despite shareholders having the option to participate in meetings electronically, in practice they do not necessarily do this. There is still some expense for shareholders to do so, particularly since the access to the means of electronic communication is at the expense of the shareholder or proxy, unless the company determines otherwise (s 63(3)(b) of the Companies Act).

114 Report of the Committee on Company Law Amendment (Cmnd 6659) Jun 1945 para 130.

115 See Prentice 1969: 693. Section 184(1) of the UK's Companies Act, 1948 stated as follows: "A company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its articles or in any agreement between it and him: provided that this subsection shall not, in the case of a private company, authorise the removal of a director holding office for life on the eighteenth day of July, nineteen hundred and forty-five, whether or not subject to retirement under an age limit by virtue of the articles or otherwise."

116 Hill 2010: 354.

117 Henochsberg 1953: 151. Section 69*ter* of the Companies Act 46 of 1926 was inserted in 1952 by s 43 of the Companies Amendment Act 46 of 1952. Section 69*ter*(1) stated as follows: "A company may by ordinary resolution remove a director before the expiration of office, notwithstanding anything in its articles or in any agreement between it and him: Provided that this sub-section shall not, in the case of a private company, authorize the removal of a director holding office for life on the thirteenth day of June, 1949."

118 *Amoils v Fuel Transport (Pty) Ltd* 1978 (4) SA 343 (W) at 346-347.

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likewise conferred on shareholders the power to remove directors from a company, notwithstanding the provisions of the company's memorandum and articles of association.¹¹⁹

In line with the recommendation of conferring greater powers on shareholders to remove directors with whom they are dissatisfied, the Supreme Court of Delaware in *Unocal Corp v Mesa Petroleum Co*¹²⁰ stated that “[i]f the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out”. The same court likewise stated in *Aronson v Lewis*¹²¹ that a stockholder is not powerless to challenge director action that results in harm to the corporation, and that the machinery of corporate democracy is a potent tool to redress the conduct of a “torpid or unfaithful management”.

Furthermore, the shareholders' power to remove directors of a company enhances the ability of shareholders to control the disposition of their investment in the company.¹²² Additionally, it serves to enhance the accountability of directors. If shareholders have removal rights, directors would know that the shareholders may exercise their right to remove them from office if they behave in an incompetent manner or engage in self-serving, opportunistic behaviour.¹²³ Since directors exercise significant discretion over the affairs of the company, it is important for them to have a reason to serve the interests of shareholders.¹²⁴ The threat of removal by the shareholders would provide directors with such a strong reason to serve the interests of the shareholders.¹²⁵

In light of the effects of the separation of power and control in a company, the power granted to the shareholders to remove directors is a critical tool in the hands of shareholders; it strikes a balance between the directors' powers of management on the one hand and the shareholders' powers of control on the other.¹²⁶ If the shareholders are displeased with the manner in which the company is being run, they have the right to exercise their ultimate power of control by removing the directors from office.¹²⁷ Therefore, the power conferred on shareholders to remove directors serves to balance the attenuated power of control of shareholders with the power of directors to manage the company, and constitutes a form of corporate democracy.¹²⁸

119 Section 220(1)(a) of the Companies Act 61 of 1973 provided as follows: “A company may, notwithstanding anything in its memorandum or articles or in any agreement between it and any director, by resolution remove a director before the expiration of his period of office.”

120 493 A 2d 946 (Del 1985) at 959.

121 473 A 2d 805 (Del 1984) at 811.

122 Bailey 1974: 86.

123 Kershaw 2012: 220.

124 Bebchuk 2007: 680.

125 *Ibid.*

126 Cartoon 1980: 17.

127 *Idem* at 18.

128 Sirodova-Paxson 1999: 11.

The conferral of this power is rooted in the separation of ownership and control (particularly in public companies) and, provided that shareholders choose to exercise these powers, they are of fundamental importance in the control of a company.

It is evident from the above discussion that the underpinning philosophy of our corporate law regime is that the shareholders' right to remove directors from office is both elementary and necessary, and that it is a key provision of modern company law.¹²⁹ Section 71(1) of the Companies Act confers this right on shareholders by stating that a director may be removed by an ordinary resolution adopted at a shareholders' meeting by the persons entitled to exercise voting rights in an election of that director. No reasons are required for the removal of a director by the shareholders. This power granted to shareholders in terms of this provision applies despite anything to the contrary in a company's Memorandum of Incorporation or rules, or in any agreement between a company and a director, or between any shareholders and a director.

5 Impact of the board's power to remove a director from office

The conferral of the removal power on the board of directors has had an impact not only on the shareholders of a company, but also on the board of directors itself. The extent of this impact is discussed below.

5 1 Impact on the shareholders of the company

Even though the Companies Act has now also granted the right to remove directors from office to the board of directors, this does not mean that the power of removal has been withdrawn from the shareholders. Section 71(1) of the Companies Act preserves the right of shareholders to remove directors from office. Accordingly, under the same Act, the right to remove a director is exercisable by both the shareholders and the directors. This accords with the reasoning in the US case of *Auer v Dressel*,¹³⁰ where the New York Court of Appeals held that even if the board of directors of a company is authorised to remove any director, this would not be an abdication by the shareholders of their inherent right to remove the directors, but rather, that it provides an additional method of removing the directors. Were this not so, the court said, the shareholders might find themselves without an effective remedy in a case where a majority of the directors were accused of wrongdoing and would be unwilling to remove themselves from office.¹³¹

A few examples when it may be beneficial for the board of directors to exercise the power of removal, are:

129 Cartoon 1980: 17.

130 118 NE 2d 590 (NY 1954) at 593.

131 *Ibid.*

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- When the shareholders who wish to remove an incompetent or miscreant director from office do not have a sufficient majority to remove that director from office.¹³²
- When the shareholders do not wish to remove a particular director from office despite his or her wrongdoing, because they believe that he or she is bringing in profits for the company, when in fact such director is a liability and is exposing the company to potential legal action.
- When the shareholders fail to remove a director from office because they are not convinced by the reasons advanced by the board of directors to remove the particular director from office.
- When the board of directors suspects that a director is passing on confidential information to a competitor, or is engaged in ethically questionable activity that will reflect poorly on the company, and they do not wish to disclose to the shareholders such wrongdoing by one of their members for fear that this may expose the company to potential legal action.¹³³ Such matters ought to be disclosed to the shareholders, but the board may be concerned that if they disclose this information to the shareholders the latter may institute legal action against them.¹³⁴

Despite the merits of conferring the power of removal on the board of directors, such conferment is not consistent with the above-mentioned rationale of originally granting shareholders the right to remove directors, namely to give the shareholders more power over the directors because the separation of ownership and control resulted in attenuated shareholder control. As discussed earlier, conferring on shareholders the power to remove directors from office gives directors a strong incentive to focus on the interests of shareholders. One other effect of conferring the power of removal on the board of directors, is that directors would be inclined to focus on the interests of the board of directors as well, which may have the effect of diluting their incentive to focus only on the interests of the shareholders and to follow the line of action preferred by the shareholders.

In terms of section 66(4)(b) of the Companies Act, the Memorandum of Incorporation of a profit company (other than a state-owned company) must provide for the election by shareholders of at least 50 per cent of the directors and 50 per cent of any alternate directors. The shareholders therefore have a right to appoint at least half of the directors on the board. As a general rule, shareholders may vote for a director in their own interests; they are under no obligation or duty to choose the person most suitable to be a director.¹³⁵ This is because it is well established that a

132 Knight 2007: 362.

133 McConvill 2005: 210.

134 *Ibid.*

135 See the UK cases of *Re Harmer (HR) Ltd* [1959] 1 WLR 62 (CA) at 82; and *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187 (PC) at 221.

shareholder's right to vote is a proprietary right.¹³⁶ In many instances, the directors appointed by the shareholders are the representatives of the shareholders. If the board of directors were to remove from office one of these shareholder representatives, this would result in the shareholder control over the board of directors being attenuated, and would further shift the balance of power between the board of directors and the shareholders.

It is submitted that the removal of a shareholder representative from the board of directors by the directors would have an effect on the balance of power not only between the board of directors and the shareholders, but also between the shareholders themselves. For instance, if the board of directors removes from office a director who is a representative of the minority shareholders, this would shift the equilibrium between the majority and minority representatives on the board¹³⁷ and consequently between the majority and minority shareholders.

This possible power shift is further exacerbated by the fact that directors have the right to fill vacancies on the board of directors.¹³⁸ If a vacancy arises on the board of directors, it must be filled by a new appointment if the director had been appointed by a person named or determined in terms of the Memorandum of Incorporation,¹³⁹ or by a new election.¹⁴⁰ The new election must be conducted at the next annual general meeting of the company (if applicable); or in any other case, within six months after the vacancy arose, at a shareholders' meeting called for the purpose of electing a director; or by a written polling of the shareholders who are entitled to vote in the election of that director.¹⁴¹ In terms of section 68(3) of the Companies Act, unless the Memorandum of Incorporation of a profit company provides otherwise, the board of directors is empowered to appoint a person – who satisfies the requirements for election as a director – to fill a vacancy on the board and to serve as a director of the company on a temporary basis until the vacancy has been filled by election. During this temporary period, the director so appointed has all the powers, functions and duties and is subject to all the liabilities of any other director of the company.¹⁴²

The board of directors of a profit company may remove a minority shareholder representative from the board and fill the vacancy, albeit on a temporary basis, with a director whom they favour. As the court in the US case of *Bruch v National*

136 *Pender v Lushington* (1877) 46 LJ Ch 317 (ChD); *Re Harmer (HR) Ltd* [1959] 1 WLR 62 (CA) at 82; *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 680; *Desai v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A) at 519; *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187 (PC) at 221; *CDH Invest NV v Petrotank South Africa (Pty) Ltd* [2018] 1 All SA 450 (GJ) para 44.

137 Sirodova-Paxson 1999: 48.

138 *Ibid.*

139 Section 66(4)(a)(i) of the Companies Act.

140 *Idem* s 70(3).

141 *Idem* s 70(3)(b)

142 *Idem* s 68(3).

*Guarantee Credit Corp*¹⁴³ stated, the “law does not look with disfavor on the policy of securing to minority stockholders a right of representation on the board of directors”. Accordingly, as stated above, the power granted to directors to fill vacancies on the board of directors has an impact not only on the balance of power between the directors and the shareholders, but also on the balance of power between the majority and minority shareholders.

5.2 Impact on the board of directors

It is submitted that the board’s power of removal of directors also has an impact on the dynamics of the board of directors itself. Such power may have the effect of inhibiting or hindering free and open discussion and debate in board meetings. A director may hesitate to express a dissenting opinion at a board meeting for fear of removal by his or her peers, or a dissident director may simply toe the line in order to preserve his or her position on the board. If directors fail to engage in discussion and debate in board meetings, or fail to question decisions to be made with regard to the company for fear of removal, this would negatively impact on the company and on the shareholders. A concern of removal may also create an environment where directors are so intimidated by the risks of removal that they feel stifled and thus refrain from taking high-risk (but potentially profitable) decisions, or from making long-term strategic decisions that would enhance the value of the company but would not necessarily result in an immediate return of profit.¹⁴⁴

Directors have a fiduciary duty to observe good faith towards the company, and in discharging that duty they must exercise an independent and unfettered judgement, and make decisions with the best interests of the company in mind.¹⁴⁵ Should directors simply toe the line for fear of removal and so fail to express controversial or dissenting opinions, they could be in breach of these fiduciary duties.

Knight argues that, while a fear of removal is an important concern, directors are not likely to remain on a board without attempting to contribute to board deliberations, on account of their fiduciary duty to act in the best interests of the

¹⁴³ 116 Atl 738 (Del Ch 1922) at 741.

¹⁴⁴ Olson 2007: 782.

¹⁴⁵ *Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd* [1927] 2 KB 9 (CA) at 23; *Re Smith & Fawcett Ltd* [1942] Ch 304 (CA) at 306; *Boulting v Association of Cinematograph Television and Allied Technicians* [1963] 1 All ER 716 (CA) at 723; *Charterbridge Corporation Ltd v Lloyd’s Bank Ltd* [1970] Ch 62 (ChD); *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) at 163; *Fulham Football Club Ltd v Cabra Estates Plc* [1992] BCC 863 (CA); *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald (No 2)* [1995] 1 BCLC 452 (ChD); *Regentcrest Plc (in liquidation) v Cohen* [2001] 2 BCLC 80 (ChD) at 105; *Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 BCLC 598 (ChD) at 618-619; *Liwszyc v Smolarek* (2005) 55 ACSR 38 (Austl) at 46-47; *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) para 18.

company.¹⁴⁶ He further contends that there exists little incentive for the directors who form a majority on a particular issue to rid themselves of a minority director when that director is not in a position to obstruct the workings of the board or to frustrate the will of the majority of the directors.¹⁴⁷

Nevertheless, in the instances where the Memorandum of Incorporation of a company requires board decisions to be unanimous, the concern of removal may well result in a minority director hesitating to express a dissenting or controversial opinion. While it is conceded that not all decisions taken by the board of directors would require unanimity and that the board of directors is not likely to remove a minority director for expressing a dissenting opinion or for voting against the majority view, the fear of dismissal may nevertheless result in a minority director hesitating to express a contrary view or failing to attempt to convince the majority to change its view even in those circumstances where he or she believes that the majority view is not in the best interests of the company.

Knight further opines that disagreements in the boardroom would usually be resolved in the normal course of events by a board vote with all the directors abiding by the result, and by those directors who do not wish to be associated with the particular course of action agreed upon by the board, simply resigning from office.¹⁴⁸ However, it is submitted that in many instances, for reasons of status, prestige or monetary rewards, a director would not be willing to resign from the board of directors if he or she does not wish to be associated with a particular course of action agreed upon by the board of directors. While resignation is a difficult step to take for any director, it is an even more difficult step for an executive director who is involved full-time in the day-to-day affairs of the company.¹⁴⁹ It is accordingly submitted that Knight's suggestion of resignation would not in all instances be either practical or attractive.

The fear of removal from office may further result in a director failing to bring to the attention of the board of directors a suspicion or knowledge of wrong doing

¹⁴⁶ Knight 2007: 361.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ In *Protect a Partner (Pty) Limited v Laura Machaba-Abiodun* [2013] JOL 31048 (LC) para 48, the Labour Court stated that executive directors of a company are also referred to as "inside directors". The court further said that executive directors represent the interest of the entity's stakeholders and often have special knowledge of its inner workings, its financial or market position, and its vision and mission. A non-executive director, the court said, is not employed by the entity and does not generally represent any of its stakeholders. The court also held that a typical example of a non-executive director is a director who is the president of a firm or entity in a different industry. For a further discussion of the distinction between executive and non-executive directors, see *Re City Equitable Fire Insurance Co Limited* [1925] Ch 407 (CA) at 429; *Fisheries Development Corporation of SA Ltd v Jorgensen*; *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) at 165; *Howard v Herrigel* 1991 (2) SA 660 (A) at 678; and *AWA Ltd v Daniels t/a Deloitte Haskins & Sells* (1992) 7 ACSR 759 (Austl) at 867.

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by fellow directors. Of concern is that this power may not only be used by the board of directors subjectively – and not objectively – but also with ulterior motives. Both of these concerns are illustrated in the UK case of *Lee v Chou Wen Hsien*.¹⁵⁰ The appellant, Lee, had become suspicious about certain perceived wrongdoings by the chairperson and managing director of the company. His requests for access to various accounts were denied. When he requested that a board meeting be convened so that he could discuss his suspicions and concerns with the board of directors, he received a notice signed by all his co-directors requesting him to resign immediately. In terms of the company's constitution, the effect of such a notice was that the office of the director in question had to be vacated immediately. The appellant was consequently removed from the board of directors. Even though the Privy Council found that the board of directors had acted with ulterior motives in removing the appellant from the board of directors, it nevertheless held that the removal was valid.¹⁵¹ In essence, the Privy Council held that, in order to avoid uncertainty in the management of the company pending the resolution of the dispute, it was necessary to hold that bad faith on the part of any one director in removing a fellow board member would not vitiate the removal and would not retain in office the director whose removal was sought.¹⁵²

It is imperative that the board of directors does not abuse its power to remove a director from office. In the US case of *Bruch v National Guarantee Credit Corp*,¹⁵³ the Delaware Court of Chancery was not in favour of granting directors a right to remove a director from office. The general manager of the company had complained to the board of directors that the director in question had been guilty of embezzlement. Without giving the particular director an opportunity to be heard, the board passed a resolution removing him from office. At the trial, the director in question denied all charges of embezzlement. The court held that the various powers exercisable by a corporation are distributed among the directors, officers and shareholders.¹⁵⁴ The power to remove a director rests with the shareholders and not with the board of directors.¹⁵⁵ In overturning the removal of the director in question, the court stated that:

To allow directors to frame charges against one of their fellows and then to try and expel him, would open the door to possibilities of fraud which designing men might use to wrest control of corporate affairs from the stockholders, or their sympathetic representatives on the board, and transfer it to those who might seek to grasp the corporation for their own ends.¹⁵⁶

150 [1984] 1 WLR 1202 (PC). The case was originally heard by the Court of Appeal of Hong Kong.

151 *Idem* at 1206-1207.

152 *Ibid.*

153 116 Atl 738 (Del Ch 1922).

154 *Idem* at 741.

155 *Ibid.*

156 *Ibid.*

It is clear that there must be effective safeguards against the abuse of power by the board of directors to remove a fellow director from office. If there are effective checks and balances, the potential for such abuse of power may be contained.

6 Maintaining the balance of powers with regard to the removal of directors from office

Section 5(1) of the Companies Act states that the same Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 7. In *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa v Bestvest 153 (Pty) Ltd*,¹⁵⁷ Gamble J stated that the effect of section 7 of the Companies Act is that courts are now required to adopt a “fresh approach” when assessing the affairs of corporate entities in South Africa. The court further stated that the legislature has pertinently charged the courts with the duty to interpret the Companies Act in such a way that the founding values of the Constitution of the Republic of South Africa, 1996 are respected and advanced, and further, so that the spirit and purpose of the Companies Act are given effect to.¹⁵⁸

The court also emphasised that one of the purposes of the Companies Act is to balance the rights and obligations of shareholders and directors within companies.¹⁵⁹ This purpose is contained in section 7(i) of the Companies Act. It is patent from the above discussion that the statutory conferment on the board of directors of the power of removal of a director has shifted the balance of powers between the shareholders and the directors. This shift in the balance is more pronounced in light of section 66(1) of the Companies Act, which confers original power on the board of directors and results in the board being subject to shareholder control to a lesser extent than hitherto.¹⁶⁰ Arguably, from the director’s point of view, the current position under the Companies Act is a preferable “balance”, because the power of the directors has been enhanced. This is not necessarily so from the point of view of the shareholders, because their control over the directors has been reduced. It is important for the rights and obligations of the directors and shareholders to be properly balanced so that directors do not abuse their powers and do not neglect the interests of the shareholders. The balance of powers between the shareholders and directors is furthermore crucial so that the shareholders are able to act as an effective counterbalance to the powerful directors.¹⁶¹

The question arises whether it is possible to maintain the balance of powers between the directors and the shareholders. It is submitted that, in light of the

¹⁵⁷ 2012 (5) SA 497 (WCC) para 20.

¹⁵⁸ *Ibid.* See, further, *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd (in business rescue)* [2017] 1 All SA 862 (WCC) para 46 where the same court endorsed this approach.

¹⁵⁹ 2012 (5) SA 497 (WCC) para 20.

¹⁶⁰ Havenga 2013: 262.

¹⁶¹ Hannigan 2016: 185.

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redistribution of the power between the shareholders and the directors, it is not possible to maintain the power between these organs in the manner that had existed prior to the conferment of the power of removal on the board of directors. The mere conferral of the power of removal on the board of directors, even if such power is not used, impacts on the balance of power between the directors and the shareholders, and on the dynamics between them, because the threat of the power of removal is ever present.

Nevertheless, even if the balance of power between the directors and the shareholders can no longer be maintained to the same extent as prior to the conferment of the power of removal on the board of directors, it is submitted that the proper balance sought by section 7(i) of the Companies Act could perhaps be achieved if the board of directors gives due consideration to the following factors before deciding whether to remove a fellow board member from office:

- The concept of corporate democracy and the inherent rights of shareholders to appoint and remove a director. Before removing a fellow director from office, the board should consider whether the inherent rights of shareholders to remove directors should be honoured, or whether they should be disregarded, particularly where the director in question was appointed by the shareholders and not by the board of directors.
- Whether a fellow director whom the board of directors wishes to remove is a representative of the minority shareholders, and if so, the impact of such removal on the dynamics between the majority and minority shareholders.
- Whether in removing a director from office, the board of directors would be breaching its fiduciary duties or acting with ulterior motives.
- Whether the board of directors is acting openly and transparently at all times and in the best interests of the company when removing a director from office.

The last two factors mentioned above would in any event have to be complied with by the board of directors in removing a fellow board member from office. Yet, as illustrated in the UK case of *Lee v Chou Wen Hsien*,¹⁶² boards of directors do sometimes act with ulterior motives in removing a director from office and do not necessarily always act openly and transparently and in the best interests of the company when doing so. It is evident from that case¹⁶³ that even where the directors are in breach of their fiduciary duties when removing a director or where they remove a director with ulterior motives, a court may nevertheless affirm the board's decision and refuse to reinstate the improperly removed director.

¹⁶² [1984] 1 WLR 1202 (PC).

¹⁶³ *Ibid.*

7 Conclusion

This article traces the historical division of powers between the board of directors and the shareholders. It further examines the underpinning philosophy of the removal of directors from office. The matter of separation of ownership and control, as famously documented by Berle and Means in 1932,¹⁶⁴ is examined and the consequences of the split between ownership and control are canvassed. This article further explores the rationale for conferring the power of removal of directors on shareholders. It is argued that, in light of the effects of the separation of power and control in a company, the power conferred on shareholders to remove directors from office strikes a balance between the attenuated power of control of shareholders with the power of directors to manage the company. It is further argued that the shareholders' power of removal is a critical tool in the hands of shareholders: it is a form of corporate democracy and a necessary and key provision of modern company law.

The enactment of section 71(3) of the Companies Act, conferring power on the board of directors to remove another director from office, has now fundamentally shifted the historical balance of power between the board of directors and shareholders, between the shareholders themselves and even among the board of directors themselves. Despite the merits of conferring the power of removal on the board of directors, such conferment is not consistent with the original rationale for giving shareholders the right to remove directors, that is, to give shareholders more power over directors. This is because the separation of ownership and control has resulted in attenuated shareholder control. In an attempt to achieve the proper balance between directors and shareholders, as required by section 7(i) of the Companies Act, to guard against directors abusing their powers and furthermore neglecting the interests of the shareholders, this article makes certain suggestions with regard to containing the redistribution of power between the directors and the shareholders.

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MANCIPATIO BY AN AGENT AND THE SATISDATIO AND REPROMISSIO SECUNDUM MANCIPIUM AS SURETIES FOR EVICTION

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ABSTRACT

The *satisfatio secundum Mancipium* and the *repromissio secundum Mancipium* were the first stipulations for eviction granted by the seller in Roman private law. The obscurity of the sources on the subject has given place to various theories concerning the exact role of these institutions. This article attempts to analyse the available evidence by revisiting the traditional idea of the impossibility of an agent to Mancipate, concluding that the role of the *satisfatio* and *repromissio secundum Mancipium* was to grant the buyer a surety against eviction when an agent Mancipated on behalf of the owner. This role would better explain the features of these institutions compared to other mechanisms protecting the buyer, such as the *stipulatio duplae* and the *exceptio rei venditae et traditae*. The sources suggest that a need for such surety was triggered by the absence of responsibility for *auctoritas* following from a *Mancipatio* by an agent. This surety has moreover left traces in Roman legal practice, which confirm the role of these stipulations and their practical importance.

Keywords: *satisfatio secundum Mancipium*; *repromissio secundum Mancipium*; eviction; *auctoritas*; *stipulatio duplae*; *exceptio rei venditae et traditae*

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1 Introduction

The *satisfatio* and *repromissio secundum Mancipium* are troubling concepts for Roman law scholars. They are often indicated as the first stipulations against eviction, which implies that they form a bridge between the *actio auctoritatis* and the stipulations for eviction. However, the sources offer only a handful of concise texts on the subject, leaving countless questions unanswered concerning not only the exact role of these institutions, but the very origins of the stipulations for eviction.

The scarcity of the sources has led scholars to suggest various theories on the exact role of the *satisfatio* and *repromissio secundum Mancipium*. The most successful theory in the last decades has been proposed by Hans Ankum, according to whom these institutions would have served the purpose of making the seller liable for eviction in the same way as if he had mancipated when he delivered a *res Mancipi* by *traditio*. Such sureties would have been granted when it was not possible to mancipate, as would allegedly be the case when an agent mancipated. This theory is more satisfactory than previous ones, since it offers a comprehensive approach to the different sources on the subject. It does, however, face serious objections. For instance, the scope granted by Ankum to the *satisfatio* and *repromissio secundum Mancipium* seems to overlap with that of the *stipulatio duplae*, which was granted in the context of the sale of *res Mancipi*. The same can be said regarding the *exceptio rei venditae et traditae*, which could be granted in favour of a buyer who acquired a *res Mancipi* by *traditio*.

The overlap between the fields of application of these institutions suggests that the role of the *satisfatio* and *repromissio secundum Mancipium* must be found elsewhere. This article offers an alternative explanation by revisiting the traditional assumption that the *Mancipatio* could not be concluded by an agent. By challenging this idea, the article proposes a revision of the sources and the existing theories on the *satisfatio* and *repromissio secundum Mancipium*, explaining them as sureties granted by the *Mancipio datus* who act on behalf of the owner, replacing the absence of liability for *auctoritas*. As it will be shown below, this role can better explain the rather specific scope of the *satisfatio* and *repromissio secundum Mancipium*, unlike the broader role fulfilled by the *stipulatio duplae* and the *exceptio rei venditae et traditae*. Moreover, the scope of these sureties allows a better understanding of their role in the evolution of the stipulations for eviction.

2 The evidence in the sources

The sources concerning the *satisfatio* and *repromissio secundum Mancipium* are so scarce that there is only one text which mentions both institutions side by side, namely the *formula Baetica*. This text dates from the first or second century AD and contains the acquisition *fiduciae causa* of a piece of land as well as a slave by the creditor Lucius Titius, which was mancipated to his slave Dama – who thereby

acquires ownership on behalf of his master – by his debtor Baianus. When describing the way in which Titius may alienate the land he acquired, the text reads as follows: “mancipio pluris HS n(ummo) I invitus ne daret, neve satis secundum Mancipium daret, neve ut in ea verba, quae in verba satis s(ecundum) m(ancipium) dari solet repromitteret neve simplam neve [duplam]”.¹ According to this text, the creditor who acquires *fiduciae causa* may transfer ownership over the things received without being compelled to give any surety against eviction. This feature has been explained because the creditor does not know the origin of the goods acquired, and therefore he would be assuming a considerable risk in case he obliged himself for the event of the eviction.²

When describing the creditor’s exemption from assuming responsibility for eviction, we are told that he may mancipate for one sesterce – thereby avoiding to become liable for *auctoritas*³ – and that he is moreover not obliged to grant a *satisfatio secundum Mancipium* (“neve satis secundum Mancipium daret”) nor a *repromissio* containing the same wording of the *satisfatio secundum Mancipium* (“neve ut in ea verba, quae in verba satis s(ecundum) m(ancipium) dari solet, repromitteret”). Also, the *stipulatio simplae* or *duplae* (“neve simplam neve [duplam]”) are excluded.⁴

While the text is rather brief concerning the institutions under analysis, it does offer valuable information. First, the *satisfatio* and *repromissio secundum Mancipium* are set side by side with the *stipulatio duplae* and *simplae*, which strongly suggests that they constitute sureties against eviction.⁵ It is moreover interesting to note that the *repromissio secundum Mancipium* is described by reference to the *satisfatio secundum Mancipium*, which indicates that the latter was better known and was probably more common.⁶ This also implies that the content of both acts was the same, having an identical wording.⁷ The only difference between them is that one act consists on a *repromissio*, which is merely a stipulation, while the *satisfatio* consists in a stipulation which is further guaranteed by a personal security (*sponsio*, *fideipromissio* or *fideiussio*).⁸ Accordingly, the buyer would be more secured through the *satisfatio* than through the *repromissio*.

1 FIRA 1968: vol 3 297 (§ 92). Translated by Ankum 1978: 11-12: “[t]hat he will not have to mancipate against his will for more than one *sestertius* and that he had not to give a *satisfatio secundum Mancipium*, neither a promise in the form of a *stipulatio* with these words, which are generally inserted in a *satisfatio secundum Mancipium*, nor to make a *stipulatio simplae* or *duplae* (for the case of eviction).”

2 Ankum 1981: 756-757.

3 Ankum 1979: 31-33; Ankum 1981: 758; Brägger 2012: 93-95; Guida 2013: 63.

4 Bechmann 1876: 370 n 3; Girard 1923: 58-59; Arangio-Ruiz 1954: vol 2 330; Ankum 1981: 759.

5 Arangio-Ruiz 1954: vol 2 330; Ankum 1981: 759-760; Brägger 2012: 118.

6 Ankum 1981: 759.

7 Lenel 1927: 547.

8 Girard 1923: 60; Sargenti 1962: 153-154; Ankum 1981: 747-748.

To conclude the analysis of the *formula Baetica*, one should bear in mind that this text describes the acquisition of ownership *fiduciae causa* through an intermediary – the slave Dama – which could eventually imply that the subsequent sale of the *res Mancipi* could be performed through the same intermediary. This should be borne in mind since, as it is shown below, other texts regarding the *satisfatio* and *repromissio secundum Mancipium* concern situations where an agent transfers ownership, which could explain the role of these institutions. If this is indeed the case, the *formula Baetica* would therefore list all the possible grounds of eviction, whether the thing was conveyed by *Mancipatio* or *translatio*, by the owner or by an agent.

Another classical text, referring solely to the *satisfatio secundum Mancipium*, is found in the letters of Cicero to Atticus, where the former writes: “De Annio Saturnino curasti probe. De satis dando vero, te rogo, quoad eris Romae, tu ut sates. Et sunt aliquot satisfationes secundum Mancipium, veluti Memmianorum praediorum vel Attilianorum.”⁹ In this letter, Cicero thanks his friend for taking care of some affairs in Rome and reminds him to perform the *satisfatio secundum Mancipium* regarding some pieces of land while he is in Rome. The context of the letter would suggest that these *satisfationes* have something to do with the administration of Cicero’s property by Atticus, that has led some scholars to consider that these pieces of land would have been sold recently by Atticus on behalf of Cicero, thereby acting as his *procurator*, and that Atticus himself should now grant the *satisfatio*.¹⁰

A third text, referring to the *repromissio secundum Mancipium*,¹¹ may be identified in the *Persa* of Plautus. In this play a letter is brought to the pimp Dordalus by the slave Tosilus, who claims to have received it from a Persian friend offering him a beautiful slave woman for sale. The letter was allegedly given to Tosilus by a young Persian, whose legal position – *procurator*, *mandatarius*, messenger, etc – is not revealed.¹² The slave woman would have been stolen from Arabia, which is why the seller is unwilling to assume any form of surety in case of eviction; all the risk of the operation would be borne by the buyer.¹³ Regarding this point, the letter reads as follows: “ac suo periculo is emat qui eam mercabitur: Mancipio neque promittet neque quisquam dabit.”¹⁴

9 Cicero *Ad Atticum* 5 1 2: “You took good care of the affair with Annius Saturninus. I ask you to give the surety yourself while you are at Rome. There are some *satisfationes secundum Mancipium* [that need to be given], like those of the states of Memmianus or Attilianus.”

10 Ankum 1981: 763-764. Sargenti 1962: 154 appears, however, less willing to fill in the gaps.

11 Girard 1923: 60; Ankum 1981: 760-762; Guida 2013: 65.

12 For a detailed description of the facts of the play, see Ankum 1979: 9-11 and Cristaldi 2011: 517-523. Ankum 1981: 760 assumes that the young Persian acts as a *mandatarius* or *procurator*.

13 Ankum 1981: 761; Cristaldi 2011: 519-520; Guida 2013: 65.

14 Plautus *Persa* 523-524. “He who buys her does it at his own risk: / no one will perform the *promissio secundum Mancipium* or deliver her through *Mancipatio*.” This somewhat free translation accepts the opinion that the word *promittet* would refer to the *repromissio secundum Mancipium*. On the various interpretations of this fragment, see Cristaldi 2011: 518 n 116.

Once again, the text is not very descriptive, but it does offer some valuable information, specifically that the sale of a slave concluded by an intermediary – in this case, the young Persian who would bring the letter – would normally involve a *mancipatio* and a *promissio* related to it, but in this case, no one would perform these acts.¹⁵

There is further evidence concerning these institutions in post-classical sources which are even more laconic. For example, the *Fragmenta Vaticana* incidentally mention a certain “*stipulatio auctoritatis*” when indicating that the eviction through an unjust decision would not make the seller liable.¹⁶ Since the responsibility for *auctoritas* sprung instantly when the seller mancipated, scholars consider that this curious expression could only refer to the *repromissio secundum Mancipium*.¹⁷ More explicit is the reference within the *Iuridicarum vocum explanatio* (also known as *notae Lindenbrogianae*), a compilation of legal abbreviations of unknown date, where the letters “*s.s.m*” are rendered as “*satis secundum Mancipium*”.¹⁸ While these texts tell us virtually nothing on these institutions, they indicate that these sureties remained in force through the classical and even the post-classical period.

At this point, it should be noted that there are no references to the *satisdatio* or *repromissio secundum Mancipium* in Justinian’s *Corpus Iuris*, which suggests that the compilers deliberately eliminated every reference to these institutions, mechanically replacing them by references to the *stipulatio duplae*. Nonetheless, scholars have been able to identify several texts which would originally have referred to the *repromissio* or *satisdatio secundum Mancipium*.¹⁹ Within the Edict, between the titles regarding the *cautio rem ratam haberi* and the *cautio ex operis novi nuntiatione*, there are texts dealing with the liability for double the price in case a *res Mancipi* was evicted. While some authors claim that this title referred to the *stipulatio duplae*,²⁰ scholars such as Lenel and Ankum have argued that the Edict of

15 The fact that the *promissio* would be coupled with the *mancipatio* may be seen in the fact that, later in the play, reference is made only to the *mancipatio*. Plautus *Persa* 532: “Nisi Mancipio accipio, quid eo mihi apud mercimonio?” (If I do not acquire by Mancipatio, what need do I have of this merchandise?); *Persa* 589: “Prius dico: hanc Mancipio nemo tibi dabit. Iam scis? – Scio” (I tell you first: no one will Mancipate her to you. Do you already know this? – I know). Contrary to this view, see Brägger 2012: 48.

16 FV 10: “Iniquam sententiam evictae rei periculum venditoris non spectare placuit neque stipulationem auctoritatis committere.”

17 Lenel 1927: 548; Ankum 1981: 762-763; Brägger 2012: 192.

18 Keil & Mommsen 1864: 300. See, on this text, Ankum 1981: 764.

19 Ankum 1981: 765-767, 777-788; Ankum 2013: 20-22, 24-27 regards as originally referred to the *satisdatio* or *repromissio secundum Mancipium* PS 2 17 1, PS 5, 10, D 21 2 76, D 21 2 53, D 13 7 8 1, D 19 1 13 17 and D 19 1 11 8-9. Later, (Ankum 2013: 15, 22-24) he adds to this list D 21 2 22 1 (following Ernst 1995: 23 n 89), D 21 2 69 3, D 21 2 41 2 and D 21 2 43. Moreover, in this latter work (Ankum 2013: 17-18) he discards that PS 2 17 1 must have been referred to the *repromissio* or *satisdatio secundum Mancipium*. To this list one may add D 21 2 51 1, following Lenel 1889: vol 1 col 464 n 7, as well as D 21 2 20, following Lenel 1889: vol 2 col 113 n 2.

20 Girard 1923: 131-134, followed by Meylan 1948: 6-9, 26-27.

the praetor at this point dealt with the *actio auctoritatis* and, immediately thereafter, with the *satisfatio secundum Mancipium*.²¹ Such a claim agrees with the wording of several of these texts, such as D 21 2 40, where the *satisfatio secundum Mancipium* is barely hidden behind the words “satis a me de evictione accepit”.²² This conclusion has also been ratified by the analysis of the various texts, which shows that in several cases the outcome is different to that of the *stipulatio duplae*.²³ Moreover, scholars have pointed out that the *stipulatio duplae* should have been dealt with by the aedile in his Edict, and not by the praetor.²⁴ It should be noted that jurists might as well have discussed problems related to the *repromissio secundum Mancipium*, and not only the *satisfatio*. The state of the sources often makes it impossible to determine which of these institutions was under analysis in specific fragments.²⁵

The paligenetic analysis of Lenel shows that the liability for *auctoritas* and the *satisfatio secundum Mancipium* were dealt with one after the other within the Edict, as can be seen in the distribution of classical works which follow the titles of the Edict.²⁶ *Auctoritas* was dealt with by Julian in book 57 of his *Digesta*; by Venuleius in book 16 of his work on stipulations; by Paul in book 76 of his *ad Edictum*; and by Ulpian in book 80 *ad Edictum*, the *satisfatio secundum Mancipium* was analysed in Julian’s book 58 of his *Digesta*, Venuleius’ book 17 on his work on stipulations, Paul’s book 77 of his *ad Edictum* and Ulpian’s book 81 *ad Edictum*. The distribution of titles within this part of the Edict has been explained because of the presence of the *satisfatio secundum Mancipium*, which would have been first grouped along with other *cautiones* within the Edict, dragging the *actio auctoritatis* along with it.²⁷ The surviving texts on the subject are scarce, which has been regarded by some scholars as proof of the limited significance of these sureties already in classical times.²⁸ Even if that was the case – which is by no means evident – the fact that these jurists dealt with the *repromissio* and *satisfatio* shows that these institutions had not disappeared by their time.

This brief survey of the sources offers some relevant clues concerning the *satisfatio* and *repromissio secundum Mancipium*. We know, for instance, that both sureties had an identical content, which was securing the buyer against eviction.²⁹ We also know that these institutions were around for quite some time – despite the fact of being only seldom mentioned in surviving sources – from the archaic to the

21 Lenel 1889: vol 1 col 464 n 8; Lenel 1927: 542-543, 546-549; Arangio Ruiz 1954: 332; Ankum 1979: 33-36; Ankum 1981: 768-788.

22 Lenel 1889: vol 1 col 464; Arangio Ruiz 1954: 332; Ankum 1981: 771, 775; Brägger 2012: 210.

23 Ankum 1979: 36-43.

24 D 45 1 5 *pr.* See, further, on this point Ankum 1981: 769-770.

25 Ankum 1981: 774; Ankum 2013: 18-19.

26 Lenel 1927: 547.

27 Lenel 1927: 543; Ankum 1981: 771-772; Brägger 2012: 223.

28 Arangio-Ruiz 1954: 332. This claim is also made by Guida 2013: 67.

29 Girard 1923: 57-58.

postclassical period,³⁰ but that all references to them were removed by Justinian. The *satisfatio* seems, moreover, to have been more common or better known than the *repromissio*. Finally, the sources often present these institutions in a context where an agent sells a *res Mancipi*, as can be seen in the texts of Cicero (where Atticus sells land), Plautus (where the young Persian sells a slave) and, less clearly, the *formula Baetica* (where the slave Dama could be the one selling the slave or the land).

It goes without saying that the sources leave many other problems unanswered. It is not clear, for instance, whether the transfer of ownership in these cases took place through *mancipatio* or through *traditio*. It is therefore unknown what the relationship between *satisfatio* and *repromissio secundum Mancipium* and the responsibility for *auctoritas* rising from the *mancipatio* was, as well as the relationship with the *stipulatio duplae*. Accordingly, the very words “*secundum Mancipium*” appear obscure, since they could either mean that the *satisfatio* or *repromissio* took place “after” the *mancipatio* or “according to [the liability rising from] the *mancipatio*”.³¹ These are some of the problems that Roman law scholars have attempted to unveil, as will be shown in the following section.

3 *Repromissio* and *satisfatio secundum Mancipium* in modern scholarship

One of the most widespread theories regarding the role of the *satisfatio* and *repromissio secundum Mancipium* during the twentieth century, which was upheld – among others – by Arangio-Ruiz,³² claimed that these sureties were granted by the *Mancipio dans* after the *mancipatio* had taken place, and that the stipulation had the same content of the liability for *auctoritas*. This had the purpose of making it possible to guarantee the obligation of *auctoritas*, since the *sponsio* and *fideipromissio* could only guarantee a *verborum obligatio*, which was not the case of the responsibility for *auctoritas*. It would therefore be natural to grant at least a *repromissio* alongside the *mancipatio*, in order to make it possible to secure it. Ankum has questioned this theory, claiming that the mere *repromissio* would appear to be useless, since only the *satisfatio* would achieve the role of granting further protection to the buyer.³³ To this he adds that these sureties would have become irrelevant after the *fideiussio* made it possible to guarantee all kinds of obligations, which contradicts the survival of the *satisfatio* through the classical period.³⁴ Moreover, one may add that if a *repromissio*

30 This contradicts the claim of Calonge 1968: 26-27, according to whom these sureties disappeared after the introduction of the *stipulatio duplae*.

31 Lenel 1927: 547.

32 Arangio Ruiz 1954: vol 2 329-332. Similarly, Lenel 1927: 546-547.

33 Ankum 1981: 749.

34 *Idem* at 749-750.

or *satisfatio* would have been concluded almost by default alongside the *mancipatio*, one could expect the sources to give a more generous account regarding them.

Bechmann and Girard³⁵ agree that the *satisfatio* and *repromissio* could serve the purpose of reinforcing the *mancipatio*, which would have been its original role. According to Girard, once the *fideipromissio* became widespread, the *satisfatio secundum mancipium* implied that the seller offered *fideiussores*, without having to grant himself an additional stipulation for that purpose.³⁶ However, these scholars add that the *satisfatio* and *repromissio* would also be granted when the seller could not mancipate, or when there were serious doubts that the seller would be responsible for the *auctoritas* when performing the *mancipatio*. Accordingly, the *satisfatio* and *repromissio* would have offered a liability for eviction in replacement of the liability for *auctoritas* which would follow from the *mancipatio*, reproducing the content of such liability.³⁷ However, none of these authors specifies in which cases of failed or risky alienation these sureties would be granted, as noted by Ankum.³⁸ Such broad scope of application would completely overlap with that of the *stipulatio duplae*,³⁹ as will be shown below.

Another theory has been set forth by Meylan, who claims that these institutions were granted as a surety that the mancipated land was handed over, along with the fruits it had borne after the *mancipatio*.⁴⁰ Despite the praise deserved by Meylan's arguments, this theory has been abandoned on account that it contradicts the sources – which relate these sureties to the responsibility for eviction, and do not restrict them to the sale of land – and that it relies on extensive claims of interpolation within the Digest.⁴¹

Hans Ankum has offered the most comprehensive analysis of the sources on the subject⁴² which has remained unchallenged for several decades. According to the Dutch scholar, the *satisfatio* and *repromissio secundum mancipium* are always mentioned in contexts where the *mancipatio* cannot validly transfer ownership, which implies that these sureties were granted when the seller could only perform the *traditio*, offering the buyer to respond in case of eviction in the same way as if the *mancipatio* was performed. Ankum points out that almost every text on the subject explicitly mentions the intervention of an agent who transfers ownership over a *res*

35 Bechmann 1876: 369-374; Girard 1923: 41, 56-65.

36 Bechmann 1876: 369; Girard 1923: 61.

37 Girard 1923: 61-62. Calonge 1968: 20-24 offers a more restricted view, claiming that these sureties were granted in abnormal cases where the *mancipatio* did not give rise to the liability for *auctoritas*.

38 Ankum 1981: 752.

39 Meylan 1948: 4.

40 *Idem* at 1-35, followed by Sargenti 1962: 160-164 and Mostert 1969: 24-56.

41 Amirante 1951: 340-344; Arangio-Ruiz 1954: 331-332; Calonge 1968: 20-21; Ankum 1981: 754-755, 773-774.

42 Ankum 1981: 739-792; Ankum 2013: 13-28.

mancipi,⁴³ something which he regards as crucial information since agents could not mancipate.⁴⁴ This sole circumstance would therefore show that the *satisfatio* and *repromissio* did not take place after the *mancipatio*, but rather served the purpose of making the seller who performed the *traditio* liable in the same way as if he had mancipated. Ankum moreover shows that there are other circumstances which would have stood in the way of a valid *mancipatio* in the different cases discussed in the sources, such as the fact that the young Persian was a *peregrinus*, or that the land of the *formula Baetica* probably did not have the *ius Italicum*.⁴⁵ All of this confirmed that these sureties would have been granted when someone could not perform the *mancipatio* over a *res Mancipi*: since he could not mancipate, he would bind himself to *praestare auctoritatem* just as if the *mancipatio* had taken place. Later Ankum would add that these sureties could simply replace the *mancipatio* when it was impractical or undesirable to resort to this mode of transferring ownership.⁴⁶

Since several texts regarding these sureties involve the intervention of an agent, Ankum further claims that the praetor would have compelled the agent who sold a *res Mancipi* to grant a *satisfatio secundum Mancipium*, which would accordingly be a *stipulatio praetoria* included in his Edict in addition to other *cautiones*.⁴⁷ According to Ankum, the seller needed to grant a *satisfatio secundum Mancipium* when an agent conveyed a *res Mancipi* because the buyer would find himself in a riskier position than if he had bought from the owner himself⁴⁸ since the latter may not recognise the validity of the sale. The only thing standing in the way of a claim by the owner would be that the agent acted according to the instructions of the *dominus negotii*, something which would normally remain beyond the buyer's knowledge. It should be noted that Ankum's argument on this point is so compelling that subsequent scholars reproducing his ideas have simply indicated that the *satisfatio* and *repromissio secundum Mancipium* served the purpose of giving a surety when an agent transferred ownership over a *res Mancipi*⁴⁹ without indicating – to Ankum's distress⁵⁰ – that these sureties would have been granted whenever a *res Mancipi* could not validly be mancipated.

As already mentioned before, Ankum offers a more comprehensive interpretation of the sources on the subject than any scholar before him. There is, however, one point in his construction which is highly debatable: when being confronted to the

43 Ankum 1981: 788-790.

44 *Idem* at 790; Ankum 2013: 18.

45 Ankum 1981: 758-761; Ankum 2013: 16. The observation regarding the *formula Baetica* is, however, far less compelling, since the author himself acknowledges (Ankum 1981: 788 n 159; Ankum 2013: 14 n 7) that this *formula* must have been the copy of a Roman or Italic model.

46 Ankum 2013: 18.

47 Ankum 1981: 768-773, 790-792; Ankum 2013: 16-17.

48 Ankum 1981: 791-792, followed by Guida 2013: 69.

49 Ernst 1995: 7 n 3; Finkenauer 2010: 49.

50 Ankum 2013: 13.

question of whether the *satisfatio* and *repromissio* were granted when a *mancipatio* or a *traditio* took place, Ankum chose the latter option. This choice is motivated by the preconception that an agent could not *mancipate*, an idea that has recently been subject to intense criticism, as shown in the following section. Moreover, the scope granted by Ankum to these sureties raises relevant problems regarding the overlap between these institutions and the *stipulatio duplae*, as well as with the *exceptio rei venditae et traditae*. These objections will be reviewed in the following sections, showing that it is much more likely that the *satisfatio* and *repromissio secundum mancipium* were sureties against eviction granted by the agent who performed a *mancipatio*, not a *traditio*.

4 *Mancipatio* by an agent

Once Ankum realised that the *satisfatio* and *repromissio secundum mancipium* were often granted in the context of the sale by an agent, he jumped to the conclusion that these institutions could not take place after a *mancipatio*, since agents could not validly *mancipate*. This claim was widespread among Roman law scholars since the nineteenth century. However, it has been shown elsewhere that the idea of a ban on agency regarding the *mancipatio* is an inheritance of a nowadays obsolete reconstruction of the development of agency in Roman law.⁵¹ According to traditional German scholarship, the *ius civile* originally banned every form of direct representation, which is why no *actus legitimus* could be performed through an agent. The Roman jurists would have overcome this prohibition in the course of time in various ways – such as the *actiones adiecticiae qualitatis* – which would in turn be a valuable lesson for the nineteenth century German jurists: if the Roman jurists had already abandoned the primitive ban on direct representation to a large extent, the classical rules such as *alteri stipulari nemo potest* should not prevent the acceptance of a general notion of *Stellvertretung* in Germany.⁵²

Despite the practical scope of this theory, it was an immediate success among Roman law scholars. One of the most ardent defenders of this reconstruction was Ludwig Mitteis, who devoted considerable efforts to discard that an agent could carry out *actus legitimi* such as a *mancipatio* or a *manumissio vindicta*.⁵³ Ankum himself followed his footsteps in contributions where he discards that slaves could *mancipate*,⁵⁴ even when Ankum wrote that it was already clear that several *actus legitimi* could indeed be concluded by an agent. In fact, Ankum struggles to find a legal ground for the impossibility of a slave to *mancipate*,⁵⁵ which makes it even

51 Rodríguez Diez 2016: 223-264; Rodríguez Diez 2017: 62-80.

52 See, on this evolution, Rodríguez Diez 2017: 64-67.

53 Mitteis 1908: 203-213.

54 Ankum 1978: 1-18; Ankum 1984: 5-17.

55 Ankum 1978: 13.

more arguable that later, when discussing the *satisfatio* and *repromissio secundum Mancipium*, he goes so far as to claim that no agent – slave or free – could *mancipate*, quoting only a couple of general textbooks to support such broad statement. Contrary to these traditional conceptions, it has been shown that the evidence in the sources strongly suggests that an authorised non-owner could indeed transfer ownership through *mancipatio* or *in iure cessio*.⁵⁶ This makes it even more urgent to revisit the idea that the *satisfatio* and *repromissio secundum Mancipium* could only be granted by an agent in the context of a *traditio*.⁵⁷

5 *Stipulatio duplae* and the *repromissio* or *satisfatio secundum Mancipium*

As pointed out above, Ankum opines that the *satisfatio* and *repromissio* would have been granted when someone could not perform the *mancipatio* over a *res Mancipi*, the most common case being the alienation by an agent. However, such theory – as well as those of Bechmann and Girard – faces an immediate challenge: if this would have been the scope of application of these sureties, it would completely overlap with that of the *stipulatio duplae*⁵⁸ which was granted for the sale of *res Mancipi* delivered by *traditio*.⁵⁹ The *satisfatio* and *repromissio* would, moreover, have become irrelevant after jurists admitted – in the course of the second century AD – that the seller was liable for eviction even if no stipulation was concluded.⁶⁰ It should, moreover, be noted that this liability also bound the agent who sold and transferred ownership, whether the delivered object was a *res Mancipi* or not.⁶¹

Ankum is aware of the overlap between the *satisfatio* and *repromissio* and the other grounds of liability for eviction, which is why he points out that the role of the *satisfatio* and *repromissio* in legal practice was not too relevant.⁶² This is an understatement; if the overlap was such, the *satisfatio* and *repromissio secundum Mancipium* simply could not have coexisted with the *stipulatio duplae* for several centuries. If the *satisfatio* and *repromissio* were indeed the first verbal sureties

56 Corbino 1976: 50-71; Corbino 1984: 2257-2271; Coppola Bisazza 2008: 100-110, 283-290; Rodríguez Diez 2016: 223-264.

57 Rodríguez Diez 2017: 71.

58 This point was already raised by Meylan 1948: 4 (followed by Mostert 1969: 27 n 146) when criticising the theories of Bechmann and Girard.

59 See, on this point, Dalla Massara 2007: 293-296 and Guida 2013: 87-90, with further references.

60 See Dalla Massara 2007: 297-310 and Guida 2013: 116-136, with further references.

61 FV 328 = D 3 3 67; D 6 2 14; D 17 1 49. The same can be said when the agent sells and grants a caution, as shown in D 19 1 13 25 (“Si procurator vendiderit et caverit emptori ...”). See, on these texts, Rodríguez Diez 2016: 98-100.

62 Ankum 2013: 18: “Übrigens darf man die Wichtigkeit der r.s.m. und der s.s.m. nicht überschätzen, wenn man sich die wichtige Rolle der auf der *stipulatio duplae* basierenden *actio ex stipulatu* und seit Pomponius und Julian der *actio empti* in Eviktionsfällen bewusst ist.”

for eviction in the context of a sale of *res Mancipi*, one could wonder, in the first place, how the *stipulatio duplae* could have later emerged as a separate stipulation. Moreover, one could expect that the *satisfatio* and *repromissio* would have had a very relevant role in early classical Roman law, as the *traditio* of *res Mancipi* became increasingly common, and that accordingly the sources would reflect the importance of these institutions. Finally, if the *stipulatio duplae* somehow displaced these older sureties, one could in fact expect that the *satisfatio* and *repromissio* would have disappeared completely after the *stipulatio duplae* was introduced, or at any rate after the *actio empti* encompassed the responsibility for eviction.

Considering the above circumstances, it seems unlikely that the *satisfatio* and *repromissio secundum Mancipium* had a role in Roman law as sureties given whenever a *res Mancipi* could not be conveyed through *mancipatio*, as claimed by Ankum.

6 *Exceptio rei venditae et traditae* and the *satisfatio secundum Mancipium*

The role of the *satisfatio secundum Mancipium* as a *stipulatio praetoria* described by Ankum would moreover overlap with the scope of the *exceptio rei venditae et traditae*, which had the precise scope of repelling the Quiritary owner who sought to recover a *res Mancipi* delivered by *traditio*. Since the buyer would be protected by the praetor, an additional surety granted by the seller with this specific aim would seem pointless. Moreover, this *exceptio* was granted to the acquirer who obtained a *res Mancipi* by *traditio* from an agent, as shown in the following text by Ulpian:

D 21 3 1 2-3 (Ulp 76 ed): (2) Si quis rem meam mandatu meo vendiderit, vindicanti mihi rem venditam nocebit haec exceptio, nisi probetur me mandasse, ne traderetur, antequam pretium solvatur. (3) Celsus ait: si quis rem meam vendidit minoris quam ei mandavi, non videtur alienata et, si petam eam, non obstat mihi haec exceptio: quod verum est. (2) If someone, acting on my mandate, sells a thing belonging to me, I shall be defeated by this defence in the event that I seek to assert title to it after the sale; unless it be proven that my mandate was that the thing should not be delivered until the full price had been paid. (3) Celsus says that if my mandatary has sold a thing of mine at a price lower than that which I specified, the thing is deemed not to have been alienated; and so if I claim the thing as mine, this defence will not lie against me; this is correct [trl Thomas/Watson, modified].

The text has been analysed in further detail elsewhere,⁶³ but for the purpose of this article it is worth noting that it poses the problem of whether the buyer can resort to the *exceptio rei venditae et traditae*⁶⁴ if an agent, acting as the seller, did not transfer ownership. In the case described in D 21 3 1 2 we are not told why Quiritary

⁶³ Rodríguez Díez 2016: 197-199.

⁶⁴ Lenel 1889: vol 2 col 860.

ownership is not transferred, but the fact that Ulpian was discussing the alienation of land (D 21 3 1 pr-1) suggests that the underlying reason was that the agent performed a *traditio* over a *res Mancipi*. Under these circumstances, if the agent acts within the instructions of the owner, the buyer will be able to oppose to the latter's claim the *exceptio rei venditae et traditae*. In other words, the most common application of this *exceptio* – to repel the owner of a *res Mancipi* that was conveyed through *traditio* – also applied to the case where the delivery was performed by an authorised non-owner. If, however, the agent did not comply with the owner's instructions, as reported in D 21 3 1 3, this defence would be of no avail.⁶⁵

Considering the scope of the *exceptio rei venditae et traditae*, it seems unlikely that the authorised non-owner would be compelled to give a special surety when performing a *traditio* over a *res Mancipi* in order to secure the buyer against a claim from the owner. At any rate, if that would have been the original role of the *satisfactio* and *repromissio secundum Mancipium*, these sureties would have become irrelevant and disappeared at an early stage of the classical period.

7 The *satisfactio* and *repromissio* as sureties for eviction at the *Mancipatio* by an agent

The overlap between the scope granted by Ankum to the *satisfactio* and *repromissio secundum Mancipium* and other institutions of classical Roman law strongly suggests that these sureties did not aim at protecting the buyer who acquired a *res Mancipi* by *traditio*. It seems more likely that these sureties were granted in the context of the *Mancipatio* by an agent. First, all the texts concerning the *satisfactio* and *repromissio* refer to the transfer of ownership over a *res Mancipi*. In this context, it would seem odd that the expression “*secundum Mancipium*” would not refer to a stipulation which took place after a *Mancipatio*.⁶⁶ Second, most of the sources record the intervention of an authorised non-owner.⁶⁷ Moreover, such scope of application of these sureties agrees with their place within the sources. The fact that these institutions are mentioned very few times over a span of several centuries – from Plautus to the *Iuridicarum vocum explanatio* – agrees well with the possibility that they were granted in the context of the *Mancipatio*, which was around for a long time but regarding which we have fragmentary information in the sources. Since there are

⁶⁵ See, moreover, D 21 3 1 5, which is analysed in Rodríguez Díez 2016: 199-201.

⁶⁶ Lenel 1927: 547; Sargenti 1962: 156.

⁶⁷ Leaving aside some exceptional cases (eg D 21 2 76; D 19 1 11 8-9; D 19 1 13 17), most texts preserved within the Digest are less explicit on this point, which is no wonder, considering that the compilers drew the texts from their original contexts. This makes it impossible to determine in what role the *venditor* acted.

few accounts of *mancipationes* performed by an agent,⁶⁸ it is no wonder that only very few texts dealing with the *satisfatio* and *repromissio secundum mancipium* have survived.

The fact that these sureties most likely had a role to play when an agent mancipated, however, leaves the problem of the exact role of the *satisfatio* and *repromissio* unsolved. Regarding the *satisfatio secundum mancipium*, part of Ankum's theory remains valid, namely that a *cautio* was necessary to secure a buyer who was in a risky position. Various sources show that a non-owner who was authorised by the owner could validly transfer ownership.⁶⁹ When doing so, he could either act on behalf of the owner (*nomine alieno*) or not (*nomine proprio*).⁷⁰ If the agent acted *nomine alieno*, the buyer would know that the transfer of ownership would depend on the owner's intent, which was a rather volatile element. The owner could change his mind or die, which would stand in the way of the transfer of ownership.⁷¹ The same thing can be said if the agent did not abide to the specific instructions of the owner,⁷² which would normally be unknown to the buyer. In short, the buyer who knowingly bought from an agent faced a series of relevant threats, which is why he would be interested in having a greater surety from the seller in the form of a *satisfatio*.

While the *satisfatio secundum mancipium* would have only been applicable to the *mancipatio* performed by an agent, it is interesting to note that the sources report a similar *cautio* which could be given to the buyer by an agent:

D 46 8 10 (Ulp 80 *ed*): Interdum ex conventione stipulatio ratam rem interponi solet, ut puta si quid procurator aut vendat aut locet aut si ei solvatur.

A stipulation for ratification is sometimes interposed by agreement, for instance, if a procurator sells or lets something or if performance be made to him.

D 46 8 11 (Hermog 6 *iuris epitomarum*): Vel paciscitur vel quodlibet aliud nomine absentis gerit.

Or if there be an agreement [not to sue] or anything be done by him in the name of one not present.

D 46 8 12 pr (Ulp 80 *ed*) Quo enim tutiore loco sit, qui contrahit de rato solet stipulari.

Whereby his position will be more secure, the contracting party usually stipulates for ratification [trl Beinart/Watson].

68 Rodríguez Diez 2016: 228-257. The need to resort to an agent in order to mancipate must have been less pressing than regarding the *traditio*, since the *mancipatio* over land could be concluded at a distance (Gai 1 121: "praedia vero absentia solent mancipari").

69 Rodríguez Diez 2016: 53-56, 63-73. D 21 2 39 1 suggests that the same seems to have been the case concerning the *mancipatio*, as shown in Rodríguez Diez 2016: 243-252.

70 Rodríguez Diez 2016: 128-136.

71 *Idem* at 73-80.

72 *Idem* at 111-114.

This group of texts deals with the *cautio rem ratam haberi*, which is normally found in the context of procedural representation. As these texts show, this *cautio* could also play a role outside the procedure,⁷³ as would be the case when the agent sells (D 46 8 10) or performs any other act on behalf of the *dominus negotii* (D 46 8 11) and the other party wants to have a surety regarding the owner's intent (D 46 8 12 pr). Under such conditions, we are told that the *cautio rem ratam haberi* is "usually" (*solet*) granted. However, the sources do not report specific cases where this *cautio* was granted by an agent when transferring ownership, which is why one may assume that this surety was far from indispensable, perhaps being only granted when the owner had given no instructions whatsoever and the acts of his *procurator* needed his ratification to be valid.

These texts are particularly relevant for the *satisfatio* and *repromissio secundum Mancipium* since the latter institutions – along with the responsibility for *auctoritas* – were dealt in the Edict immediately after the *cautio rem ratam haberi*.⁷⁴ It therefore seems plausible that the *satisfatio* and *repromissio secundum Mancipium* fulfilled a similar practical role to the *cautio rem ratam haberi* in the context of a *Mancipatio* by a non-owner, granting the acquirer a surety in the context of the acts of an agent.⁷⁵ This would, moreover, agree with Lenel's theory concerning the location of the *actio auctoritatis* and the *satisfatio secundum Mancipium* within the Edict, since the later subject would have been brought close to another *satisfatio* which had a similar practical role.

8 D 21 2 39 1 and the surety granted by "your slave"

As already shown, scholars claim to have identified numerous texts within the Digest which would have originally been referred to the *satisfatio* or *repromissio secundum Mancipium*. Such texts have often been used to map some of the features of these institutions, as well as the liability which arose from them. Besides being plagued by the uncertainties inherent to the unveiling of interpolated texts, this careful analysis has not offered further information on the exact role of these sureties. There is, however, a text by Julian that may offer key information in this regard:

D 21 2 39 1 (Jul 57 dig): Si servus tuus emerit hominem et eundem vendiderit Titio eiusque nomine duplam promiserit et tu a venditore servi stipulatus fueris: si Titius servum petierit et ideo victus sit, quod servus tuus in tradendo sine voluntate tua proprietatem hominis transferre non potuisset, supererit Publiciana actio et propter hoc duplae stipulatio ei non committetur: quare venditor quoque tuus agentem te ex stipulatu poterit doli mali exceptione summovere.

⁷³ Finkenauer 2010: 216.

⁷⁴ Lenel 1927: 541-542.

⁷⁵ Similarly Ankum 1981: 791. It should, however, be noted that the scope of the *satisfatio* and *repromissio secundum Mancipium* must have been to secure the buyer against eviction in general, and not only against the claim of the *dominus negotii*.

MANCIPATIO BY AN AGENT AND THE SATISDATIO

Alias autem si servus hominem emerit et duplam stipuletur, deinde eum vendiderit et ab emptore evictus fuerit: domino quidem adversus venditorem in solidum competit actio, emptori vero adversus dominum dumtaxat de peculio. Denuntiare vero de evictione emptor servo, non domino debet: ita enim evicto homine utiliter de peculio agere poterit: sin autem servus decesserit, tunc domino denuntiandum est.

Suppose that your slave has bought a slave, whom he sells to Titius, promising double the price in the event of eviction, while you have stipulated similarly from the vendor of the slave. If Titius were to claim the slave and be unsuccessful because your slave has not been able to transfer the ownership of the slave since he delivered it without your consent, the *actio Publiciana* remains, and so the stipulation for double will not become enforceable; hence also, your own vendor can defeat you with the *exceptio doli* if you sue him on the basis of the stipulation. But the situation is different if the slave has bought a slave and has made a stipulation for double, and subsequently sold the slave and it was evicted from the buyer; the owner of the slave [i.e. the owner of the slave that bought and sold Stichus] will have action for the total amount against the seller, but the buyer will have action against the owner only to the extent of his *peculium*. The buyer must, however, give notice of the eviction to the slave, not to his master; for then, the eviction taking place, he can effectively sue to the extent of the *peculium*; should the slave now be dead, however, he can give notice to the master [trl Thomas/Watson, modified].

Julian describes two different cases, involving six characters:⁷⁶ (1) “you”, the owner of a slave who trades; (2) “your slave”, who buys and sells other slaves; (3) a slave who is bought and sold by “your slave”, whom we can name “Stichus” to avoid confusion; (4) the original vendor who sold Stichus to “your slave”, whom we will call “Seius”; (5) Titius, who buys from “your slave”; (6) and a claimant who takes Stichus from Titius, hereafter “Maevius”. In both cases “your slave” grants a *stipulatio duplae*. In none of the cases described is Quiritary ownership over Stichus transferred to Titius: In the first case, because “your slave” acts without your consent (“sine voluntate tua”); and in the second case, because Seius was not the owner of Stichus.

The failure to transfer ownership to Titius leads to a series of consequences concerning subsequent legal claims. In the first case, Titius attempts to reivindicate Stichus and fails, since he did not acquire Quiritary ownership in the first place. However, Titius could successfully exercise the *actio Publiciana*, which shows that Maevius was not his owner. Since Titius had a better right than Maevius and may therefore resort to the *Publiciana*, he has not lost the *habere licere*,⁷⁷ which is why

⁷⁶ The case and the theories built around it are described in further detail in Rodríguez Díez 2016: 243-252.

⁷⁷ Kaser 1970: 483; Ankum 2002: 233, 235; Cristaldi 2007: 214; Coppola Bisazza 2008: 109; Guida 2013: 85-87, 164-165. Daube 1960: 110, however, assumes that the text is corrupted at this point, since the delivered object would become a *res furtiva*. However, not any conveyance *invito domino* rendered the delivered object a *res furtiva*, and even if this was the case, the impossibility to acquire through *usucapio* did not exclude the possibility to resort to the *Publiciana*. See, in this regard, Rodríguez Díez 2016: 80-98, 247.

he will not be able to make “you” liable on account of the *stipulatio duplae*. This in turn implies that if “you” seek responsibility from Seius, “you” will be defeated with an *exceptio doli*. In the second case, Maevius would be the owner of Stichus, which is why Titius would completely lose the *habere licere* and would therefore be able to claim responsibility from “you”. “You” will, in turn, be able to successfully seek responsibility from Seius.

This text has been considered by most scholars to have dealt originally with the *mancipatio* of a slave.⁷⁸ A strong indication is its location within the Edict, alongside other texts which Lenel groups under the rubric “*De auctoritate*”.⁷⁹ However, the fact that the text originally dealt with two successive *mancipationes* would imply that a slave could *mancipate*, something which has been traditionally rejected, as already pointed out above. This, in turn, has led scholars to claim that the text is severely corrupted,⁸⁰ since the very ground of the decision would have been altered. Against this traditional opinion, it has been argued that the content of the solution is classical, since the owner’s authorisation (*voluntas domini*) was indeed required for the transfer of ownership by a non-owner, both in the *mancipatio* and in the *traditio*.⁸¹ Since the ground of the decision was common to both modes of transferring ownership, it would have made sense to the compilers to preserve the text by introducing mechanical interpolations. Therefore, the text appears as one of the clearest cases of a *mancipatio* performed by a non-owner.

If Julian indeed dealt with the *mancipatio* by an agent, the references to the *traditio* and the *stipulatio duplae* in the text would be the result of the mechanical interpolations. Accordingly, it could appear that the responsibility described in the two subsequent sales – between Seius and “you”, and between “you” and Titius – would correspond to the *auctoritas* which rises from the *mancipatio*, and that accordingly no stipulation whatsoever was concluded. However, a careful analysis of the text shows that the liability of the subsequent sellers cannot have the same ground, since the features of “your” liability towards Titius are completely different to those of Seius’ liability towards “you”. In fact, the whole text revolves around the problem of the stricter liability between Seius and “you” than between “you” and Titius, which in principle enables “you” to sue Seius even if Titius cannot hold “you” liable. First, Titius can only hold “you” liable to the extent of the *peculium* granted to your slave (“*emptori vero adversus dominum dumtaxat de peculio*”). “You”, on the other hand, can sue Seius for the whole amount (“*domino quidem adversus venditorem in*

78 See, on this point, Brägger 196-197 with further references.

79 Lenel 1889: vol 1 col 463-464; Lenel 1927: 545.

80 Among the various attempts of reconstruction, see Mitteis 1908: 208-209; Girard 1923: 224-226; Daube 1960: 110-114; Kaser 1970: 481-490; Corbino 1976: 53-60; Ankum 1978: 6-10; Ankum 1979: 38-40; Ankum 1984: 11-16; Ankum 2002: 231-235; Reduzzi Merola 2004: 316-321; Cristaldi 2007: 210-214; Coppola Bisazza 2008: 103-110; and Finkenauer 2010: 82-86.

81 Coppola Bisazza 2008: 107-110; Rodríguez Díez 2016: 243-252.

solidum competit actio”), which agrees with the indivisible nature (“*in solidum*”) of the obligation of *auctoritas*. While this difference can be explained on the ground of the intervention of an agent, it should moreover be noted that the underlying fact which triggers the liability of the seller is different regarding “your” claim and Titius’ claim. On the one hand, Titius can only hold “you” liable if he loses the *habere licere*; otherwise the stipulation will not become enforceable (“*duplae stipulatio ei non committetur*”). “You”, on the other hand, can seek liability from Seius for the sole fact that Titius did not become Quiritary owner. The praetor, however, remedies the stiffness of the *actio auctoritatis* by granting Seius an *exceptio doli* against “you” if Titius has not completely lost the *habere licere* (“*venditor quoque tuus agentem te ex stipulatu poterit doli mali exceptione summovere*”).⁸²

While “your” claim appears to be grounded on Seius’ obligation of *auctoritas*, one must determine which was the ground of the more limited liability sought by Titius against “you”. In order to do so, one can also exclude that “your slave” simply delivered Stichus by *traditio*.⁸³ If that was the case, the ground for the failed transfer of Quiritary ownership would be the delivery of a *res Mancipi* through *traditio* instead of *mancipatio*, and therefore the lack of authorisation of the agent (“*servus tuus in tradendo sine voluntate tua*”) would be completely irrelevant. More importantly, it would be unconceivable that Titius would have resorted to the *rei vindicatio* in the first place, thereby believing to be Quiritary owner.⁸⁴

As claimed above, the *satisfactio* or *repromissio secundum Mancipium* were used when an agent mancipated, which makes them the most likely ground for liability between “you” and Titius for the *mancipatio* concluded by “your slave”.⁸⁵ The possibility that the slave concluded a *stipulatio duplae*, as claimed by Girard and Ankum,⁸⁶ appears much more unlikely, not only on account of the paligenetic analysis of the text,⁸⁷ but also because of the very restricted role that such stipulation appears to have had in the context of the transfer of ownership by *mancipatio*.⁸⁸

82 Girard 1923: 225, 228-229; Daube 1960: 110-112; Kaser 1970: 488-489; Ankum 1979: 39; Brägger 2012: 198-200; Rodríguez Díez 2016: 248-250.

83 Such is the claim of Kaser 1970: 486 and Reduzzi Merola 2004: 320-321.

84 Daube 1960: 110; Ankum 2002: 233 n 16.

85 Since the text describes that the seller “promises” double the price (*duplam promiserit*), it could suggest that it originally dealt with a *repromissio secundum Mancipium*. However, since the content of the *satisfactio* and *repromissio secundum Mancipium* appears to have been the same, the point is not decisive.

86 Girard 1923: 224-226; Ankum 1978: 8; Ankum 1979: 40.

87 Julian dealt with the *actio auctoritatis* in book 57 of his Digesta. Moreover, the other text which Lenel located in Julian’s book 57 of his Digesta (D 21 2 51 1, where Ulpian quotes Julian) would refer, according to this author, to the *repromissio* or *satisfactio secundum Mancipium* (Lenel 1889: vol 1 col 464 n 7). Brägger 2012: 90, on the other hand, refers this text to the *actio auctoritatis*.

88 As shown in the following section, only in exceptional cases do the sources report that a stipulation for eviction was concluded alongside a *mancipatio*, which is almost always a *stipulatio simplae*.

Accordingly, D 21 2 39 1 seems to offer the most detailed account on the practical consequences of the *satisfatio* or *repromissio secundum Mancipium*, and thus merits a detailed analysis.

Perhaps the most revealing consequence which follows from this text is that the slave who mancipated could not make his owner liable for *auctoritas*.⁸⁹ If that was the case, the features of the liability between “you” and Seius would be the same as those between Titius and “you”. Moreover, if “your slave” could in some way give rise to this liability, one could wonder why Titius would settle for the more limited liability described by Julian.

The lack of *auctoritas* following the *mancipatio* by “your slave” seems to hold the key to the role of the *satisfatio* and *repromissio secundum Mancipium*: these sureties did not have the purpose of merely reinforcing an existing liability; they constituted the source of the liability for eviction themselves. The only way in which “your slave” could make “you” liable was through a *satisfatio* or *repromissio*. In other words, the primary role of the *satisfatio* or *repromissio* would be to create a ground for liability for the seller *mancipio dans* in a context where he could not be held liable for the *auctoritas*.⁹⁰ However, D 21 2 39 1 shows that these sureties did not give rise to the obligation with an identical content to the statutory liability for *auctoritas*,⁹¹ as it had been claimed by Ankum.⁹² Accordingly, the expression “*stipulatio auctoritatis*” of the *Fragmenta Vaticana*, must be the consequence of a rather vulgar use,⁹³ as shown below. The same could be said regarding the rubric “*De contrahenda auctoritate*” in the *Pauli Sententiae* 5 10.⁹⁴ One should, moreover, not exclude that the term “*auctoritas*” could be used in a rather promiscuous fashion when discussing the responsibility for eviction in these texts.⁹⁵

89 This was already claimed by Girard 1923: 225-226 and 228-229; Ankum 1978: 8. However, this is based on the assumption that the *mancipatio* by a slave would neither transfer ownership nor make the owner liable for *auctoritas*, which is why these scholars consider that “your slave” would have resorted to the *stipulatio duplae*.

90 Such an opinion was briefly set forth by Calonge 1968: 21-24.

91 Lenel 1927: 547; Sargenti 1962: 156; Calonge 1968: 24.

92 Ankum 1981: 790; Ankum 2013: 14-15. Nonetheless, the author indicates that these sureties would grant the buyer an *actio ex stipulatu* against the seller, not an *actio auctoritatis* (or *de auctoritate*).

93 Ankum 2013: 15 n 12, on the other hand, considers this expression to be a technically accurate equivalent to the *repromissio secundum Mancipium*.

94 See, on this text, Lenel 1927: 548; Ankum 1981: 764-765. The same reference to the *auctoritas* of the seller is made in PS 2 17 1, discussed by Ankum 1981: 765-767. However, whether the rubric of PS 5 10 indeed refers to the *repromissio* or *satisfatio secundum Mancipium* is arguable on account of the observation of Girard 1923: 204 n 2 (followed by Meylan 1948: 7) that the expression “*auctoritas contrahere*” appears to refer, above all, to the liability of *auctoritas* that follows the *mancipatio*.

95 For the scope of the terms “*auctor*” and “*auctoritas*” in the context of the transfer of ownership, see Brägger 2012: 29-39. Meylan 1948: 7-8 and Guida 2013: 61 are sceptical regarding the significance of PS 5 10 and FV 10 in relation to the *repromissio* or *satisfatio secundum Mancipium*.

Returning to D 21 2 39 1, it should be noted that the mechanics surrounding the *denuntiatio* of Titius appear to agree with these conclusions. If the *mancipatio* performed by “your slave” would give rise to liability for *auctoritas*, certainly “you” would be the *auctor* and, as such, the person to whom Titius should make the *laudatio auctoris*.⁹⁶ However, Julian indicates that, as long as it was possible, the *denuntiatio* had to be made to the slave. This not only agrees with the fact that he is the most suitable person to provide the necessary information concerning the title, but also the effective party to the stipulation.⁹⁷ Just as in the *stipulatio duplae*, the claim following from the stipulation would only be in place if the buyer first made a *denuntiatio* against the seller.⁹⁸ “Your” responsibility is therefore not the one of an *auctor*,⁹⁹ but merely of a *dominus* who responds for the stipulations of his slave to the extent of the *peculium* granted to him.

The fact that these sureties would constitute the only source of liability for the seller – and not reinforce an already existing obligation – would moreover explain the very existence of the *repromissio secundum mancipium*. It has been justly pointed out that it is rather difficult to explain that the seller should stipulate for eviction after concluding a *mancipatio* (without giving guarantors), since there would seem to be a double – and redundant – ground to hold the seller liable: the *auctoritas* and the *repromissio*.¹⁰⁰ In this context, only the existence of a *satisfatio secundum mancipium* would make sense, since an additional personal security would strengthen the position of the buyer. The *repromissio*, on the other hand, would be unnecessary. The answer to this problem is that there is not a double ground for liability, since the *mancipatio* concluded by an agent would not give rise to the *actio auctoritatis*, which is why the agent had to conclude a special *repromissio* or *satisfatio*.

9 *Mancipatio* with stipulation for eviction and *auctor secundus* in Roman legal practice

The role of the *satisfatio* and *repromissio secundum mancipium* as sureties for the *mancipatio* concluded by an agent may contribute to understanding some elements of legal practice which have been neglected when analysing these institutions. Of special significance are several surviving documents regarding the sale of a *res Mancipi* or valuable *res nec Mancipi* where the parties are said to have sold and

⁹⁶ See, on this point, Ankum 2014: 2-6.

⁹⁷ Daube 1960: 114; Kaser 1970: 490.

⁹⁸ Ankum 2014: 7-11.

⁹⁹ Brägger 2012: 91: “Die Ausnahme, das im Falle des Verkaufs durch einen Sklaven die *denuntiatio* an diesen und nicht an den *dominus* zu erfolgen habe, galt somit bei der *auctoritas* nicht. Sie kam zur Anwendung, wenn der Käufer sich auf eine andere Anspruchsgrundlage stütze (*stipulatio duplae* oder *actio empti*).”

¹⁰⁰ Meylan 1948: 3-4; Sargenti 1962: 155; Mostert 1969: 27-28 n 146; Ankum 1981: 749-750, 788-790; Dalla Massara 2007: 285-286.

mancipated (“*emit mancipioque accepit*”) and, moreover, that the seller granted a stipulation against eviction.¹⁰¹ Scholars tend to agree nowadays that such reference to a *mancipatio* corresponds to a “degenerate” usage, which – at least in provincial practice – would not grant Quiritary ownership to the acquirer.¹⁰² Nonetheless, such practice is also attested in one document from Herculaneum,¹⁰³ which shows that we are not dealing exclusively with a provincial abnormality.

From the point of view of the liability for eviction, the use of a stipulation for eviction alongside the *mancipatio* is fairly odd.¹⁰⁴ When a *mancipatio* was concluded the seller would be liable for *auctoritas*,¹⁰⁵ which is why a stipulation for eviction seems completely out of place. However, the inclusion of a stipulation for eviction alongside a *mancipatio* can be related to the existence of the *satisfactio* and *repromissio secundum mancipium*, since the existence of such sureties must have made it more acceptable to include both elements in a deed of sale. Probably the main reason to replicate such usage, even when an agent did not intervene, was to seek a milder liability than the *auctoritas*.¹⁰⁶ This may explain why almost every stipulation for eviction concluded alongside a *mancipatio* was a *stipulatio simplae*.¹⁰⁷ Nonetheless, at some point the praetorian protection of the acquirer must have made it needless to mancipate, which is why the parties did not include the “*mancipioque accepit*”-clause even when the number of witnesses would have been sufficient to perform a *mancipatio*.¹⁰⁸ Such practice, however, remained in use in the provinces,¹⁰⁹ where

101 FIRA 1968: vol 3 283-284 (§ 87) (*emptio puellae*, AD 139); 285-286 (§ 88) (*emptio pueri*, AD 142); 287-288 (§ 89) (*emptio ancillae*, AD 160); 290 (§ 90) (*emptio domus*, AD 159); *Tabula Fortunatae* (first to second century AD), re-edited by Camodeca 2007: 397-404; TH² 61 (Camodeca 2017: 180-181) (63 AD). See Cristaldi 2007: 219-230 for the context of these texts and bibliographical references.

102 See Cristaldi 2007: 243-251 with further references, as well as Finkenauer 2010: 77-78 and Mattiangeli 2011: 307-323.

103 TH² 61 (Camodeca 2017: 180-181). For an outlook of stipulations for eviction in surviving documents from the classical period, see Camodeca 2017: 189-190.

104 On the coexistence of the *mancipatio* alongside a stipulation for eviction, see Ankum 1979: 27-30; and Cristaldi 2007: 251-255 with further references.

105 Brägger 2012: 47-52.

106 Ankum 1979: 29-30, followed by Cristaldi 2007: 254-254 and Brägger 2012: 50, 216-217.

107 Ankum 1979: 28-29. The only exception is FIRA 1968: vol 3 283-284 (§ 87), where the seller concludes a *stipulatio duplae*.

108 Koops 2014: 49-50 highlights that already in the year AD 166 the parties to a sale that resembles a *mancipatio* did not feel the need to include the clause “*mancipio accepit*”, as seen in FIRA 1968: vol 3 425-427 (§ 132) (*emptio pueri Seleuciaie pieriae contracta*). The same could be said of TPSulp 43 (38 AD), which however leads Camodeca 1987: 177-178 to assume that the *mancipatio* was performed anyway. Such conclusion seems debatable: since the “*mancipioque accepit*”-clause was already in use in Herculaneum at that time, it would seem curious not to include it when mancipating.

109 FIRA 1968: vol 3 283-284 (§ 87), 285-280 (§ 88), 6, 287-288 (§ 89), 290 (§ 90) correspond to the territory of ancient Dacia, and the sale of Fortunata (Camodeca 2007: 397-404) was concluded in Roman Britain.

it had its own advantages: on the one hand, the reference to the *mancipatio* would attest that the seller conveyed in an utmost formal way, even when such conveyance did not transfer Quiritary ownership; on the other hand, if there was any reason to suspect the validity of the *mancipatio*, the seller would in any case be bound by the stipulation for eviction.¹¹⁰

There is another commercial practice which shows traces of the *satisfatio* and *repromissio secundum mancipium*: the widespread misconception that a seller who granted a stipulation against eviction over a *res mancipi* should moreover offer a personal security, an “*auctor secundus*”. Classical jurists report that it was a common practice to grant such guarantors, but that it was by no means legally required. Ulpian reports the use of the vulgar expression “*auctor secundus*” (“*volgo auctorem secundum vocant*”) to describe the guarantor who secures the seller against eviction in the sale of a slave, a security which he regards as not essential unless the parties have agreed otherwise (“[e]t est relatum non debere, nisi hoc nominatim actum est”).¹¹¹ Scholars have often assumed from the use of the term “*auctor*” that this fragment was originally restricted to the *mancipatio*.¹¹² However, as claimed by Meylan,¹¹³ the text is better understood in relation to D 21 2 56 *pr*, where Paul – writing on the Edict of the aedile – reports that it was popular belief (“*ut vulgus opinatur*”) that a *cautio* should be granted along with the *stipulatio duplae*, which he discards in the same terms as Ulpian (“*sed sufficit nuda repromissio, nisi aliud convenerit*”).¹¹⁴ Similarly, another text from Ulpian rejects the need for guarantors at the sale,¹¹⁵ as well as the *Codex Iustinianus* 4 38 12 *pr* (“*Non idcirco minus emptio*

110 Camodeca 1987: 177; Cristaldi 2007: 254; Brägger 2012: 49-50. Moreover, as noted by Cristaldi 2007: 250-251, the use of witnesses prescribed by the *mancipatio* would give more publicity to the sale.

111 D 21 2 4 *pr* (Ulp 32 *ed*): *Illud quaeritur, an is qui mancipium vendidit debeat fideiussorem ob evictionem dare, quem volgo auctorem secundum vocant. Et est relatum non debere, nisi hoc nominatim actum est.* (It has been asked whether one selling a slave ought to give a verbal guarantor against eviction, what might commonly be called a second guarantor of the purchase. The tradition is that this is not essential, unless the parties have specifically provided otherwise [trl Thomas/Watson]).

112 Lenel 1889: vol 2 col 630 and Ankum 1981: 789.

113 Meylan 1948: 6 n 2, followed by Mostert 1969: 30-31 n 156.

114 D 21 2 56 *pr* (Paul 2 *ad edictum aedilium curulium*): *Si dictum fuerit vendendo, ut simpla promittatur, vel triplum aut quadruplum promitteretur, ex empto perpetua actione agi poterit. Non tamen, ut vulgus opinatur, etiam satisfacere debet qui duplam promittit, sed sufficit nuda repromissio, nisi aliud convenerit.* (If it be stated at the time of sale that a stipulation for once, triple or fourfold the price is to be entered into, an action on purchase will lie at any time. However, contrary to popular belief, one who promises double the price is not required to give security; a simple promise suffices unless the parties agree otherwise [trl Thomas/Watson]).

115 D 21 2 37 *pr* (Ulp 32 *ed*): *Emptori duplam promitti a venditore oportet, nisi aliud convenit: non tamen ut satisfacatur, nisi si specialiter id actum proponatur, sed ut repromittatur.* (The purchaser should receive the stipulation for double the price from the vendor, subject to a contrary agreement; but he is not entitled to security, unless that be specifically contracted for; he is entitled only to the promise [trl Thomas/Watson]).

perfecta est, quod emptor fideiussorem non accepit”), while the *Codex Iustinianus* 6 60 1 2 highlights that it is up to the buyer to ask for guarantors (“et emptori, si velit, fideiussorem licebit accipere”).

These texts show that it was a widespread belief in commercial practice that the seller should offer guarantors for eviction at the sale – particularly of *res Mancipi* – when a stipulation for eviction was granted, despite not being legally required.¹¹⁶ Such misconception can be explained on account of the existence of the *satisfactio secundum Mancipium*, where the seller – provided he was an agent – would indeed be compelled to give a surety against eviction when selling a *res Mancipi*. The widespread use of the *satisfactio secundum Mancipium* in commercial practice must have led to the assumption that every sale of *res Mancipi* involving a stipulation against eviction should be coupled with a personal security, a “*secundus auctor*”.

The vulgar practice of granting a *secundus auctor* alongside a stipulation for eviction in the sale of *res Mancipi* is moreover recorded in surviving contracts from the second century AD. For instance, at the *emptio pueri Seleuciaie pieriae contracta*¹¹⁷ (AD 166) a seller gives a stipulation for eviction (“si quis eum puerum partemve eius evicerit, simplam pecuniam sine denuntiatione recte dare stipulatus est”) which he reinforces with a guarantor who grants his *auctoritas* (“id fide sua et auctoritate esse iussit C. Iulius Antiochus”).¹¹⁸ The reference to the *auctoritas* of the guarantor may hint to the fact that the practice of granting a “*secundus auctor*” was borrowed from the *Mancipatio*,¹¹⁹ which may be particularly the case in the document under analysis since, as noted by Koops, the presence of five witnesses

116 It is moreover worth noting that Varro *De lingua Latina* 6 74, should not be related with the *satisfactio secundum Mancipium* and the limitations of guarantors at the *Mancipatio* in general, as it has been often been claimed in the past (eg Lenel 1927: 548; Meylan 1948: 14; Arangio-Ruiz 1954: vol 2 331; Sargenti 1962: 159). The text has in fact a much more restricted scope, as shown by De Simone 2009: 198-210.

117 FIRA 1968: vol 3 425-427 (§ 132).

118 The same pattern (stipulation for eviction with an “*auctor secundus*” at the sale of a *res Mancipi*) may be found in other stipulations for eviction dating from the classical period, such as FIRA 1968: vol 3 432 (§ 134) (*emptio puellae Ravennae facta*, second century AD): “Aescina philium Flavianum secumdem auctorem exstitisse” and FIRA 1968: vol 3 288 (§ 89) (*emptio ancillae*, AD 160): Αλεξανδρε Αντιπατρι σεκονδ(ο) αυκτωρ σεγνα(υ)ι, equivalent to “Alexander Antipatri secundus auctor signavi”. In several other texts, the stipulation for eviction is coupled with a personal security, but no reference is made to the guarantor’s *auctoritas* or to the fact that he acts as an *auctor secundus*. Some documents written in Greek use the similar term βεβαίωσις, such as FIRA 1968: vol 3 429 (§ 133) (*emptio puellae Pamphilica*, AD 151): βεβαioύντος και τη ιδία πίστει κελεύον[το]ς Ἑρμείου Ἡφαιστᾶ (...) καὶ [τ]αῦτ[α] ὑπὲρ αὐτοῦ τῇ [ι]δία π[ί]στει καὶ βεβαioύσει εἶναι ἐκέλευσεν Ἑρμείας Ἡφαιστᾶ (...) [Ἑρμείας Ἡφαιστᾶ] βεβαioῦ τ[ὸ] κοράσιον καὶ τῇ ἰδ[ι]ᾷ π[ί]στει κελεύω ὡς προγεγραπται”, rendered into Latin as “auctore (secundo) constituto et fide sua (esse) iubente Hermia Hephaestae filio (...) haec autem pro fide sua et auctoritate esse iussit Hermias Hephaestae filius (...) Hermias Hephaestae filius puellae vendendae auctor sum et mea fide (esse) iubeo ita ut supra scriptum est”. See, moreover, Straus 2004: 139-152 on the βεβαίωσις as surety for eviction in papyrological sources.

119 FIRA 1968: vol 3 288 (§ 89) reports in fact that the *Mancipatio* was concluded.

suggests that the parties tried to stick close enough to the forms of the *mancipatio*, despite the fact that they did not feel the need to include the clause “*mancipioque acceperit*”.¹²⁰

Through this analysis, the obscure use of a “*secundus auctor*” at the sale of *res Mancipi* can be explained as an (unnecessary) precaution which followed the model of the *satisfatio secundum Mancipium*, just like the practice of granting a stipulation against eviction alongside a *mancipatio*. Both commercial usages further confirm that the *repromissio* and *satisfatio secundum Mancipium* must have had a relevant position in everyday practice. Moreover, the widespread use of a “*secundus auctor*” may explain the term “*stipulatio auctoritatis*” of the *Fragmenta Vaticana* 10, which could be regarded as the stipulation granted by the guarantor of the sale, thus encompassing both the legally accurate usage of the *satisfatio secundum Mancipium* when an agent mancipated and the vulgar practice of granting an *auctor secundus* whenever a *res Mancipi* was sold.

10 Historical development of the *satisfatio* and *repromissio secundum Mancipium*

The additional information given by D 21 2 39 1 and by the documents of legal practice enables a reconstruction of the historical origins of the *repromissio* and *satisfatio secundum Mancipium*. In the course of the third century BC, an increasing number of slaves and sons-in-power acted as commercial intermediaries. The basic rule of thumb was that the position of the *paterfamilias* could be improved by the acts of his slaves and sons-in-power, but that acts which were burdensome had to be authorised by him.¹²¹ It was in this context that the *actiones adiecticiae* came into scene, allowing those who contracted with a person *alieni iuris* to hold the *paterfamilias* liable.

Concerning the transfer of ownership by *mancipatio* or *traditio*, as shown above, an authorised non-owner – whether he was a person *sui iuris* or *alieni iuris* – would validly alienate if he acted according to the owner’s authorisation (*voluntate domini*). However, as it appears from D 21 2 39 1, the *mancipatio* performed by an agent would not give rise to responsibility for *auctoritas*. The ground for this limitation is unknown, but one may suspect that, since the *auctoritas* was a form of statutory liability, it must have covered a specific range of situations which did not comprise alienations concluded by a non-owner acting on behalf of the owner.¹²²

120 Koops 2014: 49-50.

121 D 3 5 38(39); D 50 17 133. See, on this point, Miceli 2008: 38; Coppola Bisazza 2008: 101; Rodríguez Díez 2017: 73-75.

122 This idea was already proposed by Calonge 1968: 21 when discussing the letter of Cicero to Atticus: “En la situación que delata el texto ciceroniano parece lógico pensar que la presencia de *satisfaciones* no tenga otro motivo que la ausencia del *mancipio dans* de Roma; quizá por ello no podría entrar en juego la general protección de la *auctoritas* que sería necesario suplir, al menos por lo que se refiere a la posibilidad de evicción, con garantes.”

The juristic solution to this limitation was that the agent should grant a special *repromissio* in order to allow the buyer to hold the *dominus negotii* liable with the corresponding action. If the agent was a person *sui iuris*, he would bind himself; if the agent was a person *alieni iuris*, the *paterfamilias* would be liable to the extent of the *actiones adiecticiae*. It is therefore no wonder that the first mentions of the *repromissio* and the *actiones adiecticiae* are to be found at around the same period, towards the second century BC.¹²³

The *repromissio secundum Mancipium* had some obvious disadvantages compared to the responsibility for *auctoritas*, especially because the *dominus negotii* had a reduced liability, and was only bound if the act of intermediation fell within the scope of one of the *actiones adiecticiae* (which was exceptional if the agent was a person *sui iuris*). Moreover, considering the perils threatening the buyer who acquired by *mancipatio* from an agent, the *repromissio* at some point had to be reinforced by adding an additional personal security, thus becoming a *satisfactio secundum Mancipium*. The presence of guarantors would give the buyer a strong surety in order to claim the stipulated *duplum* in case of eviction, which is why the *satisfactio* must have been much more common in legal practice than the *repromissio*, as suggested by the *formula Baetica*. All of this supports the claim that it was included among the praetorian stipulations. Therefore, when Cicero writes to Atticus that some *satisfactiones* had to be granted, it is probable that the buyer could compel Atticus and seek liability if the surety was not granted. Nonetheless, the *repromissio* did retain a certain role, as attested by the *formula Baetica*.

11 Significance of the *satisfactio* and *repromissio secundum Mancipium*

According to this historical reconstruction, the *satisfactio* and *repromissio secundum Mancipium* must have had an enormous importance in the development of the responsibility for eviction. It was in the context of the *mancipatio* by a non-owner that jurists for the first time had to address the problem of making someone liable for eviction outside the boundaries of the *auctoritas*. If this problem was not solved, no seller would have been willing to acquire by *mancipatio* from an agent. The *repromissio* and *satisfactio* enabled the buyer to seek responsibility from the *dominus negotii* through the corresponding action – *de peculio, quod iussu*, etc – and the responsibility of the seller himself in case he was a person *sui iuris*. When the jurists had to determine the content of these sureties, their immediate reference was the responsibility for *auctoritas*. While it is difficult to determine to what extent the liability for *auctoritas* influenced the content of the *repromissio* and *satisfactio*, it seems likely that the seller would stipulate for twice the price of the thing sold.¹²⁴

123 Miceli 2008: 37, 38 n 15. For the dating of the *actio de peculio*, see Pesaresi 2012: 169-173.

124 Bechmann 1876: 370; Girard 1923: 62; Ankum 2013: 15.

However, as shown by D 21 2 39 1, the liability which rose from these sureties was not identical to that of the *auctoritas*.

The possibility of introducing the responsibility for eviction through a stipulation must have been an eye-opener to the jurists, who in the second century BC introduced the *stipulatio habere licere* for the sale of *res nec Mancipi*,¹²⁵ another case where – just as in the *repromissio* and *satisfatio secundum Mancipium* – the transfer of Quiritary ownership was not coupled with a form of liability for eviction.¹²⁶ Moreover, as the buyer who acquired a *res Mancipi* by *traditio* was increasingly protected by the praetor, the inconveniences of the lack of liability in case of eviction must have become more pressing. The *satisfatio* and *repromissio secundum Mancipium* appeared as an immediate model to make the seller liable, which is why jurists conceived a stipulation for double which encompassed the sale of *res Mancipi* delivered by *traditio*: the *stipulatio duplae*.¹²⁷ The main differences were that the *stipulatio duplae* was not performed *secundum Mancipium* and was not restricted to the alienations by agents. It is furthermore difficult, due to the scarcity of sources, to determine whether there were further differences between these institutions, although Ankum's analysis suggest that the liability which rose from the *satisfatio* and *repromissio secundum Mancipium* might have been closer to that of the *auctoritas* than to the *stipulatio duplae*.¹²⁸

It should be noted at this point that the development of these stipulations was intimately linked to the *in rem* protection that the buyer could obtain.¹²⁹ The seller would only take upon himself the responsibility for eviction if the buyer could defend his position in terms of real rights. Therefore, the *repromissio secundum Mancipium* could only have been granted already at the beginning of the second century BC – as attested by Plautus – if the buyer obtained Quiritary ownership over the *res Mancipi* through *mancipatio*. The *actio Publiciana* and the *exceptio rei venditae et traditae* were certainly not available at such an early stage,¹³⁰ which is why it would have been almost unimaginable that the seller would have been willing to guarantee the position of the buyer if the latter could not successfully defend himself. It therefore makes sense that the *stipulatio duplae* was introduced to protect the buyer of a *res*

125 Varro *De re rustica* 2 2 5-6; 2 3 5; 2 4 5. For recent surveys on this point, see Dalla Massara 2007: 286-293 and Guida 2013: 70-76.

126 Dalla Massara 2007: 288.

127 Varro *De re rustica* 2 10 5. See, on this point, Girard 1923: 101; Arangio-Ruiz 1954: vol 2 341; Guida 2013: 87-90.

128 See Ankum 1981: 775-782 and Ankum 2013: 19-22, 27, although the differences that the author spots may go too far, since he assumes that the liability rising from the *satisfatio* and *repromissio* must have been identical to the obligation of *auctoritas*.

129 Cristaldi 2007: 10-13, 121ff; Guida 2013: 35-58.

130 While the exact date of introduction of these remedies is disputed, scholars agree that it could not have been earlier than the second half of the second century BC. For a *status quaestionis* of the traditional scholarship on this point, see Sansón Rodríguez 1998: 129-134, 155-157.

mancipi who obtained it by *traditio* only after the praetor had created the *actio Publiciana* and the *exceptio rei venditae et traditae*.

According to this description, the *satisfactio* and *repromissio secundum Mancipium* were not insignificant sureties in Roman law. The fact that the *formula Baetica* lists them among the sources of liability for the seller shows that they were widespread in commercial practice, coexisting alongside the general stipulations for eviction through the classical period. They were not used incidentally and merely as a reinforcement for the liability of the seller, as seems to have been the case regarding the *cautio rem ratam haberi* that could be granted when transferring ownership.

The only reason why there is so little evidence on the *satisfactio* and *repromissio secundum Mancipium* is because these sureties were intimately linked to the *Mancipatio*. Moreover, the idea that the buyer could compel the seller (*Mancipio dans*) to conclude a *satisfactio secundum Mancipium* – being a *stipulatio praetoria* – was in contradiction with the general rules regarding the law of sale as indicated in the previous paragraph, which may moreover explain why such few texts on these sureties were preserved in the Digest.

Curiously enough, the downfall of the *Mancipatio* seems to be in direct connection with the introduction of the *satisfactio* and *repromissio secundum Mancipium*. Originally, the buyer had relevant incentives to require that the seller performed the *Mancipatio*, not only because he would become Quiritary owner, but also because he would eventually be able to hold him liable through the *actio auctoritatis*. Afterwards, the *satisfactio* and *repromissio secundum Mancipium* introduced the possibility to hold the seller liable when the *Mancipatio* was performed by an agent. This in turn opened the possibility for granting other stipulations for eviction even when the thing was not mancipated, especially considering that the buyer would obtain the *habere licere*, which was secured by the praetorian remedies in case the delivered object was a *res Mancipi*. At some point it must have appeared evident that the *Mancipatio* had become nothing but a tiresome formality, with almost no practical advantage over a *traditio* secured by a *stipulatio duplae*. The *Mancipatio* was thus gradually set aside, carrying the *satisfactio* and *repromissio secundum Mancipium* along with it.

12 Conclusion

The most likely role of the *satisfactio* and *repromissio secundum Mancipium*, according to the few available sources, was to serve as a surety for eviction, particularly when an agent transferred ownership. The main difficulty is to determine whether these sureties were granted in the context of a *traditio* or a *Mancipatio*, as well as the exact reason for granting them. Regarding the first issue, it has been argued that the *satisfactio* and *repromissio* could not have been granted in the context of a *traditio*, since their scope of application would overlap with the *stipulatio duplae*, as well as with the *exceptio rei venditae et traditae*. On the other hand, while scholars

traditionally have assumed that a *mancipatio* could not be concluded by an agent, this assumption is not based on the sources, but rather on preconceptions which one may nowadays label as obsolete. Since there is no overlap with other institutions in the context of the *mancipatio*, the *satisfatio* and *repromissio secundum Mancipium* are more likely to have been granted when an agent mancipated.

The role of the *satisfatio* and *repromissio*, as shown by D 21 2 39 1, was to provide a form of liability for eviction, since the responsibility for *auctoritas* would not rise when the *mancipatio* was concluded by an agent. The *satisfatio* and *repromissio secundum Mancipium* were the juristic solution to the limited scope of the liability for *auctoritas*, thus inaugurating the trend of granting stipulations for eviction. These sureties retained a relevant role in the classical period, leaving moreover traces in legal practice, such as the possibility to stipulate for eviction when mancipating or the usage of offering guarantors when granting a *stipulatio duplae*.

The reconstruction that has been offered above not only seeks to make the most out of the few sources on the subject, but also to harmonise these sureties with other institutions that protected the buyer from the perspective of personal (*stipulatio duplae*) and real rights (*exceptio rei venditae et traditae*). This attempt allows one to understand the coexistence of the *satisfatio* and *repromissio* alongside other stipulations for eviction, as well as its scarce mentions within the sources. This historical framing shows that these sureties were of key importance in the evolution of the responsibility for eviction in Roman law.

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HISTORY OF THE DISPOSSESSION OF THE RIGHTS IN LAND OF PASTORAL INDIGENOUS COMMUNITIES IN THE CAPE COLONY FROM 1652 TO 1910

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ABSTRACT

The pastoral indigenous communities living in southern Africa at the start of the colonial period were the first to be dispossessed of their rights in land. They had exercised these rights in terms of their customary law systems for centuries before the arrival of non-indigenous settlers in 1652. During the nineteenth century, the final acts of dispossession of land took place in terms of racially discriminatory legislation and administrative actions, just like the dispossession of land that took place after 19 June 1913. However, the descendants of these communities are unable to claim restoration of their rights in land in terms of the constitutional land reform programme. This contribution identifies the customary law rights in land of these communities and compares such rights with the rights that non-indigenous settlers had in the land used as grazing on loan places. This comparison shows that the rights in land used

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as grazing of non-indigenous settlers and pastoral indigenous communities were in essence the same. However, from 1813 the colonial government implemented legislation in the Cape Colony that created big disparities with regard to rights in land between them. In this contribution, it is argued that colonial dispossession of land from pastoral indigenous communities should be rectified by adopting legislation in terms of section 25(8) of the Constitution that will enable the descendants of these communities to claim restoration of their ancestral land.

Keywords: pastoral; indigenous; customary law; perpetual quitrent; settlers

1 Introduction

The first indigenous communities¹ to be dispossessed of their customary law rights in land in southern Africa were the pastoral indigenous communities² living in the south-western, southern and north-western parts of the Cape Colony.³ The descendants of some of these communities still live in the north-western and western parts of what is now respectively the Western Cape and Northern Cape Provinces, and still occupy land in terms of customary law principles.⁴ As the dispossession of the rights in land of these communities took place before 19 June 1913⁵ the Constitution⁶ and the Restitution of Land Rights Act⁷ (Restitution Act) do not provide for the restitution of such rights. In this contribution it is contended that the exclusion of the descendants

- 1 The contentious issue of who may be regarded as indigenous people in South Africa is not addressed in this contribution. The persons and communities that were or are holders of rights in land under customary law systems are referred to as indigenous people or indigenous communities.
- 2 For the purposes of this contribution “pastoral indigenous communities” means indigenous communities that only kept livestock and did not cultivate the land.
- 3 In this contribution, the Cape means the Cape Peninsula and Table Valley that are separated from the interior of the country by the Cape Flats, and a small area along the west coast up to Saldanha Bay. The Cape Colony refers to the territory as it gradually developed beyond the Cape, not only to the Colony as it existed when the Union of South Africa was formed in 1910. The meaning of the phrase is therefore determined by the period that is being dealt with at that stage. The phrase “interior of the Cape Colony” refers to the areas beyond the permanent settlement area comprising the arid areas north and north-east of the Cape. The phrase “permanent settlement areas” means the areas where there were colonial government buildings and non-indigenous settlers’ houses, like the area where Cape Town was starting to develop and areas where the non-indigenous settlers had farms.
- 4 This contribution deals specifically with the pastoral indigenous communities who lived in the region that was known as Namaqualand during the colonial period and with their descendants who currently live in the area under the jurisdiction of the Namakwa District Municipality.
- 5 This is the date on which the Natives Land Act 27 of 1913 entered into force. In terms of s 121(3) of the interim Constitution of the Republic of South Africa 200 of 1993 the date for restitution of land may not be earlier than 19 Jun 1913. This date is referred to in this article as the cut-off date.
- 6 Constitution of the Republic of South Africa, 1996.
- 7 Act 22 of 1994.

of pastoral indigenous communities that lived in the north-western Cape Colony from the land restitution sub-programme⁸ leads to unequal treatment of dispossessed persons in democratic South Africa.⁹

In this contribution it is argued that the customary law rights in land of the descendants of the dispossessed pastoral indigenous communities should be restored provided that they –

- (a) are still living in the relevant areas that are referred to in Schedule 2 to the Rural Areas Act (House of Representatives) (Rural Areas Act);¹⁰ and
- (b) still utilise land used as grazing in terms of the customary law system of their ancestors.

Section 2 deals with the customary law systems of pastoral indigenous communities and their rights in land in terms of these systems. The manner in which the residents

8 In the rest of this contribution I refer to this area as the north-western Cape. The restitution sub-programme forms part of the constitutional land reform programme provided for in s 25 of the Constitution and is dealt with in subs (7) of said s.

9 The Transformation of Certain Rural Areas Act 94 of 1998 (Transformation Act) makes provision for the redistribution of land in, amongst other areas, the Namakwaland District Municipality, but does not provide for the restitution of the customary law rights in land dispossessed during the colonial period.

10 Act 9 of 1987. Schedule 2 provides as follows:

<i>Area</i>	<i>Description of Area</i>
1. Concordia	As defined in paragraph D of the Schedule to Proclamation 53 of 1912.
2. Ebenezer	As defined in the Schedule to Proclamation 222 of 1964.
3.	
4. Komaggas	As defined in paragraph B of the Schedule to Proclamation 53 of 1912, together with the farm Bontekoe as defined by Proclamation 333 of 1960.
5. Leliefontein	As defined in paragraph A of the Schedule to Proclamation 53 of 1912, together with the farms Tweerivieren and Hoorngat as defined by Proclamation 114 of 1960.
6.	
7.	
8.	
9. Richtersveld	As defined in the Schedule to Proclamation 182 of 1957.
10.	
11.	
12. Steinkopf	As defined in paragraph C of the Schedule to Proclamation 53 of 1912, together with the farm Wolftoen as defined by Proclamation 94 of 1962.
13.	
14.	
[Item 14 added by Proclamation No 162 of 1989]	

The specific areas dealt with in this contribution are referred to as the Reserves and are listed as items 1, 4, 5, 9 and 12 in the Table.

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of the Reserves continue to occupy land used as grazing in terms of customary law systems is also discussed.¹¹

Section 3 deals with the rights in land of non-indigenous settlers¹² that are comparable with the customary law rights of pastoral indigenous communities. The non-indigenous settlers concerned occupied land used as grazing on loan places in the interior of the Cape Colony.

The discussion of pastoral indigenous communities' and non-indigenous settlers' rights in land used as grazing serves as the background for the discussion in section 4. This section deals with the legislation and administrative measures introduced into the Cape Colony from 1813 that made it possible for the colonial government to survey and demarcate land,¹³ and grant, sell and lease the land units to non-indigenous settlers. As the residents of the Reserves were eventually prevented from exercising their customary law rights on land occupied by their ancestors in terms of customary law systems, they were dispossessed of their rights by the abovementioned legislation and administrative measures.

The colonial government was able to introduce the legislation and administrative measures referred to above because the English common law doctrine of tenures was made part of the domestic law of the Cape Colony after 1813.¹⁴ The introduction of

11 This discussion deals mainly with the manner in which the residents of the Leliefontein Reserve still occupy the communal land on that Reserve with their livestock. This is due to the fact that the majority of the research regarding the utilisation of grazing in the semi-arid Namakwaland district has been done at Leliefontein.

12 In this contribution the phrase "non-indigenous persons" refers to natural and legal persons who cannot be regarded as indigenous persons as contemplated in n 1 and who acquired their rights in land in terms of the domestic law of the Cape Colony. The phrase "non-indigenous settlers" refers to persons who left the service of the Dutch East India Company (Company) to conduct farming operations for their own account, and their descendants, as well as non-indigenous immigrants, like the French Huguenots, who were not employees of the Company. It is contended that there is a difference between the common law of the Cape Colony in the colonial period and the law that is today known as the common law of South Africa. It is not contended that Roman-Dutch law was not introduced in the Cape Colony in 1652 or that it was not the basis of property law in the Cape Colony. Roman-Dutch law of property principles were applied in situations that were familiar to the colonial government and non-indigenous settlers. However, the colonial government was confronted with circumstances relating to the occupation of land in which conventional Roman-Dutch law principles could not be applied. Consequently, it adopted measures to address these circumstances that gradually became customs in the Cape Colony, or published *plakate* (local laws) to address the problem. These customs and *plakate* formed part of the legal system that is referred to as the domestic law of the Cape Colony.

13 Surveyed and demarcated land is referred to as land units in this contribution.

14 The classical formulation of the doctrine reads as follows: "The true meaning of the word fee, *feodum*, is the same with that of feud or fief, and, in its original sense, it is taken in contradistinction to *allodium*; which latter the writers on this subject define to be every man's own land, which he possesses merely in his own right, without owing any rent or service to any superior ... But *feodum*, or fee, is that which is held of some superior on condition of rendering him service; in which superior the ultimate property of the land resides. And, therefore, Sir Henry Spelman defines a feud or fee to be the right which the vassal or tenant has in lands, to use the same, and

this doctrine had the effect that all land in the Cape Colony not belonging to non-indigenous persons (Crown land) was regarded as the property of the British Crown. In *Richtersveld Community v Alexkor Ltd*¹⁵ (*Richtersveld 2*) the Supreme Court of Appeal (SCA) found that the doctrine was not applicable to land claimed by the Richtersveld community and that they were not dispossessed of their rights in land before 19 June 1913. Section 5 of this contribution deals with the negative effect that the SCA's approach to Crown land has on the customary law rights in land of the residents of the Reserves other than Richtersveld.

In section 6 it is suggested that legislation should be enacted in terms of section 25(8) of the Constitution to redress the dispossession of the rights in land of the ancestors of the current residents of the Reserves during the colonial period.

2 Key concepts of the customary law systems of pastoral indigenous communities

Legal historians have not yet written a definitive work specifically on the customary law systems of the pastoral indigenous communities that lived in the territory that became the Cape Colony.¹⁶ Therefore, to determine the key concepts of these customary law systems the descriptions and approaches offered by historians, archaeologists and anthropologists of the manner in which indigenous communities occupied the land are used.¹⁷

take the profits thereof to him and his heirs, rendering to the lord his due services: the mere allodial property of the soil always remaining in the lord. This allodial *property* no subject in England has; it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the crown. The sovereign, therefore, only has *absolutum et directum dominium*: but all subjects' lands are in the nature of *feodum* or fee; whether derived to them by descent from their ancestors, or purchased for a valuable consideration, for they cannot come to any man by either of those ways, unless accompanied with those feudal clogs which were laid upon the first feudatory when it was originally granted. A subject, therefore, has only the usufruct, and not the absolute property of the soil; or, as Sir Edward Coke expresses it, he has *dominium utile*, but not *dominium directum*." See Kerr 1876: 88-89.

15 2003 (6) SA 104 (SCA).

16 The only published work found on the customary law systems of exclusively pastoral indigenous communities in southern Africa, is Hinz & Grasshoff (eds) 2016.

17 The appropriateness of using this method to determine the content of the customary law rights in land of an indigenous community is confirmed by the Constitutional Court (CC) in *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) 481 (*Alexkor*). In view of the CC's remarks, the facts regarding the use of land that are obtained from histories of indigenous communities are used in this contribution to reach logical conclusions regarding the manner in which the communities exercised their rights in land.

2 1 Basis of pastoral indigenous communities' rights in land

Yanou describes the relationship between indigenous communities in Africa and the land they occupy as follows:¹⁸

The right to own property is a very ancient one and speculations on its nature goes [*sic*] beyond Plato's philosophical views. Africans for instance, customarily regard land as a gift from God or a bequest by the ancestors. Its possession and control is [*sic*] inextricably linked to the identity of the community such that it is impossible to construe the people without it.

From these remarks it appears that a basic feature of indigenous communities' perception of their right to occupy land¹⁹ is that it was given to them as a community. It is implicit in this approach that the community may use the land given to them in the manner that it regards as the most beneficial. Pastoral indigenous communities not only had the general right to use the land to sustain themselves by gathering and hunting, but also used specific areas of the land as grazing.²⁰ It appears that the fact that pastoral indigenous communities' livestock used specific areas of grazing over a period of time gave them stronger rights in land than nomadic hunter-gatherer indigenous communities.²¹ It is accepted that the different pastoral indigenous communities that lived in a region developed rules that governed which resources each community could use in that region. In view of this development it can be contended that indigenous communities had occupied land for centuries but after

18 Yanou 2005: 89-90.

19 In *Alexkor*, the CC provides the following guidelines on the manner in which customary law rights must be applied: "It is clear, therefore, that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law." See *Alexkor Ltd v The Richtersveld Community* at 479.

20 Anthropologists refer to the territories occupied by pastoral indigenous communities as nomadic orbits. A nomadic orbit needed the following three essential elements to come into existence: (a) a community; (b) livestock owned by individual members of the community; and (c) locations with water resources and associated grazing between which the community migrated. These characteristics are deduced from the descriptions of nomadic orbits given by Hattingh 2016: 270-288.

21 The rights in land of nomadic hunter-gatherer indigenous communities are not discussed in this contribution as the spatial aspect of the territories they lived in was not determined by physical boundaries but by "organised agreements" between such indigenous communities. See Gilbert 2007: 691. Since they did not own livestock, the nomadic hunter-gatherer lifestyle of indigenous communities meant that the physical extent of the land they used would not have been ascertainable. Also, the extent of the area within which they hunted and gathered could not be determined.

they acquired livestock and became pastoral indigenous communities they had to use the land subject to their customary law system.

2 2 The role of livestock in the customary law systems

Schapera remarks that land had value for indigenous communities “chiefly as pasture and hunting ground”.²² Based on this statement it is contended that without livestock indigenous communities did not obtain rights in land as such communities did not need water resources or grazing for their livestock. Communities that did own livestock had to look for the best water resources and grazing wherever these could be found.²³ Large livestock units, like cattle, required large amounts of grazing.²⁴ Therefore, depending on the climate and the fertility of the soil of the region, and the availability of open water, the communities had to move from place to place to ensure that their livestock were adequately cared for. The bigger the herds and flocks the more extensive were the spaces occupied by the community.²⁵ Livestock were owned by individuals and not by a community as a whole. The livestock belonging to individuals were often herded together, but this did not mean that the combined herds or flocks were the common property of the community.²⁶

2 3 The availability of water resources and grazing as determinant of the location of nomadic orbits

An important feature of nomadic orbits was that they did not have defined boundaries.²⁷ Schapera offers the following explanation of how nomadic orbits could exist without defined boundaries:²⁸

It appears rather that in the early days of the Dutch settlement the different Hottentot tribes were situated far apart, each tribe forming centres round which it migrated, and claiming as its territory all the land where its members were accustomed to graze their herds or to live.

22 Schapera 1930: 286. As this contribution deals only with pastoral indigenous communities and not indigenous hunter-gatherer communities, the value of land as hunting ground is not taken into account.

23 Elphick 1977: 57.

24 Boonzaier 1996: 29.

25 Elphick 1977: 117-118 substantiates this view with his comparison between the Cochoqua indigenous community and the indigenous communities that lived at or near the Cape Peninsula.

26 Schapera 1930: 293.

27 *Idem* at 286-287.

28 *Idem* at 287.

Over time the practice developed that specific indigenous communities came to be regarded as the primary users of specific water resources.²⁹ The limits of the nomadic orbits of the communities were defined by the location of the water resources of which they were the primary users.

2.4 Occupation of specific spaces as grazing within nomadic orbits

The physical spaces within nomadic orbits where indigenous communities exercised their customary law rights must be described without resorting to comparisons with the legal concepts of property and ownership as defined by South African common law.³⁰ For the purposes of this contribution these spaces are referred to as communal land use units. These communal land use units had the following characteristics:

- (a) The size of the space was determined by the amount of grazing needed by the combined livestock belonging to the members of a community.
- (b) The location of the physical space was determined by the location of the water resources where a specific community was acknowledged as being the primary user of such resources.
- (c) The boundaries of the land used as grazing by the combined livestock of a community were not fixed.

In view of these characteristics, the said physical spaces may be defined as areas of grazing used by the combined livestock of a community in the vicinity of a

29 *Idem* at 87. Guelke & Shell 1992: 807 refer to remarks made by indigenous persons at the conclusion of the 1659 war between the Company and indigenous communities living at the Cape that show that “access to water was a critical factor in the Khoikhoi pastoral economy”. Contrary to Guelke’s remarks, Elphick 1977:44 contends that the location of water resources as indication of a community’s nomadic orbit was only applicable in Namaqualand. He remarks that in the south-western Cape “springs were apparently not of vital significance”. Smith 1984: 100 is of the opinion that water was readily available in the south-western Cape and therefore did not play an important role in determining the nomadic orbits of indigenous communities. The remarks referred to by Guelke relate to a specific incident during the 1659 war when Oedaso, the chief of the indigenous community living in the vicinity of Saldanha Bay, denied the indigenous communities of the Cape access to the best water resources of the area. This was one of the reasons why the Cape indigenous communities were persuaded to seek peace with the Company. Guelke’s contention is preferable to that of Elphick and Smith as it reflects the views of persons who had experienced firsthand how water resources were controlled by the community that was the primary user thereof. The phrase “primary users” is used for a community that had the necessary power to prevent another community from using a water resource.

30 This principle has been laid down by the CC in *Alexkor Ltd v The Richtersveld Community* at 480-481 and in *Bhe v Magistrate, Khayelitsha*, (*Commission for Gender Equality as Amicus Curiae*); *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) 640.

water resource where that community was acknowledged as the primary user of the resource.

As this contribution is specifically concerned with the customary law rights in land of pastoral indigenous communities in the arid north-western Cape it is necessary to point out the differences between the concepts of a nomadic orbit and a communal land use unit. In more arid areas where a water resource could dry up during certain times of the year the indigenous communities had water resources of which they were the primary users in different geographical areas. Such a community could therefore have communal land use units in a winter rainfall area and in a summer rainfall area. The nomadic orbits of indigenous communities are described as covering the whole territory between two such geographical areas.³¹

In view of characteristic (a) of a communal land use unit mentioned above a community could not claim land that it was not using or did not reasonably need to provide sufficient grazing for its combined livestock. In addition to the rights in land used as grazing the community had customary law rights in land on which their encampment stood and where they erected enclosures for the safety of the combined livestock. It did not have these rights in the whole area covered by its nomadic orbit.

2 5 Protection of customary law rights in communal land use units

In arid parts, the control of water resources was the key determinant of a pastoral indigenous community's territorial claims. The fact that a specific community was the primary user of a water resource meant that other indigenous communities had to obtain permission to use that water resource while the primary user was in occupation and control thereof.³² This necessarily implied that permission also had to be obtained to use the land as grazing. The primary user could also demand payment of a tribute from another indigenous.

2 6 Exercise of customary law rights in land on the Reserves in the twenty-first century

The customary law systems of the pastoral indigenous communities of the pre-colonial and colonial eras as described above no longer exist in their pure form. One

31 The nomadic orbit of an indigenous community like the Namaqua covered an enormous territory (see Hattingh 2016: 278), in which there had to be areas that were not suitable for grazing or where there were no water resources. It is therefore reasonable to argue that there were specific areas within this vast territory where they exercised their rights. These were the communal land-use units where indigenous communities exercised their rights in land.

32 See Schapera 1930: 287. It is interesting to note that theorists about how Man first obtained rights in land, like Pufendorf, postulate that even in the time when there was an abundance of resources, there had to be agreement between persons about the taking of basic things from nature that were needed for their survival. See Olivecrona 1974: 221.

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of the factors that contributed to the changes in the customary law systems is the legislation relating to the Reserves that was adopted during the twentieth century. The Mission Stations and Communal Reserves Act³³ (Mission Stations Act) dealt amongst other things with the land around mission stations that was reserved for the exclusive use of the residents of the mission stations.³⁴ The Mission Stations Act was enacted in 1909 and was aimed at removing the control of secular matters from the missionaries at mission stations. Another purpose of the Mission Stations Act was to place the landholding of the residents of the mission stations and communal reserves on a formal footing.³⁵ As time progressed during the twentieth century the only land where the descendants of pastoral indigenous communities could exercise their customary law rights was the communal land located in the Reserves.³⁶

Currently, the owners of livestock on the Reserves still occupy the communal land used as grazing in terms of customary law systems. The customary law systems followed on the Reserves fall within the definition given by Herbst of such systems:³⁷

African customary law in the modern sense of the word (ie, with Western influence):

denotes all those legal systems originating from African societies as part of the culture of particular tribes or groups that have been maintained, supplemented, amended and or superseded in part by:

- (a) changing community views and the demands of the changing world;
- (b) contact with societies with other legal systems;
- (c) contact with and the influence of other legal systems; and
- (d) the direct and indirect influence of foreign (non-indigenous) government structures.

33 Act 29 of 1909 (Cape of Good Hope).

34 See the remarks in para 4.4 regarding the Tickets of Occupation issued by the governor of the Cape Colony, which included a diagram or description of the reserved land.

35 See, in this regard, the long title of the Mission Stations Act, which provided as follows: "To Provide for the better management and control of certain Mission Stations and certain Lands reserved for the occupation of certain Tribes or Communities, and for the granting of titles to the Inhabitants of such Stations and Reserves." See *Colony of the Cape of Good Hope Acts of Parliament Sessions of 1908, being the first and second sessions of the twelfth Parliament* (1908): 5544. The Union and Republic of South Africa's governments subsequently adopted legislation that repealed the Mission Stations Act and regulated the use of communal land, amongst other matters, on the Reserves created in terms of the Mission Stations Act. See, in this regard, the Rural Coloured Areas Act 24 of 1963, the Rural Coloured Areas Law 1 of 1979 and the Rural Areas Act.

36 The land on the Reserves is still owned by the State, but the Transformation Act has been enacted to facilitate the process of transfer of this land from the State to – (a) a municipality; (b) a communal property association registered in terms of s 8 of the Communal Property Associations Act 28 of 1996; or (c) another body or person approved by the Minister in general or in a particular case. Once the transfer of land in terms of the Transformation Act has been completed, the Rural Areas Act will be repealed.

37 Herbst & Du Plessis 2008: 3.

As the residents of the Reserves who own livestock are still able to utilise the rights in land of which their ancestors were dispossessed it is contended that the northern Cape³⁸ is a region where rights in land dispossessed during the colonial period can successfully be reinstated.

In the early 1980s the majority of the residents of Leliefontein³⁹ were still maintaining flocks of sheep and goats on the communal land on the Reserve.⁴⁰ Webley remarks that although the boundaries of Leliefontein limited the range within which transhumance could take place, it still played an important role in livestock farming.⁴¹

The stock posts of Leliefontein are small encampments where herders establish themselves during winter. These encampments are usually situated near a water resource.⁴² Marinus remarks that stock posts serve as the central points of loosely defined grazing areas for specific flocks using the outer commonages of Leliefontein. He is of the opinion that although this is an informal system employed by the residents of Leliefontein the livestock owners and herders are bound by the norms created by the residents with regard to grazing around stock posts.⁴³ Marinus is therefore of the opinion that certain Leliefontein families or groups have “preferential access” to the grazing and water resource at a specific stock post.⁴⁴

38 The phrase “northern Cape” does not refer to the Northern Cape Province, but to the area that stretches north from the Olifants River along the West Coast to the Gariep River. See, also, n 4.

39 See the remarks in n 11 with regard to the reasons why the example of Leliefontein and the stock post system there is used in this contribution. For the purposes of this contribution it is accepted that any Reserve where land used as grazing is occupied in terms of the stock post or a similar system, the livestock owners are exercising customary law rights in land.

40 Webley 1986: 57.

41 From Rohde and Hoffman’s article, it appears that transhumance was still a feature of stock farming on Leliefontein in the early twenty-first century although it is mostly individuals – or in some instances couples – that accompany the flocks of livestock (see Rohde & Hoffman 2008: 193). The *Oxford English Dictionary* defines “transhumance” as “[t]he seasonal transfer of grazing animals to different pastures, often over substantial distances”, ‘transhumance’, n.” See *OED Online* (Mar 2017) available at <http://www.oed.com.uplib.idm.oclc.org/view/Entry/204785?redirectedFrom=transhumant> (accessed 13 Apr 2019).

42 Webley 1986: 58.

43 Marinus 1998: 597.

44 *Idem* at 598. The informal manner in which this system of preferential access areas developed on Leliefontein is described as follows by Marinus: “Informal resource entitlement constitute [*sic*] small groups of up to five stock owners (usually with strong kinship links between them) migrating with their herds within loosely defined tracts of land adjacent to the settlements where they live (Boonzaier 1987: 481, Archer 1995: 32). Thus specific families or groups have preferential access to certain areas, which are established informally and through long association. Some tracts of land, waterholes and springs have always been regarded as ‘belonging’ to certain lineages. (The claim to these areas has never been one of exclusive ownership as fellow community members are granted usufruct to springs, waterholes as well as agricultural lands.)” The practice of “preferential access” described by Marinus has the same characteristics as the practice of “primary users” discussed above.

HISTORY OF THE DISPOSSESSION OF THE RIGHTS IN LAND

Combrink emphasises the informal manner in which different herders and owners of livestock occupy the available grazing on the outer commonages of Leliefontein.⁴⁵ He contends that it is generally accepted by the livestock owners on Leliefontein that they will not encroach on each other's grazing situated at or near a stock post acknowledged as being used exclusively by the herder of a specific flock.⁴⁶ This contention is in line with the observation of Marinus that certain livestock owners have "preferential access" to the grazing and the water resource at specific stock posts.⁴⁷ In his discussion of the government's policy to divide the outer commonages on some of the Reserves into private farms, Smith also refers to the detrimental effect the fencing of private farms had on the Reserves, in particular on the informal system of occupation of land at stock posts. He describes this informal system as one where the stock owners negotiated between themselves to decide on their usage rights on the outer commonage for their livestock.⁴⁸ In a more recent study in which the herding practices on Leliefontein were observed and interviews were conducted with livestock owners, herders and agricultural advisers the following was observed with regard to the occupation of stock posts:⁴⁹

Livestock keepers [sic] rights to establish and maintain one or more stockposts were not formally recognised, but once a stockpost was established it was regarded by the rest of the community as being appropriated by the livestock keeper, and may be kept in the family for several generations. However, there are areas of the rangeland where stockposts are established for shorter time periods, and several livestock keepers may establish stockposts here at different times. The area immediately around a stockpost (100-200m radius) is regarded as accessible to that livestock keeper only. Whilst herders are careful not to allow their grazing routes to overlap with those of nearby herds, areas away from the stockpost are not regarded as exclusive.

In this study, the practice with regard to the use of water resources at the stock posts is described as follows:⁵⁰

Water points are usually regarded as being accessible by all. Where these are very closely associated with a stockpost or cropping lands, other herders will establish rights of access with the person regarded as having "ownership" of the area. Access to water is seldom the cause of dispute but may involve a cost paid in the form of a sheep or goat for slaughter. Many dug wells are developed and maintained through cooperative action among herders, whilst wind or solar pumps are established by local authorities but frequently neglected thereafter.

45 Combrink 2004: 54.

46 *Ibid.*

47 According to Salomon 2013: 72, there are 600 stock posts and 169 water points at Leliefontein, which means that several stock posts make use of the same water point.

48 Smith 1996: 7.

49 Allsopp 2007: 746.

50 *Ibid.*

It is contended that the informal system of demarcating and occupying grazing at and around stock posts described by the various authors is in fact a manifestation of the customary law system that is still in place at Leliefontein. The exclusive use of an area of land as grazing at or near a water resource by the flock or flocks of a specific group of residents of Leliefontein is a characteristic shared with the communal land use units that were occupied by indigenous communities during the seventeenth and eighteenth centuries. The stock post system at Leliefontein is therefore a modified version of the communal land use units that were occupied by indigenous communities.

3 Rights in land used as grazing on loan places

In contrast to customary law systems, where rights in land were obtained by means not directly related to the land, an identifiable and demarcated land unit had to exist before a non-indigenous person could obtain rights therein in terms of Roman-Dutch law.⁵¹ The system of describing the land and indicating it on a diagram was introduced in the south-western Cape in 1657 when the Company first gave land to non-indigenous settlers for agricultural purposes.⁵² However, in the interior of the Cape Colony the non-indigenous settlers were livestock farmers and only engaged in agriculture for subsistence purposes. Initially the Company did not exercise any control over the land occupied as grazing by the non-indigenous settlers in the interior of the Cape Colony. After 1703 an informal system of grazing licences developed. This control system was superseded by the loan place system in 1714. As the land used as grazing on loan places was never surveyed or demarcated before it was allocated to non-indigenous persons it must be accepted that they did not obtain rights in such land in terms of Roman-Dutch law. It is therefore necessary to determine what rights, if any, they obtained in such land and in terms of which rules they obtained such rights.⁵³

51 Van der Merwe 1989: 25; Badenhorst 2003: 28-29; Sonnekus 2001: 84; Watermeyer 1914: 37-38; Von Bar 2014: 4-5, 6.

52 Leibbrandt 1900: 262. In this contribution, the words “agriculture” and “agricultural” are used in their original sense of “cultivating the soil to produce crops”. The *Oxford English Dictionary* defines “agriculture” amongst other meanings as follows: “Originally: the theory or practice of cultivating the soil to produce crops; an instance of this (now rare)”. ‘agriculture, n.” *OED Online* (Dec 2016) available at <http://www.oed.com.uplib.idm.oclc.org/view/Entry/4181?redirectedFrom=agriculture#eid> (accessed 22 Apr 2019).

53 The Company was convinced that the land in the Cape Colony belonged to it. An example of where such ownership was asserted is the resolution of 1 Jul 1732, where the owners of allocated land are warned not to cultivate land outside their land beacons on “*Comps. grond*”. *Resolutions of the Council of Policy of Cape of Good Hope* C. 90. However, in this contribution it is contended that the Company did not have any private law rights in the land in the interior of the Cape Colony. The Company was therefore not able to transfer any rights to the non-indigenous settlers by granting land to them. The contention is based on the fact that the settlement of the interior of the Cape Colony was accomplished by non-indigenous settlers and not by the Company. See Guelke 2003: 94; Theal 1897: 4; Sleigh 2007: 542, 551, 553.

3 1 Precursor of the loan place system

Colonial government officials recorded the particulars of the grazing licences in a register known as the *Oude Wildschutte Boeken*.⁵⁴ Its initial purpose was to note the applications lodged by non-indigenous settlers to hunt game. In 1810 an official of the Office of the Receiver-General remarked that he had, in order to try to establish the origins of the loan place system, scrutinised this register.⁵⁵ The grazing licences were granted for varied periods of time, and in some cases the applicants were authorised to grow crops on the land while in other cases they were not. One of the conditions that appeared in all the grazing licences was that the non-indigenous settlers had to respect each other's right to use the grazing and should not encroach on the grazing of another. When encroachment did occur the non-indigenous settlers approached the colonial government to resolve the dispute. One of the heemraden of a district was charged with investigating a complaint made and writing a report on the matter. The colonial government then could either withdraw the offending license or confirm it or ensure that agreement was reached between the parties on how the grazing should be used.⁵⁶ This action was an exercise of the colonial government's power to ensure orderly distribution of grazing between the non-indigenous settlers. This power did not originate from the colonial government's ownership of the loaned land, as asserted by Van der Merwe,⁵⁷ but from its position as sovereign ruler that could authorise its subjects to use land as grazing. The non-indigenous settler who complained about the encroachment on his grazing by another settler who had been issued with a license in the same area was not enforcing a right in land when he complained about the encroachment. He was only holding the colonial government to its undertaking not to issue an authorisation that would cause another non-indigenous settler to encroach on the grazing he used for his livestock. It was not clear from the entries in the register whether the applicants had to pay anything for the authorisations or whether the extent of land that could be used as grazing was specified.⁵⁸

3 2 Establishment of the loan place system

The colonial government received a letter from the Directors of the Company dated 12 August 1713, in which they were urged to find new ways of increasing the revenue of the Cape Colony.⁵⁹ Governor De Chavonnes drew the colonial government's

54 Theal 1900: 429.

55 *Idem* at 428.

56 Van der Merwe 1938: 83.

57 *Idem* at 82.

58 Theal 1900: 429.

59 *Resolutions of the Council of Policy of Cape of Good Hope* C. 32.

attention to the fact that giving the non-indigenous settlers grazing licences in the interior of the Cape Colony had no financial benefit for the Company.⁶⁰ He requested that the colonial government should consider suitable ways in which the Company could derive some financial benefit from these licences. Therefore, the colonial government decided on 3 July 1714 that the Company should receive something in return from the non-indigenous settlers who had been using land as grazing free of charge since 1703. The colonial government resolved that when the non-indigenous livestock farmers came to request grazing licences in the interior they would be given such land on loan. The colonial government decided to impose a fee to be paid as recognition for the privilege to loan the land in the interior as grazing.⁶¹

The colonial government's resolution was published in the form of a *plakaat*.⁶² The *plakaat* of 3 July 1714 provided that non-indigenous settlers who used land as grazing in the interior of the Cape Colony would in future have to loan the land from the colonial government and pay a recognition fee for the privilege. However, the *plakaat* did not provide for the manner in which the land used as grazing had to be identified and demarcated. Therefore, although the *plakaat* provided for the fiscal conditions that had to be met by a non-indigenous settler to occupy a loan place it did not provide for the substantive rights that the occupier of the loan place had in the land he used as grazing. The *plakaat* merely provided that the non-indigenous person who had paid the recognition fee would be authorised to use the land in the interior as grazing. The loan place system was a unique feature of the land law system of the Cape Colony that was introduced into its domestic law by the *plakaat* of 3 July 1714. The loan place system was therefore a creature of statute and was not based on Roman-Dutch law. Consequently, occupation of a loan place did not confer any rights similar to the Roman-Dutch law right of ownership or lease on the occupier. The *plakaat* was silent on the rights of occupiers. Their rights flowed from the authorisation that they received to use an essentially unlimited territory as grazing for their livestock.⁶³ In return for the payment of recognition they received

60 Jeffrey 1948: 31.

61 *Ibid.*

62 *Ibid.* *Plakaten* were a source of law in the Cape Colony. Roos 1897: 10; Roos 1906: 242-243. Wessels endorses the views expressed by Roos. See Wessels 1908: 358-359. Van Zyl 1907: 132-133 is of the opinion that Roos was mistaken in his opinion. He wrote a series of articles in the *SALJ* in which he motivates why the legislation enacted by the colonial government prior to 1795 cannot be regarded as a source of law for the Cape Colony. Botha 1913: 298-299 discusses the divergent views relating to the legislation enacted by the colonial government before 1795 under the subtitle "The common and statute law at the Cape of Good Hope during the 17th and 18th centuries" in an article in the *SALJ* entitled "Notes on some controverted points of law". He refers to several cases heard by the Council of Justice in the Cape Colony before 1795 in which reference is made to *plakaten* enacted by the colonial government. He therefore concludes that legislation enacted by the colonial government before 1795 was regarded as a source of law by the highest court in the Cape Colony. From these remarks it appears that the views expressed by Roos and Wessels must be preferred to that of Van Zyl.

63 Van der Merwe 1938: 108.

the protection of the colonial government against unfair deprivation of the grazing at or near their homestead.

4 Transformation of the domestic land law of the Cape Colony

During the second British occupation the Governor, the Earl of Caledon, became aware of the problems that existed in the Cape Colony with regard to occupation of land and initiated an investigation into land matters.⁶⁴ Reports on the loan place system were prepared by the Office of the Receiver-General of Revenue, the Fiscal of the Cape Colony, JA Truter, and the President of the Court of Justice, WS van Ryneveld. The investigation culminated in the enactment of the Conversion of Loan Places to Perpetual Quitrent Proclamation on 6 August 1813 (Perpetual Quitrent Proclamation) by Governor Cradock.

4 1 Abolishment of the loan place system

According to the Preamble of the Perpetual Quitrent Proclamation its purpose was to improve the cultivation of land in the Cape Colony by giving security of title to the non-indigenous occupiers of loan places by converting loan places into perpetual quitrent tenure farms.⁶⁵ The approach adopted in the Perpetual Quitrent Proclamation was that the extent of the land granted on perpetual quitrent would be the same as the land legally occupied by the non-indigenous settler on loan. However, the extent would not exceed 3000 morgen except if authorised by the governor.⁶⁶ The quitrent that had to be paid was to be determined by “the situation, fertility, and other favourable circumstances of the land” but could not exceed 250 rixdollars per year.⁶⁷ On conversion of a loan place to quitrent the land had to be surveyed before the title deed to the land would be issued to the owner. The *landdrost* of the district where the land was converted had to send the diagram of the surveyed land to Cape Town and had to certify that no other person had been prejudiced by the survey and that the land did not exceed 3000 morgen.⁶⁸

4 2 Implementation of the Perpetual Quitrent Proclamation

In this contribution it is contended that when the Perpetual Quitrent Proclamation was implemented two misconceptions regarding the existing system of loan places

64 Weaver 2001: 12

65 Jackson 1906a: 12.

66 *Idem* at 12-13.

67 *Idem* at 13.

68 *Idem* at 14.

had the effect that non-indigenous settlers were placed in a much better position with regard to rights in land used as grazing than indigenous communities. The discussion in sections 2 and 3 above shows that the rights in land used as grazing in the interior of the Cape Colony were in essence the same for non-indigenous settlers and indigenous communities. From the perspective of the present constitutional dispensation and land reform programme it is clear that the Perpetual Quitrent Proclamation was racially discriminatory legislation as it disregarded the rights in land conferred on indigenous communities by their customary law systems.

4 2 1 Misconception that loan places were leased to non-indigenous settlers

The conception of the colonial government that rights of non-indigenous settlers in land used as grazing on loan places could be equated to the rights of a lessee originates with the first report prepared by Truter. He remarks that –

as long as the loan places were only gratuitous concessions the withdrawing of such grants and the ceding of such places to others required nothing more than the simple will of the Government without that the person who for the time had gratis the use of Government ground could, with even a shadow of reason, demand a longer enjoyment of such mere favor [*sic*] contrary to the will of Government.⁶⁹

Truter therefore contends that, prior to 1714, the rights that the non-indigenous settlers had in the land used as grazing in terms of a grazing license were very insecure. This is evident from his remark that the non-indigenous settlers occupied the land as a mere favour from the colonial government. According to Truter the *plakaat* of 3 July 1714 made the rights of the non-indigenous settlers in the loan places more secure as the land was no longer loaned to non-indigenous settlers but leased to them.⁷⁰

In the resolutions of the colonial government that dealt with lease of land to the non-indigenous settlers the Dutch words *verhuyren*, *huirders* and *huyrder* are used throughout.⁷¹ In the cases where land was loaned the Dutch word *leening* is used.⁷² This practice clearly illustrates that the colonial government did not regard lease of land and loan of land as the same thing. However, there are more convincing arguments why the *plakaat* did not change the existing system of grazing licenses into a lease system. These arguments are based on Roman and Roman-Dutch law principles relating to the lease of land. The loan place system that was established in the interior of the Cape Colony did not conform to these principles. De Groot

69 Theal 1901: 95.

70 *Ibid.* It must be borne in mind that Truter did not make a distinction between the grazing license system and the loan place system instituted from 1714.

71 *Resolutions of the Council of Policy of Cape of Good Hope* C. 10 and C. 12. The entry for 1 Jan 1659 in Van Riebeeck's *Journal* also refers to "verhuyring". See Bosman & Thom 1957: 1.

72 *Resolutions of the Council of Policy of Cape of Good Hope* C. 14.

remarks that for a lease to come into existence the thing that is given in hire must be certain.⁷³ Cooper sheds light on the requirements that must be met to ensure that the thing is certain. He states that the property must be identified or identifiable. When the measurement of the land can be given, it is sufficiently identified to be susceptible to be leased.⁷⁴ For example, the leases that were granted in terms of the 1732 *erfpacht* system were in most cases identified by naming the land owned by the lessee and stating what the measurement of the leased land was.⁷⁵ When the land that is to be leased is described by giving the limits or boundaries thereof it is regarded as being identified land. When no description either by measurement or by describing the boundaries can be given of land, such land cannot be leased.⁷⁶ The land used as grazing that was loaned to the non-indigenous settlers could not be described nor could it be measured.

It is contended that because Governor Cradock regarded the loan place system as akin to a lease system he did not find it incongruous to provide in the Perpetual Quitrent Proclamation that the rights in loan places can be converted into ownership. In other words, because Truter wrongly advised the Governor that the non-indigenous settlers were lessees of the colonial government they obtained real rights in land to replace the limited use rights they in fact had in the land.

4 2 2 Misconception regarding the size of loan places

In the report of the Office of the Receiver-General of Revenue mention is made of the custom that an occupier of a loan place had the exclusive use of the land used as grazing stretching a half-hour's walk in each direction from a central point or beacon on the loan place. It appears that the author of the Receiver-General's report based his contentions on the instructions that the Batavian Governor, General Janssens, issued to field cornets regarding the allocation of loan places to non-indigenous settlers.⁷⁷ In his first report Truter commented on the Receiver-General of Revenue's remarks and refuted the existence of such a custom in the following terms:⁷⁸

73 Lee 1926: 387.

74 Cooper 1973: 34.

75 *Resolutions of the Council of Policy of Cape of Good Hope* C. 93. The *erfpacht* system was introduced to provide non-indigenous agriculturalists the opportunity to lease land adjacent to their existing farms for agricultural purposes.

76 Cooper 1973: 34-35.

77 This custom was described as follows in the field cornet instructions published in 1805: "On inspecting the Land asked for as a Loan Place, the Field-Cornet begins (the Applicant having pointed out the Land) by fixing a middle point, and ascertains whether, in every direction from it, the extent of half an hour can be allowed without touching on the Freehold, Quitrent Land, or Loan Right, of others, or on any Government Land reserved for Uitspan Places, or other public uses." See Harding 1838: 81-82. In this contribution, this instruction is referred to as the half-hour principle.

78 Theal 1901: 99.

It is generally maintained at present that a loan possessor has a right to occupy three hours ground round the middle point of his place, that is half an hour on every side of the same; but however generally this is asserted, and even confirmed by some Magistrates, yet I cannot coincide therein, because there are many places which cannot be extended to an hour in diameter without injuring other places, and, because if there be no law, as is the case, prescribing this distance, there does not exist any [sic] why this distance should be considered as natural; it being moreover necessary to view the business in this light, as otherwise many places must be considered as not having their legal extent, which since many years have been possessed as fully sufficient.

Notwithstanding the clear indication by Truter that it cannot be contended that the practice provided for in Janssens' field cornet instructions was intended to indicate that a loan place had a fixed area of grazing allocated to it, Governor Cradock decided that loan places must be converted into farms not exceeding 3 000 morgen in size.⁷⁹ That meant that non-indigenous settlers who previously had nothing more than the right to use land as grazing in the interior of the Cape Colony, on the conversion of the loan place became the owner of a surveyed land unit in terms of Roman-Dutch law principles.

4 3 Survey, grant and sale of Crown land

Once the Cape Colony was formally ceded to the British sovereign in 1814 the colonial government proceeded to grant and sell the waste land⁸⁰ in the Colony. In the period from 1813 to 1843 the provisions of the Perpetual Quitrent Proclamation were applicable to the grants of land made by the colonial government.⁸¹ In 1840 the British government launched a concerted effort to standardise the land laws of the British Empire.⁸² In order to implement the instructions received from the Colonial Land and Emigration Commissioners the colonial government published the "Conditions and regulations upon which the Crown land at the Cape of Good Hope will be disposed of" (Conditions and Regulations) in the Colonial *Government*

79 It appears that the size of 3 000 morgen was derived from a calculation based on the half-hour principle referred to in n 78. See Weaver 2003: 117; Sampson 1994: 75.

80 In this contribution, the phrase "waste land" means all land before it was occupied in any manner by non-indigenous persons.

81 Although the Perpetual Quitrent Proclamation was only applicable to conversions of loan places, Milton 1996: 667-668 remarks that the courts later made it clear that the Perpetual Quitrent Proclamation was also applicable to original grants of land and not only loan place conversions. In the *Report of the Surveyor-General*, it is remarked that although the British government was of the opinion that the Perpetual Quitrent Proclamation should only be applicable to the conversion of loan places; the first grants that were made by Cradock were original grants and not loan place conversions. *Report of the Surveyor-General on the Tenure of Land, on the Land Laws and Their Results, and on the Topography of the Colony Cape of Good Hope* 1876: 23.

82 Christopher 1984: 11.

Gazette on 7 September 1843.⁸³ Paragraph 1 of the Conditions and Regulations provides in peremptory terms that the “unappropriated Crown Lands in this Colony will be sold in Freehold, and by Public Auction only”. The Conditions and Regulations provided that applications could be made for a piece of land identified in the application to be put up for sale. After receipt of an application the Surveyor-General had to survey the land identified in the application. From paragraph 6 of the Conditions and Regulations it appears that apart from land applied for, the colonial government could also offer land for sale on its own initiative.⁸⁴ Milton remarks that the purpose of the Conditions and Regulations was to establish a uniform land tenure system in the form of freehold tenure in the Cape Colony to bring it in line with the rest of the British Empire.⁸⁵

The first Parliament of the Cape Colony enacted the “Act for Regulating the Manner in which Crown Lands at the Cape of Good Hope shall be disposed of”⁸⁶ (1860 Crown Lands Act) which repealed the Conditions and Regulations and replaced it with a system that provided that “all waste and unappropriated Crown lands will be sold subject to an annual quitrent on each lot, and at a reserved price, sufficient at least to defray the costs of inspection, survey, erection of beacons, and title deed”.⁸⁷ The 1860 Crown Lands Act reinstated the quitrent system as provided for in the Perpetual Quitrent Proclamation.⁸⁸ Although the 1860 Crown Lands Act did not contain a definition of Crown land several sections provide which land is to be regarded as Crown land and which not. From an analysis of these sections it appears that the legislature regarded all land not occupied by non-indigenous persons within the boundaries of the Cape Colony as being waste Crown land, with the exception of the land assigned by the Governor to the residents of towns and villages to use as pasture. Although the 1860 Crown Lands Act was repealed in 1878 its successor Acts did not add or subtract anything from the description of Crown land in the 1860 Crown Lands Act.

4 4 Negative effect of the alienation of Crown land on pastoral indigenous communities

Pastoral indigenous communities living in the north-western Cape experienced less encroachment on their land than their counterparts in other areas of the Cape Colony. During the nineteenth century the mission stations in this region were not primarily regarded as places of refuge by the indigenous communities who, notwithstanding the intrusion of non-indigenous settlers, were able to keep on occupying land in

83 Harding 1845: 336-337.

84 Christopher 1984: 13-14.

85 Milton 1996: 668-669.

86 Act 2 of 1860.

87 Section 1 of the 1860 Crown Lands Act. See Jackson 1906a: 763.

88 Milton 1996: 669.

terms of their customary law systems as independent communities. However, these communities found it to their benefit to be under the protection of the missionaries at the mission stations. The missionaries interceded with the British colonial government on behalf of the communities concerned and were instrumental in safeguarding their right to occupy land as grazing and for residential and agricultural purposes at or near the mission stations.

Since the land occupied at mission stations by pastoral indigenous communities was regarded as Crown land, the Governor of the Cape Colony issued Tickets of Occupation to the communities concerned. These Tickets of Occupation included a diagram or a description of the land around the mission stations that was reserved for the exclusive use of the indigenous residents of the mission stations. The land identified in the Tickets of Occupation became the territories of the Reserves that were created in terms of legislation adopted in the twentieth century.⁸⁹ However, the extent of the territory identified in the Tickets of Occupation was in most cases much less than the land used as grazing by the pastoral indigenous communities living at the mission stations.⁹⁰ The legislation dealing with Crown land in the Cape Colony made it possible for the colonial government to dispossess the pastoral indigenous communities of the land outside the boundaries defined in the Tickets of Occupation that they occupied in terms of their customary law systems.

This dispossession of land was an almost invisible process. In his description of the district of Namaqualand, Noble remarks that “there are upwards of one hundred and thirty measured farms and one or two mission stations in the southern part, the produce and stock on which are valued at £180000”.⁹¹ This means that in 1875 there were already 130 farms held under perpetual quitrent tenure in the north-western Cape. Part of the surveyor’s function is to divide and separate the surveyed land from the surrounding land. This is done by placing beacons on the corners of the measured land and depicting the demarcated land on the diagram accompanying a title deed.⁹² However, the beacons placed by the surveyor were not a physical barrier to movement of man and livestock across the measured land.⁹³ It was only when fences were erected between these beacons that access to the measured land was restricted. Although the process of fencing of private land around the Reserves was

89 See n 36.

90 Sharp & West 1984: 4.

91 Noble 1875: 86.

92 Denoon 1947: 178.

93 Hill describes the manner in which land was occupied in the Northern Cape during the nineteenth century as follows: “During the 19th century the Cape Colony gave tickets of occupation for land in the vicinity of the missions to the Khoikhoi as a guarantee of permanent occupation. This safeguarded the indigenous people against further encroachment by Europeans (Boonzaier 1987). The missions thus formed the basis for the establishment of the six Coloured Rural Areas (reserves) of Namaqualand. *At this time, however, nomadic movement was not contained within the boundaries of the reserves. A system of reciprocity between European farmers and the Khoikhoi facilitated movement of pastoralists over large areas of privatised European land, the reserves and State land*” (emphasis added). See Hill 1990: 199.

only completed in the twentieth century⁹⁴ it is contended that it was the legislation adopted in the Cape Colony during the colonial period that made the dispossession of the land outside the boundaries of the Reserves possible. In other words, because land used as grazing by indigenous communities was regarded as Crown land and could be sold in terms of the legislation discussed in subsection 4.3 the customary law rights in land of the residents of the Reserves were extinguished.

5 Contemporary legal developments that hamper the restitution of land dispossessed during the colonial period

To date, the *Richtersveld* cases⁹⁵ are the only reported South African court cases in which the residents of a Reserve have succeeded in claiming back the land that was occupied by their ancestors during the colonial period. The Richtersveld community's claim to the land that their ancestors used as grazing before they were dispossessed was granted in terms of the Restitution Act. Notwithstanding the successful claim of the Richtersveld community no other community living on the Reserves has succeeded with a claim for restitution in terms of the Restitution Act. Mostert comments as follows on the limited value that *Alexkor* has as a precedent for communities in similar circumstances who wish to institute a claim for restitution of their land:⁹⁶

The judgments of both the supreme court of appeal and the constitutional court ensure some kind of justice for the Richtersveld people, without creating any expectations of a broadbased restitution policy for the many other (now) dispersed and incohesive groups, who might have been subjected to an even more disruptive and changeful history, and who might have wanted to rely on the precedent set by the *Richtersveld* case.

In this contribution it is contended that the reason why *Richtersveld 2* and *Alexkor* are not appropriate precedents for the residents of the Reserves is the approach of

94 Rohde remarks that in the case of Leliefontein the boundaries of the Reserve and the neighbouring privately owned land were not fenced until after the Second World War. See Rohde & Hoffman 2008: 197, 201, 211. Similarly, Samuels 2013: 49-50 remarks as follows: "In Namaqualand pastoralists were prevented from using white-owned land when privately white-owned farms were fenced off and a camp system was introduced under the Fencing Act, 1912 (Act No 17 of 1912). Fencing also began to replace herding as a livestock management option in the Karoo at this time (Dean et al, 1995). Fencing of private farms adjacent to Leliefontein continued until the 1960s since several private farmers did not want to proceed with erecting fences until the Leliefontein management board paid half of the fencing costs (Leliefontein Management Board Unpublished minutes). Fencing was perceived to increase the carrying capacity of the veld and improved rangeland condition (Archer, 2002)."

95 The phrase "*Richtersveld* cases" is used as a collective name for all the cases involving the land claim of the *Richtersveld community against Alexkor Ltd and the State*. In addition to the cases in the Land Claims Court (LCC) and SCA, the CC, in *Alexkor*, confirmed the decision of the SCA.

96 Mostert & Fitzpatrick 2004: 321.

the SCA in *Alexkor 2* to the question whether the British Crown became the owner of all land in the Cape Colony.

In *Richtersveld Community v Alexkor Ltd*⁹⁷ (*Richtersveld 1*) the LCC decided that the Richtersveld indigenous communities lost their rights in their land when the British government annexed the territory where they lived in 1847.⁹⁸ The LCC remarks that the law in force in the Cape Colony at the time of annexation provided that all land “not granted under some form of tenure belonged to the Crown”.⁹⁹ The LCC also relies on *Cape Town Town Council v Colonial Government and Table Bay Harbour Board*¹⁰⁰ (*Harbour Board*) to substantiate its finding with regard to the extinction of the indigenous communities’ rights in land in 1847.¹⁰¹ In *Harbour Board* the Supreme Court also accepts as a matter of fact that “the nominal title to all ungranted land remains with the Crown”.¹⁰²

The remarks of the LCC in *Richtersveld 1* referred to above play an important part in its decision that the Richtersveld community’s claim to restitution under the Restitution Act cannot succeed. In essence the LCC found that because all land in the Cape Colony not in private ownership became Crown land the Richtersveld community was dispossessed of their rights in land in 1847. The SCA disposed of the LCC’s findings in this regard as follows:¹⁰³

The LCC held that in terms of the law in force in the Cape Colony at the time of the annexation all land not granted under some form of tenure belonged to the Crown (at para [43]). In this regard it relied upon some authors and an obiter statement in *Cape Town Council v Colonial Government and Table Bay Harbour Board* (1906) 23 SC 62. This view, no doubt, is based upon English feudal law and to the extent that Roman-Dutch law had some remnants of feudal law, that law was never introduced into South Africa.

It is contended that the SCA erred in its finding that the land in the Cape Colony did not become the property of the British Crown. The conduct of the colonial

97 2001 (3) SA 1293.

98 *Richtersveld Community v Alexkor Ltd* 2001 (3) SA 1293 at 1315.

99 *Ibid.*

100 1906 23 SC 62 69.

101 *Richtersveld Community v Alexkor Ltd* 2001 (3) SA 1293 at 1315.

102 *Town Town Council v Colonial Government and Table Bay Harbour Board* at 69.

103 *Richtersveld Community v Alexkor Ltd* 2003 (6) SA 104 (SCA) at 128-129.

104 An example of the colonial government’s conduct is how it dealt with land at Port Nolloth that had been occupied by pastoral indigenous communities for centuries. The purpose of the Port Nolloth Crown Lands Act 33 of 1904 was to enable non-indigenous occupiers of land at Port Nolloth to obtain title in such land. To this end, s 2 of the Port Nolloth Act provided as follows: “Notwithstanding anything to the contrary contained in any Act it shall be lawful, from and after the passing of this Act for the Governor to grant title in favour of such claimants, to such pieces or lots of Crown land at Port Nolloth as the said Commission may recommend.” See Jackson 1906b: 4759-4760. From this it is clear that the British colonial government acted as if the land belonged to the British Crown. The Governor was authorised to grant land occupied by pastoral indigenous communities to non-indigenous occupiers in terms of the Port Nolloth Act without any compensation being offered to these communities.

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government when dealing with waste land in the Cape Colony¹⁰⁴ and the remarks of the colonial courts¹⁰⁵ clearly show that the English common law doctrine of tenures was incorporated into the domestic law of the Cape Colony. This argument is strengthened by the fact that in *Barnett v Minister of Land Affairs*¹⁰⁶ (*Barnett*) the SCA deemed it necessary to refer to *Harbour Board* as support for the statement that "the legal principle to be applied is that, since all land originally belongs to the State, land which has never been transferred into private ownership remains State land".¹⁰⁷

The significance of the SCA not accepting that the British Crown was the owner of all waste land in the Cape Colony, is that the fact that the residents of all the other Reserves in the region have been dispossessed of their rights in land in terms of racially discriminatory legislation or administrative actions is lost sight of. It cannot be equitable to differentiate between indigenous communities or persons who were dispossessed of their rights in land by racially discriminatory legislation or administrative actions. However, the cut-off date and the failure of the SCA to acknowledge that pastoral indigenous communities have been dispossessed of their rights in land by such legislation and actions, differentiate unfairly between descendants of such communities and other indigenous communities.

The courts have perpetuated the inequality between the descendants of pastoral indigenous communities and other indigenous communities caused by the cut-off date. In cases like *Prinsloo v Ndebele-Ndzundza Community*¹⁰⁸ (*Prinsloo*) and *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*¹⁰⁹ (*Goedgelegen*) the courts accepted that the customary law rights in land of indigenous communities were not extinguished even though non-indigenous persons had become the registered owners of the land in question.¹¹⁰ Notwithstanding the survey and sale of the land next to the Reserves¹¹¹ in the nineteenth century, in many cases the residents of the Reserves

105 In *De Villiers v The Cape, Divisional Council* (1875) 5 Buch 50 and *Berry v The Divisional Council of Port Elizabeth* (1880-1881) 1 EDC 241 (*Berry*), the courts made it clear that all land in the Cape Colony belonged to the British Crown before it was granted to non-indigenous settlers. In the last mentioned case the court remarked that the Crown as *dominus directus* had retained rights in the perpetual quitrent land of the plaintiff. The Divisional Council's right to raise material on the perpetual quitrent farm for the purpose of constructing roads is referred to as a paramount right that cannot be equated to an easement or servitude. See *Berry v The Divisional Council of Port Elizabeth* at 245.

106 2007 (6) SA 313 (SCA).

107 *Barnett v Minister of Land Affairs* at 322.

108 2005 6 SA 144 (SCA).

109 2007 6 SA 199 (CC).

110 In these cases, the claimants continued to reside on the land although they were dispossessed of their customary law rights in the land. *Prinsloo v Ndebele-Ndzundza Community* at 152-154; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* at 213.

111 The residents of the Reserves were dispossessed of their customary law rights in this land because the continued existence of such rights was not compatible with South African common law principles relating to ownership of land as applied through the nineteenth and twentieth centuries up to 1994.

continued to exercise customary law rights on the privately owned land. However, because they did not reside permanently on the land they used as grazing they were eventually excluded from such land when it was fenced by the owners. Therefore, although both the claimants in *Prinsloo* and *Goedgelegen* and the residents of the Reserves were dispossessed of their customary law rights in land, only the claimants were able to remain on the land and, according to the SCA and CC, thus retained their right to claim back their land, while it was impossible for the residents to remain on the land outside the Reserves and they consequently could not claim it back.

6 Restitution of land dispossessed during the colonial period

Reversing the effects of colonial dispossession of land must be achieved by adopting the legislation contemplated in section 25(8) of the Constitution, which provides as follows:

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

The privately owned land that has been acquired and will be acquired by the state in the vicinity of and around the Reserves for the purpose of redistribution should be made available to the residents of the Reserves in terms of legislation made in terms of section 25(8) of the Constitution. Such legislation may, subject to section 25(1) and (2) of the Constitution, provide for a system where land is made available to livestock owners to use as grazing in accordance with the customary law systems used on the Reserves. I contend that the cut-off date is not an impediment to the proposed legislation to be made under section 25(8) of the Constitution as it will redress the results of past racial discrimination and prevent unfair differentiation between different indigenous groups that were all victims of such discrimination.

Legislation made in terms of section 25(8) should take into account that the north-western Cape is an arid region and its resources must be utilised in a sustainable manner. It can be argued that the system of migration of livestock between winter and summer rainfall regions is the most sustainable for the region. In this regard Vetter remarks as follows:¹¹²

In semi-arid ecosystems, livestock and wildlife need to have access to winter and summer grazing, areas of different vegetation, widely scattered water points and ideally areas of forage reserve in times of drought (Samuels *et al* 2007). Unlike crop production, livestock farming requires fairly large tracts of land, and sharing a single large area is thus ecologically

112 Vetter 2013: 6.

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and economically more appropriate than dividing the commons into smaller individual land parcels.

Legislation introducing a system of occupation of land along the lines suggested by Vetter will mean that areas of land will have to be demarcated where the rights of an owner of land, such as a municipality or a communal property association,¹¹³ will be limited. The ownership rights of such entities will be limited by the residents of the Reserves using land as grazing and water resources in terms of their customary law systems. Such legislation will introduce a significant shift away from the South African common law principles relating to ownership of land.

7 Conclusion

It may be contended that the dispossession of the customary law rights in land of the descendants of pastoral indigenous communities has not received the necessary attention because very little is known about the nature of such rights.¹¹⁴ In this contribution it is illustrated that the pastoral indigenous communities had well-developed customary law systems that regulated the manner in which they occupied land and used available water resources. It is also contended that the residents of the Reserves are still occupying communal land on the Reserves in terms of these customary law systems. In view of the constitutional recognition that is given to customary law it is imperative that the customary law systems of pastoral indigenous communities are also taken into account when dealing with the restitution of dispossessed land.

The rights in land of non-indigenous settlers who occupied loan places before the introduction of the Perpetual Quitrent Proclamation have also not been considered in any great detail. It was accepted that the occupation of a loan place conferred the same rights in land on the occupier that a lessee of land had. This contribution is aimed at countering the notion that non-indigenous settlers had such secure rights in the land they occupied on loan places.

The re-evaluation of the rights in land of pastoral indigenous communities in terms of their customary law systems and the rights in land of non-indigenous settlers in terms of the domestic law of the Cape Colony leads to the conclusion that prior to 1813 non-indigenous settlers and pastoral indigenous communities had essentially the same rights in the land they used as grazing. However, the introduction of the Perpetual Quitrent Proclamation and the subsequent legislation discussed above created a land law system that disregarded the customary law rights in land of pastoral

113 These are the entities who will become the owners of the land transferred in terms of the Transformation Act. See n 37.

114 In this regard it must be noted that some writers on the land question in South Africa have negated the fact that the pastoral indigenous communities did have customary law rights in land. See, eg, the remarks made in Changuion & Steenkamp 2012: 16.

indigenous communities. Inevitably, this created an inequitable land law system that was in essence based on difference in race. The application of the domestic law of the Cape Colony to the land occupied by pastoral indigenous communities had the effect that they were dispossessed of their rights in land.

The purpose of this contribution is to show that although there may be good reasons¹¹⁵ for the determination of a cut-off date for the purposes of restitution of land it has created unwarranted differentiation between the descendants of pastoral indigenous communities and other indigenous communities living in other parts of South Africa. The approach adopted by the LCC in *Alexkor* 1 must be accepted as correct. Such an approach will acknowledge that pastoral indigenous communities have been dispossessed of their customary law rights in land prior to the cut-off date by the racially discriminatory legislation and actions of the British colonial government.

It is suggested that the unique nature of the customary law systems of pastoral indigenous communities as discussed in this contribution will render the complicated qualification system of the Restitution Act unnecessary for the purposes of the suggested legislation to be made in terms of section 25(8) of the Constitution. It must be accepted that the ancestors of the residents of the Reserves were dispossessed of their customary law rights in land. It is therefore not necessary to define and identify communities that may qualify for restitution of their land. It is submitted that if the residents of the Reserves are still occupying land in terms of customary law systems on the Reserves they must be authorised by the proposed legislation to exercise these rights on the land their ancestors occupied as grazing outside the boundaries of the Reserves.

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115 See the *White Paper on South African Land Policy April 1997* at 77-78: available at <http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperlandreform.pdf> (accessed 25 Jan 2019).

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THE HISTORY AND NATURE OF THE RIGHT TO INSTITUTE A PRIVATE PROSECUTION IN SOUTH AFRICA

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ABSTRACT

In 1828, legislation was enacted in South Africa to provide for the right to institute a private prosecution. Between 1828 and 1976, South African statutory law expressly provided that a victim of crime had a right to institute a private prosecution. However, this changed with the promulgation of the Criminal Procedure Act 51 of 1977. Section 7 of that Act provides for a list of people who may institute private prosecutions, but it does not expressly state that a victim of crime has such a right. Nevertheless, the courts have held that section 7 does provide for the right of a victim of crime to institute a private prosecution. The purposes of this article are manifold: to highlight the history of the right to institute a private prosecution in South Africa; to argue that although section 7 does not expressly provide for the right to institute a private prosecution, its drafting history could be relied on to contend for the existence of such right; to discuss the nature of the right to institute a private prosecution; to discuss the limitations on the right to institute a private prosecution; and to suggest ways in which this right may be strengthened.

Keywords: Bill of Rights; private prosecution; South Africa; Constitution of the Republic of South Africa; legal history

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1 Introduction

Although South African courts have, for many years, recognised that a victim of crime may institute a private prosecution, there is no express constitutional or statutory right to institute a private prosecution. Unlike in some African countries, such as Kenya and the Gambia, the Constitution of the Republic of South Africa, 1996 (hereafter the 1996 Constitution) does not mention private prosecutions. Nonetheless, for a long time, the courts have held that a victim of crime has a right to institute a private prosecution.¹

Before dealing with this jurisprudence, it is important to note that, in South African law, there are two types of private prosecutions.² First, private prosecution by an individual under section 7 of the Criminal Procedure Act 51 of 1977 (hereafter the 1977 Act) on the basis of a certificate issued by the Director of Public Prosecutions (DPP) – which is the focus of this article; and, secondly, private prosecution by statutory right under section 8 of the 1977 Act.³ The latter type of private prosecution can be undertaken by both natural and juristic persons on the basis of specific pieces of legislation, and requires no certificate from the DPP.⁴ In such a case, the DPP withdraws his right to prosecute and allows a statutory body or an individual to prosecute certain offences. Municipalities, for example, may prosecute people or

- 1 In the past, however, private prosecutions were resorted to by employers to prosecute employees for conduct, such as absence from work or leaving the employer's premises without permission. See, for example, *Cuppa Gownden (Appellants) v Hawksworth (Respondent)* (1896) 17 NLR 340; *Himunchal v Rojia* (1904) 25 NLR 259; *The King v Levey* (1905) 19 EDC 167; *Levey v Bayes* 1905 EDL 167; *Thoppaya v Kynochs, Ltd* (1923) 44 NPD 341.
- 2 In *Rex v Kupeka* 1929 OPD 65 at 66, the court gave the following two types of private prosecutions, namely "[e]very person having the necessary interest may bring a private prosecution on obtaining a *nolle prosequi* from the Attorney-General, and some municipalities and other public bodies are statutorily empowered to bring private prosecutions for contraventions of their regulations without having to obtain a *nolle prosequi*".
- 3 Section 8 provides that "(1) [a]ny body upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try that offence. (2) A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the attorney general [DPP] concerned and after the attorney-general [DPP] has withdrawn his right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution. (3) An attorney-general [DPP] may, under subsection (2), withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the attorney-general [DPP], and that the attorney-general [DPP] may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution". In *Germiston Town Council v Union Government* 1931 TPD 396 at 402, the court held that the right of municipalities to institute private prosecutions was granted by the legislature.
- 4 See, for example, s 23(4) of the Extension of Security of Tenure Act 62 of 1997; s 33 of the National Environmental Management Act 107 of 1998; s 24 of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972; and s 25 of the Hazardous Substances Act 15 of 1973.

companies for infringing municipal laws/regulations on the basis of the right granted to them under section 8.⁵

This article focuses on the right to institute a private prosecution on the basis of a certificate issued by the DPP after he has declined to prosecute. Below, the author discusses the history of the right to institute a private prosecution in South Africa.

2 The history of private prosecutions in South African law

Private prosecutions were introduced in South Africa by the British colonialists. In *Groenewoud and Colyn v Innesdale Municipality*,⁶ the court held that:

There can be no doubt that under Roman-Dutch law, more especially after the Criminal Ordinance of 5th July, 1570, the right of prosecution vested solely in the State. This was recognised in various statutory enactments in the Cape, and the whole subject was fully dealt with in the Criminal Procedure Ordinance No. 40 of 1828, the provisions of which upon the question of prosecution were reproduced in the Transvaal by Law 9 of 1866 and in the Criminal Procedure Code No. 1 of 1903. These Ordinances provide that the only persons entitled to prosecute privately are those who can show some substantial and peculiar interest in the issue of the trial arising out of some injury which they have suffered by the commission of the alleged offence.⁷

The court added that “[t]here is no doubt that the right of private prosecution is a matter appertaining, generally speaking, to the administration of justice”.⁸ In *Mullins and Meyer v Pearlman*,⁹ the court held that “[t]he right of private prosecution for criminal offences in South Africa is apparently the creature of statute. It did not exist under Roman-Dutch law so far as I am aware”.¹⁰ In England, the right to institute

5 There is a long list of cases dating back to 1884 in which statutory bodies have prosecuted individuals or companies. See *Benoni Municipality v Jungi Ragnana* 1956 (3) SA 513 (T). For a detailed discussion of this aspect, see *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development (Corruption Watch as amicus curiae)* 2017 (4) BCLR 517 (CC). However, a decision by a municipality to conduct a private prosecution has to be authorised by the relevant officials or committee; if not, the prosecution is invalid. See *Woolf v Rex* 1911 EDL 119.

6 *Groenewoud and Colyn v Innesdale Municipality* 1915 TPD 413.

7 *Idem* at 415.

8 *Ibid.*

9 *Mullins and Meyer v Pearlman* 1917 TPD 639.

10 *Idem* at 643. See, also, *Eaton v Moller* (1871-1872) 2 Roscoe 85 at 86, in which Denysen J of the Supreme Court of the Cape of Good Hope held that “as the law at one time stood, no one but the Fiscal or Attorney-General could prosecute criminally, because the object of a criminal prosecution was to vindicate the law of the country. Later that law was modified, and private parties were allowed to prosecute, on getting a certificate from the Attorney-General that he declined to do so. Later still there arose another modification, by which the private party was allowed to elect whether he himself would prosecute or would put the matter into the hands of the Public Prosecutor”.

private prosecutions preceded public prosecutions. One of the things that the British introduced to the Cape was English criminal procedure law. The British settlers found the legal system at the Cape (Roman-Dutch law) unfamiliar and wanted English law to be introduced.¹¹ The introduction of British law to the Cape was preceded by a commission of inquiry. The debates of the British Parliament (House of Commons) show that the legislators at the time wanted that commission to be established with the mandate to, *inter alia*, look “into the state of the laws; and also into the practical administration of justice”.¹² When the commission of inquiry (the Colebrooke and Bigge Commission) was established, it was indeed given that mandate and¹³ one of the issues it dealt with concerned the prosecution of offences. The commission recommended that:

The prosecution of crimes and misdemeanors throughout the Colony should be effected by informations filed by the Attorney General in cases of importance, and by the clerks of the Crown in his name in ordinary cases, but we think that in all others, but more especially in those of libel, assault, or other misdemeanors, a right should be to the parties conceiving themselves injured to carry on the prosecution themselves if they should prefer doing so, or if the Attorney General should decline it, and in such case we think that the parties declaring that intention should be required to enter into recognizances to prosecute at the next ensuing Court of Session or Circuit.¹⁴

On the issue of the costs in the case of an unsuccessful prosecution, the report recommended that the practice of ordering the accused, in a public prosecution, to pay “costs which their criminal conduct has occasioned” should be discontinued, but that courts should have the discretion “to order payment of costs in those cases in which private individuals having exercised the right of prosecution shall not succeed in obtaining convictions”.¹⁵

The following are some of the issues that should be noted about the commission’s above-mentioned recommendations regarding whether or not private prosecutions in the Colony of the Cape of Good Hope should be permitted. First, the general rule was that an offence should be prosecuted by the public prosecutor. Private prosecution was the exception. Secondly, if private prosecutions were to be allowed, it had to be limited to minor offences, such as libel and assault. Thirdly, a person had a right to institute a private prosecution, provided that he could show that he had been injured by the crime. Put differently, he had to have been a victim of crime. Fourthly, a victim of crime had a right to institute a private prosecution if he preferred to do so

11 Van den Bergh 2012: 74.

12 *Hansard UK House of Commons Debates* no 7 (25 Jul 1822) col 1801 available at <https://api.parliament.uk/historic-hansard/commons/1822/jul/25/commission-of-inquiry> (accessed 11 Apr 2019).

13 The commission was established in 1823; see Van Niekerk 2015: 379-384.

14 Theal 1897: 124-125.

15 *Idem* at 129.

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or if the Attorney-General had declined to prosecute. This meant that there were two ways through which a victim of crime could exercise his right to institute a private prosecution: (1) if he preferred to institute a private prosecution before the Attorney-General declined to prosecute; or (2) if that person preferred to institute a private prosecution after the Attorney-General had declined to prosecute. In both cases, the Attorney-General's consent would not be a prerequisite. Fifthly, the moment the person indicated his intention to institute a private prosecution, he had to be prepared to prosecute the suspect at the next court session. This meant that a prosecution had to be conducted as soon as possible. Sixthly, in the event of an unsuccessful private prosecution, the court had the power to order the private prosecutor to reimburse the government the costs occasioned by his prosecution. The report was silent on the issue of whether some of that money would have gone to the acquitted individual. It was also silent on the question of whether, in the event of a successful prosecution, the private prosecutor was entitled to claim from the government the money he had spent on prosecuting the offender after the Attorney-General's decision to decline to prosecute.

The commission of inquiry's report was submitted to the Committee of the Legislative Council on the Judicial Establishment of the Colony of the Cape of Good Hope and was considered by the Secretary of State for War and the Colonies (Viscount Goderich). In his despatch to the Governor of the Cape (Major-General Bourke) dated 5 August 1827, Viscount Goderich expressed his views on the commissioners' report. On the issue of prosecution, Goderich noted that:

The subject of the administration of Criminal Justice is passed over by the Commissioners in their report without any particular remark. I presume it to have been their intention to dispose of this question by their general advice respecting the introduction of the Law of England... But the difficulty of adopting the English forms of practice of Criminal Procedure at the Cape of Good Hope would for the present at least appear insuperable. The great peculiarity of the English Criminal Jurisprudence is that there is no officer to whom the constitution has committed the general duty of Public Prosecutor. That Office is sustained by the Attorney General in England only in certain special cases of crimes committed directly against the state. But even in State Offences amounting to felony or treason, the Attorney General cannot subject any man to trial without the intervention of the Grand Jury. In all ordinary cases of crime Offenders are usually prosecuted by the private person more immediately injured by the Offender. Without pausing to discuss the abstract and general question whether the Office of the Public Prosecutor should in any Country be entrusted to the voluntary zeal of private persons, it is sufficient for the present purpose to say, that some more perfect security for the due execution of the Law is required at the Colony of the Cape of Good Hope. It is obvious that the great mass of the Inhabitants cannot have either leisure or inclination for such a charge, and that the participation of private men in prosecutions would be regarded, not as the assertion of an important, but only as an unrequited and invidious burthen. It is further to be considered that this peculiar principle of English Law supposes the existence of a numerous Magistracy dispersed throughout every part of the Kingdom, to whom the private prosecutor can at all times resort with little inconvenience. It requires also a large

body of inferior Officers of Justice under the immediate command of the Magistrates. Now this complex machinery is not at present to be found in the Colony, nor have I any ground to suppose that the necessary materials from which it might be constructed could be found there.¹⁶

This despatch, to which the Royal Charter for the Better and More Effectual Administration of Justice within the Colony of the Cape of Good Hope was appended, was meant to inform the governor of the British government's position on the aspects raised by the commission. In the above quote, Goderich took the view that the system of private prosecutions as understood and applied in England at the time would not be transplanted to the Cape of Good Hope. This is because there was no "complex machinery" at the Cape of Good Hope to enable the system to function. It was also clear that the office of the public prosecutor at the Cape of Good Hope would be established with the duty to prosecute crimes. Therefore, prior to the 1828 Ordinance mentioned above, victims of crime in the Cape of Good Hope did not have a right to institute a private prosecution. This position would influence the nature of private prosecutions in South Africa for many decades to come.

Although the 1827 despatch was sceptical about allowing private prosecutions at the Cape, such prosecutions were nevertheless introduced a year later. The 1828 Ordinance on criminal procedure,¹⁷ which "adopted English criminal procedure",¹⁸ made it clear that, in all cases, it was the public prosecutor who had the right to prosecute, and that it was only when he had decided to decline to exercise that right, that he was to issue a certificate authorising a private individual to institute a private prosecution. The first sections of the Ordinance provided for the jurisdiction of the Supreme Court of the Colony of the Cape of Good Hope and for that of the inferior courts.¹⁹ Section 6 provided that "[t]he Attorney-General of the Cape of Good Hope is vested with the right, and entrusted with the duty, of Prosecuting in the Name and on the Behalf of the King, all Crimes and Offences committed in this Colony". The section added that the Attorney-General had to exercise "this right of Prosecution" in person in the Supreme Court and in the lower courts through other officials, such as the clerks (in district courts), the Superintendent of Police (in the police court) or by any other person appointed by the Attorney-General. Section 8 provided that: "This right and power of Prosecution in the Attorney-General, is absolutely under his own management and control." Under section 9, the Attorney-General had "the power at any time before Conviction, of stopping all Prosecutions commenced by him, or by the Superintendent of Police, or by the Clerks of the Peace, at the Public instance" and, in such an event, the accused would have to be acquitted by the court.

16 *Idem* at 266-267.

17 See Ord 40 of 1828 (Regulating the Manner of Proceeding in Criminal Cases) (Cape).

18 Farlam & Zimmermann 2001: 90.

19 Sections 1-5.

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The Attorney-General had the right, and was entrusted with the duty, to prosecute all offences committed in the colony. This right and duty to prosecute extended to all offences committed within the colony. This was presumably meant to provide, beyond a doubt, that no categories of offences were to be left to prosecution by private individuals. The Attorney-General had absolute power over prosecution. This meant, for example, that a private individual could not force him to prosecute an offence that he had declined to prosecute or to stop a prosecution that he had decided to pursue.

However, the Ordinance also provided for circumstances in which an individual might institute a private prosecution. Section 11 provided that “[w]here in virtue of the right of Prosecution hereinafter given to private Parties, any private Party intends to prosecute any Person” whose release from detention has been authorised by the Attorney-General, “it shall be competent for such private Parties, upon entering into a Recognizance for the Prosecution of the said Defendant in the form hereinafter set forth, to apply to the” relevant court or judicial officer (if the court is not sitting) “for a Warrant for the further detention in Gaol of such Person”. The section further provided that, where the accused had already been released from detention “for his recommittal to” prison to await his trial and on the basis of that application, the court or judge “shall make such Order, as to them shall seem proper”. It is important to note two things about section 11. First, it was possible for the “right of prosecution” to “be given to private parties”. In other words, the Ordinance recognised that a private individual did not have an automatic right to institute a private prosecution. That right could only be granted if the Attorney-General had indicated that he was not going to prosecute the said person. Secondly, it was permissible for a private person to apply for a court order regarding the detention of a person he intended to prosecute.

Section 13 provided that:

In all cases, where the Public Prosecutor declines to prosecute for any alleged Crime or Offence, it is competent for any private Party, who alleges that he has suffered injury by any such alleged Crime or Offence, to prosecute in any Court, competent to the Trial of the same, the Person alleged to have committed such Crime or Offence.

Three things should be noted about section 13. First, a private individual could not institute a private prosecution unless the public prosecutor had declined to prosecute. This emphasised the fact that the public prosecutor had the right and duty to prosecute any offence committed in the colony. Secondly, a private prosecutor could prosecute “any alleged crime or offence”. This meant that private prosecution was not limited to minor offences. Thirdly, for a private person to be able to institute a private prosecution, he must have allegedly “suffered injury” as a result of that offence. Put differently, he had to have been a victim of crime.

Section 14 of the Ordinance stipulated as follows:

In order that no Prosecution, at the instance of a private Party, may take place, until the Public Prosecutor shall have exercised his discretion, whether he will prosecute the Offender at the Public instance, it shall not be competent for any private Party to obtain the Process of any Court for summoning any Party to answer to any Indictment or Complaint, unless the said private Party shall produce to the Officer, authorised by Law to issue such Warrant, the Indictment or Complaint, having endorsed thereon where the Indictment is to be tried in the Supreme or Circuit Court, a Certificate under the hand of, and subscribed by, the Attorney-General, that he has seen the Indictment, and declines to prosecute at the Public instance for the Offence therein set forth; and where the Indictment or Complaint is to be tried in any Inferior Court, a Certificate, under the hand of, and subscribed by, the Officer who by Law is entitled to prosecute at the Public instance in such Court, that he has seen the said Indictment or Complaint, and declines to prosecute at the Public instance for the Offence therein set forth; and in every case, in which the Attorney-General declines to prosecute, he and the Officers, through whom he exercises the right of Prosecution in the Inferior Courts, shall, at the request of the Party intending to prosecute, grant the Certificates abovementioned on every Indictment submitted to them by such private Party.

Two aspects of section 14 are worth mentioning. First, a certificate from the Attorney-General or a public prosecutor was a prerequisite for any private party to institute a private prosecution. Without the certificate, the relevant court official could not issue the required court document to compel the accused to appear before court.²⁰ Secondly, if the Attorney-General or his officer declined to prosecute, he had to (“shall”) issue the relevant certificate to a person intending to institute a private prosecution. The word used here was “shall” and not “may”. In other words, the moment the Attorney-General declined to prosecute, he had no choice but to issue the said certificate to a person who had applied for it. It was at that stage that the person could exercise his right to prosecute. The effect of this provision was that, once the Attorney-General had declined to exercise his duty and right to prosecute, the right to prosecute was bestowed on the victim of the crime. However, unlike the Attorney General, a victim of crime did not have a duty to prosecute.

Section 15 of the Ordinance provided that:

To support a Prosecution at the private instance, the private Party prosecuting must be able to show some substantial and peculiar interest in the issue of the Trial, arising out of some injury, which he individually has suffered by the commission of the alleged Crime or Offence set forth in the Indictment or Complaint.

20 In *Mcunu v Landsberg* (1913) 34 NPD 140, it was held that private prosecution was invalid if it was done without the certificate from the Attorney-General confirming that he had declined to prosecute.

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This section emphasised the fact that only victims of crime could institute private prosecutions. Nevertheless, under section 16, a husband possessed “this right of Prosecution in respect of Crimes and Offences committed against his wife”. Also, in terms of section 17, “[t]he legal Guardians of Minors possess[ed] this right of Prosecution in respect of Crimes and Offences committed against their Wards”. Section 18 furthermore provided that “[t]he Wife or Children, or where there is no Wife or Child, any of the next of kin, of any deceased Person, possess this right of Prosecution in respect of any Crime by which the Death of such Person is alleged to have been caused”. It is critical to note that although a husband had a right to institute a private prosecution for an offence committed against his wife, a wife did not have a right to institute a private prosecution for an offence committed against her husband, unless the husband had died as a result of the alleged crime. This should be understood against the background that, at the time, equality between men and women did not exist.²¹ However, if a married woman was a public trader, she could institute a private prosecution against a debtor.²² A woman could also institute a private prosecution for offences committed against herself.²³

Under section 19, in the event of an acquittal, a court was empowered to order a private prosecutor to reimburse the accused the expenses he had incurred defending himself. Section 20 required the private prosecutor to deposit £20 sterling at the court and to obtain two sureties before the court could summon the accused to be prosecuted. The British would later extend the above provisions on private prosecutions to other parts of South Africa.²⁴

21 This means that s 7 of the 1977 Act, which still retains this discriminatory approach, is discriminatory against women and therefore unconstitutional. In *Tsholo v Kgafela* [2005] JOL 16146 (B), the widow instituted a private prosecution against a person who had allegedly murdered her husband on the basis of s 7 of the 1977 Act.

22 In *Mcintyre v Goodison* (1877) 7 Buch 83 at 84, the Supreme Court of the Cape of Good Hope held that “[i]n this particular case the [trade] license was made out in the name of the respondent; and we must, in the absence of evidence to the contrary, presume that she acted with the consent of her husband as a public trader”. The court then quoted Van der Linden, who had stated that “[t]he wife becomes, by marriage, as it were a minor; and the husband her curator or guardian: she has no power to appear in Court; she is not capable of herself to enter into any contract without the knowledge or consent of her husband, so as to bind her to others, except so far as she may clearly appear thereby to have derived an advantage or profit; or that she, with the knowledge of her husband, has carried on trade openly” and, again, where he stated that “[i]n like manner, when the cause concerns a married woman, the husband must appear for the wife, except in the following cases: 1. When the woman is a public trader”. The court therefore held that “inasmuch as this license was in the name of the woman herself, without the husband in any way being recognized or named in it, I think she has obtained a locus standi in matters appertaining to that license and business connected therewith, so as to entitle her to institute this private prosecution”.

23 In *Ex parte Hendley* 1926 WLD 5, the Attorney-General granted a certificate that was used by the female applicant to institute a private prosecution for perjury.

24 Dugard 1977: 10-35.

Apart from this criminal procedure Ordinance, other pieces of legislation passed in the nineteenth century also made provision for private prosecutions. These provided for two types of private prosecutions, namely those that could only be instituted by victims of crime²⁵ and those that could be instituted by any person regardless of whether or not he had been a victim of crime.²⁶ In those instances where more than one person was aggrieved by the commission of an offence, legislation required the Attorney-General to “select as private prosecutor the person whom he deems most fit and proper” to conduct the prosecution.²⁷ In some instances, legislation provided that trustees could institute private prosecutions on behalf of organisations or societies.²⁸ In 1830, the 1828 Ordinance was “explained” by way of a further Ordinance. The 1830 Ordinance stated that a certificate from the Attorney-General was not a prerequisite for a person to institute a private prosecution under section 14, unless the offence in question was of such a nature that it “ought not to be permitted to be prosecuted at the instance of the private party”.²⁹ Although the 1830 Ordinance was amended in 1852, the amendments did not affect the provisions relating to the issue of the certificate in question.³⁰ However, when the British later extended the law of criminal procedure to Natal and the Transvaal, they transplanted the 1828 Ordinance as it had been *before* the 1830 additions.³¹

The historical developments in South African law with regard to private prosecutions between 1828 and 1977 were succinctly summarised by the High Court in *Black v Barclays Zimbabwe Nominees (Pvt) Ltd* as follows:³²

Apart from their substantial influence on legislation in the other provinces, the provisions of the Cape Ordinance of 1828...were to a large extent incorporated in the Criminal Procedure Act 31 of 1917. The subsequent Criminal Procedure Act 56 of 1955 substantially re-enacted the provisions of the 1917 Act relating to private prosecutions, the only relevant difference

25 See, for example, s 12 of the Cattle Theft Repression Act 16 of 1864 (Cape of Good Hope); s 73 of Ord 6 of 1843 (Estates Insolvent) (Cape of Good Hope); and s 16 of the Stock and Produce Thefts Act 35 of 1893 (Cape of Good Hope).

26 See ss 8, 10 and 11 of the Corrupt Practices at Elections Prevention Act 21 of 1859 (Cape of Good Hope); s 22 of the Police Offences Act 27 of 1882 (Cape of Good Hope); s 9 of the Public Health Act 4 of 1883 (Cape of Good Hope); s XVI of the Wines and Spirits Act 8 of 1875 (Cape of Good Hope); s 17 of the Cruelty to Animals Law 31 of 1874 (Natal); and s 8 of the Sunday Law 24 of 1878 (Natal).

27 Section XVI of the Merchandise Marks Act 12 of 1864 (Cape of Good Hope).

28 Section 5 of the Friendly Societies' Act 7 of 1882 (Cape of Good Hope).

29 Sections 6 and 7 of Ord 73 of 1830 (Ordinance for Explaining, Altering, and Amending the Ordinance No 40) (Cape).

30 See Ord 8 of 1852 (Ordinance for Regulating in Certain Respects the Prosecution of Crimes in Districts in Which There Shall not Be Resident Clerks of the Peace, and for Other Purposes) (Cape of Good Hope).

31 Ord 18 of 1845 (Ordinance for Regulating the Manner of Proceeding in Criminal Cases in the District of Natal) (Natal); Ord 1 of 1903 (Criminal Procedure Code) (Transvaal).

32 *Black v Barclays Zimbabwe Nominees (Pvt) Ltd* 1990 (1) SACR 433 (W).

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between s 14 of the 1917 Act and s 11 of the 1955 Act being that the former referred to ‘any private party’ whereas the latter referred to ‘any private person’. It is to be noted that there was no definition of the word ‘party’ in the then current Interpretation Act 5 of 1910. In the 1977 Act s 7 provides substantially the same as ss 11 and 14 of the 1955 Act.³³

The above extract from the judgement indicates that, like the Cape Ordinance of 1828, the Criminal Procedure and Evidence Act 31 of 1917 also provided for the right to institute a private prosecution. Section 14 of the latter Act provided that:

In all cases where the Attorney-General declines to prosecute for an alleged offence any private party, who can show some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence, may prosecute in any court competent to try the offence, the person alleged to have committed it.

Section 15 of the same Act provided that:

The following also possess this right of prosecution: (a) A husband in respect of offences committed against his wife; (b) the legal guardians or curators of minors or lunatics in respect of offences committed against their wards; (c) the wife or children or, where there is no wife or child, any of the next of kin of any deceased person in respect of any offence by which the death of such person is alleged to have been caused; (d) public bodies and persons on whom the right is specially conferred by statute in respect of particular offences.

It is evident that the right to institute a private prosecution was expressly provided for in the 1917 Act.³⁴ In *Brown v Moffat*,³⁵ the court held that section 15 provided for the right of prosecution. In *Thoppaya v Kynochs, Ltd*,³⁶ the court held that the phrasing in section 15(d) “must refer to a statutory provision which expressly gives the right to prosecute privately”.³⁷ The 1917 debates of the House of Assembly on the Criminal Procedure Bill show that the legislature was of the view that all prosecutions had to be conducted by the state and that private prosecutions were to be an exception.³⁸

The Criminal Procedure and Evidence Act of 1917 was later replaced by the Criminal Procedure Act 56 of 1955. Unlike the 1917 Act, which expressly provided that victims of crime had a right to institute private prosecutions, this right was not expressly mentioned in the relevant section of the 1955 Act.³⁹ Section 11 provided that:

33 *Idem* at 435-436.

34 See, also, s 16 of the 1917 Act, which expressly mentioned “the right of prosecution...given to private parties”.

35 *Brown v Moffat* 1918 TPD 242 at 245.

36 *Thoppaya v Kynochs, Ltd* (1923) 44 NPD 341.

37 *Idem* at 349.

38 “Debates of the House of Assembly of the Union of South Africa as reported in the Cape Times, Volume II, Second Session, Second Parliament (16 February to 3 July 1917)” 3 Mar 1917 *Cape Times* at 43.

39 The Hansard version of the House of Assembly debate on the 1955 Criminal Procedure Bill is silent on the issue of private prosecutions. See *Hansard Debates of the House of Assembly* vols 87, 88 and 89 at 1405-5161.

In any case in which the attorney-general declines to prosecute for an alleged offence: (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence; or (b) a husband, if the said offence was committed against his wife; or (c) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward; or (d) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence, may, subject to the provisions of sections fourteen and fifteen prosecute in any court competent to try the said offence, the person alleged to have committed it.

Although section 11 does not expressly mention the right to institute a private prosecution, a reading of other relevant sections of the Act shows that section 11 could easily be interpreted as conferring on the victim of crime the right to institute a private prosecution. For example, section 1(xviii) defined a “private prosecutor” to mean “any public body or person who in terms of section eleven or twelve has the right to prosecute in respect of any offence”. The right to institute a private prosecution was also referred to in sections 12⁴⁰ and 15 of the Act. The 1955 Act was eventually replaced by the 1977 Act, which still applies today.

Unlike the 1917 Act, which expressly mentioned the right to institute a private prosecution on the basis of a certificate *nolle prosequi*, the 1977 Act does not expressly mention this right. Section 7 of the current Act provides that:

(1) In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence – (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence; (b) a husband, if the said offence was committed in respect of his wife; (c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or (d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward, may, subject to the provisions of section 9 and section 59(2) of the Child Justice Act, 2008, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

However, section 8, which deals with “private prosecution under statutory right”, provides that:

(1) Any body upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try that offence. (2) A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the [DPP] concerned and after the [DPP] has withdrawn his right of

40 Section 12 provided that “[a]ny public body or any person on whom the right to prosecute in respect of any offence is expressly conferred by law, may prosecute in any court competent to try the said offence, the person alleged to have committed it”.

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prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution. (3) A [DPP] may, under subsection (2), withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the [DPP], and that the [DPP] may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution.⁴¹

It has been argued that a private prosecution under section 8 “is not a true ‘private prosecution’ even though it is identified as a ‘private prosecution’ in the Criminal Procedure Act”.⁴² This is because these prosecutions are conducted by public bodies or authorities and they remain under the control of the DPP. For example, under section 6(b) of the current Act, a person or body conducting a prosecution under section 8 of the same Act cannot stop such a prosecution without the DPP’s consent. The debates of the House of Assembly on the Criminal Procedure Bill, which would later become the 1977 Act, show that section 8 is not applicable to private prosecutions on the basis of a certificate *nolle prosequi*. One Member of Parliament argued that there was a need for Parliament to make it very clear that section 8 was only applicable to public bodies in order to avoid confusing private prosecutions on the basis of a certificate *nolle prosequi* and private prosecutions under statutory right.⁴³ In response, the then Minister of Justice, who had tabled the Bill before Parliament, clarified that “this clause [clause 8] refers exclusively to bodies such as local authorities and other similar bodies that have the right to prosecute – nothing more”.⁴⁴ This means that the omission to expressly mention the right to institute a private prosecution under section 7 was not an oversight on the part of the legislature. The debates further indicate that prosecutions under section 8 are different from those under section 7.⁴⁵

In the light of the above discussion, the question remains whether, under section 7 of the 1977 Act, a victim of crime has a right to institute a private prosecution on the basis of a certificate *nolle prosequi*. In order to answer this question in the next part of this contribution, reference will be made to case law and to the drafting history of section 7.

41 Section 45 of the National Prosecuting Authority Act 32 of 1998 provides that “(a) an attorney-general shall, unless the context indicates otherwise, be construed as a reference to the National Director; and (b) an attorney-general or deputy attorney-general in respect of the area of jurisdiction of a High Court, shall be construed as a reference to a Director or Deputy Director appointed in terms of this Act, for the area of jurisdiction of that Court”.

42 Joubert 2014: 84.

43 *Hansard Debates of the House of Assembly* (13 Apr 1973) cols 4811-4812 per submissions by Mr JJM Stephens.

44 *Idem* at col 4812 per submission by the Minister of Justice.

45 *Hansard Debates of the House of Assembly* (11 Mar 1977) cols 3393-3394.

3 The nature of the right to institute a private prosecution

In contrast to the statutory position discussed above, the courts have long since recognised the right of a victim of crime to institute a private prosecution. This jurisprudence may be divided into two periods: the pre-1977 jurisprudence (when the right to institute a private prosecution was expressly provided for by the Criminal Procedure and Evidence Act 31 of 1917 and by its successor, the Criminal Procedure Act 56 of 1955); and the post-1977 jurisprudence, when this right is not expressly mentioned in the 1977 Act.

In the 1872 decision of *Eaton v Moller*,⁴⁶ the Supreme Court of the Cape of Good Hope held that a victim of crime has a right to institute a private prosecution.⁴⁷ In *Chinian (Appellant) v Kupusamy (Respondent)*,⁴⁸ the court held that the relevant pieces of legislation “expressly declare the manner in which the right to a private prosecution may be established and exercised”.⁴⁹ In *Wakefield (Appellant) v Houghting (Respondent)*,⁵⁰ the court held that “the right to prosecute has been conferred by law”.⁵¹ As mentioned above, in *Mullins and Meyer v Pearlman*,⁵² the court held that “[t]he right of private prosecution for criminal offences in South Africa is apparently the creature of statute. It did not exist under Roman-Dutch law so far as I am aware”.⁵³ In 1949, the court referred to the right to institute a private prosecution as being “very special”.⁵⁴ In addition, it has been held that in case the

46 *Eaton v Moller* (1871-1872) 2 Roscoe 85.

47 See, also, *Fischer v Genricks* (1885-1886) 4 SC 31, in which the court held that private prosecutions are authorised by legislation.

48 *Chinian (Appellant) v Kupusamy (Respondent)* (1892) 13 NLR 220.

49 *Idem* at 220.

50 *Wakefield (Appellant) v Houghting (Respondent)* (1895) 16 NLR 171.

51 *Idem* at 173. See, also, *Van Zijl v Graaf* (1907) 24 SC 72 at 74, where the court stated that the rights of private prosecutors were governed by different pieces of legislation; and *Mcunu v Landsberg* (1913) 34 NPD 140 at 141, where the court held that the right to institute a private prosecution is governed by legislation.

52 *Mullins and Meyer v Pearlman* 1917 TPD 639.

53 *Idem* at 643. See, also, *Thoppaya v Kynochs, Ltd* (1923) 44 NPD 341 at 349. In *Fourie v Resident Magistrate of Worcester* (1897) 14 SC 54, the court held that “[b]y the common law of this country all criminal prosecutions must be conducted by a public prosecutor. A private individual, who under the Roman law had the right to prosecute in his own name, could in Holland only lay his complaint before the proper public official whose duty it became, upon sufficient cause shown, to conduct the prosecution on behalf of the State...[with reference to Voet]. In 1828, however, it was enacted in this [Cape] Colony, by Ord. No. 40, sect. 13, that where the public prosecutor declines to prosecute, it shall be competent for any private party, who alleges that he has suffered injury by any crime or offence, to prosecute the offender in any competent Court”.

54 In *Bornman v Van der Merwe* 1946 OPD 192, the appellant was convicted as a result of a private prosecution by the respondent. The court held that “[e]ssentially, private prosecutions are in the nature of private litigation. The parties take their courage in both hands and institute and defend to gain their private ends. Since the State has made ample provision for the prosecution of offenders at the public instance, it seems equitable that the parties who desire to exercise their very special rights should do so at their own peril of being mulcted in costs. The same applies to the costs of appeal” (as quoted in *Arenstein v Durban Corporation* 1952 (1) SA 279 (A) at 300).

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DPP declines to prosecute or is prevented by the executive from issuing a certificate to allow a victim of crime to institute a private prosecution, the effect would be to deprive the victim of “a right to a ‘*nolle prosequi*’”.⁵⁵ In such a case, a court will hold that the victim of crime has *locus standi* to institute a private prosecution even without a certificate *nolle prosequi*. This is because one of the objects of punishment is to prevent victims of crime from taking the law into their hands.⁵⁶

In *Freedom under Law v National Director of Public Prosecutions*,⁵⁷ the High Court held that “the right to pursue a private prosecution in terms of section 7” of the 1977 Act does not prevent courts from scrutinising a public prosecutor’s decision not to prosecute.⁵⁸ In *Nundalal v Director of Public Prosecutions KZN*,⁵⁹ the High Court held that “[a] person whose feelings and good name are injured has the right to prosecute privately if he actaullay [*sic*] suffers an injury”⁶⁰ and that “a decision to deny a private prosecutor the right to prosecute should be taken cautiously not least because it implicates the right to access to the court under s 34 of the Constitution. If he meets all the requirements for a private prosecution under the CPA and the right to prosecute is not hit by the limitation in s 36, the private prosecution should be allowed to proceed”.⁶¹ There are also other cases in which courts have mentioned a victim’s right to conduct a prosecution under section 7 of the 1977 Act.⁶² However, the High Court has further observed that private prosecutions “are very rare in” South Africa.⁶³

Apart from the fact that a private prosecution is a right, it can also be a remedy.⁶⁴ The Constitutional Court has observed, in passing, that:

Whether a private prosecutor is exercising a governmental power is a point which need not now be decided. It may be argued that the private prosecutor is not vindicating a private right, but is invoking the power of the State to punish crime. Sections 12 and 13 of the Criminal Procedure Act 51 of 1977 reflect the State’s continuing interest in a private prosecution.⁶⁵

55 *Mweuhanga v Cabinet of the Interim Government of South West Africa* 1989 (1) SA 976 (SWA) at 984.

56 *Shifidi v Administrator-General for South West Africa* 1989 (4) SA 631 (SWA).

57 *Freedom under Law v National Director of Public Prosecutions* 2014 (1) SACR 111 (GNP).

58 *Idem* para 190.

59 *Nundalal v Director of Public Prosecutions KZN* 2015 JDR 0876 (KZP).

60 *Idem* para 53.

61 *Idem* para 54.

62 *Delpont v S* [2015] 1 All SA 286 (SCA) para 31; *Reynolds NO v Beinash* [1998] JOL 2274 (W) at 6; *Black v Barclays Zimbabwe Nominees (Pvt) Ltd* 1990 (1) SACR 433 (W) at 434 and 438.

63 *Berg River Municipality v Zelpy 2065 (Pty) Ltd* 2013 (4) SA 154 (WCC) para 47. See, also, *Balagooroo Senaithalway Educational Trust v Soobramoney* 1965 (3) SA 627 (N) at 629.

64 See *Berg River Municipality v Zelpy 2065 (Pty) Ltd* 2013 (4) SA 154 (WCC) para 47: “One would not usually regard a criminal remedy as one which is available to the harmed individual. It is a public remedy at the discretion of the prosecuting authorities. Only if the directorate of public prosecutions declines to prosecute can the individual launch a private prosecution, and I would hesitate to call a private prosecution an ‘ordinary remedy’.”

65 *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) at n 88.

The above observation by the Constitutional Court is not without support. The drafting history of the sections on private prosecutions in the 1977 Act shows that one Member of Parliament was of the view that “a private prosecution is deemed to be on behalf of the State, but it is not at the instance of the State”.⁶⁶ In *S v De Freitas*,⁶⁷ the court held that:

[T]he right to institute a prosecution which is the right which lapses, is a right which vests in the State...and is a right which is exercised on behalf of the State by the Attorney-General [DPP]. Where the Attorney-General [DPP] declines to prosecute and issues a certificate *nolle prosequi* and where certain other requirements are present an interested member of the public is entitled to bring a private prosecution. The primary right, however, to prosecute is that of the State and at best the citizens with an interest have a *spes* which will only be realised in the event of the Attorney-General [DPP] declining to prosecute.⁶⁸

In one case, the court held that the mere fact that the DPP has declined to prosecute does not mean that he is obliged to issue a certificate to the victim of crime to enable him to institute a private prosecution.⁶⁹ Whether or not this view is correct, is doubtful.⁷⁰ However, the right to institute a private prosecution is not absolute and its limitations will be discussed below.

The discussion thus far shows that courts have held that a victim of crime has a right to institute a private prosecution under section 7 of the 1977 Act, even though section 7 does not expressly provide for that right. However, this holding is supported by the history of private prosecutions in South Africa. It should be noted that the 1996 Constitution refers to four categories of rights: (1) rights provided for in the Bill of Rights; (2) common-law rights; (3) customary law rights; and (4) statutory rights.⁷¹ In South African law, there is a clear distinction between common-law rights and statutory rights.⁷² However, as the Supreme Court of Appeal held, there is no “rule that a statutory right is stronger than a common-law right”.⁷³ It could be argued that in cases where the legislator’s intention was to provide for a statutory right, this has been done expressly. For example, the 1977 Act provides for the following rights: the right of statutory bodies to institute a private prosecution;⁷⁴ the

66 *Hansard Debates of the House of Assembly* (11 Mar 1977) col 3394 per submissions by Mr WT Webber.

67 *S v De Freitas* 1997 (1) SACR 180 (C).

68 *Idem* at 183.

69 *Singh v Minister of Justice and Constitutional Development* 2009 (1) SACR 87 (N).

70 See *Nundalal v Director of Public Prosecutions KZN* 2015 JDR 0876 (KZP).

71 Section 39(3) of the Constitution provides that “[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill”.

72 *Agri South Africa v Minister for Minerals and Energy (Afriforum as amici curiae)* 2013 (7) BCLR 727 (CC); *Xstrata South Africa (Pty) Ltd v SFF Association* 2012 (5) SA 60 (SCA) para 10.

73 *Lester v Ndlambe Municipality* 2015 (6) SA 283 (SCA) para 23.

74 Section 8 of the Criminal Procedure Act 51 of 1977.

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right of the accused to institute bail proceedings;⁷⁵ the right of the accused to be tried before another judicial officer should the prosecutor and accused withdraw from the plea and sentence agreement;⁷⁶ the right of the accused to legal representation;⁷⁷ third-party rights in the property ordered to be forfeited to the state;⁷⁸ the right of complainants to make representations in some cases where the offender is being considered for parole;⁷⁹ and the general right to prosecute.⁸⁰

Although section 7 of the 1977 Act does not expressly provide for the right to institute a private prosecution, the drafting history of this section clearly shows that Parliament's intention was to provide for that right. The debates of the House of Assembly on the Criminal Procedure Bill indicates that Members of Parliament were of the view that section 7 provides for the right to institute a private prosecution. The submissions that "it is an important right of a private person to be able to prosecute privately" and that "[a]n ordinary private prosecutor prosecutes in respect of rights conferred upon him by this legislation, i.e. clause 7(1)" were not objected to.⁸¹ The right to institute a private prosecution under section 7 of the 1977 Act is thus a statutory right.

In South African law, a victim of crime does not have a right to compel a public prosecutor to institute criminal proceedings against a suspected offender.⁸² In *Gillingham v Attorney-General*,⁸³ the court held that it could not compel the Attorney-General to prosecute. Likewise, in *Kuranda v Barnet and Assistant Landdrost of Johannesburg*,⁸⁴ the court held that a public prosecutor may refuse to prosecute even if requested by a victim of crime to prosecute the suspect. However, this position is not unique to South Africa.^{85,86} In South Africa, although public prosecutors have the authority and a duty to prosecute crime,⁸⁷ a public prosecutor

75 *Idem* s 50(1)(b).

76 *Idem* s 150A(9)(d).

77 *Idem* s 73(2A).

78 *Idem* s 35.

79 *Idem* s 299A Act. For cases in which this provision has been invoked, see *Madonsela v S* [2014] ZAGPPHC 1013; *Derby-Lewis v Minister of Correctional Services* 2009 (6) SA 205 (GNP); *S v Nxumalo* [2018] JOL 40541 (KZD).

80 Section 18 of the Criminal Procedure Act 51 of 1977.

81 *Hansard Debates of the House of Assembly* (13 Apr 1973) cols 4811-4812 per submissions by Mr JJM Stephens.

82 Even the Service Charter for Victims of Crime in South Africa does not provide for this right. See Department: Justice and Constitutional Development (2004): *passim*.

83 *Gillingham v Attorney-General* 1909 TS 572.

84 (1891-1892) 4 SAR TS 288.

85 It is the same view as that held by the European Court of Human Rights. See, generally, Rainey, Wicks & Ovey 2017: 289-290.

86 However, this position is not unique to South Africa. For example, the Nigerian Supreme Court held that "an individual has no right to insist that a criminal offence should be prosecuted by the State". See *Attorney-General of Kaduna State v Mallam Umaru Hassan* (1985) LPELRSC 149/1984 at 26.

87 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 176.

may in some circumstances decline to prosecute a suspect even if there is evidence that the latter committed an offence.⁸⁸ A victim of crime who is not satisfied with the public prosecutor's decision not to prosecute has the following options: he may invoke section 179(5)(d) of the Constitution and petition the National Director of Public Prosecutions to review the decision not to prosecute;⁸⁹ he may institute a private prosecution; or he may approach the High Court and challenge the rationality, legality or lawfulness of the decision not to prosecute.⁹⁰ After illustrating the nature of the right to institute a private prosecution, it is important to have a look at some of the limitations to this right.

4 Limitations on the right to institute a private prosecution

The right to institute a private prosecution is not absolute. As already mentioned, this right only arises when the DPP has declined to prosecute.⁹¹ In the 1889 case of *Himunchal, Appellant, v Clerk of the Peace for Klip River; Respondent*,⁹² the court held that "there can be no private prosecution, until the Crown prosecutor has refused to prosecute, and his refusal has been certified on the plaint".⁹³

There are situations where a victim of crime will not be permitted to institute a private prosecution against a person, even if there is evidence that that person committed the offence against the victim. These measures are perhaps meant to ensure that the right to institute a private prosecution is not abused. In South Africa, there have been attempts to abuse the right to institute private prosecutions.

88 See *Freedom under Law v National Director of Public Prosecutions* 2014 (1) SACR 111 (GNP) para 121, where the court observes that "[t]he discretion of the prosecuting authority to prosecute, not to prosecute or to discontinue criminal proceedings is a wide one. Nonetheless, as is reflected in the Prosecution Policy Directives, the prosecuting authority has a duty to prosecute, or to continue a prosecution, if there is a *prima facie* case and if there is no compelling reason for non-prosecution".

89 Section 179(5)(d) of the 1996 Constitution provides that the National Director of Public Prosecutions "may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following: (i) The accused person. (ii) The complainant. (iii) Any other person or party whom the National Director considers to be relevant".

90 See, generally, *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA); *National Director of Public Prosecutions v Freedom under Law* 2014 (4) SA 298 (SCA).

91 However, in Natal in earlier years, the Public Prosecutor did not have to decline to prosecute before a master could institute a private prosecution against his servant. See *Himunchal v Rojia* (1904) 25 NLR 259. In the Transvaal, the Attorney-General's certificate was not required before a private prosecution could be instituted in a summary trial before an inferior court. See *Rex v Japel* 1906 TS 108.

92 *Himunchal, Appellant, v Clerk of the Peace for Klip River; Respondent* (1889) 10 NLR 33.

93 *Idem* at 34. See, also, *Thoppaya v Kynochs, Ltd* (1923) 44 NPd 341 at 344.

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For example, in *Van Deventer v Reichenberg*,⁹⁴ the respondent instituted a private prosecution against the applicant, a Supreme Court judge, for allegedly defeating the ends of justice because he had set aside the respondent's earlier private prosecution. In making an order for the stay of prosecution, the court *in casu* held that it would be contrary to public policy for a judge to be cross-examined on a case he had presided over and that the respondent had abused court process by instituting a private prosecution.

In *Ellis v Visser*,⁹⁵ the private prosecutor did not have the title to institute a private prosecution, because he had no actionable injury. In *Ernst & Young v Beinash*, the court found that the respondent instituted a private prosecution without the title to prosecute and with ulterior motives.⁹⁶ In *Phillips v Botha*,⁹⁷ the court found that a private prosecution had been instituted to enforce the payment of an illegal gambling debt. In *Crookes v Sibisi*,⁹⁸ the court held that, like a public prosecutor, a private prosecutor is allowed to withdraw and reinstate a charge against the accused in terms of section 6(a) of the 1977 Act, and that a court will not allow a private prosecution to be used to harass the accused.⁹⁹ This is so, even though section 6(a) does not refer to private prosecutors. The High Court has held that "[n]otwithstanding that the private prosecutions are not strictly speaking civil proceedings, they are indeed forms of litigation that fall within the purview of the Vexatious Proceedings Act [3 of 1956]".¹⁰⁰

Another way in which the abuse of the right to institute a private prosecution may be brought to an end, is by the DPP taking over the private prosecution. Section 13 of the 1977 Act provides that:

[A DPP] or a local public prosecutor acting on the instructions of the [DPP], may in respect of any private prosecution apply by motion to the court before which the private prosecution is pending to stop all further proceedings in the case in order that a prosecution for the offence in question may be instituted or, as the case may be, continued at the instance of the State, and the court shall make such an order.

The issue of whether or not a court may prevent the DPP from taking over a private prosecution under section 13 arose in the case of *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)*.¹⁰¹ The applicants had been

94 *Van Deventer v Reichenberg* 1996 (1) SACR 119 (C).

95 *Ellis v Visser* 1954 (2) SA 431 (T).

96 *Ernst & Young v Beinash* 1999 (1) SA 1114 (W) at 1135.

97 *Phillips v Botha* 1999 (2) SA 555 (SCA).

98 *Crookes v Sibisi* [2010] JOL 25407 (KZP).

99 *Idem* para 25. In *S v Hendrix* 1979 (3) SA 816 (D) at 819, the court held that a private prosecutor may withdraw and reinstate a charge against an accused.

100 *Ernst & Young v Beinash* 1999 (1) SA 1114 (W) at 1135.

101 *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 (2) SACR 669 (C).

prosecuted with one M. Following a plea agreement between M and the state, M pleaded guilty on condition that the charge against the applicants be withdrawn. When the charge against the applicants was withdrawn, one B, who had been the victim of the applicants' crime, applied for a certificate from the DPP to institute a private prosecution against the applicants. It is against that background that the respondent reinstated the charge against the applicants. He argued, *inter alia*, that "a Director of Public Prosecutions is obliged to institute a prosecution whenever a *prima facie* case is made out and a private person demands a certificate *nolle prosequi*".¹⁰² In ordering a stay of the applicants' prosecution, the court held that:

[I]t is open for a private individual to demand a certificate *nolle prosequi* from a Director and to proceed to institute a private prosecution, if he or she is aggrieved by the decision of that Director not to prosecute in any particular instance. Sections 7-15 of the Criminal Code allow thereof. The fact that these provisions of the Code were left unaffected by the legislator when it enacted the new Act indicate, in my view, that the legislator recognised that there would be instances where a *prima facie* case has been made out, but a Director of Public Prosecutions would exercise his discretion not to prosecute. In that recognition, the legislator elected not to interfere with that discretion, leaving the necessary avenues open for citizens aggrieved by perceived misapplication of that discretion to obtain redress.¹⁰³

The court added that:

I have accordingly decided to grant an order in terms of which the prosecution of the first and second applicants is permanently stayed. In coming to this decision, I am mindful of the argument...that, were a private prosecution in due course to be instituted against the applicants, the respondent would be entitled, in terms of s 13 of the Code, to intervene and to take over the prosecution. In my view, the fact that this is so should not affect my decision. The respondent would have to apply to the court in which the prosecution is instituted in order to so intervene and, no doubt, would have to show cause why he should be allowed to so intervene. The order which I intend to grant will no doubt influence that court, when and if such an application is brought by the respondent. What that court decides, in the circumstances which may then prevail, cannot be predicted by me.¹⁰⁴

In the above case, the court seems to suggest that in the DPP's application to take over a private prosecution, he has to show cause why he or she should intervene; failing that, the application may be rejected. There are at least three reasons why the court's interpretation of section 13 above is disputable. First, section 13 provides that once an application is brought, the court has no alternative but to allow the DPP to intervene. The word used is "shall" as opposed to "may." The drafting history of the 1977 Act shows that Parliament was of the view that when the word "shall" is used, "the court is obliged" to do what the section in question requires.¹⁰⁵ The DPP

102 *Idem* at 680-681.

103 *Idem* at 680.

104 *Idem* at 684.

105 *Hansard Debates of the House of Assembly* (13 Apr 1973) cols 4817-4824. Although the majority view was that, in practice, "'may' means nothing else but 'shall'. Every magistrate will interpret the 'may' as 'shall'" (at 4824).

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does not even have to consult with the private prosecutor. Secondly, the drafting history of section 13 shows that the intention of the legislature was to make it clear that the DPP was not to seek the court's permission before taking over a private prosecution.¹⁰⁶ Thirdly, earlier jurisprudence does not support the court's reasoning. This jurisprudence makes it clear that neither the court, nor the private prosecutor can stop the DPP from taking over a private prosecution. In *Central African Examiner (Pvt) Ltd v Howman NNO*,¹⁰⁷ the court held that "the Court has no power to stop him prosecuting at the public instance if he wishes to do so, except on the basis that the issue is *res judicata*",¹⁰⁸ and that should the DPP decide to take over a private prosecution "the Court has no discretion to refuse to allow him to do so".¹⁰⁹

What is not clear in section 13 is whether the DPP may take over a private prosecution for the purpose of stopping it. Section 13 appears to suggest that the DPP can only intervene in a private prosecution for the sole purpose of continuing it at the instance of the state. However, since section 6 of the 1977 Act empowers the DPP to discontinue a prosecution, nothing prevents him from discontinuing a private prosecution that he has taken over. This is because the moment the DPP takes over a private prosecution, it becomes a public prosecution. It should also be remembered that section 20(1)(c) of the National Prosecuting Authority Act 32 of 1998 empowers a public prosecutor to discontinue criminal proceedings.¹¹⁰ One of the ways in which the victim's right may be strengthened is for the court to have the discretion to decide whether or not to allow the DPP's application to intervene in a private prosecution, and for the private prosecutor to then consent to the DPP's application. This approach has been taken in countries, such as the Gambia¹¹¹ and Ghana.¹¹²

The question remains whether, under section 6 of the 1977 Act, the private prosecutor or the court has a role to play before the DPP stops a private prosecution that he has taken over. Section 6 of the 1977 Act provides that:

A [DPP] or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution under section 8, may (a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge; (b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: Provided that where a prosecution is conducted by a person other than [the DPP] or a body or person referred to in section 8, the prosecution shall not be stopped unless the [DPP] or any person authorized thereto by the [DPP], whether in general or in any particular case, has consented thereto.

106 *Idem* at cols 4812-4813.

107 *Central African Examiner (Pvt) Ltd v Howman NNO* [1966] 2 All SA 260 (R).

108 *Idem* at 265.

109 *Idem* at 266.

110 For the discussion of the relationship between s 6 of the Criminal Procedure Act 51 of 1977 and s 20(1)(c) of the National Prosecuting Authority Act 32 of 1998, see *Freedom under Law v National Director of Public Prosecutions* 2014 (1) SACR 111 (GNP) paras 157-160.

111 Sections 85-86 of the Constitution of the Republic of Gambia 1 of 1997.

112 Section 56 of the Constitution of the Republic of Ghana, 1992.

In simple terms, these are some of the observations about section 6 of the 1977 Act. First, the section contemplates that only three types of people may conduct the prosecution in question, namely: the DPP; any person conducting a prosecution at the instance of the state (public prosecutor); and any body or person conducting a prosecution in terms of section 8. Secondly, in stopping a prosecution, the DPP does not need anyone's consent. However, a public prosecutor (who is not the DPP) or any body or person conducting a prosecution on the basis of section 8 needs the DPP's consent to stop a prosecution. The question of whether section 6 is applicable to both public and private prosecutions arose during the debates in the National Assembly. One legislator, Mr Webber, asked the Minister of Justice:

[T]o explain the intention of the proviso...that provides that...if the prosecution is at the instance of a person other than an Attorney-General or a body or person referred to in section 8, i.e. a statutory body, such trial shall not be stopped unless the Attorney-General has consented. Is it the intention of the hon. the Minister and of this legislation that any prosecutor in any court who...wishes to stop a trial after the accused has pleaded...shall first obtain the approval of the Attorney-General?¹¹³

In response, the Minister submitted that the above proviso "applies only to private prosecutions and statutory provisions of the municipalities. In other words, if a court case is already in progress, the trial shall be stopped in consultation with the Attorney-General".¹¹⁴ It was submitted that if the Minister's argument, namely that the proviso referred to private prosecutions on the basis of a certificate *nolle prosequi*, was correct, "then he should do away with this proviso, because as clause 6 reads at the moment, there is no reference whatsoever to a private prosecution".¹¹⁵ The Member added that clause 6 is not applicable to private prosecutors, but that it only applies to state prosecutors.¹¹⁶ The Minister responded that he was "not prepared to accept the" proposed amendment, but that he "shall have another look at it, and if it proves to be necessary" he was willing to make the amendment.¹¹⁷ The Hansard debates¹¹⁸ and the text of section 6 show that the Minister did not find it necessary to make the amendment.

This means that there are two possible ways to interpret section 6(b). The first interpretation is that it is only applicable to public prosecutors and prosecutors conducting prosecutions on the basis of section 8 of the 1977 Act. This reading is supported by the submissions by Mr Webber and by the literal meaning of the section. It is also the reading supported by some South African authors,¹¹⁹ prosecutors and

113 *Hansard Debates of the House of Assembly* (11 Mar 1977) col 3393.

114 *Idem* at 3393.

115 *Idem* at 3394.

116 *Ibid.*

117 *Ibid.*

118 *Idem* at 3394-4530.

119 Joubert 2014: 74.

courts.¹²⁰ The second interpretation is that it is applicable to private prosecutions. This reading is based on the Minister's submissions in Parliament. In the author's opinion, the text of section 6 shows that it is applicable to public prosecutors only.

4 1 *Locus standi* to institute a private prosecution

As mentioned above, a victim of crime may institute a private prosecution.¹²¹ Section 10 of the 1977 Act provides that a private prosecution has to be instituted in the name of the private prosecutor.¹²² This enables the accused to know, *inter alia*, whether or not he will pay the costs of the prosecution in the event of a successful prosecution.¹²³ A private prosecution may be instituted in respect of any offence. In *Lemue v Zwartbooi*,¹²⁴ the court held that "a private party who has suffered injury by any crime or offence may...prosecute where the public prosecutor has declined to prosecute".¹²⁵ In other words, a person who has been injured by the commission of an offence has a right and is "entitled" to institute a private prosecution.¹²⁶ The 1977 Act does not require that a private prosecutor should have a *prima facie* case against the accused before he may institute a private prosecution, and the High Court has not questioned this position.¹²⁷

An issue which has been dealt with by South African courts concerns whether a private company may institute a private prosecution. South African courts have held that a private company is not a "private person" within the meaning of section 7 of

120 *S v Gouws* 2008 (2) SACR 640 (T); *S v Soli* [2000] JOL 7171 (Ck); *S v Tom*; *S v Barnard* [2010] JOL 24827 (ECG); *S v Sethoga* [1990] 1 All SA 292 (A); *S v Magayela* [2003] JOL 11566 (T); *Gneiting v S* [2006] JOL 17437 (T); *S v Masilo* [2017] JOL 38866 (FB).

121 See *Hansard Debates of the House of Assembly* (13 Apr 1973) col 4806, where it is stated that, in most cases, the private prosecutor will be the original complainant.

122 See *Claymore Court (Pty) Ltd v Durban City Council* 1986 (4) SA 180 (N); and the much older case of *Latchmenna v Regina* (1899) 20 NLR 185.

123 *Queen v Wicks* (1897-1898) 12 EDC 98 at 100.

124 *Lemue v Zwartbooi* (1896) 13 SC 403.

125 *Idem* at 406.

126 *Queen v Mitchell* (1897) 14 SC 119 at 121.

127 In *Solomon v Magistrate, Pretoria* 1950 (3) SA 603 (T) at 613, the court held that "[t]he Legislature...must have contemplated that private prosecutors might in many cases have weak grounds for prosecution – a decision by the [DPP] not to prosecute would indicate this – but the policy of Parliament, no doubt, was to allow prosecution even in weak cases, in order to avoid the taking of the law by the complainant into his own hands. The Act contains no provision requiring that the private prosecutor shall satisfy anyone that he has a *prima facie* case. The penalty for vexatious and unfounded prosecution is liability for costs". Nevertheless, historically, a private prosecution could only be instituted once the High Court had established that the private prosecutor had a *prima facie* case against the accused. In other words, in addition to the certificate from the Attorney-General that he had declined to prosecute (which he had to issue without concerning himself with the question of whether or not a private prosecutor had a *prima facie* case), the High Court had to grant permission to the private prosecutor to prosecute. See *Ex parte Andrews* (1908) 22 EDC 336; *Daly v The Solicitor-General* 1911 EDL 399; *Ex Parte Cole* 1914 EDL 399.

the 1977 Act and therefore has no *locus standi* to institute a private prosecution.¹²⁸ In *Black v Barclays Zimbabwe Nominees (Pvt) Ltd*,¹²⁹ the court referred to the history of the legislative provisions on private prosecutions in South Africa and held that:

It would appear from the foregoing that the right to prosecute privately was originally created for natural persons only, viz people affected by offences in the manner contemplated in the relevant provisions. Companies incorporated by registration...had not yet made their appearance on the community scene at that time. The first legislation concerning companies in the Cape Colony was the Joint Stock Companies Limited Liability Act 23 of 1861 which was followed by the Cape Companies Act 25 of 1892, the latter being replaced by the Companies Act 46 of 1926 and which applied in South Africa until the Companies Act 61 of 1973 was promulgated.¹³⁰

On appeal, the Appellate Division (now the Supreme Court of Appeal) agreed with the High Court that private companies are not permitted to institute private prosecutions under section 7 of the 1977 Act. The Appellate Division added that:

The general policy of the Legislature is that all prosecutions are to be public prosecutions in the name and on behalf of the State...The exceptions are firstly where a law expressly confers a right of private prosecution upon a particular body or person (these bodies and persons being referred to in s 8(2)) and, secondly, those persons referred to in s 7. There may well be sound reasons of policy for confining the right of private prosecution to natural persons as opposed to companies, close corporations and voluntary associations such as, for example, political parties or clubs.¹³¹

Other courts have since held that private companies do not have *locus standi* to institute private prosecutions.¹³² Although courts have referred to section 7 to hold that juristic persons are not permitted to institute private prosecutions, the history of private prosecutions in South Africa shows that an argument could still be made that section 7 does not prohibit juristic persons from instituting private prosecutions. Two reasons will be advanced in support of this submission. First, the drafting history of section 7 does not show reasons why the right to institute a private prosecution should not be extended to private companies. The debates of the House of Assembly on the Criminal Procedure Bill, which would later become the 1977 Act, show that not even a single Member of Parliament submitted that private companies should not

128 *Black v Barclays Zimbabwe Nominees (Pvt) Ltd* 1990 (1) SACR 433 (W).

129 *Ibid.*

130 *Idem* at 436.

131 *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* 1990 (4) SA 720 (A) at 726. However, in the past, a bank could institute a prosecution. See, for example, s 4 of the Natal Bank Law 43 of 1888. A railway company could also prosecute: see s 18 of the Stanger and Kearsney Railway Act 40 of 1899 (Natal).

132 *Reynolds NO v Beinash* [1998] JOL 2274 (W); *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development (Corruption Watch as amicus curiae)* 2017 (4) BCLR 517 (CC).

be permitted to institute private prosecutions.¹³³ If one of the objectives of section 7 was to prevent private companies from instituting private prosecutions, one would have expected the legislature to expressly provide for that. Secondly, and perhaps most importantly, there is evidence that private companies have indeed instituted private prosecutions in certain instances after the Attorneys-General had declined to prosecute. This is so, notwithstanding the fact that South African legislation has never expressly authorised private companies to institute private prosecutions. For example, in *Mosenthal & Co v Cantor*,¹³⁴ the court permitted private companies to conduct a private prosecution against the accused for fraudulent insolvency, and these companies went ahead to conduct the private prosecutions. In *Thoppaya v Kynochs, Ltd*,¹³⁵ the court did not question the right of a private company to institute a private prosecution.¹³⁶ In *Joseph Baynes, Ltd v The Minister of Justice*,¹³⁷ the Attorney-General declined to prosecute one Lawson for theft (he had stolen money from the applicant company). The applicant, a private company, instituted a private prosecution against Mr Lawson and he was convicted. The magistrate, and later the High Court, ordered the state to pay the costs that the applicant company had incurred in prosecuting Mr Lawson. The above judgements show that there is evidence that private companies have instituted private prosecutions in the past.

A director, shareholder or creditor of a company has no *locus standi* to institute a private prosecution on behalf of a company. This is because a company is a distinct entity from its shareholders, directors and creditors and an offence committed against the company is not committed against its shareholders, directors or creditors.¹³⁸ This could explain why some private companies have made funds available to the National Prosecuting Authority to prosecute people who have committed offences

133 *Hansard Debates of the House of Assembly* (13 Apr 1973) cols 4805-4812.

134 *Mosenthal & Co v Cantor* 1915 EDL 371. The indictment on which the court based its decision stated that “William Mosenthal, Edgar Adolph Henry Mosenthal and Harold Robert Mosenthal (carrying on business in partnership as Adolph Mosenthal & Co.), merchants, of Port Elizabeth, and Stephen Fraser & Co., merchants, of Port Elizabeth, prosecuted Barnett Cantor, a shopkeeper, formerly of Steytlerville, now of Cape Town, on the following charges: (1) Fraudulent insolvency in that whereas his estate was sequestrated as insolvent on December 22, 1914, he did between November 11, 1914, and January 18, 1915, at Steytlerville, Port Elizabeth, and other places unknown to the prosecutors, conceal and remove £768 19s. 1d. (part of his estate) with intent to defraud his creditors; and (2) Culpable insolvency, in that while carrying on business as a shopkeeper at Steytlerville he failed, from and after September 10, 1914, to keep reasonable books and accounts”.

135 *Thoppaya v Kynochs, Ltd* (1923) 44 NPD 341.

136 See, for example, *Mosenthal & Co v Cantor* 1915 EDL 371, where the court granted the applicants (including private companies) permission to prosecute a person for fraud. See, also, *Thoppaya v Kynochs, Ltd* (1923) 44 NPD 341, in which the court did not question the right of a private company to institute a private prosecution.

137 *Joseph Baynes, Ltd v The Minister of Justice* 1926 TPD 390.

138 *Reynolds v Beinash* [1998] JOL 2274 (W).

against these companies. This is on the basis of section 38 of the National Prosecuting Authority Act 32 of 1998.¹³⁹

In one case, the court found that although prima facie it seemed like a public prosecution, it was in fact a private prosecution masquerading as a public prosecution.¹⁴⁰ There may be a need for South Africa to amend its legislation so that private companies are expressly empowered to institute private prosecutions. This is because private companies, like natural persons, are also affected by crime¹⁴¹ and they have been working closely with the South African government in the fight against crime. Most importantly, some of these companies are willing and able to finance the prosecution of those who have committed crimes against them. It has to be recalled that the fact that a private company prosecutes those who have committed offences against it does not mean that the accused will not get a fair trial. As early as 1846, the law provided that a private prosecutor can be a witness in a case he is prosecuting.¹⁴² Section 35(3) of the Constitution guarantees the accused a right to a fair trial, irrespective of whether the prosecutor is a private prosecutor or a public prosecutor. Furthermore, the Constitutional Court held that an accused in a private prosecution has the same rights as an accused in a public prosecution.¹⁴³ In *Citibank NA v Van Zyl NO*,¹⁴⁴ the High Court held that “in a private prosecution in terms of section 7 of the Criminal Procedure Act 51 of 1977, the onus and standard of proof do not differ from those applicable to a prosecution by the State”.¹⁴⁵ Failure to amend section 7 of the 1977 Act to expressly allow private companies to institute private prosecutions means, *inter alia*, that its constitutionality will be challenged. In the past, the constitutionality of section 7 was already challenged on the ground that it unfairly discriminates against juristic persons. However, the Constitutional Court,

139 Section 38 provides that “(1) The National Director may in consultation with the Minister, and a Deputy National Director or a Director may, in consultation with the Minister and the National Director, on behalf of the State, engage, under agreements in writing, persons having suitable qualifications and experience to perform services in specific cases. (2) The terms and conditions of service of a person engaged by the National Director, a Deputy National Director or a Director under subsection (1) shall be as determined from time to time by the Minister in concurrence with the Minister of Finance. (3) Where the engagement of a person contemplated in subsection (1) will not result in financial implications for the State – (a) the National Director; or (b) a Deputy National Director or a Director, in consultation with the National Director, may, on behalf of the State, engage, under an agreement in writing, such person to perform the services contemplated in subsection (1) without consulting the Minister as contemplated in that subsection. (4) For purposes of this section ‘services’ include the conducting of a prosecution under the control and direction of the National Director, a Deputy National Director or a Director, as the case may be”.

140 *Bonugli v Deputy National Director of Public Prosecutions* 2010 (2) SACR 134 (T); *S v Tshotshoza* 2010 (2) SACR 274 (GNP).

141 See South African Police Service “Annual crime report” (2017/2018) available at https://www.saps.gov.za/services/annual_crime_report2019.pdf (accessed 24 Jul 2019).

142 Section 5 of Ord 14 of 1846 (Ordinance for Improving the Law of Evidence) (Cape) provided that “no person shall hereafter be incompetent to give evidence in any case by reason that in such case he prosecutes at his own instance for any crime or offence”.

143 See *Bothma v Els* 2010 (1) BCLR 1 (CC).

144 *Citibank NA v Van Zyl NO* [2008] JOL 21103 (O).

145 *Idem* para 16.

because of the unique facts of the case it was dealing with, did not find it necessary to resolve the issue of whether or not section 7 was unconstitutional.¹⁴⁶

4 2 Persons against whom a private prosecution may not be instituted

There are persons against whom a private prosecution may not be instituted. Section 59(2) of the Child Justice Act 75 of 2008¹⁴⁷ provides that “a private prosecution in terms of section 7 of the Criminal Procedure Act may not be instituted against a child in respect of whom the matter has been diverted in terms of this Act”. A private prosecution may also not be instituted against a person who has been indemnified from prosecution. In *Rapholo v State President*,¹⁴⁸ the court held that “[t]he option of a private prosecution in terms of s 7 of the Criminal Procedure Act...is a useful safety valve in the absence of which parties might take the war-path. This right is lost where indemnity is granted”.¹⁴⁹ This is also the case where a witness incriminates himself/herself as a state witness in terms of section 204 of the 1977 Act. In addition, previous legislation from 1830 also provided that a private prosecution could not be brought against an accomplice who had given evidence for the prosecution.¹⁵⁰ However, a person may institute a private prosecution against his spouse.¹⁵¹

4 3 Cost to institute private prosecution and security by a private prosecutor

In terms of section 15 of the 1977 Act, a private individual has to incur the expenses associated with conducting a private prosecution.¹⁵² This has required

146 *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development (Corruption Watch as amicus curiae)* 2017 (4) BCLR 517 (CC).

147 Child Justice Act 75 of 2008.

148 *Rapholo v State President* 1993 (1) SA 680 (T).

149 *Idem* at 688-689.

150 Sec s 10 of Ord 72 of 1830 (Ordinance for Altering, Amending, and Declaring in Certain Respects, the Law of Evidence within this Colony) (Cape).

151 *Rohloff v Ocean Accident and Guarantee Corporation Ltd* 1960 (2) SA 291 (A) at 302.

152 Section 15 provides that “(1) The costs and expenses of a private prosecutor shall, subject to the provisions of subsection (2), be paid by the private prosecutor. (2) The court may order a person convicted upon a private prosecution to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence: Provided that the provisions of this subsection shall not apply with reference to any prosecution instituted and conducted under section 8: Provided further that where a private prosecution is instituted after the grant of a certificate by an attorney-general [DPP] that he declines to prosecute and the accused is convicted, the court may order the costs and expenses of the private prosecution, including the costs of an appeal arising from such prosecution, to be paid by the State”. There is an exception to this principle. Section 182 of the Criminal Procedure Act 51 of 1977 provides that “[a] prisoner who is in a prison shall be subpoenaed as a witness on behalf of the defence or a private prosecutor only if the court before which the prisoner is to appear as a witness authorizes that the prisoner be subpoenaed as a witness, and the court shall give such authority only if it is satisfied that the evidence in question is necessary and material for the defence or the private prosecutor, as the case may be, and that the public safety or order will not be endangered by the calling of the witness”.

private individuals to instruct attorneys and advocates to conduct prosecutions on their behalf.¹⁵³ This is the case, even though section 7(1) of the 1977 Act allows a private prosecutor to conduct a private prosecution “either in person or by a legal representative”. The debates of the House of Assembly on the Criminal Procedure Bill show that Members of Parliament were of the view that in many instances private prosecutors would need legal advice and representation in instituting and conducting private prosecutions.¹⁵⁴ Over a hundred years ago, the court highlighted the need for legal assistance in conducting private prosecutions. In *Fourie v Resident Magistrate of Worcester*,¹⁵⁵ the court held that “[t]he obstacles in the way of a private prosecution are so great that it is impossible to expect a private and unlettered individual successfully to encounter them without legal assistance”.¹⁵⁶

Also, section 9 of the 1977 Act provides that a private prosecutor has to deposit an amount as security that he will prosecute the offence expeditiously and also as security for the costs that may be incurred in respect of the accused’s defence to the charge. In the combined cases of *In re JN Fuller’s Insolvent Estate*; and *JN Fuller (Applicant) v Trustees (Respondents)*,¹⁵⁷ the court held that “in a private prosecution, the prosecutor is bound to give security to pay costs”.¹⁵⁸ There are thus two deposits to be made in terms of section 9. The first deposit is the one to ensure that the prosecutor will prosecute the matter expeditiously. In the author’s opinion, there is no objection to this deposit, provided the amount in question is not exorbitant or negligible. If the amount is exorbitant, it might discourage low-income-earning victims of crime from instituting private prosecutions. If it is negligible, it might encourage those who do not have a genuine desire to prosecute offenders in the shortest time possible to institute private prosecutions. However, the second deposit (as security for the costs that the accused may incur in his defence) might impede low-income-earning victims of crime from instituting private prosecutions if the alleged offender is a wealthy person who engages the services of expensive lawyers. This is what happened, for example, in the case of *Du Toit v Rooiberg Mineral Development Co, Ltd*.¹⁵⁹ In this case, the appellant instituted a private prosecution against the respondent company for alleged victimisation. The appellant engaged the services of a junior counsel to prosecute the respondent. The respondent company instructed an expensive law firm to defend it, and the firm then instructed a senior counsel, junior counsel and an attorney. The magistrate ordered the appellant to deposit an amount proposed by the respondent company’s lawyers. The appellant

153 *Bonadei v Magistrate of Otjiwarongo* 1986 (1) SA 564 (SWA).

154 *Hansard Debates of the House of Assembly* (13 Apr 1973) cols 4807-4810.

155 *Fourie v Resident Magistrate of Worcester* (1897) 14 SC 54.

156 *Idem* at 60.

157 *In re JN Fuller’s Insolvent Estate* (1883) 4 NLR 14; *JN Fuller (Applicant) v Trustees (Respondents)* 1883 NPD 14.

158 *Idem* at 15.

159 *Du Toit v Rooiberg Mineral Development Co, Ltd* 1954 (1) SA 297 (T).

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appealed against this order to the High Court arguing, *inter alia*, “that the magistrate, though he realised that his decision made it impossible for the appellant to institute the private prosecution gave appellant no alternative decision which would enable him to institute the same”.¹⁶⁰ The appellant further added “that no reasonable person would have fixed the amount of security at a figure so high as to amount for all practical purposes to a nullification of the appellant’s right of private prosecution”.¹⁶¹ In dismissing the appeal, the High Court held that a magistrate’s order on the issue of security deposit is not appealable to the High Court and that “the fact that his determination of the amount of the security, if otherwise unexceptionable, has the unfortunate consequence of making a private prosecution by appellant a matter of practical impossibility, show that the magistrate’s determination was in any way irregular or unreasonable”.¹⁶² In *Williams v Janse Van Rensburg (I)*,¹⁶³ the court held that the private prosecutor was not required to make a deposit, because the accused’s legal bill was to be footed by the state. The court held that “the words ‘costs which the accused may incur’ in s 9(1)(b) mean costs which the accused will probably incur personally or, to put it another way, the costs referred to are those which an accused might reasonably be expected to bear personally”.¹⁶⁴ Although a victim of crime has a right to institute a private prosecution, such proceedings can be an expensive exercise. This fact has been recognised by South African courts for many years. In *Jamalodien v Ajimudien*,¹⁶⁵ the court observed that incurring expenses in conducting a private prosecution “is unavoidable”.¹⁶⁶ One hundred years later, in *Ndlovu v S*,¹⁶⁷ the Constitutional Court likewise observed that “instituting a private prosecution is prohibitively expensive”.¹⁶⁸ In effect, this means that it is only the wealthy who can exercise the right to institute a private prosecution. Low-income earners may not be able to exercise this right unless they fundraise or unless they are assisted by non-governmental organisations.¹⁶⁹ However, section 15(2) of the 1977 Act provides that, in the event of a successful private prosecution, a court may order the convicted person or the state to pay the costs and expenses of the private prosecution. Case law

160 *Idem* at 299-300.

161 *Idem* at 303.

162 *Idem* at 305.

163 *Williams v Janse Van Rensburg (I)* 1989 (4) SA 485 (C).

164 *Idem* at 488.

165 *Jamalodien v Ajimudien* 1917 CPD 293.

166 *Idem* at 295.

167 *Ndlovu v S* 2017 (10) BCLR 1286 (CC).

168 *Idem* para 58 (and specifically n 39 there).

169 This was the case, for example, when a South African non-government association reportedly offered legal assistance to a young lady who had been assaulted by Mrs Grace Mugabe, the First Lady of Zimbabwe. See Staff Writer “Gerrie Nel to lend legal support to Grace Mugabe’s alleged assault victim” 17 Aug 2017 *Business Day* available at <https://www.businesslive.co.za/bd/national/2017-08-17-gerrie-nel-mulls-offering-gabriella-engels-his-help/> (accessed 24 Jul 2019).

shows that an application has to be made by the private prosecutor before a court may order the state to pay the costs of a private prosecution.¹⁷⁰

4 4 Costs in the event of an unsuccessful private prosecution

Section 16 of the 1977 Act provides that:

(1) Where in a private prosecution, other than a prosecution contemplated in s 8, the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal, the court dismissing the charge or acquitting the accused or deciding in favour of the accused on appeal, may order the private prosecutor to pay to such accused the whole or any part of the costs and expenses incurred by him in connection with the prosecution or, as the case may be, the appeal. (2) Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his request such costs and expenses incurred by him as it may deem fit.

In *Carter, Appellant, v Alexander, Respondent*,¹⁷¹ the court held that “costs are given in private prosecutions in like manner as in civil cases”.¹⁷² In a private prosecution, a court can only award those costs that are authorised by law.¹⁷³ The court has held that “a private prosecutor runs the risk of an adverse order of costs”.¹⁷⁴ In *Buchanan v Voogt NO*,¹⁷⁵ the court held that its power under section 16(1) is discretionary and that section 16(2) is peremptory.¹⁷⁶ The court added that:

A prerequisite to the application of the provisions of ss (2) is that the prosecution has been, in the opinion of the court, unfounded and in addition, vexatious. That is clearly the effect of the use of the conjunctive ‘and’ between ‘unfounded’ and ‘vexatious’. Subsection (2) confers a discretion on the court as to when a prosecution is to be characterised as unfounded and vexatious but it is a judicial discretion which is subject to review.¹⁷⁷

The court further held that “the court should be slow in coming to a decision mulcting in costs under that subsection a prosecutor who *bona fide* seeks justice in a private

170 In *Greyling v Tunce* 1920 EDL 1, the respondent was convicted of assault with intent to cause murder on the basis of a private prosecution instituted by the applicant after a certificate had been granted by the Solicitor General. The court ordered the state to pay the costs and expenses that the applicant had incurred in prosecuting the respondent. See, also, *Joseph Baynes, Ltd v The Minister of Justice* 1926 TPD 390, in which the court held that the magistrate had been correct when he had ordered the state to pay the costs and expenses that the applicant company had incurred in prosecuting the accused for theft.

171 *Carter, Appellant, v Alexander, Respondent* (1884) 5 NLR 288.

172 *Idem* at 290.

173 *Snyders v Theron* (1892-1893) 10 SC 309.

174 *Buchanan v Marais NO* 1991 (2) SA 679 (A) at 685.

175 *Buchanan v Voogt NO* 1988 (2) SA 273 (N).

176 *Idem* at 274.

177 *Ibid.*

prosecution”.¹⁷⁸ However, if it is clear that a private prosecution was instituted when the private prosecutor knew that the prosecution was unfounded and then still went ahead with it, he opens himself not only to civil action, but may also be ordered to pay the accused’s costs.¹⁷⁹ In other words, in deciding whether or not to order the private prosecutor to pay the costs and expenses incurred by the acquitted person, courts will consider the reason behind, and the circumstances surrounding, the institution of a private prosecution.¹⁸⁰

5 Conclusion

In this article, the author has dealt with the history of the right to institute private prosecutions in South Africa. The author suggests ways through which this right may be strengthened. There may be a need for the law to be amended to empower private companies to institute private prosecutions. The existence of the right to institute a private prosecution has enabled victims of crime to participate in the criminal justice system. This has resulted in ensuring that some perpetrators, who would otherwise have escaped punishment, are brought to book for the offences they have committed.¹⁸¹ This right has also been used by some organisations to put pressure on the National Prosecuting Authority to prosecute influential individuals whom public prosecutors had, for questionable reasons, decided not to prosecute.¹⁸² In situations where the legislation establishing a statutory body is vague on the question of whether or not such a body may institute private prosecutions against people for

178 *Idem* at 275. In *Boopa v Magistrate, Lion’s River* 1931 NPD 179, in which the accused was acquitted in a private prosecution, the court refused to order the private prosecutor to pay the applicant the costs and expenses incurred in defending himself.

179 In *R v Chipo* 1953 (3) SA 602 (SR) at 611, the court held that “[o]ur system of public prosecution places obstacles in the way of anyone who wants his neighbour to be prosecuted on a charge which he knows to be false, chief among them being the requirement that the *Attorney-General* or his deputy shall determine whether there are good grounds for prosecution before any prosecution, whether public or private, can be instituted. If in spite of these obstacles any such false informant persists in a private prosecution he makes himself liable, not only to a civil action, but also to be mulcted in costs”.

180 *Maree v Bidder*, NO 1939 CPD 437.

181 A few years ago, a case was reported in the media in which a father successfully instituted a private prosecution against a man who murdered his daughter (the private prosecutor’s daughter). See “Girlfriend-killer found guilty in private prosecution” 10 Jul 2014 *News24* available at <https://www.news24.com/SouthAfrica/News/Girlfriend-killer-found-guilty-in-private-prosecution-20140710> (accessed 3 Nov 2017).

182 Mathope “AfriForum’s Gerrie Nel to prosecute Duduzane Zuma privately for the 2014 crash” 17 Oct 2017 *Citizen* available at <https://citizen.co.za/news/south-africa/1692265/afriforums-gerrie-nel-to-prosecute-duduzane-zuma-privately-for-the-2014-crash/> (accessed 24 Jul 2019); Grobler “One charge of culpable homicide withdrawn against Duduzane Zuma” 26 Mar 2019 *News24* available at <https://www.news24.com/SouthAfrica/News/second-charge-of-culpable-homicide-withdrawn-against-duduzane-zuma-20190326> (accessed 24 Jul 2019).

allegedly mistreating animals, the Constitutional Court interpreted that legislation so as to indeed permitting the statutory body to institute private prosecutions.¹⁸³ This serves to show that the Constitutional Court is aware of the critical role that private prosecutors may play in the protection of animals against cruelty. The same judgement also shows that there is a possibility that anti-corruption activists could, in the near future, petition the Constitutional Court to interpret section 7 of the 1977 Act in such a manner that would empower them, and in particular juristic persons, to institute private prosecutions against government officials for allegedly committing economic crimes, such as corruption and money laundering.¹⁸⁴ For example, an international oil giant was also convicted of environmental offences in South Africa by way of private prosecution.¹⁸⁵

That said, one of the questions that has to be addressed is whether the private prosecution procedure in South Africa is an effective remedy available to victims of crime.¹⁸⁶ In *Salisbury Bottling Co (Pvt) Ltd v Central African Bottling Co (Pvt) Ltd*,¹⁸⁷ the court referred to the legislation governing private prosecutions on the basis of a certificate *nolle prosequi* and held that “[t]his procedure by private prosecution can therefore provide an effective remedy to a private person in cases in which the breach of a statutory duty is made a criminal offence”.¹⁸⁸ As mentioned above, in *Berg River Municipality v Zelpy 2065 (Pty) Ltd*,¹⁸⁹ the court observed that private prosecution is a remedy, albeit not an ordinary one. A private prosecution may be instituted for different objectives, including the need to ensure that perpetrators of crime are brought to book for the offences they have committed. It is also one of the ways in which a victim of crime participates in the criminal justice system. However, the challenge remains that although there is a possibility of instituting a private prosecution, it is very unlikely that the poor will be able to institute such proceedings. This is because of the costs and expenses associated with such prosecutions. A crime will almost always involve the violation of the victim’s right or rights. This means

183 *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2017 (4) BCLR 517 (CC).

184 *Idem* paras 3, 22, 23 and 64.

185 *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* [2019] JOL 41717 (GP).

186 International human rights bodies require the existence of effective remedies in states parties to different treaties. See, for example, Human Rights Committee “Concluding observations on the third periodic report of Bosnia and Herzegovina” CCPR/C/BIH/CO/3 (13 Apr 2017) para 8; Human Rights Committee “Concluding observations on the third periodic report of Serbia” CCPR/C/SRB/CO/3 (10 Apr 2017) para 17; Committee on the Elimination of Discrimination against Women “Concluding observations on the eighth the Protection of the Rights of All periodic report of Ukraine” CEDAW/C/UKR/CO/8 (9 Mar 2017) para 11(d); Committee on the Protection of the Rights of All Migrant Workers and Members of their Families “Concluding observations on the initial report of Honduras” CMW/C/HND/CO/1 (3 Oct 2016) para 39.

187 *Salisbury Bottling Co (Pvt) Ltd v Central African Bottling Co (Pvt) Ltd* [1958] 2 All SA 204 (FC).

188 *Idem* at 211.

189 *Berg River Municipality v Zelpy 2065 (Pty) Ltd* 2013 (4) SA 154 (WCC) para 47.

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that instituting a private prosecution is one of the ways to ensure that a victim of crime protects his rights. It is therefore imperative that stumbling blocks are not put in the victim's way in protecting his rights through private prosecution. Below are some of the strategies that could be adopted to ensure that the right of a victim of crime to institute a private prosecution is strengthened.

There is a need to ensure that indigent private prosecutors get state funding to conduct these prosecutions. This issue was raised over a hundred years ago by the Supreme Court of the Cape of Good Hope in the case of *Fourie v Resident Magistrate of Worcester*,¹⁹⁰ where the court held that:

In my opinion the privilege to conduct a private prosecution implies the right to appear in Court by Counsel or agent. It would in many cases be a useless privilege if the law were otherwise. An ignorant person is charged with an offence and convicted. He subsequently discovers evidence which proves to his satisfaction that the conviction was obtained on perjured evidence. He may not in the first instance be able to induce the public prosecutor to take the same view of the case, but in order to lay his case properly before the Magistrate with a view to a committal of the alleged offenders for trial he wishes to be assisted in Court by his legal adviser...In the absence of any express prohibition by law I am of opinion that the right to appear by agent must be held to exist.¹⁹¹

The court expressly held that a private prosecutor has a right to be represented by counsel if he is to exercise his right to institute a private prosecution meaningfully. Another way to strengthen the right to institute a private prosecution is to amend the 1977 Act to require that, in case the DPP has declined to prosecute, the police or the public prosecutor should make available all the relevant evidence in their possession to the private prosecutor. The law could also provide that the police or the public prosecutor may decline to make such evidence available to the private prosecutor if there are compelling reasons to do so. The drafting history of private prosecutions in terms of section 7 of the 1977 Act supports this recommendation. During the debates in Parliament on the Criminal Procedure Bill, one of the reasons given as to why the period within the certificate *nolle prosequi* should expire if not used should be increased from six weeks to six months (although it was later increased to three months), was that “[t]here may be difficulties in issuing the process within so short a period of time, bearing in mind that it may be necessary for the person instituting the private prosecution to obtain documents which were previously in the hands of the State”.¹⁹² This implies that the DPP, should he decline to prosecute, is expected to make available to the private prosecutor the relevant documents or other evidence in his possession. A private prosecutor could also rely on section 32 of the Constitution.

190 *Fourie v Resident Magistrate of Worcester* (1897) 14 SC 54.

191 *Idem* at 59.

192 *Hansard Debates of the House of Assembly* (13 Apr 1973) col 4805.

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THE BASIC TENETS OF INTESTATE (CUSTOMARY) SUCCESSION LAW IN ANCIENT EGYPT

NJ van Blerk*

ABSTRACT

This article discusses the basic tenets of customary intestate succession law in ancient Egypt as one “branch” of succession law. It considers the initial role of religion in the emergence of succession law as background. It furthermore discusses the basic structure or order of inheritance from a legal perspective. An attempt is made to indicate that there was a structure followed which changed very little over time although the emphasis and connection with religion diminished. The position of descendants, ascendants, husband and wife and their legal relationship to the deceased is discussed against the backdrop of the nuclear family and the estate being treated as a *res incorporalis*. Consideration is given to elements of *parentela* and *per stirps* possibly present. The position of the eldest son as sole heir and “caretaker” is discussed. Ultimately the focus is on what we can learn about customary-intestate succession law in ancient Egypt from early texts in the Old Kingdom through to the New Kingdom.

Keywords: Ancient Egypt; customary intestate succession law; belief in the afterlife; sustenance; custom; tradition; precedent; nuclear family; eldest son

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1 Introduction

This article is part of a bigger endeavour into the study of “testamentary disposition documents” in ancient Egypt.¹ In order to understand the different documents the ancient Egyptians used as testamentary dispositions, it is necessary to have a clear understanding of the ancient Egyptians’ customary intestate succession law. This article aims at explaining the basic tenets of ancient Egyptian customary intestate succession law.

Succession law in ancient Egypt emerged from the belief in the afterlife. Belief in the afterlife necessitated that the deceased be sustained after death. It was the responsibility, within the family context, of the eldest son and the children (and family) to fulfil this duty. The nuclear family and the protection of the family property as a “whole” were essential in this regard. Elements of intestate and testate succession law are identifiable as the deceased could also make arrangements prior to death by way of a testamentary disposition. One can obviously not suggest that the ancient Egyptians had testate and intestate succession law as we understand it today, but elements of testate and succession law are present. This article focuses on one branch of succession law, namely the basic tenets of “intestate succession law” elements in ancient Egypt. This is also historically the oldest.

The term “customary intestate succession” is used for purposes of this article. This notion represented the ancient Egyptians’ customary way of dealing with intestate matters which were effectively the result of the obligation and duty for sustenance resting with the immediate nuclear family. It would furthermore support the ancient Egyptians’ respect for tradition, custom and precedent. One may argue that this is an indication of an early development of jurisprudence within customary-intestate succession law.

Generally, when someone dies intestate, it means that he or she died without a valid will. This also appears to have been the case in ancient Egypt even though the Egyptians did not have a specific document used as a “will”. The ancient Egyptians used a variety of documents which served the purpose of a “testamentary disposition” with the intention of altering the “customary-intestate succession law”.

The law of intestate succession is important in determining who the beneficiaries of the deceased are and this was also the case in ancient Egypt. The “customary-intestate succession” law is applicable unless a “testamentary disposition” was made prior to death.

1 The testamentary disposition made prior to death in ancient Egypt is similar to the Roman law “testament” (see Seidl 1957: 57). As Seidl (1957: 58) correctly emphasises: “Wenn man überhaupt den Ausdruck ‘Testament’ verwenden will, um damit eine ägyptische Urkunde zu bezeichnen, so muß man sich wieder darüber klar sein, daß man damit Vorstellungen, die aus dem römischen Recht stammen, dem Leser suggeriert.” It is for this reason that the term “testamentary disposition” is rather used in this study.

An extraordinary characteristic of ancient Egypt was the fact that women had greater freedom of choice and more equality under social and civil law than their contemporaries in Mesopotamia or even the women of the later Greek and Roman civilisations.² Women could, furthermore, *inter alia* inherit property, including immovable property, and both men and women could inherit equally and from each parent separately.³

Our main sources for “customary-intestate succession law” in ancient Egypt are quite late and date mostly, but not only, from the Demotic *Codex Hermopolis* from the Late Period.⁴ The law of succession is, however, not always the most progressive or dynamic part of a civilisation’s legal system, which means that we are actually able to form a proper understanding of a civilisation’s idea of succession law. This is especially true in the case of ancient Egypt which was more conservative and followed tradition, custom and precedent.

The *Codex Hermopolis* contains portions of a variety of texts from different periods which have most probably been reworked by a jurist of the early third century BCE.⁵ A number of legal matters are covered in the *Codex Hermopolis*, and the final texts of this Code deal with the law of succession and more specifically with the position of the “eldest son” in disputed cases.⁶ It furthermore addresses various actions regarding inheritance. The *Codex Hermopolis*, however, is not the only source and other sources include documents relating to testamentary dispositions, adoptions and disputes.⁷ These sources will now be discussed.

2 What does succession law entail?

The law of succession is basically concerned with the transfer of property, as vested in a person at his death, to another person or persons. This presupposes the existence of the notion of private property (property owned by a person). When a person dies, his assets pass by inheritance to people qualified to succeed the deceased. The rules of the law of succession determine who the qualified person or persons are and it also establishes the scope of the benefits.

2 See Brewer & Teeter 1999: 96.

3 *Idem* at 96-97.

4 See Addendum A for a timeline of ancient Egypt.

5 See Allam 2007: 270.

6 *Idem* at 269.

7 According to Allam 2001: 158 there is existing documentation that provides us with vivid glimpses of the ancient Egyptians’ inheritance practices. The author supplies examples, such as the *Papyrus Moscow* from Akhmim, 70 BCE, recording a *donatio mortis causa* and the *Papyrus Leiden*, from Memphis 257/256 BCE, illustrating that if an estate passed undivided to the heirs, they had to manage it jointly so that everyone received a part of its profits.

THE BASIC TENETS OF INTESTATE (CUSTOMARY) SUCCESSION LAW

It is important to remember that the law of succession should always be studied within its broader social context. The law of succession, besides being a product of society, may also perform a function for the society. Friedman (quoted in Fleming and referring to succession⁸) observes that the law and rules –

help define, maintain and strengthen the social and economic structure. They act as a kind of pattern or template through which the society reproduces itself each generation. Rules of inheritance and succession are, in a way, the genetic code of a society. They guarantee that the next generation will, more or less, have the same structure as the one that preceded it. In the long run, for example, there could be no upper class or aristocracy without rules about the inheritance of wealth and privilege, which permit the upper class or aristocracy to continue. And if rules permit free transfer of property and freedom of testation, a middle class society can be created and maintained.

According to Fleming – in a very general sense – all rules of law (which include all rules of succession) serve identifiable social functions.⁹ To describe social behaviour it is important to analyse the motivation behind actions, and not simply the actions themselves as listed in the text.¹⁰ Although such an analysis might often seem subjective, it could well be the only way to put an isolated legal text into its wider context.¹¹ It is therefore important to understand the ancient Egyptians world and the wider influences of their motivations, influenced by among others religion, family and economic factors when considering texts.

3 The importance of belief in the afterlife

Belief in the afterlife was an all-encompassing belief in ancient Egypt. The hope for eternal life influenced every aspect of their lives. For the ancient Egyptians the living and the dead formed part of the same community, resulting in a moral relationship between the dead and the living.¹² After death, the deceased would be sustained not only by prayers and inscriptions on the tomb walls and on funerary papyri, but also by an active mortuary cult.¹³ Special arrangements were made in order to ensure that the upkeep and provisioning of the tomb continued in perpetuity, and a special priest, the *ka*-priest, was appointed and undertook this duty in return for an income from the deceased's estate.¹⁴ This duty was very often that of the eldest son. For the wealthy this responsibility lay with the priests and family, while the poor relied exclusively on family members for their offerings.¹⁵ This duty on the family fell on the nuclear family.

8 1978: 233.

9 *Ibid.*

10 Eyre 1992: 207.

11 *Ibid.*

12 See Baines 1991: 147, 151.

13 See David 2002: 288-289.

14 *Ibid.*

15 Ikram 2007: 349.

Examining, for instance, the tombs of Giza or Saqqara (Old Kingdom), one immediately gets the impression that a prominent motif in the decorations is the bringing of offerings for the deceased.¹⁶ The Egyptians were always concerned with sustenance in the afterlife, since they aspired to have a life much like their earth-like existence after death.¹⁷ They resorted to magic and rituals in the hope of securing sustenance for themselves in the afterlife and depended upon the actual delivery of food and drink at their tombs and in front of their statues.¹⁸ This reaffirms the notion of the living and the dead being part of the same community in the ancient Egyptians' mind.

The deceased was dependent upon the actual delivery of food and drink by his or her family.¹⁹ It was practice in ancient Egypt that the next generation would take responsibility for the care of the deceased and would receive the deceased's property.²⁰ There was consequently a strong sense of obligation by the descendants and the nuclear family was essentially responsible for this duty.

There was a link in the private sphere between the mortuary cult and the inheritance of property since inheritance was conditional upon the son's fulfilment of his cult duties towards the deceased estate.²¹ The task of the eldest son and the priests was consequently to keep the *ka* of the deceased supplied, who would, in return for fulfilling his duty, receive a share of the largest endowment.²² Since the mortuary cult was intended to last in perpetuity it was hoped that the land set aside for the endowment would remain in the family from generation to generation.²³

The first signs of succession law are firmly rooted in the religious environment. It would be the ancient Egyptians "obsession" with the afterlife that necessitated sustenance after death. This obligation on the family and family property would introduce a custom within the family which would be followed as a precedent in their culture. According to David, because of the emphasis placed on funerary customs, many legal transactions are concerned with situations relating to funerary property.²⁴

4 The nuclear family as a social unit

The social function of succession law refers specifically to maintaining and protecting the family as a social unit, which explains why the law of succession

16 Allam 2007: 13.

17 *Ibid.*

18 *Ibid.*

19 See Allam 2007: 265.

20 See Pestman 1969: 59.

21 Taylor 2001: 175.

22 *Ibid.*

23 *Ibid.*

24 2002: 288.

is also influenced by the social trends affecting the family.²⁵ The basic Egyptian family unit consisted of a man, a woman and children they may have.²⁶ Adoption was possible in ancient Egypt which meant that adopted children formed part of the nuclear family as is evident *inter alia* from the *Papyrus Ashmolean Museum* 1945.96 (Adoption Papyrus) from the New Kingdom (Twentieth Dynasty). Intestate succession law, for example, prescribes that the immediate family members are the beneficiaries of the *de cuius*' estate.²⁷

For this reason it is important to understand the socio-economic life and norms in ancient Egypt, which should be taken into account when studying the first signs of the development of succession law in ancient Egypt. The social context of ancient Egypt was extremely important considering the fact that the idea was for the immediate family, specifically the children, to inherit in order to sustain the deceased, and also to keep the family property together. In practical terms someone had to take responsibility at the death of the *de cuius* for certain matters pertaining to the burial process, as well as for matters pertaining to the deceased's property, of which the distribution of the inheritance was an important part.

The nuclear family was the core of Egyptian society: even the Egyptian gods were arranged into the same family groupings and many genealogical lists indicate how important family ties were.²⁸ From "The Contendings of Horus and Seth" we know that values, such as justice²⁹ and family solidarity, were very dear to the Egyptians.³⁰ The earliest examples of inscriptions, texts and paintings reflect the importance of family in ancient Egypt and specifically the nuclear family.

5 Family property

The nuclear family in ancient Egypt was an essential part and foundation of their social life together, with the emphasis on protecting the family property. The very

25 Egyptian kinship terms lacked specific words to identify blood relatives beyond the nuclear family: see Brewer & Teeter 1999: 95. Although these terms would sometimes be combined to express exact relationships (son's son etc), the simple terms commonly have an extended meaning covering several different biological and marital relationships (see Rowlandson & Takahashi 2009: 110).

26 See Pinch 2000: 370-371.

27 The *de cuius* refers to the deceased person. My definition of *de cuius* is a deceased person who has assets and thus an estate that needs to be dealt with after death. Hiemstra & Gonin (2013: 405) translate *de cuius* as "erflater" in Afrikaans and as "testator" in English. In my opinion the Afrikaans translation is correct and it agrees with my own definition given above, while the English translation is incorrect, since "testator" only refers to a case where there is a will. It would *prima facie* appear that English does not have an unambiguous word for the *de cuius*.

28 See Brewer & Teeter 1999: 95.

29 Justice was central to the Egyptian world and a key element of Egyptian law.

30 Sweeney 2002: 143.

earliest pious foundations emphasise the “protection of property as a unit”. This played an important role in the way they viewed their initial obligation for sustenance of the deceased and the resulting emergence of succession law.

In ancient Egypt there was a formal system of private law under which property could be the subject of private transactions.³¹ This is supported by Goedicke since already in the Old Kingdom private people could own property and we can therefore postulate a legal sphere that may be summarised under the modern term “private law”.³² According to Goedicke “law” and “property” are intimately connected, so that the existence of rights by private individuals presupposes the existence of private property.

Belief in the afterlife made it almost essential for particularly immovable property to stay intact within the family in order to sustain the deceased after his or her death. The *institutio heredis* was therefore a concept or idea not foreign to the ancient Egyptians, even though the concept might have been developed and defined by Roman law much later in history.

In Roman law the deceased’s estate was regarded as an entity, a *res incorporalis* which passed to the deceased’s heir, and this estate, viewed as *universitas* (a “whole”), was known as *hereditas*.³³ This appears also to have been the case in ancient Egypt. Texts from earlier periods do not give us such informative details although these earlier texts disclose that a community of heirs existed in one form or the other, perhaps to prevent the fragmentation of the estate,³⁴ and Pestman asserts that in the beginning the estate remained undivided and that this may have remained so for generations to come.³⁵

It is important to note that immovable property was usually not divided among heirs, but held jointly by the family.³⁶ From the *Codex Hermopolis* we have an example of property to be held jointly (and not divided) in column IX 19–IX 21 from which it is clear that the house itself is not divided, but was held jointly, with the profit to be divided (by the eldest son) among the co-owners if the house was sold.³⁷

It would appear that the initial reason to keep the property intact was to make it economically functional for the duty of sustenance of the deceased, but that it was later done purely for economic reasons as piety (for sustenance) diminished.

This concept of the institution of a single heir appear to be present in ancient Egypt with the important role played by the eldest son to prevent the split-up of

31 David 2002: 288.

32 See Goedicke 1970: 190.

33 See Burdick 1989: 548.

34 See Allam 2001: 159.

35 See Pestman 1969: 64.

36 See Brewer & Teeter 1999: 97.

37 Mattha 1975: 41.

property into uneconomic plots, but also to fulfil the important role of taking charge of the required sustenance of the deceased (as will also be discussed *infra*).³⁸

According to Versteeg, immovable property in ancient Egypt usually passed undivided in inheritance as it made practical sense to allow houses and agricultural fields to remain intact.³⁹ The estate was therefore treated as an entity.

6 What happens when the *de cuius* dies?

According to Pestman, everything needs to be organised: the deceased must be mummified and buried, bills and burial tax must be paid and, if necessary, provision must be made for the widow and any minor children, etc.⁴⁰ It is possible that the deceased him- or herself would have arranged these payments. But what happened if the *de cuius* did not make arrangements prior to death by means of a testamentary disposition? In order to answer this question it is necessary to ascertain what actually happened with the inheritance itself.

A cornerstone of Egyptian morality was the respect for one's parents, with the most fundamental duty of the eldest son (or occasionally daughter) being to care for his parents in their last days and to ensure that they receive a proper burial.⁴¹ The eldest son would take possession of the family property in order to prevent the property to be split up and in order for it to function as an economic unit so that it can provide the necessary sustenance for the deceased.

7 The role of the “eldest son”

It would appear, *prima facie*, that the eldest son's role in ancient Egypt was very similar to that of an executor or administrator. Of particular importance in ancient Egypt was the initial importance of and duty to sustain the deceased. This duty of managing the estate fell on the “eldest son”.⁴² The word for “eldest son” is *SraA*.⁴³

38 Muhs (2016: 5) is of the opinion that the ancient Egyptian state was primarily interested in protecting and enforcing its own property rights for tax collection purposes. Thus the responsibility for protecting and enforcing individual property rights was often shared with a variety of formal and informal organisations, or even private social control. Muhs furthermore states that this is most evident in the early first millennium BCE, when the Egyptian state fragmented and the temples took over the responsibility for enforcing property transfer agreements.

39 2002: 139-140.

40 Pestman 1969: 64.

41 Brewer & Teeter 1999: 95.

42 The eldest son often also inherited his father's job and position (see Brewer & Teeter 1999: 97). The word for “eldest son” is *SraA* (see Allam 2001: 158).

43 See Allam 2001: 158.

The *Codex Hermopolis* (column VIII 30–31) states as follows:⁴⁴ “If a man dies, he having lands, gardens, temple-shares (?) and slaves ... it is his eldest son who takes possession of his property (or better estate).”

Allam makes a valid observation that we might miss the point in a given succession if we always translate *SraA* by “eldest son”, since passages in the *Codex Hermopolis* as well as provisions in marriage contracts indicate that the firstborn was not necessarily the favourite, but the *SraA* did come from ranks of the descendants.⁴⁵ The *Codex Hermopolis* also gives an example of a case where the estate went to a son other than the *SraA*, and other similar situations are also mentioned in the law book.

Unless otherwise indicated, the undivided property was managed by the eldest son on behalf of all the heirs.⁴⁶ The eldest son held the position, as it were, as head of the family and was also responsible for matters to be dealt with when someone died. According to Allam the eldest son played a very important role in the succession and he could be any of the sons, or even a daughter in the absence of sons.⁴⁷ A daughter could become “eldest son” if there were no male children (column IX 14–IX 16 of the *Codex Hermopolis*).⁴⁸ The eldest son received more benefits and his or her share usually exceeded those of other heirs.

The *Codex Hermopolis* mentions that another child could take over the funerary obligations if the eldest son was unable or unwilling to do so, in which case this substitute “eldest son” became entitled to the additional inheritance which had been earmarked for the biological eldest son.⁴⁹ This substitute eldest son then administered his father’s estate and became a guardian for his mother, brothers and sisters. If the deceased had no children it was possible for the deceased’s brother to become “eldest son” who was preferably the firstborn male child of the deceased.⁵⁰ If there was no male child, the rule was that a closer degree of kinship was more important than gender, which in turn was more important than order of birth.⁵¹ It would therefore

44 According to Strudwig (2005: 57) the following text conventions are generally used in the translation of Egyptian texts:

[] enclose translations of restored text. Text in these brackets, in italics, is specifically speculative;

() enclose words that are not in the original text, but are added to clarify the translation. Text within these parentheses, in italics, serve the purpose to explain;

... indicate gaps in the text or words which cannot be translated;

<> enclose words or parts of words which are omitted in the original text;

(?) follows words or phrases of which the translation is doubtful.

See, also, Mattha 1975: 39.

45 See Allam 2001: 158.

46 The children may in some cases act all together, as they have a definite right to inherit. In some cases the mother acts for the children, probably because they are still minors. See Pestman 1969: 65.

47 Allam 2001: 158.

48 See Mattha 1975: 40.

49 Versteeg 2002: 139.

50 See Lippert 2013: 3.




51 *Ibid.*

appear that the word might preferably refer to the person acting as “caretaker” or “executor”, acting in that capacity, rather than the biological eldest son.

Although we have good evidence for the hierarchy of the “eldest son” from the *Codex Hermopolis*, which is very late in Egyptian history, it was merely a compilation of earlier established law. Given the ancient Egyptians’ tendency for custom, tradition and precedent it is most likely that very little changed over the years. Importantly we have much earlier confirmation of the role of the “eldest son”. From the Old Kingdom (Fourth Dynasty) we have, for example, the *Inscription of Heti*, where the eldest son is specifically important since he must supervise the mortuary priests performing the rites for the deceased Heti.⁵² The assets as well as the other children are also placed under the eldest son’s care who acts as an “administrator”, a modern-day “executor” in Heti’s case. Theodorides gives the following translation:⁵³

As for all my children, truly, that which I have constituted for them, as assets of which they shall enjoy the usufruct, I have not granted any of them the right to dispose of his (share), as a gift or in consideration of payment (?) ... an exception being made for the son he may have and to whom he shall transfer (it). They are to act under my eldest son’s authority as they would act with regard to their own property; for I have appointed an heir against the day – the latest possible – when I shall go to the West.

In the *Inscription of Niankhka* (Fifth Dynasty), Niankhka put all the members of his family association under the guardianship of his eldest son. Here the importance of the “eldest son” playing the role of administrator is once again highlighted.

The terminology of “eldest son” for the “caretaker” or “executor” could change or be expanded. The estate was later under the control of an administrator or trustee (*rwD*) who could be one of the heirs.⁵⁴ The undivided property is managed by an appointed administrator who administers the estate on behalf of all the heirs, and who in some texts from the New Kingdom is referred to as “representative” (*rwD*  or ).⁵⁵ It would appear from hieratic papyri and ostraca that individuals’ estates were looked after by a trustee (*rwD* ) who could be one of the heirs.⁵⁶ Pestman is of the view that although a woman could be appointed administrator, the eldest son was usually the obvious person to act as administrator in cases where no other arrangement was made.⁵⁷

We find an example in the fourteenth century BCE where – in the scribe Mose’s tomb inscription at Saqqara – mention is made of a woman, Urnero, who was

52 Jasnow 2003: 124.

53 1971: 293.

54 See Allam 2001: 159.

55 Pestman 1969: 64. Besides the passage from the *Inscription of Mes* (14th century), see also *Papyrus Berlin* 3047.8 (13th century). See, too, Helck 1963: 65-73.

56 See Shaw & Nicolson 2008: 158.

57 See 1969: 64-65.

appointed by an official from the supreme council to assume the responsibility of an administrator or trustee (*rwd*) on behalf of her five brothers and sisters.⁵⁸

The task of the administrator or trustee was not easy and there are numerous examples of litigation initiated by the heirs opposing the administrator or trustee.⁵⁹ In the dispute mentioned by the scribe Mose, an official from the supreme council was called upon to carry out the division of the estate among the heirs. According to Allam a series of Demotic texts exists on which a lawsuit was based, and with a record of the proceedings during the trial.⁶⁰ He is of the opinion that this record, found in *Papyrus British Museum 10591 (recto)*, is the most elaborate record of judicial proceedings from the ancient world.

Papyrus Berlin 9010 from the Old Kingdom is important for two reasons as it refers to a dispute by the eldest son (Tjau), and it also confirms the existence of customary-intestate succession.⁶¹ The eldest son disputes the existence of a “testamentary disposition”⁶² made by his father and maintains the property should remain with him (implying the existence of customary-intestate succession). We read as follows from the papyrus:⁶³ “But this Tjau has replied that his father never made it (this document) in any place whatever”, and “But if he (Sobekhotep) does not produce the witnesses (*irw*) in whose presence this utterance was voiced, none of the said User’s property shall be kept in his possession; it shall be kept in the possession of his son (ie the eldest son of User), the royal noble, the overseer of caravans, Tjau.”

From the Middle Kingdom, *Papyrus UC 32055* (*Papyrus Kahun II 1*) is an example about legal action taken by the eldest son, indicating the role of the eldest son as administrator similar to our present day executor. It indicates that the eldest son as administrator stepped into the shoes of the deceased in order to effectively enforce the completion of an outstanding legal action on behalf of the deceased and on behalf of the deceased’s estate; acting therefore legally as executor on behalf of the estate in a matter of an “incomplete transactio” to recover the owing obligation. It also appears from *Papyrus Ashmolean Museum 1945.97* (“Will” of Naunakht) that the eldest son might have been “compensated” for his administrative role as “caretaker” or “executor” as Naunakht awards a copper bowl as legacy to the eldest son in her testamentary disposition.

58 Allam 2001: 159.

59 *Ibid.*

60 *Ibid.*

61 The eldest son initially relied on the customary intestate succession law and disputed a testamentary disposition made prior to death (see Seidl 1957: 57).

62 This might, according to Muhs (2016:28), be a reference to a “testament” (*wḏt-mdw*) or a transfer (*imyt-pr*) document serving as a testamentary disposition.

63 Trl by Theodorides 1971: 295-296.

8 Who are the intestate customary heirs?

Looking at the practical order of inheritance in cases of “customary-intestate succession law” in ancient Egypt, it would appear that the inheritance would as a rule always first go to descendants before ascendants and that husband and wife did not inherit from each other. This may be explained in more detail:

8 1 Husband and wife

According to Baines it appears that marriage, being the prevalent state of Egyptian life, fell outside the religious context and that the institution of marriage existed with concomitant sanctions against adultery, but without evidence that any rituals or other religious observances were celebrated.⁶⁴ Marriage seems to have been a social arrangement in order to regulate property rights.⁶⁵ There is no evidence of any form of legal or religious ceremony in order to establish the marriage:⁶⁶ it was a private affair in ancient Egypt in which the state took no interest and of which it kept no record.⁶⁷ There seems to have been no legal obligation to register a marriage and no standard religious ceremony in a state-run temple.⁶⁸ There may have been a feast to mark the occasion of “marriage”⁶⁹ and once a couple started living together, they were regarded as being married.⁷⁰ The ancient Egyptians were monogamous (except for the king) and many official records indicate that couples expressed true affection for each other.

The spouses maintained control of the property they brought into the family, while property they acquired during marriage was held jointly.⁷¹ An Egyptian woman had the right to be provided for during marriage by receiving her subsistence from her husband, without which a marriage ceased to exist,⁷² and it was customary that some households could be enlarged since widowed, divorced, or unmarried women lived with their closest male relative.⁷³

The spouses could each own their own property and they could each inherit from their own family, but not from each other.⁷⁴ As a rule husbands and wives did not inherit from each other. This means that the spouse could only inherit when there

64 Baines 1991: 144.

65 See Brewer & Teeter 1999: 96.

66 Johnson 1996: 179.

67 *Ibid.*

68 See Pinch 2000: 372.

69 *Ibid.*

70 Brewer & Teeter 1999: 96.

71 *Ibid.*

72 Eyre 2007: 225.

73 Pinch 2000: 371.

74 Even though it was the rule that a husband and wife did not inherit from each other, this did not mean that the widow or widower was not taken care of (see Pestman 1969: 71, 73).

was a “testamentary disposition document” available. Lippert indicates that spouses were not considered heirs in the legal order of succession (her terminology).⁷⁵ In other words, spouses were not considered customary intestate succession heirs of each other.

However, it is important to remember that the wife could be “adopted” by the husband and that she would then become an intestate heir as a “child”. In the case of *Papyrus Ashmolean Museum* 1945.96, Nanefar (the wife) confirms that her husband adopted her. She states *inter alia* that “(my husband) made me a child of his ... having no son or daughter apart from myself”.⁷⁶ For the ancient Egyptians the interest in adoption was based on the results of the devolution of property.

Spouses could still inherit from their own families, financial arrangements might have been made on his or her behalf at the time of marriage, an alimentary obligation could rest on the children or there could be joint property which the couple acquired jointly during the marriage.⁷⁷ Matrimonial property, that is, property acquired during the marriage, was generally divided into three parts. One part would go to the wife if she was widowed (or divorced), and the other two-thirds were held in trust for the children.⁷⁸ However, if there were no children this share would go to the husband’s parents or his siblings.⁷⁹ In other words, the joint property was divided into two parts when one of the spouses died, with two-thirds going to the husband or his heirs, and one-third to the wife or her heirs. It would appear that at a woman’s death, her children inherited her dowry and therefore upon the death of her husband, an Egyptian woman retained a life estate in her dowry.⁸⁰

An aspect unique to the ancient world, according to Wilkinson,⁸¹ was the fact that women in ancient Egypt enjoyed a legal status equal to that of men. Women maintained control over their property and after marriage one-third of the new commonly acquired property belonged to the wife. In addition, women were free to dispose of their property as they wished or saw fit.⁸² *Papyrus Ashmolean Museum* 1945.97 (“Will” of Naunakht) and *Papyrus Ashmolean Museum* 1945.96 (Adoption Papyrus) are examples where a woman had property and disposed of it by means of a testamentary disposition.

According to Lippert one of the earliest examples of this “one-third” principle is from the Seventeenth Dynasty (stela Cairo JE 52456) and we have several examples from the New Kingdom (*Papyrus Turin* 2021; *Papyrus Geneva D* 409; and *Papyrus*

75 2013: 3.

76 See Gardiner 1941: 23-24.

77 Pestman 1969: 73.

78 Pinch 2000: 372.

79 *Ibid.*

80 See Versteeg 2002: 138.

81 Wilkinson 2016: 133.

82 *Ibid.*

Ashmolean Museum 1945.97. This “one-third” principle is commonly mentioned in Late Period and Ptolemaic marriage documents, for example *Papyrus BM* 10120.⁸³

However, this “one-third” was not an inheritance at all, since the wife was already endowed with it during her husband’s lifetime. This follows from the fact that the wife was also entitled to this “one-third” in the case of divorce (*Papyrus Turin* 2021 and *Papyrus Geneva D* 409).⁸⁴

Reference to this “one-third” principle far predates the earliest marriage documents and in these later marriage documents the “one-third” principle is given as a well-known fact. It may therefore be assumed that it was not dependent upon individual arrangements but legally binding from at least the New Kingdom onward.⁸⁵

The wife’s right of disposal in respect of this property was usually restricted so that it would fall automatically to her children after her death.⁸⁶ In other words, the rules of customary intestate succession would apply.

8 2 The eldest son as sole heir

According to Lippert it was emphasised in ancient Egypt that the firstborn son of a marriage would be regarded as eldest son in terms of the legal order of succession (which I prefer to call the “customary intestate succession”) and in this process would become the main or even the sole heir.⁸⁷ In the *Codex Hermopolis* we read the following in column VIII 29–VIII 30: “The man to whom daughters are at first born and later on sons are born to him, it is the male children who furnish (literally ‘make for’) him with an eldest son.”⁸⁸

The *Codex Hermopolis* defines the functions of the eldest son, but there is no doubt that these provisions may be projected back to earlier periods. The relevant passages confirm the eldest son as the natural or sole heir in terms of customary intestate succession, unless the *de cuius* made arrangements prior to his death.⁸⁹ In this regard columns VIII 30–31 state the following: “If a man dies, he having lands, gardens, temple-shares [?] and slaves, he having sons, and he having not assigned [literally ‘written’] shares to his children while alive, it is his eldest son who takes possession of his property [*or better* estate].”⁹⁰ Of importance is that customary intestate succession is confirmed here and specifically the role of the eldest son, who takes possession. It also affirms the role of the testamentary disposition in the sense that it is specifically mentioned that customary intestate succession will only apply if

83 See Lippert 2013: 9.

84 *Ibid.*

85 *Ibid.*

86 Pestman 1961:120-121.

87 Lippert 2013:10.

88 Mattha 1975: 42.

89 Eyre 1992: 216.

90 See Mattha 1975: 39.

no testamentary disposition was drawn up before death. Noteworthy is also the fact that we have a clear indication here that “property” could include both movable and immovable property.

The purpose of customary intestate succession, as Lippert argues, appears to have been the creation of a sole (male) heir. It is assumed that this person had a certain moral, although probably not a legal, obligation to care for his non-inheriting relatives.⁹¹

This principle, however, was already weakened in the early New Kingdom since the heir was no longer a sole heir with moral obligations to support his siblings, but acted as a *rwḏw*, a caretaker administering the estate for the equal distribution of profits,⁹² as may be derived from the *Codex Hermopolis*, column VIII 31–33, in the following statement:

If the younger brothers bring action against their elder brother saying ‘Let him give us shares of the estate [*lit.* property] of our father’, the elder brother is to write the list of names and write the number of his younger brothers, the children of his father, those alive and those who died before their father died, the eldest son likewise. And he is given the share he prefers.⁹³

It is submitted that the eldest son is acting here as caretaker. We are, however, also able to ascertain that the eldest son had first choice to choose a portion, and it is furthermore implied here that the predeceased children are to be represented by their children, confirming that the *per stirpes* principle applied in ancient Egypt.

However, the caretaker or administrator (*rwḏw*) did not always meet his obligations towards his siblings, and in cases like these, the courts of the later New Kingdom went further to strengthen the position of the siblings.⁹⁴

This viewpoint might be behind the development described in the *Inscription of Mes* from the Nineteenth Dynasty.⁹⁵ In this matter disputed land had originally (in the Eighteenth Dynasty) been passed undivided to heir after heir who acted as *rwḏw* caretakers for their non-inheriting siblings. However, when arguments arose regarding the distribution of income, a later court decided to split the land into smaller portions for each descendant. This allowed the parties belonging to the same *parentela* more direct access to a share of the inheritance and the decision was later contested by the descendants of the original caretakers who wanted to be reinstated into their more advantageous position.

Papyrus Berlin P 3047 is an example of a similar case where one member of the *parentela* sues his brother who was appointed caretaker because he had not been allowed to profit from his share of the inheritance. In court the *rwḏw* admits

91 2013: 2.

92 *Ibid.*

93 See Mattha 1975: 39.

94 See Lippert 2013: 2.

95 *Ibid.*

the brother's right and declares his consent to splitting the plaintiff's share of the inheritance, which is then let to a temple in order to ensure an income.⁹⁶

According to Lippert the struggle between the older principle of sole heir and the later one of distribution between the descendants had not been fully resolved even in the Twentieth Dynasty.⁹⁷ This may be seen from *Papyrus Cairo CG 58092 (recto)* where the writer recounts how he refuted the demands of his siblings for their shares of their parents' inheritance. It is important to note that his argument is not that he is the eldest son, but that he alone was burdened financially with the burial of his parents.

8.3 Children

When someone died, the practice in ancient Egypt was that the deceased's children inherited.⁹⁸ Property first passed to a deceased's children.⁹⁹ Children could furthermore inherit from both parents since men as well as women could own property.¹⁰⁰ It is also important to note that children acquired rights at birth over their parents' matrimonial property and the parents' ability to dispose of such property was limited.¹⁰¹

As Pestman suggests, when someone died in ancient Egypt, his or her children were the first to be considered as heirs to the property of the estate.¹⁰² From the passages of the *Codex Hermopolis* it appears that by the Late Period the rights of the other siblings as co-heirs were finally fully acknowledged.¹⁰³ The eldest son still took possession of the property (inheritance) and was even allowed to sell part of it, but he was obliged to divide it (or the price, if sold) when his younger siblings demanded it. However, the eldest son retained the most advantageous position since he was entitled to a better or larger share.¹⁰⁴

The eldest son was also the only heir who was allowed to prove his claims to objects simply by referring, without documentation, to the fact that he inherited them from his father.¹⁰⁵ Column IX 32–IX 33 of the *Codex Hermopolis* states as follows: "No man can say 'The property is mine, it is my father's', except the eldest son. He is entitled to say that '[t]he property is mine, it belongs to my father'."¹⁰⁶

Property given before death as a gift (by a parent) to one of the other children was not regarded as part of the estate upon the parent's death, and if there was no

⁹⁶ *Ibid.*

⁹⁷ See Lippert 2013: 2.

⁹⁸ Pestman 1969: 59.

⁹⁹ Versteeg 2002: 137.

¹⁰⁰ See Pestman 1969: 59; Johnson 1969: 183.

¹⁰¹ Eyre 2007: 242.

¹⁰² 1969: 59.

¹⁰³ See Lippert 2013: 2.

¹⁰⁴ Lippert 2013: 2; see, also, the discussion in the previous paragraph.

¹⁰⁵ *Idem* at 3.

¹⁰⁶ See Mattha 1975: 42.

donation document, an oath had to be taken by the one who claimed the property.¹⁰⁷ In this regard column IX 17–IX 19 of the *Codex Hermopolis* reads as follows:

If a man dies and he has property in the hand [?] of the younger son, and if the elder son brings action against him because of it [the property], and if the younger brother says ‘The property [for which he brings action against me is mine, my father is he who gave it to me] (?)’, he is made to swear saying, ‘It is my father who gave me this property saying “Take it to thyself”’.¹⁰⁸

Children normally inherited from both their father and mother individually and obviously the father and mother themselves inherited from his or her own family.¹⁰⁹ Since both the father and mother were allowed to own property, the basic principle implies two inheritances.¹¹⁰ This shows that the idea of inheritance in the direct line was deeply rooted in the mind-set of the ancient Egyptians.

The above-mentioned principle of “two inheritances” has implications in a situation where one of the parents remarries and has children born out of the second marriage which would mean that the children of both marriages would be entitled to inherit from the relevant parent.¹¹¹ It is submitted that children from the same *parentela* were therefore entitled to an equal share from the relevant parent’s estate.

In cases where a son predeceased the *de cuius* but left descendants, these grandchildren would take their father’s share *per stirpes*.¹¹² It was therefore possible for the descendants to “represent” a predeceased antecedent and this implies that the principle of *stirpes* was known to ancient Egyptians. Westbrook makes the important observation that daughters in ancient Egypt had the same right and the principle of inheriting *per stirpes* therefore applied to both sons and daughters.

In ancient Egypt children of the deceased preceded siblings of the deceased as legal heirs. The first *parentela* would be the initial customary intestate heirs. As indicated above, the inheritance first went “down” to the descendants, which included children or their children, effectively applying the principle of *per stirpes* succession. It was only when there were no descendants that siblings were considered. According to Lippert it is possible to observe this system already in the Old Kingdom from the order in which descendants were listed in enumerations of possible heirs, with the *Inscription of Kaemnofret* being an example.¹¹³ The *Inscription of Kaemnofret* consistently names children before brothers and sisters.

107 Lippert 2013: 3.

108 Mattha 1975: 40–41.

109 Allam 2001: 159.

110 Pestman 1969: 59.

111 *Idem* at 59–60.

112 See Westbrook 2003b: 57.

113 2013: 3.

THE BASIC TENETS OF INTESTATE (CUSTOMARY) SUCCESSION LAW

According to Versteeg there seems to have been some degree of preference in respect of the inheritance of the eldest son.¹¹⁴ Lippert agrees on this matter, confirming that the norm was for the eldest son (first-born son) to inherit the property of his deceased father (and in my view, by implication, also the deceased mother), while at the same time carrying out the duty to bury him (by implication, both the parents) and to take care of the other family members.¹¹⁵ Pestman is of the opinion that the eldest son does not only have more obligations, but also more rights than the other heirs.¹¹⁶ It was furthermore the eldest son who was obliged to arrange funeral arrangements for his parents and it would appear that he therefore inherited a larger share as a kind of compensation for these duties.¹¹⁷

The custom was to keep immovable property intact, and Versteeg maintains that it is for this reason that the children usually inherited immovable property jointly, with the eldest son (or in some cases another sibling acting as the substitute eldest son) managing the jointly owned immovable property for the benefit of the group as a whole.¹¹⁸

The principle of *per stirpes* is supported by Lippert's observation that the eldest son received the inheritance of those siblings who died childless, as is confirmed in the *Codex Hermopolis*, column IX 5–IX 9.¹¹⁹ On this point the *Codex* states the following in column IX 5–IX 9 (trl in Mattha 1975: 39-40):

If the younger brother brings action saying 'The children whom our eldest brother said "They existed [*i.e.* belonged] to our father", did not exist as sons [to him]' [?]. He who existed. [If] [?] the younger brother says, 'They did not Exist to our father', the eldest brother is made to swear concerning them saying 'The children whom I said they existed [to our father, they existed as sons to him] (?) [... There is no] falsehood therein'. He is made to declare 'They were not at all (*lit.* once) with their mother'. Form of the oath which he is made to take: 'So-and-So [Son of So-and-So] said [...] existed as sons to my father; they died before their father died.' The one concerning whom he does not swear is not allotted a share. [The one concerning whom he swears] is allotted a share.

However, this applied only where a son was acting as eldest son and not where a daughter was doing so. In the case where a daughter was acting as eldest son and there was a childless sibling, the whole inheritance was divided by the number of surviving siblings plus one and she would receive a double share.¹²⁰ In this regard we read the following in column IX 14–17 from the *Codex Hermopolis*:

[...] man dies and he has no son but he has a daughter [...] she (?) is given one (?) share in addition to her share (?). If it be (?) daughters whom he has (?), [they give] (?) an extra share

114 2002: 138.

115 2013: 1.

116 1969: 58, 66.

117 See Versteeg 2002: 138-139.

118 *Idem* at 140.

119 2013: 2.

120 *Idem* at 3.

to his eldest daughter in addition to her share (?); [it is given in addition (?)] to (?) her (?) one (?) share (?). the eldest daughter is not allowed to say ‘Since other children (?) of his are minors (?), let me be given their share (?).’ She is not given [their share] (?) [see Mattha 1975: 40].

It would appear that there was a rule of “male before female” among the deceased’s children regarding their inheritance. It is possible that this rule also applied to the other categories of siblings and parents of the deceased, but there is no evidence to support this. In ancient Egypt, furthermore, among children of the same gender the older children preceded the younger.¹²¹ This preference of “older over younger” appears also to have applied to siblings, and if someone died childless, for instance, the deceased’s share of the paternal property fell to the deceased’s eldest brother, but the same was not applicable to an all-female group.¹²²

Regarding gender equality, it would appear that in the legal order of succession there was a clear preference for male children. This prevailed despite the fact that Egyptian women could hold property independently from their husbands and were able to pass it on to whomsoever they liked.¹²³ Male children, however, preceded female children as legal heirs and birth-order played an important role. In this regard, column IX 2–3 of the *Codex Hermopolis* is applicable: “property is next divided into shares according to the number of his children. Then his sons receive shares according to their order (*or* rank) (of birth) and his daughters receive after them according to their rank of birth”.¹²⁴ Older children also preceded younger children among children of the same gender in customary intestate succession.¹²⁵ For the ancient Egyptians the ideal heir was the eldest son.

Allam states that mention is often made of the specific Egyptian legal device called *katochè*, which gave children a type of preferential claim regarding the devolution of their father’s estate in Hellenistic and Roman writings.¹²⁶ The children enjoyed a claim to their father’s property during his lifetime and the father could not dispose of it as he pleased without their consent, and after the father’s death, the children’s claim became a property title.

Pestman makes an important observation that although the children only received their inheritance when the *de cuius* died, this did not change the fact that the children already had certain rights to this inheritance.¹²⁷ The mere fact that they were children of the parents gave them certain rights to the parents’ property of the parents.¹²⁸ In conclusion, it appears that the inheritance was to go first to the descendants *per stirpes* although *prima facie* the eldest son had some priority.

121 *Idem* at 4.

122 See Lippert 2013: 4.

123 *Idem* at 3.

124 Mattha 1975: 39.

125 Lippert 2013: 3.

126 Allam 2001: 159.

127 1969: 60.

128 Pestman 1969: 62.

8 4 Brothers and sisters

If a deceased did not have surviving children, the *Codex Hermopolis* informs us that under these circumstances the estate would revert to the deceased's brothers and sisters.¹²⁹ This would by implication mean that such a person also did not have any surviving grandchildren, or rather any descendants at all, because of the *per stirpes* principle applicable in ancient Egypt.

According to Pestman the principle that the brothers and sisters would inherit if there were no descendants of the *de cuius* is found in texts right from the beginning of the second millennium.¹³⁰ From the *Stèle Juridique* we have the example of Kebsi, who wished to leave his official position to someone, having inherited it from his father, and who said that "[It came] to my father as a property of his brother ... who died without children".¹³¹

8 5 Parents

If the *de cuius* had no children, nor any brothers or sisters, his parents would inherit his estate.¹³² Lippert, however, maintains that such a scenario is not attested to and was probably quite rare.¹³³

Pestman, furthermore, affirms that there is not a single case known to us where it indeed happened that the parents inherited in circumstances where there were no children nor brothers and sisters.¹³⁴ We do, however, find signs in some texts which support the idea.

An example from a seventh-century deed is the *Papyrus Turin* 2118 where a brother and sister sell a piece of land, and with the authority of the heirs in mind, they include the following clause: "We have no son, daughter, brother, sister, father, mother or anyone else in the world who could 'go to law' about it."¹³⁵ The fact that the father and mother are mentioned in the clause implies that they could also be heirs in terms of customary intestate succession.

8 6 Other family members

Not a single reference is found in available texts to indicate that other family members might have been eligible to inherit from the *de cuius*. It is submitted that the clause from *Papyrus Turin* 2118 might also be seen as a reference to other members of the

129 Pestman 1969: 68.

130 *Ibid.*

131 *Ibid.*

132 See Pestman 1969: 70.

133 2013: 3.

134 1969: 70.

135 *Ibid.*

family, or rather the extended family beyond the parents, because reference is made to “anyone else”. It is mentioned at the end after the mentioning of descendants and antecedents and might refer to siblings within the extended family; in other words, the nearest blood relative beyond the parents. This is a principle familiar to modern-day law of intestate succession.

9 Conclusion

There was a link between belief in the afterlife and the first signs of succession law. The socio-economic circumstances of the ancient Egyptians played an important role in the development of succession law. In the case of customary intestate succession law, the property (or rather the estate) went to the descendants first. For the ancient Egyptians the ideal was for the eldest son to be the sole heir for the purpose of sustenance of the *de cuius*, taking care of the nuclear family and protecting family property by keeping it intact. This position of the eldest son as sole heir eventually weakened as he acted as caretaker for his siblings (who effectively also became intestate heirs). The children were the intestate heirs, and male and older children preceded. Adoption was known in ancient Egypt and an “adopted child” could inherit in terms of customary intestate succession. The principle of *per stirpes* was applied and the descendants of the first *parentela* had priority over the second and further *parentela*. In the absence of descendants, the estate went to the deceased’s brothers and sisters. In their absence the estate went to the parents and in their absence to the deceased’s collaterals. Husbands and wives did not inherit from each other in terms of customary intestate succession. The ancient Egyptians’ reliance on custom, tradition and precedent indicates that we can form a very good idea of their views on customary intestate succession which is important when we study the broader subject of succession law in ancient Egypt. This emphasis on custom, tradition and precedent would appear to be important first signs of jurisprudence in ancient Egyptian succession law, especially customary intestate succession.

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Addendum A

Timeline

(Source: Wilkinson 2016: xxxi-xxxiii)

PERIOD / DATES (BCE) / DYNASTY / KING	DEVELOPMENTS IN EGYPT
Early Dynastic Period, 2950-2575	
First Dynasty, 2950-2750	
Second Dynasty, 2750-2650	
Third Dynasty, 2650-2575	Step Pyramids at Saqqara
Old Kingdom, 2575-2125	
Fourth Dynasty, 2575-2450	Great Pyramid at Giza
Fifth Dynasty, 2450-2325 (nine kings, ending with Unas, 2350-2325)	Pyramid Texts
Sixth Dynasty, 2325-2175 (five kings, ending with Pepi II, 2260-2175)	Harkhuf's expeditions
Eighth Dynasty, 2175-2125	
First Intermediate Period, 2125-2010	Civil war
Ninth/Tenth Dynasty, 2125-1975	
Eleventh Dynasty (1st part), 2080-2010 (three kings, including Intef II, 2070-2020)	
Middle Kingdom, 2010-1630	
Eleventh Dynasty (2nd part), 2010-1938 (three kings, ending with Mentuhotep IV, 1948-1938)	
Twelfth Dynasty, 1938-1755 (eight kings, including: Amenemhat I, 1938-1908 Senusret I, 1918-1875 Senusret III, 1836-1818)	Golden age of literature
Thirteenth Dynasty, 1755-1630	

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PERIOD / DATES (BCE) / DYNASTY / KING	DEVELOPMENTS IN EGYPT
<i>Second Intermediate Period, 1630-1539</i>	Civil war
Fourteenth Dynasty, c 1630	
Fifteenth Dynasty 1630-1520	Hyksos invasion
Sixteenth Dynasty, 1630-1565	
Seventeenth Dynasty, 1570-1539 (several kings, ending with Kamose, 1541-1539)	
<i>New Kingdom, 1539-1069</i>	
Eighteenth Dynasty, 1539-1292 (fifteen kings, including: Ahmose, 1539-1514 Thutmose I, 1493-1481 Thutmose III, 1479-1425 Hatshepsut, 1473-1458 Amenhotep III, 1390-1353 Akhenaten, 1353-1336 Tutankhamun, 1332-1322 Horemheb, 1319-1292)	Reunification Battle of Megiddo Amarna revolution
<i>Ramesside Period, 1292-1069</i>	
Nineteenth Dynasty, 1292-1190	
Twentieth Dynasty, 1190-1069 Ten kings, including Ramesses V, 1150-1145 Ramesses XI, 1099-1069	
<i>Third Intermediate Period, 1069-664</i>	
Twenty-first Dynasty, 1069-945 Twenty-second Dynasty, 945-715 Twenty-third Dynasty, 838-720 Twenty-fourth Dynasty, 740-715 Twenty-fifth Dynasty, 728-657 (five kings, starting with Piankhi, 747-716)	Political division Kushite conquest
PERIOD / DATES (BCE) / DYNASTY / KING	DEVELOPMENTS IN EGYPT
<i>Late Period, 664-332</i>	
Twenty-sixth Dynasty, 664-525 (six kings, starting with Psamtek I, 664-610)	
Twenty-seventh Dynasty (First Persian Period), 525-404 (five kings, including Darius I, 522-486)	Persian conquest
Twenty-eighth Dynasty, 404-399	

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Twenty-ninth Dynasty, 399-380	
Thirtieth Dynasty, 380-343	
Thirty-first Dynasty (Second Persian Period), 343-332	
Macedonian Dynasty, 332-309	
Alexander the Great, 332-323	
<i>Ptolemaic Period, 309-30</i>	Death of Cleopatra

IN MEMORIAM: HANS ANKUM (1930–2019)

Hans (Johan Albert) Ankum was born on 23 July 1930 in a family originally coming from Germany¹ with a socialist background. His father was appointed burgomaster in Koog aan de Zaan, a small town north of Amsterdam in 1946 and his mother was a teacher of French. He was the elder of two brothers. After secondary school in Zaandam, where he studied Greek and Latin, he studied law at the Amsterdam Municipal University. He hesitated momentarily because of his musical talents. The Conservatory could be another attractive option, but he eventually chose the law faculty in the Municipal University of Amsterdam as his future domain. Among his Amsterdam teachers were Marcel Henri Bregstein (1900–1957), a brilliant professor of private law, and Hendrik Richard Hoetink (1900–1963), professor of Roman law. He certainly was a very good student and after his master's degree (1953) he went to Paris with a Dutch scholarship where he lived in the Dutch Pavilion in the Cité Universitaire for two years (1954–1956). There he started the research for what was to be a voluminous doctoral thesis on the *actio Pauliana* and its history.² Moreover, he made many friends amongst the French Romanists and legal historians. After 1956 he was an assistant of Professor Hoetink.

1 Ankum is a small village in Lower Saxony near Osnabrück. For biographical information see, also, CH van Rhee & LC Winkel (2011): “Een Romeinsrechtelijke coryfee – Rechtshistorici in de Lage Landen (11): Interview met Hans Ankum in *Pro Memorie*” 12(2): 146-168.

2 JA Ankum (1962) *De geschiedenis der actio Pauliana* (Zwolle) 491pp with a summary in French.

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In 1960 he was appointed as a lecturer in legal history in Leyden. In 1962 he defended his thesis in Amsterdam for which he was awarded with the highest distinction *cum laude*. At the same time he published a book on the development of the *actio Pauliana* in the nineteenth century.³ Both books are remarkable accomplishments. In his thesis he devoted not only attention to classical Roman law, but he also covered medieval doctrine since the glossators, and old French and Dutch law until the nineteenth century codification. In his second book he was a forerunner of the legal historians interested in the legal history of the nineteenth century – at that time still nearly undiscovered. In 1963 he was appointed as a professor for legal history at the University of Leyden and in 1965 he was called back to the chair of Roman law, legal history and juristic papyrology at the Municipal University of Amsterdam as a successor of his promotor Hoetink who passed away in 1963. There he taught the important courses in the first year of Roman law and legal history. Hans Ankum was a brilliant teacher. He used to lecture in the biggest audience hall of the law faculty and he inspired many students. He retired in 1995 and received studies in his honour in two volumes.⁴ His output was impressive: two books of his collected articles were published.⁵ He mastered several foreign languages which facilitated his many contacts abroad. He became the informal co-ordinator of the yearly SIHDA conferences, especially after the death of his friend Aristide Theodoridès in 1994.

His method consisted of a thorough analysis of the Roman legal sources, taking into account their paligenetic origin. Moreover, he was often aware of non-legal issues that were important for Roman jurists,⁶ although he published mainly in the realm of classical Roman law and occasionally on later legal history. He was not influenced by the spell of the doctrine of extensive interpolations. In this respect he followed the example of his promotor Hoetink, who in his doctoral thesis (1928), was already careful in assuming Justinianic interpolations in the Digest.⁷ After 1967, the year of the conference *La critica del testo*, this theory – or rather, the ideology of interpolations – turned out to be an outdated paradigm, mainly based on exaggerate standards imposed upon the Latin used by the Roman jurists. Hans Ankum often

3 JA Ankum (1962) *De Pauliana buiten faillissement in het Nederlands recht sedert de codificatie* (Zwolle): 246pp with a summary in French.

4 R Feenstra et al (eds) (1995) *Collatio ivris romani – Etudes dédiées à Hans Ankum à l'occasion de son 65^e anniversaire* (Amsterdam) I-II 710pp.

5 Hans Ankum (2007) *Extravagantes – Scritti sparsi sul diritto romano* (a cura di Carla Masi Doria e Johannes Emil Spruit) (Napoli) 531pp; Hans Ankum (2014) *Nueva antología Romanística* (Madrid) 430pp.

6 “Griekse invloeden op het Romeinse recht en de Romeinse rechtswetenschap” *Lampas* 1982: 331-340.

7 HR Hoetink (1928) *Periculum est emptoris* (Haarlem) dissertation under the supervision of JC van Oven in Leyden.

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stressed the individualism of the Roman jurists, for example very clearly in brilliant articles on Papinian.⁸

Hans Ankum was an example of informal leadership. In Amsterdam he formed a group of assistants who were bound by friendship and mutual interest. He was always very helpful, his door was open and he had a talent to attract very different people. It was never too much for him to provide colleagues, especially in Eastern Europe where library facilities were not as good as in the Netherlands, with copies of articles. I still see him after normal office hours behind the copying machine. Among his many pupils are Arthur Hartkamp, author of a brilliant thesis on classical Roman law, later equally brilliant in private law, eventually *Procureur Generaal* at the Dutch Supreme Court and a key figure in the recodification of Dutch private law (1992); Peter Kop, later judge in the Dutch Supreme Court; and Eric Pool, later professor at the Free University in Brussels.

Hans Ankum was justly honoured on several occasions: In 1986 he was elected as a member of the Royal Dutch Academy of Sciences where only one active representative of each branch of studies may be nominated. In 1992 he was bequeathed by the Queen with the high decoration “Ridder Nederlandse Leeuw”. Several universities, especially Eastern European Universities, bestowed honorary doctorates on him: for example Brussels Free University, Aix/Marseille, Bochum, Prague, Belgrade, Sofia (UNWE) and Murcia.

His last years were not easy: he suffered from health problems, mental and corporeal, which required rather long periods of hospitalisation after 2016. He passed away quietly on June 3, 2019 after an evening concert in his beloved *Concertgebouw*.

He was a great and admirable successor of the equally famous Dutch legal humanists of the seventeenth century.

Laurens Winkel

IN MEMORIAM: HANS ANKUM

Professor Hans Ankum was the Honorary Editor of *Fundamina* for many years. During all these years he supported and assisted *Fundamina. A Journal of Legal History*, the journal of the Southern African Society of Legal Historians. He published articles in our journal and also supported members of our Society when publishing and presenting papers abroad.

We knew Professor Ankum as someone who could always be approached for assistance. In addition, we also knew that he was an academic who put his heart and soul into his work, and worked for many more hours per day than most of his

8 “Le laconisme extrême de Papinien” (1994) *Estudios de Historia del Derecho Europeo in Homenaje al Professor G Martínez Diez* (Madrid): 43-61 = *Extravagantes*, 279-297; (1996) “Papinian, ein dunkler Jurist?” *Orbis Iuris Romani* 2: 5-32.

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colleagues. He furthermore had a good sense of humour and was a true lover of the good life, and often the soul of a party.

Professor Ankum always had time for his colleagues – young and old. Especially the young ones benefited, for he always had time for them too. I will never forget the first SIHDA Conference that I attended in Turkey. My colleague and I were intimidated by all the senior professors, but he encouraged and supported us. And almost thirty years later we saw him do the same to our new and young colleagues.

We will miss you, Hans.

Rena van den Bergh
(Editor of *Fundamina* 1996–2018)