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LA RAISON D'ETAT DANS LA ROME ANTIQUE: PROLÉGOMÈNES (CICÉRON, TITE-LIVE, TACITE)

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ABSTRACT

This paper discusses the concept of raison d'Etat, or statecraft, in Rome under the Republic and the early Empire. The first part focuses on Republican times, when the Romans took extraordinary measures to stop a revolt abroad – Numance in 133 BC and Corinth in 146 BC – or to return order and stability to Rome with a senatusconsultum ultimum. This can be considered first steps where the State's survival was more important than the lives of citizens.

The second part deals with statecraft under the Roman Empire (first century AD), considering the state as an entity independent from the prince. Examples deriving from Tacitus' *Histories* have been used to emphasise the fact that some Roman politicians took decisions in order to preserve the State, for example in 69 when Mucianus convinced Vespasian to rebel against two bad emperors, namely Otho and Vitellius.

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Fundamina
Volume 24 | Number 1 | 2018
pp 1-17

DOI: 10.17159/2411-7870/2018/v24n1a1
Print ISSN 1021-545X/ Online ISSN 2411-7870

The third and last part deals with another point of view on the Roman Empire, namely that the *raison d'Etat* was actually the will of the emperor to save his own power and its dynastic transmission. It was often very difficult to distinguish between the Emperor and the State. The reigns of Tiberius and Nero offer a dark version of statecraft, full of dissimulation and violence against whoever was willing or able to reign after them. In consequence, the essay shows that the strong prejudice that Statecraft originated with Machiavelli and was unknown in ancient states is not correct and that the concept of *raison d'Etat* can be applied to ancient Rome.

Keywords: Statecraft; Rome; Cicero; Livy; Tacitus; politics; empire

"Omne magnum exemplum habet aliquid ex iniquo, quod contra singulos utilitate publica rependitur."[1] Cet avis intervient dans le contexte bien connu de l'affaire Pedanius, un Préfet de la ville assassiné chez lui par certains de ses esclaves sous le règne de Néron. La coutume voulait qu'on exécutât dans ces cas-là tous les esclaves,[2] complices ou non, qui se trouvaient dans la maison au moment des faits. Or certains s'émurent du grand nombre d'innocents qui allaient périr, mais Cassius[3] plaida au Sénat pour le respect de la règle dans l'intérêt de l'Etat: le passage cité conclut son discours.

Cela correspond assez au sens que nous accordons au concept de raison d'Etat[4] qui est d'abord le fait de mettre en avant l'intérêt de l'Etat aux dépens des particuliers, afin de justifier une action contraire à la justice. C'est placer l'intérêt de l'Etat au-dessus de la morale commune. Pour mémoire, le premier traité politique traitant la question de la "Ragione di stato" date de 1589.[5] Mais avant Botero, auteur de ce traité, c'est Machiavel qui, sans utiliser l'expression de raison d'Etat, a le mieux exposé ses subtilités et ses nécessités. La raison d'Etat naîtrait donc à l'époque moderne quand l'Etat naît véritablement, bien après la Rome antique?

La République romaine n'avait assurément pas tous les attributs d'un Etat moderne – en particulier il lui manquait une force de police permanente[6] qui assure l'ordre public et la sécurité – mais c'était un Etat solide avec un Sénat se chargeant de

1 Tacite *Ann* 14, 44, 4. Le discours de Cassius a fait l'objet d'une analyse de Nörr 1983: 187-222, qui traite rapidement des aspects juridiques pour analyser surtout les effets rhétoriques du discours et la présentation de Cassius comme chantre d'une *seueritas* peut-être obsolète à son époque.

2 Voir, concernant le contexte général du contrôle exercé sur les esclaves, Bradley 1987: 99-100, 131-134.

3 Sur ce sénateur, C Cassius Longinus, voir Liebs 2010: 25 (bibliographie dans la note 80).

4 De fait, Bellen a consacré une étude à cette affaire, intitulée "Antike Staatsräson", voir Bellen 1982: 449-467: c'est pourquoi nous avons choisi de commencer par cet exemple. Voir Meinecke 1998: 25-27 (il évoque Thucydide, Euripide chez les Grecs, Cicéron et Tacite pour Rome).

5 Nous laisserons de côté ici les prédécesseurs de Botero qui utilisèrent l'expression avant lui, comme Guicciardini et Della Casa: voir Bonnet 2003: 315-329.

6 Voir sur cette question Nippel 1995: 4-46, 120-121 pour un état de la question bibliographique. Lintott souligne bien le problème dans son ouvrage: voir Lintott 1999: 89 en particulier.

la politique extérieure ainsi que des finances, une justice dotée de tribunaux devenus permanents et spécialisés depuis Sylla, enfin une armée efficace. Ses faiblesses étaient en partie compensées par une capacité indéniable – et parfois sous-estimée – à savoir assouplir les cadres existants pour s'adapter à de nouvelles réalités. Dans un deuxième temps, Auguste a largement contribué à la mise en place d'un Etat pourvu de toutes les institutions permanentes permettant son bon fonctionnement[7] et certains de ses successeurs, comme Claude qui a mis en place de véritables ministères, ont perfectionné la machine administrative impériale.

L'objet de notre étude sera de poser la question du rôle de Tacite dans la réflexion sur la raison d'Etat, en trois temps: nous verrons d'abord un premier sens de la raison d'Etat, à savoir la survie de l'institution aux dépens de l'individu prié de se sacrifier si besoin est, un sens bien présent à Rome dès la République. Dans un deuxième temps, nous verrons comment Tacite plus que d'autres eut le sens de l'Etat, sans lequel il n'y a pas de raison d'Etat. Enfin, nous étudierons dans un troisième temps la peinture des Julio-Claudiens dans les *Annales*, avec la confusion entre affaires publiques et affaires du Prince.

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Une première façon d'envisager la raison d'Etat est de considérer que c'est la survie de l'institution passant par la subordination totale de l'individu à l'Etat. Ce phénomène peut être observé dès l'époque de la République: de fait, Tite-Live et avant lui Cicéron ont abordé la question. Les cas de figure peuvent être assez différents, mais ils se laissent néanmoins classer en deux grandes catégories. Considérons d'abord le dévouement d'un individu en temps de guerre: comment ne pas songer à Regulus[8] dont l'histoire est connue en particulier par l'éloge de Cicéron[9] dans le *De finibus*? Ce général romain, qui avait tenté un débarquement en Afrique lors de la première Guerre Punique et se retrouva aux mains des Carthaginois à la suite d'une défaite,[10] fut envoyé comme ambassadeur à Rome avec pour mission de faire accepter à ses concitoyens un traité de paix:[11] s'il échouait, les pires tortures lui étaient promises à son retour en Afrique. Or, Regulus plaida contre ce traité défavorable à Rome, et préféra donc le salut de l'Etat à la vie.

7 C'est ainsi qu'on trouve des institutions de police sous l'Empire: voir l'exemple de l'Asie mineure étudié par Brélaz 2005: 4-5 où il souligne l'absence de l'idée de police chez les Romains, en tant qu'organe administratif spécifiquement affecté au maintien de l'ordre, avant d'étudier les différentes solutions mises en place (pp 69-230 sur les institutions municipales, et pp 231-282 sur le rôle de l'armée pour garantir la sécurité publique).

8 Voir Mix 1970 qui synthétise toutes les données dont nous disposons sur Regulus et la mise en place de sa légende à Rome. Sur une comparaison entre Regulus et Duilius, autre général de la première Guerre Punique, voir Gendre & Loutsch 2001: 136-163.

9 Cf *Fin* 2, 65. Cicéron cite à nouveau l'exemple de Regulus dans le *De Officiis* pour montrer qu'il choisit ce qui était utile à l'Etat au détriment de ce qui aurait pu lui être utile: cf *Off* 3, 99-100.

10 Cf Polybe 1, 30-35.

11 Il semble qu'il se soit agi d'un arrêt des combats, ou d'un échange de prisonniers.

L'histoire connaît des variantes: les *Periochae* indiquent sobrement qu'il fut exécuté, d'autres sources insistent sur les tortures qui lui auraient été infligées.[12] Cicéron met surtout en avant la *fides* de Regulus, le respect de la parole donnée au mépris de sa propre vie, dans sa présentation. Cependant, il serait possible de s'interroger sur les raisons du choix de Regulus, en se demandant si c'était un sens très élevé de l'intérêt de l'Etat qui lui était propre ou si cette façon de voir était partagée par tous, auquel cas on n'aurait pas ici, certes, une raison d'État fruit d'une autorité étatique imposant une décision, mais une forte pression du groupe poussant un individu à se sacrifier si nécessaire.

Un deuxième exemple est offert par le général romain vaincu aux Fourches Caudines. Postumius décide de se laisser livrer aux Samnites après son retour peu glorieux à Rome.[13] Son sacrifice est alors loué par tous:

> Postumius in ore erat; eum laudibus ad caelum ferebant, deuotioni P. Deci consulis, aliis claris facinoribus aequabant: emersisse ciuitatem ex obnoxia pace illius consilio et opera; ipsum se cruciatibus et hostium irae offerre piaculaque pro populo Romano dare.[14]

Postumius se sacrifie à la raison d'Etat bien plus que ne l'imaginent encore ses concitoyens: en effet, une fois amené aux Samnites pour leur être livré, il argue de sa nouvelle citoyenneté samnite, en tant que prisonnier, pour offrir un motif de *bellum iustum* à Rome en frappant un de ses gardes romains. C'était pousser très loin la logique de la raison d'Etat, puisque non seulement le consul permettait à sa patrie de ne pas se sentir engagée par un traité de paix désavantageux, mais au péril de sa vie il lui offrit même de quoi reprendre la guerre dans la meilleure des positions selon la logique romaine, celle de l'agressé. Dans des années très difficiles pour Rome, qui ne luttait pas seulement pour le contrôle de la Campanie mais quasiment pour son salut contre les Samnites alliés à d'autres peuples présents en Italie et désireux de prendre une revanche sur les Romains, la raison d'Etat est là sans qu'il soit besoin de la nommer. Cet Etat militaire, constamment en guerre depuis 509 avant Jésus-Christ ou presque, attend et obtient de ses citoyens un sacrifice personnel s'il en est besoin pour assurer le salut de la *res publica*.

On achèvera cette série d'exemples avec une famille célèbre pour avoir pratiqué régulièrement le rite de la *deuotio*:[15] le premier fut le consul de 340 Publius Decius Mus au cours de la bataille de Véséris lors du soulèvement de la Ligue Latine. Tite-Live décrit longuement ce rite et souligne à la fin que l'on aurait pu envoyer à la mort n'importe quel citoyen romain inscrit dans la légion, afin de mieux mettre en valeur le sacrifice de Decius.[16] Son fils se dévoua à son tour à la bataille de

12 Cf Florus 2, 2 et Appien *Pun* 5 par exemple.

13 Cette *deditio* a été très bien analysée par Michel 1980: 679sqq.

14 Liv 9, 10, 3-4: voir le commentaire de Oakley 2005: 131-132 qui souligne que ce thème était annoncé déjà plus tôt, cf Liv 9, 4, 10.

15 Sur ce rite et ses implications religieuses, voir Dumézil 1952.

16 Liv 8, 9.

Sentinum[17] en 295, et son petit-fils fit de même à la bataille d'Asculum contre Pyrrhus en 279. On retrouve bien ici la survie de l'Etat assurée par le sacrifice d'individus, mais est-ce vraiment de la raison d'Etat au sens où nous l'entendons usuellement? N'est-ce pas plutôt un sens très élevé de l'intérêt de l'Etat qui amena des généraux à se sacrifier librement? Le Sénat n'exigeait pas d'eux expressément qu'ils meurent dans les conditions décrites plus haut: on peut évidemment penser qu'il devait y avoir une pression sociale énorme, mais il ne s'agit pas ici des innocents sacrifiés de façon injuste au nom de l'intérêt public.

En revanche, la destruction de Corinthe en 146 avant JC (tout comme la destruction de Carthage ou le martyre de Numance en Espagne) pourrait apparaître comme une application de la raison d'Etat puisque les Romains voulurent faire un exemple afin de marquer les esprits et de dissuader les peuples vaincus de se soulever à nouveau. La Grèce s'étant soulevée contre la domination romaine, Corinthe fut détruite et ses habitants massacrés ou vendus comme esclaves. Cicéron critique les Romains, et le cas l'embarrasse assez pour qu'il préfère glisser dessus en évoquant plus longuement un exemple grec:

> Sed utilitatis specie in re publica saepissime peccatur, ut in Corinthi disturbatione nostri; durius etiam Athenienses qui sciuerunt ut Aeginetis qui classe ualebant, pollices praeciderentur.[18]

Le commentaire de Cicéron est sans appel: il condamne ces mesures extrêmes comme de la cruauté totalement inutile avec les termes *species* – il s'agit d'une illusion d'intérêt pour l'Etat – et *peccare* surtout qui signale une erreur. C'est que dans un ouvrage qui tient beaucoup du testament philosophique – mais surtout politique comme très souvent chez Cicéron – l'opposition de principe entre l'utile et le beau, entre ce qui rend service et ce qui est conforme à la justice, qui est à la base de la raison d'Etat en fait, est clairement refusée.[19] Le beau (autrement dit, ce qui est juste) et l'utile sont inséparables, et ne forment qu'un du point de vue de Cicéron.[20]

Cette réflexion est – à notre sens – révélatrice de l'absence de consensus au sein des élites romaines à propos de ces mesures exceptionnelles: plus que de raison d'Etat il faudrait souvent parler de raison d'un individu qui réussit à convaincre ses pairs au Sénat, l'exemple le plus célèbre étant Caton l'Ancien dont l'obstination l'emporta, alors que Scipion Nasica était beaucoup moins convaincu de la nécessité de détruire l'ancienne rivale Carthage.[21] Plus largement, elle montre aussi les limites de l'utilisation possible de la raison d'Etat dans un régime qui n'est pas dirigé par une

17 Cf Liv 10, 27-29, 20: voir Oakley 2005: 275-277 (analyse générale soulignant les différences dans la présentation de la *devotio* du père et celle du fils) et 313-329 (commentaire du texte).

18 Cicéron *Off* 3, 11, 46.

19 Cf Cicéron *Off* 1, 159 et 3, 20-35 en particulier.

20 Sur la fausse opposition entre beau et utile, cf *Off* 1, 9-10: c'est néanmoins l'enjeu du livre 3 du *De Officiis*, surtout, cf *Off* 3, 7sqq. Voir Nemo 1998: 340.

21 Sur l'opposition entre Caton le Censeur et Scipion Nasica au sujet de Carthage, voir Gelzer 1963: 39-72.

seule personne – tout entourée qu'elle soit de ses conseillers et ministres – pouvant imposer sa vision de l'intérêt public à tous.

Qu'en était-il en cas de troubles politiques intérieurs? Il faut se pencher sur l'utilisation du senatusconsulte *ultimum*[22] adopté en 121. La formulation de cette proclamation de l'état d'urgence, pour résumer l'enjeu, est connue grâce à Cicéron qui la cite dans la *Première Catilinaire*: "Decreuit quondam senatus uti L. Opimius consul uideret ne quid res publica detrimenti caperet."[23]

Le principe était que les institutions régulières seraient suspendues le temps de mettre fin au désordre, et surtout cette mesure exceptionnelle permettait d'exécuter des individus jugés responsables d'une agitation dangereuse pour l'Etat, ainsi que leurs complices, sans avoir à passer par l'assemblée populaire et sans tenir compte de leur rang ou de leur magistrature. Cicéron décrit très bien cela, toujours dans la *Première Catilinaire*:

> nox nulla intercessit; interfectus est propter quasdam seditionum suspiciones C. Gracchus, clarissimo patre, auo, maioribus, occisus est cum liberis M. Fuluius consularis. Simili senatus consulto C. Mario et L. Valerio consulibus est permissa res publica; num unum diem postea L. Saturninum tribunum pl. et C. Seruilium praetorem mors ac rei publicae poena remorata est? [24]

Le consul de 63 souligne ici premièrement la rapidité d'action – on ne remit pas au lendemain – puis la sévérité, puisqu'il n'y avait que des soupçons de sédition, et enfin la place au sein de l'Etat tenue par les victimes de la répression: Caius Gracchus avait été tribun de la plèbe, Fulvius était ancien consul.

Cicéron rappelle également que le senatusconsulte *ultimum* fut plusieurs fois utilisé contre des tribuns de la plèbe jugés séditieux, et donc dangereux pour l'Etat, puisque le Sénat proclama l'état d'urgence à nouveau contre Saturninus et son complice Servilius coupables d'avoir organisé l'assassinat en plein Forum d'un concurrent et responsables des troubles qui suivirent.[25] Cela se passa en 100 avant JC sous le sixième consulat de Marius qui fut bien obligé de sévir contre ceux qui étaient alors ses alliés politiques, la raison d'Etat l'emportant sur ses propres intérêts.

On objectera que le senatusconsulte *ultimum* n'était qu'une arme forgée par une partie de l'Etat – les sénateurs – contre une autre partie de l'Etat – les tribuns de la plèbe – et que l'on ne saurait parler de raison d'Etat dans ces conditions. C'est tout l'enjeu du *Pro Rabirio*, un discours prononcé par Cicéron en 63 pour la défense d'un chevalier romain âgé, Rabirius, accusé d'avoir participé à l'exécution du tribun Saturninus ... ou plutôt à son meurtre, aurait dit son accusateur, Labienus, qui faisait

22 Voir Von Ungern-Sternberg 1970: 63sqq et Plaumann 1913: 321-386.

23 Cicéron *Cat* 1, 4.

24 *Ibid*.

25 Voir Doblhofer 1990 sur les *Populares* des années 111-99 et plus particulièrement at 73-88 sur Saturninus dont une biographie a été écrite par Cavaggioni 1998: 144-157 sur le senatus consulte *ultimum* utilisé contre ce tribun.

partie des *Populares*: ces enfants spirituels des Gracques contestaient la validité du senatusconsulte *ultimum* qui selon eux bridait la population, portait atteinte à la *sacrosanctitas* des représentants de la plèbe et remettait en cause la souveraineté populaire. La polémique est résumée par Cicéron au début de son discours:

> Non enim C. Rabirium culpa delicti, non inuidia uitae, Quirites, non denique ueteres iustae grauesque inimicitiae ciuium in discrimen capitis uocauerunt, sed ut illud summum auxilium maiestatis atque imperi quod nobis a maioribus est traditum de re publica tolleretur, ut nihil posthac auctoritas senatus, nihil consulare imperium, nihil consensio bonorum contra pestem ac perniciem ciuitatis ualeret, idcirco in his rebus euertendis unius hominis senectus, infirmitas solitudoque temptata est.[26]

On notera d'abord que le senatusconsulte *ultimum* est décrit dès le début comme un moyen de porter secours à l'Etat. Surtout Cicéron insiste sur toutes les forces en présence qui sont protégées par le senatusconsulte *ultimum*:

> Quam ob rem si est boni consulis, cum cuncta auxilia rei publicae labefactari conuellique uideat, ferre opem patriae, succurrere saluti fortunisque communibus, implorare ciuium fidem, suam salutem posteriorem salute communi ducere, est etiam bonorum et fortium ciuium, quales uos omnibus rei publicae temporibus exstitistis, intercludere omnis seditionum uias, munire praesidia rei publicae, summum in consulibus imperium, summum in senatu consilium putare; ea qui secutus sit, laude potius et honore quam poena et supplicio dignum iudicare.[27]

Certes il y a les sénateurs, mais il y a également l'autorité des consuls, mais il y a tous les *boni* – les bons citoyens – d'accord pour lutter contre un fléau qui menace l'Etat. Ensuite, les consuls chargés d'appliquer l'état d'urgence doivent mobiliser la population en étant prêts à se sacrifier eux-mêmes pour le salut de l'Etat: si ce n'est pas de la raison d'Etat … Enfin, tous les citoyens dignes de ce nom doivent prêter main-forte contre les fauteurs de trouble. Cicéron décrit longuement la répression mise en place contre Saturninus et Servilius afin de mettre en lumière ce consensus: ce fut bien une large majorité de la population qui aida à l'application du senatusconsulte *ultimum*, donc ce fut bien l'Etat qui se défendit contre quelques citoyens pernicieux.

Si l'on ne regarde que le résultat, l'application du senatusconsulte *ultimum* tient de la mise en place d'une raison d'Etat: on sacrifie des citoyens, des particuliers, au bien commun – l'*utilitas publica*, en les exécutant afin d'assurer le bon fonctionnement des affaires publiques. Mais du point de vue de Cicéron,[28] du point de vue de ceux qui votèrent cette proclamation de l'état d'urgence, c'était une autre affaire, parce qu'ils considéraient que les victimes de la répression étaient bien coupables: il n'y

26 Cic *Rab* 1, 2.
27 Cic *Rab* 1, 3.
28 Cicéron condamne dans le *De Officiis* toute gouvernance s'appuyant sur la cruauté et la crainte, autrement dit une certaine idée de l'utile pour le gouvernant aux dépens de ses administrés, cf *Off* 2, 23sqq.

avait point d'injustice dans ces conditions, point de sacrifice d'innocents au nom de la survie de l'Etat, mais une nécessaire réaction contre des citoyens séditieux.

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Cette présentation du senatusconsulte *ultimum* ne correspond pas à la façon dont Tacite lui-même voyait les choses … Il décrit la fin de la République comme un temps où l'Etat tangue, déchiré par les divisions et les ambitions:

> Vetus ac iam pridem insita mortalibus potentiae cupido cum imperii magnitudine adoleuit erupitque; nam rebus modicis aequalitas facile habebatur. sed ubi subacto orbe et aemulis urbibus regibusue excisis securas opes concupiscere uacuum fuit, prima inter patres plebemque certamina exarsere. Modo turbulenti tribuni, modo consules praeualidi, et in urbe ac foro temptamenta ciuilium bellorum; mox e plebe infima C. Marius et nobilium saeuissimus L. Sulla uictam armis libertatem in dominationem uerterunt.[29]

Cette présentation doit beaucoup à Salluste, Tacite s'étant ici inspiré de la digression sur les guerres civiles présente dans la *Guerre de Jugurtha.*[30] Elle est assez surprenante à première vue de la part d'un haut fonctionnaire avec un sens de l'Etat très élevé qui écrit plus d'un siècle après. Sans revenir sur les détails de la carrière de l'historien et les querelles d'érudits sur le fait de savoir si son père était le fameux procurateur de Belgique Cornelius Tacitus ou non,[31] il convient de retenir que par son parcours et ses relations il appartenait au milieu des grands commis de l'Etat: son épouse était la fille d'Agricola, consul en 77 et gouverneur de Bretagne. Pline le Jeune son ami était également haut fonctionnaire. Les deux ont connu plusieurs crises politiques de la fin du règne de Néron jusqu'à l'avènement de Trajan et les deux ont choisi de faire fonctionner le système, même sous un mauvais Prince. Tacite critique d'ailleurs une opposition stérile qui aboutit à l'élimination d'hommes de valeur qui auraient pu servir l'Etat.[32]

De ce fait, la raison d'Etat est bien présente chez Tacite, mais il faut préciser que l'Etat est une entité indépendante de la succession des Princes et donc des empereurs eux-mêmes. C'est d'ailleurs une première clé pour comprendre la critique des dernières années de la République quand des individus essaient de s'emparer du pouvoir en nuisant au bon fonctionnement des institutions. La raison d'Etat que l'on peut repérer dans les *Histoires* en particulier, du fait de la dissociation forcée de l'Etat et des Princes trop éphémères pour ne faire qu'un avec lui, est un concept de haut fonctionnaire: elle aurait pu intéresser un Richelieu, grand serviteur de l'Etat … Elle

29 Tacite *Hist* 2, 38: voir le commentaire de Syme 1982: 142-144. L'expression *e plebe infima* est assez curieuse pour Marius, mais c'est probablement pour créer un contraste avec Sylla et grossir même artificiellement les différences sociales qui existaient entre les deux ennemis.

30 Cf Salluste *BJ* 41-42. Il est à relever que la narration de la *Conjuration de Catilina* ne laisse pas deviner d'aversion particulière au senatusconsulte *ultimum*, cf *CC* 29, 3 alors que César y était nettement moins favorable.

31 Nous renvoyons à Syme 1958: 59-75.

32 Cf Tacite *Agric* 42, 6 et *Ann* 16, 16, 1.

a un côté très moderne qui n'est pas sans faire songer à la façon dont la Quatrième République a pu exister en France pendant douze ans malgré l'instabilité chronique des gouvernements, parce que la machine fonctionnait grâce à l'administration.

Le premier exemple de présence de la raison d'Etat, le plus évident d'ailleurs, c'est le choix d'un Prince. Cela se voit dans le discours de Galba à Pison:[33] dans ce passage qui doit sans doute beaucoup à une adoption beaucoup plus récente du point de vue de Tacite – celle de Trajan par Nerva en 98 – le vieil empereur énumère les raisons de son choix. Il doit à l'Etat un successeur désigné jeune pour éviter l'instabilité: il va le choisir dans une des familles les plus nobles de Rome, ce qui assure là encore une continuité. Et il s'attache à un homme qui aime sa patrie, en plus d'avoir les qualités d'un bon dirigeant. La raison d'Etat est là quand Galba fait le procès des mauvais conseillers qui préfèrent abonder dans le sens du Prince plutôt que lui dire ce qu'il doit faire: "Nam suadere principi quod oporteat multi laboris, adsentatio erga quemcumque principem sine adfectu peragitur."[34]

Elle est là aussi dans le choix du meilleur, ce qui passe par le sacrifice de ses propres enfants qui n'ont pas les mêmes qualités. Ce problème du choix d'un Prince permettant la survie de l'Etat est en réalité présent dans l'ensemble des deux premiers livres des *Histoires*, quand les hauts-fonctionnaires se désespèrent de devoir choisir entre un Othon et un Vitellius, jugés l'un comme l'autre pernicieux et dangereux pour Rome. Et finalement l'on pourrait voir en la candidature de Vespasien une réaction dictée par la raison d'Etat à l'œuvre afin de garantir à Rome un Prince capable d'assurer le bon fonctionnement des institutions:[35] quoi que l'on puisse penser de Mucien, et Tacite ne l'embellit certes pas, le discours qu'il tient à Vespasien pour le convaincre d'être candidat à l'Empire est marqué du sceau de la raison d'Etat. Il s'agit d'être utile à l'Etat – *rei publicae utile* –, de le sauver même, comme le montre l'adjectif *salutare* également employé par Mucien qui précise juste après sa pensée:

> non aduersus diui Augusti acerrimam mentem nec aduersus cautissimam Tiberii senectutem, ne contra Gai quidem aut Claudii uel Neronis fundatam longo imperio domum exurgimus; cessisti etiam Galbae imaginibus: torpere ultra et polluendam perdendamque rem publicam relinquere sopor et ignauia uideretur …[36]

Vespasien se doit à l'Etat menacé de ruine par Vitellius; ce n'est qu'ensuite que Mucien use d'un autre argument, celui de la sécurité personnelle de Vespasien. On pourrait arguer qu'il s'agit de rhétorique fallacieuse pour pousser Vespasien au crime: on peut cependant considérer que Mucien, lui aussi haut-fonctionnaire, commence par des motifs nobles, les plus susceptibles de toucher un autre haut-fonctionnaire comme Vespasien.[37]

33 Tacite *Hist* 1, 15-16.
34 Tacite *Hist* 1, 15, 4.
35 Sur les concurrents de la guerre civile de 69-70, voir Morgan 2006, et plus ancien Wellesley 2000.
36 *Hist* 2, 76.
37 Sur Vespasien et Mucien, voir Levick 1999 (chapitre 4 en particulier).

Paradoxalement, c'est un des deux mauvais Princes cités comme repoussoirs par Mucien qui agit selon la raison d'Etat au crépuscule de sa vie, en décidant de se suicider plutôt que de relancer la guerre contre Vitellius en causant la ruine de milliers d'hommes et la destruction de l'Italie: "an ego tantum Romanae pubis, tot egregios exercitus sterni rursus et rei publicae eripi patiar? eat hic mecum animus, tamquam perituri pro me fueritis, set este superstites." [38]

Othon emploie également l'expression *remisisse rei publicae nouissimum casum*: il a épargné à l'Etat un nouveau malheur alors que ses soldats étaient prêts à livrer bataille.[39] Et il va veiller à lui en éviter d'autres par ses dernières mesures, en particulier la destruction de lettres compromettantes qui auraient été l'occasion de représailles: "libellos epistulasque studio erga se aut in Vitellium contumeliis insignis abolet; pecunias distribuit parce nec ut periturus."[40] Libre à Mucien, comme à Tacite d'ailleurs, de considérer que ce ne fut pas la raison d'Etat mais le désespoir et l'incapacité à supporter l'attente qui amenèrent Othon à arrêter les combats. Libre aux lecteurs des *Histoires* de songer que le souci bien humain de la gloire et de la postérité fut aussi un motif important du choix d'Othon, d'autant qu'il gomme soigneusement sa propre responsabilité dans le meurtre de Galba pour accuser Vitellius d'être responsable de la guerre civile. Il n'empêche que la raison d'Etat est bien présente, en filigrane, en référence.

On donnera un dernier exemple qui concerne cette fois la gestion de l'Empire: c'est le discours de Petilius Cerialis, au livre IV des *Histoires*, lorsqu'il justifie l'impérialisme romain devant les Trévires et les Lingons.[41] Un premier point essentiel est la conscience d'une continuité de l'Etat: "octingentorum annorum fortuna disciplinaque compages haec coaluit, quae conuelli sine exitio conuellentium non potest …"[42] Le deuxième point à retenir est l'application de la raison d'Etat à la gestion de l'Empire, et sa description très réaliste. Il faut des armées pour garantir la paix; ces armées doivent être payées; donc il faut des impôts:

> Nos, quamquam totiens lacessiti, iure uictoriae id solum uobis addidimus, quo pacem tueremur; nam neque quies gentium sine armis neque arma sine stipendiis neque stipendia sine tributis haberi queunt: cetera in communi sita sunt.[43]

Les Gaulois doivent supporter ces tributs pour permettre à l'Etat de fonctionner, à leur avantage puisqu'il leur offre la paix et une intégration, certes progressive mais réelle. C'est la raison d'Etat qui veut que les Romains garantissent leurs frontières en intervenant en Gaule.

38 *Hist* 2, 47.
39 Sur ce passage voir le commentaire de Ash 2007: 203-207.
40 *Hist* 2, 48.
41 Voir le commentaire de Chilver & Townend 1985: 78-80 et Ternes 1990: 112-122.
42 *Hist* 4, 74.
43 *Ibid.*

Le troisième point retiendra particulièrement notre attention: c'est la distinction nette de l'Etat et des Princes.[44] *Vita breuis*, *res publica longa* ... Cerialis montre clairement que l'institution fonctionne grâce à des rouages anciens et solides, que les empereurs soient bons ou mauvais puisque de toute façon leur règne a une fin:

> et laudatorum principum usus ex aequo quamuis procul agentibus: saeui proximis ingruunt. quo modo sterilitatem aut nimios imbris et cetera naturae mala, ita luxum uel auaritiam dominantium tolerate. uitia erunt, donec homines, sed neque haec continua et meliorum interuentu pensantur. [45]

Un Tacite, un Agricola, un Pline auraient pu tenir semblables propos: on a ici une conception de la raison d'Etat vue par un haut fonctionnaire soucieux du bon fonctionnement de la machine et qui y participe de son mieux. De ce point de vue, Tacite n'est pas l'inventeur de la raison d'Etat, mais il est sans doute son meilleur metteur en scène par son talent d'historien et d'écrivain plus largement.

* * *

Néanmoins, il y a une autre façon de voir qui perce dans la description du règne des Julio-Claudiens, dans les *Annales*, en particulier. Lors de ces années de mise en place d'un régime monarchique, la personne du Prince était indissociable de l'Etat sur la lancée de ce qu'Auguste put représenter aux yeux de ses contemporains. Certes, en théorie il y avait distinction par exemple entre la fortune de l'Empereur et le Trésor public: Auguste insiste sur ce qui provient de son patrimoine personnel avec les expressions *ex patrimonio meo,*[46] *pecunia mea,*[47] *ex horreo et patrimonio meo,*[48] afin de mettre en valeur sa générosité envers ses concitoyens. Mais les excès d'un Caligula[49] montrent bien les limites du système.

Néron s'efforça pendant un certain temps de marquer la différence, à la manière d'un Auguste, entre son propre patrimoine et le trésor public: il souligne qu'il aide l'Etat de soixante millions de sesterces par an,[50] il aide avec ses propres revenus – *sua pecunia*[51] – les victimes de l'incendie de Rome. Néanmoins, ses folles dépenses en constructions et les récompenses versées à ses favoris l'amenèrent lui aussi à dilapider patrimoine des Césars et ressources de l'Etat ensemble: il eut donc recours aux mêmes expédients que Caligula à la fin de son règne.[52]

44 Sur cette question voir Fritz 1957: 79-81: l'auteur souligne, entre autres, que les provinces se trouvèrent mieux sous les "mauvais" empereurs que sous le règne des "bons" Princes.
45 *Ibid*.
46 Cf Auguste *RG* 15, 1.
47 *Idem* 17, 1: "Quater pecunia mea aerarium iuui ..."
48 *Idem* 18.
49 Cf Suétone *Cal* 37-42.
50 Cf Tacite *Ann* 15, 18, 3.
51 *Idem* 15, 43, 2.
52 Cf Suétone *Ner* 30-32.

De même, il arriva que la justice fut rendue dans la *domus* du Prince sur le Palatin, sous Claude:[53] la séparation entre justice d'Etat et arbitraire de l'Empereur était alors bien théorique … On retiendra comme principal exemple l'affaire Valerius Asiaticus, victime de la jalousie de l'impératrice Messaline, et "jugé" dans les appartements de l'empereur en lieu et place du Sénat: "Neque data senatus copia; intra cubiculum auditur, Messalina coram et Suillio corruptionem militum, quos pecunia et stupro in omne flagitium obstrictos arguebat."[54] Les scandales s'étant accumulés, une des premières mesures promises par Néron au début de son règne fut d'éviter le mélange des genres: *discretam domum et rem publicam* …[55] Le même Claude contribua certainement à une plus grande efficacité de la machine en créant en quelque sorte des ministères, mais comme il mit à leur tête ses propres affranchis, l'Etat risquait bien d'apparaître comme placé entre les mains du Prince. On peut ajouter à cela que même dans les provinces le Prince avait ses hommes, le procurateur en particulier, pour surveiller les hommes du Sénat, ce qui aboutissait en quelque sorte à deux administrations parallèles et concurrentes, sachant que le dernier mot revenait à l'Empereur.

Par conséquent, il est vrai qu'avec le régime mis en place sous les Julio-Claudiens l'on trouve dans le récit de Tacite une raison d'Etat qui est en fait la raison du Prince, on aurait envie de dire le *conatus regnandi* d'un individu. Elle se caractérise par plusieurs traits: l'élimination des concurrents, réels et potentiels, le secret et l'opacité, la concentration du pouvoir sur la personne du Prince et son entourage avec de ce fait le difficile problème des favoris. La confusion opérée entre intérêt du Prince – la survie de son pouvoir – et intérêt de l'Etat est particulièrement redoutable pour le bon fonctionnement des affaires publiques, surtout à Rome.

Toutes ces facettes de la raison d'Etat à l'oeuvre dans les *Annales*'s s'entremêlent en effet quand il s'agit en particulier de l'exécution des *capaces imperii*, pour reprendre la formule de Tacite,[56] ces hommes qui se posaient en rivaux ou pouvaient apparaître comme tels, c'est-à-dire des sénateurs membres de grandes familles et ou avec une carrière prestigieuse. C'est sans doute le processus d'élimination des concurrents de Néron qui est le plus visible et le plus connu. Les premiers dangers immédiats pour le règne de Néron – à savoir les deux enfants de Claude – furent écartés par Agrippine: Octavie fut mariée à Néron tandis que Britannicus était marginalisé. Les meurtres commencèrent avec l'empoisonnement de Claude qui menaçait de remettre en cause les plans de la mère de Néron, puis la mort de Britannicus. On passa à une autre échelle quelques années plus tard, lorsque précisément le *quinquennium*, ces cinq premières années de règne jugées bénéfiques, prit fin.

Commença alors une période où Néron considéra comme raison d'Etat ce qui correspondait à ses propres vœux et inquiétudes. Pour reprendre rapidement des

53 Sur ce Prince voir Levick 1993. Sur sa façon de rendre la justice, voir Tuori 2016: 156.

54 Tacite *Ann* 11, 2, 1.

55 Tacite *Ann* 13, 4, 2.

56 Il l'emploie pour Galba en premier, cf *Hist* 1, 49, 4.

événements bien connus de tous, Néron voulait répudier Octavie pour épouser Poppée, mais Agrippine s'y opposait. Assurément les sentiments des uns et des autres jouèrent un rôle, mais du point de vue de Néron il y avait probablement d'un côté le passé – Octavie qui était indispensable pour lui donner de la légitimité au moment de son accession au trône – et de l'autre l'avenir représenté par Poppée. Or un Prince a besoin d'un héritier et Octavie ne semblait pas pouvoir le lui donner. Donc la raison d'Etat selon Néron consistait à choisir l'avenir, en considérant qu'il était déjà Empereur depuis plusieurs années et qu'il n'avait plus besoin de sa première femme.

Agrippine fut éliminée, d'une part parce qu'elle s'opposait au projet d'union avec Poppée,[57] d'autre part parce qu'elle représentait désormais un facteur de troubles incessants. En effet, mécontente de son fils elle menaçait de lui susciter des concurrents depuis un moment:[58] Britannicus ou Cornelius Sulla ou Plautus … Or elle avait une certaine popularité, en particulier auprès de l'armée et des prétoriens, en tant que fille de Germanicus. Il est difficile de comprendre pourquoi Sénèque et Burrus se sont rangés du côté de Néron:

> Igitur longum utriusque silentium, ne inriti dissuaderent, an eo descensum credebant ut, nisi praeueniretur Agrippina, pereundum Neroni esset. Post Seneca hactenus promptius <ut> respiceret Burrum ac sciscitaretur an militi imperanda caedes esset.[59]

Les deux hommes de confiance du Prince, choisis par Agrippine, semblent hésiter devant l'annonce de l'échec d'une première tentative de matricide; puis Sénèque tire la conclusion qui semble s'imposer. Il est devenu trop dangereux de laisser Agrippine en vie, puisqu'elle sait que son fils a tenté de l'éliminer et qu'il s'agira désormais d'une lutte à mort entre eux deux. On retrouve ici le secret, le conseil des proches du pouvoir et la décision de procéder à un acte que la morale réprouve. Quant à Octavie, en tant que fille de Claude elle représentait, qu'elle le veuille ou non, une source d'insécurité pour le pouvoir de Néron: celui-ci se décida à la faire exécuter après des manifestations populaires en faveur de la jeune femme.[60]

A partir du moment où Néron était arrivé au trône dans des circonstances qui n'étaient pas celles – indiscutables – de la succession d'un fils légitime à son père, il ne pouvait qu'être pris dans un cercle vicieux d'éliminations successives, d'autant que la politique de mariages organisés par Auguste multipliait le nombre de *capaces imperii* qui avaient autant de titres à prétendre au trône que le rejeton d'Agrippine.[61] L'objectif se mêle au subjectif, les motifs réels de crainte aux frayeurs du Prince: ce

57 Cf Tacite *Ann* 14, 1, 1-2.

58 Après la mort de Britannicus, Agrippine avait mis en avant Rubellius Plautus qui descendait lui aussi d'Auguste: cf *Ann* 13, 19-20. Agrippine fut menacée (*idem* 13, 21), tandis que Rubellius Plautus fut éliminé peu après.

59 *Ann* 14, 7, 3.

60 Cf *Ann* 14, 61-64.

61 Voir Syme: 1989 (on pourra en particulier se référer aux arbres généalogiques qui se trouvent à la fin de cet ouvrage).

que l'on constate, c'est que Tacite était sans doute bien conscient de cette situation, mais il a complètement masqué cette complexité dynastique pour présenter Néron comme un monstre.[62]

Néanmoins, les six premiers livres des *Annales* semblent bien offrir le plus de matière à réflexion sur la raison d'Etat, avec la figure de Tibère. Son règne fut long, qui dura vingt-trois ans, et s'acheva par une mort dans le calme; ce fut une période sans guerre ruineuse ou calamiteuse, parce que ce Prince privilégia la diplomatie. Et de ce fait, les caisses de l'Etat étaient bien remplies à sa mort. Tout cela fut obtenu par une certaine politique et par la conduite d'un homme à la tête de l'Etat. La qualité principale reconnue à Tibère par les penseurs politiques fut sa capacité de dissimulation: c'est en effet une des clés de la raison d'Etat. De fait Tacite le décrit comme renfermé et enclin à cacher les mauvaises nouvelles.[63] Surtout il demeure mystérieux sur ses propres intentions et ne laisse pas deviner aisément ce qu'il va faire, d'autant qu'il n'hésite pas à utiliser des leurres comme ces préparatifs faits au moment de la sédition en Germanie pour faire croire qu'il allait s'y rendre afin de ramener le calme.[64]

On pourrait, néanmoins, considérer que Tibère était surtout quelqu'un qui n'aimait pas s'exprimer. Le véritable théoricien de la raison d'Etat est Sallustius Crispus qui énonce ses règles au début des *Annales*, lorsqu'il fallut gérer l'exécution du jeune Agrippa Postumus:[65]

> quod postquam Sallustius Crispus particeps secretorum (is ad tribunum miserat codicillos) comperit, metuens ne reus subderetur, iuxta periculoso ficta seu uera promeret, monuit Liuiam ne arcana domus, ne consilia amicorum, ministeria militum uulgarentur, neue Tiberius uim principatus resolueret cuncta ad senatum uocando: eam condicionem esse imperandi, ut non aliter ratio constet quam si uni reddatur.[66]

L'assassinat du petit-fils d'Auguste, qu'il ait été commandé par celui-ci dans son testament ou fomenté par Livie et Tibère, n'allait pas manquer d'être critiqué: Tibère choisit donc de se décharger de toute responsabilité en annonçant que la chose serait discutée au Sénat. Crispus rappelle alors le Prince à l'ordre par l'intermédiaire de Livie: certaines affaires demandent le secret et ne doivent être sues que par l'Empereur. En réalité, Sallustius Crispus cherche surtout à se protéger: on voit ici, en plus du culte du secret qui permet d'éliminer discrètement des concurrents, l'importance des entourages qui sont là pour conseiller le Prince et le protéger, mais ont également à cœur leurs propres intérêts, souvent. Tibère connut ainsi une crise importante avec

62 Il est de ce fait assez paradoxal de voir Tacite utilisé pour trouver des recettes de politique au service de la raison d'Etat.

63 Cf *Ann* 1, 24.

64 Cf *Ann* 1, 47.

65 Sur cet épisode, voir l'analyse de Fritz: 1957 at 81-83: il conclut que l'exécution fut bien ordonnée par Auguste lui-même, ce qui nous semble le plus probable.

66 *Ann* 1, 6.

la conjuration de Séjan, son trop ambitieux préfet du prétoire qui se voyait bien lui succéder, mais il sut s'en débarrasser à temps au moyen d'une répression féroce aux dépens de nombreux innocents comme les propres enfants de Séjan.[67]

Celui-ci avait intrigué pendant des années[68] à la cour en séduisant d'abord la bru de Tibère pour la convaincre d'empoisonner Drusus, son mari et le fils du Prince. Puis, une fois ce premier héritier naturel mort, il avait sévi au détriment de la famille de Germanicus: sa veuve Agrippine et leurs nombreux enfants. Tous les garçons furent victimes de ses intrigues, à l'exception de Caligula, puisqu'ils représentaient une alternative. Mais les amis et soutiens d'Agrippine ne furent pas plus épargnés: Séjan lança contre eux des accusateurs, afin d'isoler et d'affaiblir le parti adverse. On a donc la description d'une cour en proie à la division du fait de la question lancinante de la succession du Prince, compliquée par les choix d'Auguste qui avait imposé à Tibère d'adopter son neveu Germanicus alors qu'il avait un fils.

Comment ce processus d'élimination fut-il mis en place? Tibère avait remis d'actualité en 21 la *lex de maiestate*[69] qui permit d'abattre un bon nombre de personnes selon les intrigues du moment. Ce fut l'arme de la raison d'Etat: cette loi, qui datait des temps républicains, permettait à l'origine de punir les trahisons contre la patrie, mais aussi à l'occasion des affronts faits au peuple romain. On pensera à la célèbre vestale Claudia trouvant qu'il y avait décidément trop de monde sur le Forum pour circuler tranquillement et souhaitant à haute voix une défaite navale de plus avec beaucoup de morts – c'était l'époque des Guerres Puniques – pour que la foule soit moins importante.

Si Auguste avait évité de s'en servir, Tibère la remit en vigueur à son propre bénéfice: ce n'était plus la *maiestas* du peuple romain qui était en jeu, mais celle du Prince. Et le champ d'application devint infini ou presque: à côté des tentatives de complot, la *lex de maiestate* pouvait toucher des personnes qui avaient simplement émis des regrets de voir Agrippine maltraitée, des personnes qui auraient porté atteinte à la dignité du Prince à leur domicile en ne montrant pas assez de respect pour une statue ou un portrait sur une bague. Cette loi encourageait le développement de la délation: il pouvait y avoir des motifs personnels, mais certains n'eurent aucun scrupule à servir de vecteurs des mauvaises intentions de Tibère (ou de Séjan quand il était en grâce). La *maiestas* du Prince permit ainsi de se débarrasser de beaucoup de gens de manière très commode grâce à un concept flou.

Conclusion

Nous avons pu constater que la raison d'Etat, loin d'être un anachronisme, existait déjà dans la Rome antique: c'est l'*utilitas publica*, ce qui rend service à l'Etat aux

67 Cf *Ann* 6, 5, 9, 1.
68 Voir Hennig 1975.
69 Voir la synthèse de Bauman 1967.

dépens parfois des particuliers. Les historiens romains ont été particulièrement attentifs à ce concept, qu'il s'agisse de Tite-Live ou de Tacite, sans oublier Salluste, parce qu'un de leurs objectifs était d'offrir à leurs lecteurs des leçons pour une bonne gestion de l'Etat et de l'*imperium Romanum*. *Historia magistra* … Et parce que l'histoire à Rome n'est pas seulement enseignement, mais également divertissement, en puisant à d'autres genres littéraires, en s'inspirant d'autres procédés stylistiques, les historiens romains et peut-être en particulier Tacite ont su marquer les esprits par leur peinture saisissante du fonctionnement d'un Etat. Belle leçon qui nous est parvenue à travers les siècles …

BIBLIOGRAPHY

Ash, R (2007) *Tacitus. Histories* Book II (Cambridge)

Bauman, R (1967) *The Crimen Maiestatis in the Roman Republic and Augustan Principate* (Johannesburg)

Bellen, H (1982) "Antike Staatsräson. Die Hinrichtung der 400 Sklaven des römischen Stadtpräfekten L. Pedanius Secundus im Jahre 61 n. Chr." *Gymnasium* 89: 449-467

Bonnet, S (2003) "Botero machiavélien ou l'invention de la raison d'Etat" *Les études Philosophiques* 3: 315-329

Bradley, KR (1987) *Slaves and Masters in the Roman Empire. A Study in Social Control* (Oxford)

Brélaz, C (2005) *La sécurité publique en Asie Mineure sous le Principat (I – III s. ap. J.C.). Institutions municipales et institutions impériales dans l'Orient romain* (Bâle)

Cavaggioni, F (1998) *L. Apuleio Saturnino tribunus plebis seditiosus* (Venezia)

Chilver, GEF & Townend, GB (1985) *A Historical Commentary on Tacitus' Histories IV and V* (Oxford)

Doblhofer, G (1990) *Die Popularen der Jahre 111-99 vor Christus* (Wien-Köln)

Dumézil, G (1952) "La bataille de Sentinum. Remarques sur la fabrication de l'histoire romaine" *Annales* 7: 145-154

Fritz, K von (1957) "Tacitus, Agricola, Domitian and the problem of the Principate" *Classical Philology* 52: 73-97

Gelzer, M (1963) "Nasicas Widerspruch gegen die Zerstörung Karthagos" *Kleine Schriften* 2 (Wiesbaden): 39-72

Gendre, M & Loutsch, C (2001) "C. Duilius et M. Atilius Regulus" in Coudry, M & Späth, T (eds) *L'invention des grands hommes de la Rome antique* (Paris): 131-172

Hennig, D (1975) *L. Aelius Seianus. Untersuchungen zur Regierung des Tiberius* (München)

Levick, B (1993) *Claudius* (Yale)

Levick, B (1999) *Vespasian* (London)

Liebs, D (2010) *Hofjuristen der römischen Kaiser bis Justinian* (München)

Lintott, A (1999) *Violence in Republican Rome* (Oxford)

Meinecke, F (1998) *Machiavellism* (New Brunswick)

Michel, JH (1980) "L'extradition du général en droit romain" *Latomus* 39: 675-693

Mix, ER (1970) *Marcus Atilius Regulus: Exemplum Historicum* (The Hague & Paris)

Morgan, G (2006) *69 A.D. The Year of Four Emperors* (Oxford)

Nemo, P (1998) *Histoire des idées politiques dans l'Antiquité et au Moyen-Âge* (Paris)

Nippel, W (1995) *Public Order in Ancient Rome* (Cambridge)

Nörr, D (1983) "C. Cassius Longinus: Der Jurist als Rhetor (Bemerkungen zu Tacitus, *Ann.* 14.42-45)" in Heinen, H (ed) *Althistorische Studien. Festschrift H. Bengtson* (Wiesbaden): 187-222

Oakley, SP (2005) *A Commentary on Livy.* Books VI-X (Oxford)

Plaumann, G (1913) "Das sogenannte Senatusconsultum ultimum, die Quasidiktatur der späteren Republik" *Klio* 13: 321-386

Syme, R (1958) *Tacitus* (Oxford)

Syme, R (1982) *Salluste* (Besançon)

Syme, R (1989) *The Augustan Aristocracy* (Oxford)

Ternes, CM (1990) "Le discours de Cerialis aux Trévires et aux Lingons (Tac., *Hist.* 4, 73sq): une charte de la romanisation?" *REL* 68: 112-122

Tuori, K (2016) *The Emperor of Law. The Emergence of Roman Imperial Adjudication* (Oxford)

Ungern-Sternberg, J von (1970) *Untersuchungen zum spätrepublikanischen Notstandsrecht. Senatus consultum ultimum und hostis-Erklärung* (München)

Wellesley, K (2000) *The Year of the Four Emperors* (London & New York)

THE HISTORICAL DEVELOPMENT OF DIAMOND MINING LEGISLATION IN GRIQUALAND WEST DURING THE PERIOD 1871 TO 1880

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ABSTRACT

In 1871 the diamond fields where the first known diamonds in South Africa were discovered were proclaimed as a British territory named Griqualand West. In 1880 Griqualand West was annexed as part of the Cape Colony. During the period 1871 to 1880, Griqualand West was under the control of three different administrations, each of which enacted different diamond mining legislation. This article provides a historical overview of the diamond mining legislation that was enacted in Griqualand West from 1871 to 1880 in order to determine the factors which influenced the development of diamond mining legislation in Griqualand West.

Keywords: Diamond mining legislation; Griqualand West; mining; prospecting; diamonds; land tenure

1 Introduction

The discovery of diamonds in South Africa played an important part in the development of the country's economy. The Eureka diamond, which is acknowledged to be the

* Member of the Pretoria Bar. The article is based on a LLD thesis completed at the North-West University in 2017 with the title "The historical development of the right to mine diamonds in South Africa".

Fundamina
Volume 24 | Number 1 | 2018
pp 18-56

DOI: 10.17159/2411-7870/2018/v24n1a2
Print ISSN 1021-545X/ Online ISSN 2411-7870

first diamond discovered in South Africa, was discovered in 1866 in the district of Hopetown, an area which was then regarded as "no-man's land". It was, following the discovery of diamonds, simply referred to as the diamond fields[1] and in 1871 it was proclaimed as British territory.

The period after the proclamation of Griqualand West as a British territory in 1871 may – from a diamond mining perspective – be divided into three periods. First, the period between 1871 and 1872 during which Griqualand West was under the control of Sir Barkly as Governor, and administered by three Commissioners. Second, the period from 1873 until 1879 when Griqualand West was designated a province and became a British Crown Colony,[2] and, third, the period after the annexation of Griqualand West as part of the Cape Colony in 1880. During each of these periods, different legislative measures were adopted to regulate the search for diamonds and the working of claims in Griqualand West. In this article, the historical development of the diamond mining legislation that was enacted in Griqualand West from 1871 until the annexation thereof as part of the Cape Colony in 1880 is analysed.

2 First period: The three Commissioners during 1871 and 1872

After the proclamation of Griqualand West as a British territory, Sir Barkly governed Griqualand West from Cape Town, the capital of the Cape Colony.[3] In 1871 Griqualand West was divided into three magisterial districts, namely Klipdrift, Pniel and Griqua Town.[4] Sir Barkly appointed three Commissioners to administer Griqualand West on his behalf, one for each of the three districts.[5]

During the two years that Sir Barkly governed Griqualand West through the three Commissioners, approximately seventy-four proclamations were passed. Three of these proclamations were important from a diamond mining perspective. In the

1 Herbert 1972: 11; Boyle 1873: 84; Roberts 1984: 5; Beet & Terpend 1917: 15-18; Williams 1905: 115; McNish 1968: 15-17; Davenport 2013: 40; Worger 1987: 9; Marquard 1955: 178; *Minister of Mineral Resources of the Republic of South Africa v Sishen Iron Ore Company (Pty) Ltd* 2013 (4) SA 461 (SCA) par 3; Simons 2004: 10-11; Rotberg 2002: 57; Roberts 1972: 4; Doughty 1963: 202; Machens 2009: 139-142; Hornsby 1874: 5; Millin 1933: 10.

2 During this period, Griqualand West was under the control of Lieutenant-General Southey, who was dismissed in 1875 and replaced by Major William Owen in 1875 as Administrator. See Buchanan 1882: par 6.

3 Sir Barkly issued seven proclamations in respect of Griqualand West on 27 Oct 1871. In Griqualand West Procl 68 of 27 Oct 1871, he proclaimed that the laws and "usages" of the Cape Colony were deemed to be the laws of Griqualand West insofar as the laws were not inapplicable. In Griqualand West Procl 70 of 1871, provision was made for a High Court of Griqualand West pending the passing of a law to provide for the annexation of Griqualand West as part of the Cape Colony.

4 Griqualand West Procl 69 of 27 Oct 1871.

5 Griqualand West Procl 73 of 27 Oct 1871; Buchanan 1882: par 5.

first proclamation, namely the Griqualand West Proclamation 71 of 27 October 1871 (hereafter the 1871 GW Diggings Proclamation), provision was made for rules and regulations under which the search for diamonds or digging of claims in Griqualand West had to be carried out.[6] In the second proclamation, the Griqualand West Proclamation 72 of 1871, which was also passed on 27 October 1871, provision was made for the acknowledgement of existing private rights or titles to possess movable or immovable property which had been *bona fide* acquired by the inhabitants of Griqualand West. This proclamation became known as the "Quieting Proclamation" (hereafter the 1871 GW Quieting Proclamation). And in the third proclamation, the Griqualand West Proclamation 59 of 7 November 1872 (hereafter the 1872 GW Prospecting Proclamation) provision was made for regulations for the payment of licences for prospecting on private property.

Each of these three proclamations impacted on the development of the right to mine diamonds in Griqualand West and they are discussed in the following subsections.

2 1 The 1871 Griqualand West Diggings Proclamation

The 1871 GW Diggings Proclamation was adopted to regulate the working of claims to extract diamonds once a diamond field had been proclaimed. Its purpose was thus to regulate the working of claims after the diamonds had already been discovered and a diamond field proclaimed. The prospecting or searching for diamonds was not regulated under the 1871 GW Diggings Proclamation. The 1871 GW Diggings Proclamation referred to the "searching" for diamonds in the context of the working or digging of claims in proclaimed diamond fields.

2 1 1 The working of claims

Each diamond field proclaimed under the 1871 GW Diggings Proclamation was divided into different claims.[7] Every person who wanted to work a claim had to obtain a digging licence.

There was no statutory reservation of the rights to diamonds in favour of the British Crown or the Government of the Cape Colony during the period that

6 Buchanan 1882: pars 5-6, states that initially no *Government Gazette* existed in Griqualand West. The early proclamations seemed to have been promulgated by the Commissioners themselves reading them out in the presence of the diggers at the various diamond fields.

7 Section 19 of the 1871 GW Diggings Proclamation provided that the size of each claim was thirty feet by thirty feet or nine hundred square feet. In terms of s 5 of the 1871 GW Diggings Proclamation an Inspector was appointed for each diamond field with duties and powers as set out in the 1871 GW Diggings Proclamation. The Inspector of each proclaimed diamond field had to mark out, with pegs, the boundaries of the different claims in the diamond fields. In terms of ss 2-5 of the 1871 GW Diggings Proclamation the Inspector was obliged to keep a register of claims within the relevant diamond field and to receive licence money or royalty or rent payable for the right to search for or to dig diamonds within the relevant diamond field.

Griqualand West was administered by the three Commissioners. The question as to who was entitled to work claims (where diamonds had already been discovered) depended on the specific form of land tenure.

Three types of land tenure were acknowledged in the 1871 GW Diggings Proclamation. These three forms were, first, Crown land; second, private land and the title of which was subject to the reservation of rights to diamonds, presumably in favour of the British Crown (hereafter in this article referred to as reserved private land);[8] and third, private land without any such reservation in the title deed of the land (hereafter in this article referred to as unreserved private land). The 1871 GW Diggings Proclamation did not provide definitions for these different types of land tenure.

In the case of the discovery of diamonds on Crown land or reserved private land, the High Commissioner was entitled to proclaim, by public advertisement, a diamond field on the Crown land or reserved private land. In the case of the proclamation of a diamond field on reserved private land, the consent of the relevant landowner was not required for the proclamation of a diamond field, although certain measures were adopted in an attempt to accommodate the landowner.[9] In the case of Crown land and reserved private land, the Crown could, by granting digging licences to members of the public, determine and regulate who was entitled to dig for diamonds.

In the case of the discovery of diamonds on unreserved private land, the consent of the landowner was required before a diamond field could be proclaimed.[10] Section 29 of the 1871 GW Diggings Proclamation provided that a digging situated on unreserved private land was deemed to be a public diamond field, which could be proclaimed as such, provided firstly, that the landowner consented to the establishment of diamond diggings on his property and, secondly, that the landowner granted at least twenty-four claim licences to work claims on his land, or he must have granted licences to search for diamonds on his land on a total surface of at least 20 000 square feet.[11]

Every claimholder had to pay a royalty or rent. In the case of Crown land and reserved private land the sum of licence monies, royalties or rent that the holder of a digging licence had to pay, was prescribed.[12] In the case of unreserved private land,

8 Section 23 of the 1871 GW Diggings Proclamation states as follows: "The private property of any person, the title to which lands (*sic*) is or shall be subject in the original grant thereof to a reservation of the right to precious stones or minerals." It is not the purpose of this article to analyse or address the concept of "land tenure" or its origin. In this article the term "land tenure" is used with reference to land rights.

9 Sections 1 and 23 of the 1871 GW Diggings Proclamation provided that a diamond field could be proclaimed in respect of existing diggings and new diggings.

10 *Idem* at s 29.

11 *Ibid*.

12 Section 20 of the 1871 GW Diggings Proclamation provided that with regard to claims that were worked by no more than three people, an amount of five shillings per month was payable. Where a claim was worked by not more than six persons, an amount of ten shillings per month was payable. Thereafter, for every additional person employed by the claimholder, an amount of two shillings per month was payable.

the landowner had to determine the licence money, rent or royalty payable for each claim. The Civil Commissioner had to collect the monthly payments to be made by the diggers in respect of diamond fields proclaimed on unreserved private land and account to the relevant landholder, withholding one-tenth of the money recovered and any costs incurred for the establishment and maintenance of the land on which the diamond field was situated.[13] The diggers at each digging could establish a Diggers' Committee which could adapt rules or by-laws which had to be adopted at a public meeting called by the Inspector. The rules or by-laws, including those rules and by-laws that had previously been adopted in respect of existing diggings, had to be sent to the Civil Commissioner for approval.[14] There was no provision in the 1871 GW Diggings Proclamation prescribing the number of claims that each claimholder could hold.[15]

Claimholders could transfer their claims provided that the Inspector had registered the transfer of the claims and that all licence money, royalty or rent and registration fees due and payable had been paid in respect of the relevant claim.[16] The so-called "jumping" system that previously applied at the river diggings was continued. This system provided that diggers had to work their claims continuously, which assisted in the uniform working of a pit.[17] If a person failed *bona fide* to work a claim for eight days, his claim was forfeited.[18]

13 Section 29 of the 1871 GW Diggings Proclamation. Later, the maximum amount which a landowner could charge in terms of the 1872 GW Prospecting Proclamation was fixed at one pound per month.

14 Section 14 of the 1871 GW Diggings Proclamation. Rules or by-laws that were in conflict with substantial justice and reason or with any of the provisions in the 1871 GW Diggings Proclamation could – in terms of s 15 of the 1871 GW Diggings Proclamation – not be approved. The interests of landowners of reserved private land were, in terms of s 23 of the 1871 GW Diggings Proclamation, protected in that no rules or by-laws passed at any public meeting, which limited the amount of compensation payable to the landowner, were valid unless the relevant landowner consented thereto. Landowners of unreserved land were similarly protected in that s 29 of the 1871 GW Diggings Proclamation provided that no rules or by-laws that were passed at a public meeting, affecting or interfering with the landowner's property rights or defining the compensation to be paid were binding on any landowner without his consent.

15 According to Worger 1987: 16-17, the diggers could only hold two claims pursuant to the 1871 GW Mining Proclamation. See, also, Davenport 2009: 52. No support for these statements could be found in the 1871 GW Diggings Proclamation.

16 Sections 7 and 8 of the 1871 GW Diggings Proclamation. The Inspector was required to register every purchase or transfer of every claim in respect of the relevant diamond field. Every vendor or purchaser had to pay a registration fee of five shillings upon the registration of each purchase.

17 See Turrell 1987: 34-35.

18 Section 16 of the 1871 GW Diggings Proclamation. Section 16 of the 1871 GW Diggings Proclamation was later suspended. According to Davenport 2009: 52, the 1871 GW Diggings Proclamation prevented the monopolisation of the diamond industry through the continued application of the "jumping system".

2 1 2 The interests of the landowner

Although a diamond field could be proclaimed on reserved private land without the consent of the landowner, certain measures were included in the 1871 GW Diggings Proclamation to protect the interests of the landowner. The High Commissioner first had to attempt to reach an agreement with the landowner of the reserved private land on the terms and conditions on which diamond diggings on the reserved private land could be worked or the terms on which diggers could search for diamonds on the reserved private land. If they could not reach an agreement, the High Commissioner could simply enter the reserved private land or cause such land to be entered in order to take possession of the mines and the diamonds therein on behalf of the British Crown, provided that notice of the entry was given to the landowner.[19] The landowner was entitled to reasonable compensation for all damage caused to the surface and soil of the land as a result of the diamond digging, mining and the searching for diamonds on his land. The amount that was payable for any damage to the surface and soil of the reserved private land had to be agreed on between the landowner and the High Commissioner within a period of three months.[20] The landowner could also, instead of accepting compensation for damages, agree to sell his property to the High Commissioner.[21]

2 2 The 1871 GW Quieting Proclamation

Although the 1871 GW Quieting Proclamation did not specifically refer to diamonds, it impacted on the searching for diamonds and the working of diamond diggings in Griqualand West.[22] In the 1871 GW Quieting Proclamation Sir Barkly declared that existing private rights or titles to possess any movable or immovable property which had been *bona fide* acquired by inhabitants of Griqualand West under the laws of the State and Government under which they were previously living *de facto,* would not be invalidated or prejudicially affected.[23]

19 See *Union Government (Minister of Mines) v Thompson* 1919 AD 404 at 421.

20 Section 26 of the 1871 GW Diggings Proclamation provided that if they could not reach an agreement within three months, the dispute had to be referred to arbitration to determine the amount payable.

21 If the parties could not agree on the purchase price within three months, the dispute was in terms of s 28 of the 1871 GW Diggings Proclamation also referred to arbitration. The value of the diamonds existing on or under the land could in terms of ss 27 and 28 of the 1871 GW Diggings Proclamation not be taken into account in determining the compensation payable for the purchase price of the land.

22 See *Webb v Giddy* 1878 3 App Cas 908.

23 Dale 1979: 353. It was recorded in the preamble of the 1871 GW Quieting Proclamation that the inhabitants of the Griqualand territory may have had doubts in particular regarding the status of land that they occupied, the sovereignty over which there had previously been a dispute between the Griqua Chief, Waterboer and the Governments of the Orange Free State and the *Zuid-Afrikaansche Republiek*. The Appellate Division held in *Botha v Minister of Lands* 1965 (1) SA 728 (A) that the object of the 1871 GW Quieting Proclamation, was "to quiet the apprehension of inhabitants of the new British Territory with regard to the existing titles to their land, 'especially those occupying lands' which had been affected by the Keate Award".

All persons that claimed any title or right of possession or any other right in land within Griqualand West, were requested to submit a written statement to the Civil Commissioner of the district in which such land was situated, setting out details of the claim and the nature of the rights claimed. The details of the rights and titles had to be recorded publicly.[24] The 1871 GW Quieting Proclamation further provided that the existing titles of private persons would be duly respected and considered to be valid if they would have been valid under the laws of the *de facto* Government under which the private persons holding them were previously living.[25]

The real impact of the 1871 GW Quieting Proclamation only became clear a few years later. A special Land Court was established in Griqualand West through the Griqualand West Ordinance 3 of 1875 dated 9 September 1875[26] to adjudicate on land claims in Griqualand West, which then had the status of a province. Judgments or decrees of the Land Court were provisional for a period of three months to provide aggrieved parties with an opportunity to appeal to the High Court of Griqualand West. After the lapsing of the period of three months, application could be made to the Land Court to obtain a final judgment if an appeal had not been noted.[27] Any person who obtained a final order would be entitled to demand and receive a title from the Governor with regard to the land that formed the object of the judgment in accordance with the terms of the judgment.[28]

24 Section 1 of the 1871 GW Quieting Proclamation.

25 See s 2 of the 1871 GW Quieting Proclamation. The confirmation or the cancellation of titles claimed by grant or other document from the Government of the Orange Free State or the Government of the *Zuid-Afrikaansche Republiek* in Griqualand West after 1 Jan 1870 was specifically reserved. Section 3 of the 1871 GW Quieting Proclamation provided that each case would be investigated by Sir Barkly and that the relevant title deed would either be cancelled or confirmed or confirmed subject to certain conditions.

26 The title of which was "Ord to Establish a Court to Adjudicate on Claims to Land in the Province of Griqualand West" (hereafter the 1875 GW Land Court Ord). See, also, Buchanan 1882: par 25.

27 This requirement was dispensed with in 1876 with the adoption of the Amendment of Land Court Ord 13 of 1876 of 13 Oct 1876 which provided that a provisional judgment granted by the Land Court became final upon the expiration of three months in every case where an appeal was not noted within the three-month period.

28 See s 10 of the 1875 GW Land Court Ord. In *London and SA Exploration Co Ltd v Kimberley Divisional Council* 1884 3 HCG 125, the landowners of the farm Alexanderfontein, situated in the Kimberley district, instituted an action against the Kimberley Divisional Council for trespassing on their farm. The plaintiffs argued that they owned the farm Alexanderfontein by virtue of a grant from the Government of the Orange Free State. The Kimberley Divisional Council erected a toll-house and other buildings on the farm and pleaded that with effect from the date of proclamation of the 1871 GW Proclamation on 27 Oct 1871 (providing for the proclamation of Griqualand West as a British Territory) the farm Alexanderfontein vested in the British Crown. The farm Alexanderfontein had originally been granted to its first owners by the Government of the Orange Free State in 1862 on perpetual *quitrent*, subject to certain conditions which were registered against the title of the land, including the following: "That all roads passing over this land, or which may hereafter be made upon lawful authority, shall remain free and unencumbered … that the said land shall be further subject to all such duties and regulations as already are or may in future be established concerning lands granted upon the like condition." The farm Alexanderfontein was included in the area that was proclaimed as a British territory known as Griqualand West in 1871. In 1876, the London and South African Exploration Company Limited's title was confirmed by the Land Court of Griqualand West. No new title was issued to the owners of the farm. The High Court of Griqualand West held that it was clear from the 1871 GW Quieting Proclamation that the effect of 1871 GW Proclamation was not to transfer the *dominium* in the farm Alexanderfontein to

In *Carter v Van Niekerk and Union Government (Minister of Lands)*[29] the landowner of a farm riparian to the Vaal River instituted an action against Van Niekerk, a digger (operating under a digger licence) who had dug for and extracted diamonds from the half of the river bed adjoining the owner's farm, which the owner argued formed part of his land. In 1863 the then President of the Orange Free State granted the farm in question to Carter's predecessors in title. The predecessors in title applied to the Land Court in terms of the 1875 GW Land Court Ordinance and obtained judgment on 19 June 1876 in which it was confirmed that the law of the Orange Free State applied to the land.[30] The previous owners who obtained judgment in the Land Court did nothing further with regard to the judgment. Approximately four years later on 15 July 1880 the Governor, without waiting for a demand or request from the landowners, proceeded to issue and register a title in respect of the land. The following condition was included in the title deed of 15 July 1880:

> That the issue of this title without any express reservation to the Government of its rights to all precious stones, gold or silver found on or under the surface of the land shall in no degree prejudice the position of the said Government in regard to the same.

Chief Justice Maasdorp remarked that the title was issued in the form of a new and original grant in perpetual *quitrent* without the reservation to the landowners of their rights under their "Free State title" or under the judgment of the Land Court and with the addition of the clause regarding the reservation of precious stones which did not form part of their original title or the judgment.[31] The landowner argued that as the owner of the land he was also the owner of all diamonds, gold and silver on

the British Crown, but to acknowledge and confirm the rights of persons that claimed any title or right of possession in movable or immovable property. The Court held further that the farm was held under a title from the Government of the Orange Free State, without the conditions in favour of the British Crown reserved in Colonial *quitrent* titles which existed under Sir John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure 6 of 1813 (hereafter the Cradock Proclamation). The Kimberley Divisional Council therefore had no right to enter the plaintiff's land and to erect the toll-house and buildings thereon. The Court concluded that the plaintiff was protected by the Orange Free State title against the invasions of their proprietary rights which rights had to be protected as provided for in the 1871 GW Quieting Proclamation. On appeal, the Kimberley Divisional Council argued that the Cradock Proclamation became applicable to the farm Alexanderfontein by operation of law when Griqualand West was annexed to the Cape Colony in 1880. In *Kimberley Divisional Council v London and SA Exploration Co Ltd* 1885-1906 2 Buch AC 84, Chief Justice De Villiers dismissed the appeal and held that s 4 of the Cradock Proclamation did not apply to *quitrent* land in the Cape Colony unless the grant of the land contained such a reservation.

29 1910-1917 GWLD 445.

30 Chief Justice Maasdorp recorded at 459 that "[t]he reasons which influenced the Judge of the Land Court in giving his judgment in favour of the claimants of farms under Free State titles were put in the course of the evidence of the witness … and are to the following effect … I must hold, under Ord 72, 1871, that the rights of the Free State claimants to the farms Scholtzfontein, Waterbak, and other farms must be judged of as if those farms lay in the Free State and were subject to Free State law".

31 *Carter v Van Niekerk* at 460.

and under the surface of the land in question.[32] The defendants' defence was that the clause that had been inserted into the title deed constituted an express reservation of the rights to all diamonds found on the relevant farm in favour of the Government.[33] Chief Justice Maasdorp, however, held that the Government could not reserve to itself what it had not already possessed. He held that in the case of an original *quitrent* grant of unalienated Crown land, the Government was entitled to reserve to itself as much of the ownership of such Crown land and of the rights attaching to the land as it wanted to, but it could not reserve to itself what belonged to the owner of the land that had already been alienated.[34] Prior to the issue of the grant of 15 July 1880, the owner's predecessors in title were entitled to receive a grant confirming the perpetual *quitrent* from the Orange Free State with all the rights attaching thereto – the Government of the Orange Free State would not have been entitled to claim the ownership in such precious stones and the Government of Griqualand West similarly had no such right.[35]

Van Niekerk and the Union Government appealed to the Appellate Division,[36] but Innes CJ dismissed the appeal and stated that the farm never belonged to the Government of Griqualand West. The land in question was private property at the date of annexation of Griqualand West as part of the Cape Colony and it remained private property thereafter.[37] The Appellate Division referred to the decision in *Webb v Giddy* in which it was decided that a similar grant made by the Government of the Orange Free State conveyed not mere *emphyteutic* rights, but also the ownership of the soil, including the diamonds and minerals which it contained. The Appellate Division held that the grant initiated by the Governor in 1880 had to be interpreted as conferring the same mineral rights as the Orange Free State title for which it was substituted. Regarding the term "perpetual *quitrent*" Innes CJ stated as follows:[38]

> That was a term in general use in South Africa to describe a tenure, the incidents of which might greatly vary. Upon the common law meaning it is not necessary to dilate; but that meaning had been fundamentally modified in different localities. In the Cape it had become a form of ownership governed first by Sir John Cradock's Proclamation (1813), and thereafter by the provisions of Act 14 of 1878. In the Free State it had evolved into a tenure which, as decided by the Privy Council, gave the minerals to the owner. By Griqualand West Ordinance 3 of 1874 certain statutory incidents were assigned to it, which included a reservation of precious stones, gold and silver to the Crown. But that measure regulated the disposal of unalienated or waste lands; it was not intended to apply and could not apply to grants issued in terms of the quieting proclamation in substitution for Free State titles.

32 *Ibid*. This is in accordance with the *cuius est solum* principle.

33 *Idem* at 466.

34 *Ibid*.

35 *Carter v Van Niekerk* 467.

36 *Van Niekerk and Union Government (Minister of Lands) v Carter* 1917 AD 359.

37 *Idem* at 372.

38 *Idem* at 379.

The Appellate Division also referred to the position with regard to other farms along the Vaal River which had been originally held under Free State title and stated that the Cape Government was for a long time willing to rectify titles which purported to reserve mineral rights to the Crown. After the annexation of the Griqualand West as part of the Cape Colony, the Cape Government, in an attempt to rectify the position, began to issue "clean titles" which clearly gave the minerals in the land to the landowner in exchange for titles that either reserved them to the Crown or purported to be without prejudice to any rights the Crown possessed. This practice was, however, discontinued after the Government had issued seventy-five "clean titles".[39]

2 3 The 1872 GW Prospecting Proclamation

Prior to the issue of the 1872 GW Prospecting Proclamation there was no statutory provision in Griqualand West regulating the prospecting or searching for diamonds in respect of land that had not already been proclaimed as a diamond field. Before the commencement of the 1872 GW Prospecting Proclamation, a person who wanted to prospect on land that belonged to another person where no diamond field had been proclaimed, had to require the consent of the landowner.

The position was amended with the proclamation of the 1872 GW Prospecting Proclamation, but only in respect of private property.[40] The purpose of the 1872 GW Prospecting Proclamation was twofold. It firstly provided regulations for the payment of licences for prospecting on private property for precious stones, gold or silver. Secondly, it determined the rate of digging licences on such parts of the private property that had not previously been proclaimed as a public diamond field. The term "private property" was not defined in the 1872 GW Prospecting Proclamation. There was no proviso that the term "private property" referred only to reserved private land.[41] The consequence was that unreserved private land[42] was included and regulated under the 1872 GW Prospecting Proclamation.[43]

39 A bill was introduced into the Cape Parliament by the Government to delete from the title deeds of all properties originally held under Free State title any conditions referring to the mineral rights of the Crown. The bill was never enacted and in *Van Niekerk and Union Government (Minister of Lands) v Carter* at 382, Innes CJ remarked as follows in regard to the failure to remove the conditions from the title deeds: "There are, it would seem, certain titles of the Free State farms still in existence which contain an express reservation of minerals in favour of the Crown. It is clear now that those minerals did not belong to the Crown, and that clean titles should have been issued in such cases. I venture to think that the fitting course for the Union Government to take is to divest itself of rights which it could only have reserved under a mistaken view of the law; and by legislation or otherwise to take steps to restore such rights to those entitled to them."

40 On 7 Nov 1872, two of the three Commissioners issued the 1872 GW Prospecting Proclamation.

41 Referred to in this article as private land, the title deed of which was subject to the reservation of the rights to diamonds in favour of the Crown.

42 Referred to in this article as privately owned land, the title of which did not contain a reservation of the right to diamonds in favour of the Crown or anyone else.

43 Section 8 of the 1872 GW Prospecting Proclamation.

With reference to its first objective, section 1 of the 1872 GW Prospecting Proclamation provided that the Civil Commissioner of any district within which private property was situated would be entitled to issue a prospecting licence, authorising the holder thereof to prospect for the period of one month on any part of the relevant private property that was not a proclaimed diamond field.[44]

There was no reference in the 1872 GW Prospecting Proclamation to the fact that any of the provisions of the 1871 GW Diggings Proclamation had been repealed. It is submitted that a person who wanted to prospect for diamonds on unreserved private land, would only have been entitled to obtain a prospecting licence regarding such land if it is with the consent of the landowner. It is not clear why a landowner of unreserved private land would have been obliged to allow the holder of a prospecting licence to prospect for diamonds on his land if the landowner could not be compelled to consent to the establishment of diggings on his land.[45]

In the case of reserved private land, the consent of the landowner was not required to obtain a prospecting licence and the landowner could not exclude prospectors from his land.[46]

2 3 1 Rights and obligations of the prospector

A digger who found diamonds, gold or silver while prospecting under a prospecting licence was obliged to report the finding to the Civil Commissioner of the district.[47] Diggers who found diamonds while working under a prospecting licence was entitled to the free grant of two claims of thirty square feet each at the place where the diamonds had been discovered.[48] The 1872 GW Prospecting Proclamation did not apply in respect of Crown land. Thus, a person who found diamonds on Crown land was not entitled to the rights of a discoverer as provided in section 6 of the 1872 GW Prospecting Proclamation. It is submitted that in the case of unreserved private land, the digger would only be entitled to be granted two claims if the landowner consented

44 The licence fees payable in respect of each prospecting licence were prescribed in s 2 of the 1872 GW Prospecting Proclamation. In the case of a party of not more than three persons, an amount of one pound sterling was payable for a monthly licence. In the case of a party of more than three and not more than ten persons, an amount of two pounds sterling was payable. In the case of a party of more than ten persons, an amount of four shillings was payable for every person above ten, in addition to the two pounds sterling.

45 This appears to be the correct interpretation: years later, with the issue of Griqualand West Procl 8 of 1880 dated 30 Sep 1880, it was noted in the prescribed form for a prospecting licence that the consent of the landowner of unreserved private land was required in order to prospect on unreserved private land.

46 *Union Government (Minister of Mines) v Thompson* at 421.

47 Section 3 of the 1872 GW Prospecting Proclamation. Failure to report a finding would upon conviction before a magistrate result in the forfeiture of the prospecting licence and to the payment of a fine not exceeding twenty pounds sterling and in the event of default of payment, to imprisonment with or without hard labour for any period not exceeding three months.

48 Section 6 of the 1872 GW Prospecting Proclamation. Previously at the river diggings, the Diggers Republic's Rules provided that the discoverer was entitled to be awarded four claims.

to the establishment of diamond diggings on his land under the 1871 GW Diggings Proclamation. The previous position that applied under the 1871 GW Diggings Proclamation in terms of which the landowner was entitled to determine the rate at which digging licences would be issued,[49] was amended with the proclamation of the 1872 GW Prospecting Proclamation. The maximum amount for digging licences as determined by the landowner of unreserved private land was fixed at one pound per month.[50] No provision was made for the renewal of prospecting licences granted in terms of the 1872 GW Prospecting Proclamation.

2 3 2 Interests of the landowner

Certain measures were adopted to protect the interests of landowners. An applicant for a prospecting licence was obliged to provide security for payment of twenty pounds sterling in the form agreed to by the Civil Commissioner in order to indemnify the landowner against any surface damage resulting from the prospecting operations.[51] The holder of the prospecting licence was also not entitled to search for diamonds within a distance of one hundred yards of any house or building that the landowner or occupier of the land used without the consent of such landowner or occupier.[52] Prospecting on any land under cultivation was also prohibited unless the landowner or occupier consented thereto.[53] These measures did not apply in the case of prospecting for diamonds on Crown land. There were also no similar restrictions in respect of the working of claims on proclaimed diamond fields.

2 3 3 Diamond fields on Vooruitzigt, Dutoitspan and Bultfontein

By the end of 1871, the diggings known as De Beers, Kimberley, Bultfontein and Dutoitspan were divided into approximately 3200 full claims and many of them were further subdivided.[54] They were situated on private land and there was no reservation of the rights to diamonds in favour of any Government or the Crown in the title deeds of the land on which the mines were situated.[55] On 17 November 1871, two of the local Commissioners issued three proclamations establishing diamond fields on the

49 Section 29 of the 1871 GW Diggings Proclamation.

50 Section 8 of the 1872 GW Prospecting Proclamation. The amounts payable to the landowner were also subject to the withholding of charges for the Government's expenses.

51 Section 5 of the 1872 GW Prospecting Proclamation.

52 Section 7 of the 1872 GW Prospecting Proclamation.

53 Section 7 of the 1872 GW Prospecting Proclamation. Prospecting without a prospecting licence was in terms of s 4 of the 1872 GW Prospecting Proclamation punishable by a fine not exceeding twenty pounds sterling and in the event of default of payment, to imprisonment with or without hard labour, for any period not exceeding one month.

54 Davenport 2009: 52, 55.

55 *Beaconsfield Municipality v London and SA Exploration Co Ltd* 1884 3 HCG 183; *London and SA Exploration Co v Bultfontein Mining Board* 1888-1889 6 SC 201 at 212.

farms Vooruitzigt,[56] Dutoitspan[57] and Bultfontein.[58] It was recorded in the preambles of all three proclamations that the titles of these three farms were not subject to the reservation of minerals and precious stones in favour of the Crown. Thus, for the purposes of this article, it was unreserved private land.[59]

3 Second period: Griqualand West designated as a Province (1873 to 1879)

The three Commissioners were not successful in governing Griqualand West. They were situated in the different districts of Klipdrift, Pniel and Griqua Town which made uniform government difficult. They often held different and conflicting views on matters and were faced with numerous challenges, at the centre of which were the technological and operational problems that the diggers faced and with which legislation did not keep up.[60]

Circumstances at the diggings in Griqualand West deteriorated. Allowing diggers to own individual claims, permitted the diggers to remove the soil within each claim at their own time, which often resulted in ground slides between adjoining claims since not all diggers worked their claims at the same rate.[61] It became evident that

56 Griqualand West Procl 30 of 17 Nov 1871. This proclamation was later repealed in terms of Griqualand West Ord 5 of 1874.

57 Griqualand West Procl 31 of 17 Nov 1871. This proclamation was later repealed in terms of Griqualand West Ord 5 of 1874.

58 Griqualand West Procl 32 of 17 Nov 1871. This proclamation was later repealed in terms of Griqualand West Ord 5 of 1874.

59 The appointed local Commissioners further issued proclamations under the 1871 GW Diggings Proclamation, in which they made provision for the establishment of diamond fields on a number of portions of Crown land. In Griqualand West Procl 33 of 1871 dated 28 Nov 1871, diamond fields were established on Crown lands at Pniel, Webster's *Kopje*, Cawoods' Hope and Blue Jacket in the District of Kimberley. On the same day, Griqualand West Procl 34 of 1871 was issued, establishing diamond fields on Crown lands at Hebron, Good Hope, Bad Hope, Gong Gong, Union *Kopje*, Keiskamma, Forlorn Hope, Esterhuizen's Rush, Winter's Rush and Delport's Hope in the Barkly District. Griqualand West Procl 35 of 8 Dec 1871 established diamond fields on Crown lands at Longland's Rush, in respect of the area between Winter's Rush and Delport's Hope in the Barkly District. Griqualand West Proc 39 of 1872 dated 10 Jan 1872 was issued to establish diamond fields on Crown land between Upper Klipdrift and Good Hope. Griqualand West Procl 53 of 4 Sep 1872 established a diamond field at Waldek's Plant.

60 Davenport 2009: 52. The Commissioners sometimes made irrational decisions. In Griqualand West Procl 47 of 23 Jul 1872 they proclaimed that all digging licences held by so-called natives and coloured people were ordered to be suspended and they imposed restrictions on the renewal of such licences. The proclamation was issued, following complaints of theft and serious riots. This proclamation was cancelled by Sir Barkly on 10 Aug 1872.

61 Turrell 1987: 11-12 describes the method of diamond digging in Griqualand West during those early years as follows: "[D]igging was conducted on a damaging, haphazard basis. Soil taken out of a claim was sorted on an adjacent one; water was struck after forty feet and so each hole was filled in and another one begun. Dutoitspan was so badly worked, wrote one official, 'that there are not ten full claims worked to a depth of forty feet, although it has been worked for eighteen months longer than Colesberg Kopje [Kimberley Mine] and there is not an average depth of ten

amalgamation of the claims was the solution, not only to prevent ground slides, but also to reduce the rising costs of diamond digging.[62] The "jumping" system which provided that claims of diggers who failed to work their claims continuously and *bona fide* for purposes of extracting diamonds could be "jumped" by other diggers, was regarded as the main opposition to the consolidation of the claims.[63]

The diggers at Griqualand West were furthermore concerned that the main focus of the Government of the Cape Colony was on the farming industry and that laws adapted for agriculture such as those of Cape Town and the rest of the Cape Colony, were not suitable for the mining community of Griqualand West. They desired a representative government situated in Griqualand West.[64]

On 30 November 1872 Sir Barkly cancelled the appointment of the three local Commissioners[65] and appointed Richard Southey as administrator with full authority to govern Griqualand West on his behalf.[66] Six months later, Sir Barkly declared that

feet.' Sorting inside the mine obstructed digging as debris mounds were left upon productive soil. In an attempt to encourage diggers to take soil out of the mines, a central road, running across the pits, was left intact in Bultfontein and Dutoitspan, while in Kimberley Mine a road system was adopted on a grand scale. Across the pit from north to south fourteen roads were laid. Each claim surrendered seven and a half feet along one side and backed with its adjacent claim made roads fifteen feet in width. The soil was hauled out of the claims in buckets, loaded on to waiting carts or wheel barrows on the roadways and then taken out of the pit to diggers' encampments for sorting. But the roadway system could not last. Diggers undermined the roadways in their search for diamonds and by April 1872 the system had developed into a death trap." See also Davenport 2009: 53. In regard to the duty of a claimholder to work his claim with reasonable diligence, see *Murtha v Von Beek* 1880-1884 1 Buch AC 121; *Reed v De Beers Consolidated Mines Limited* 9 1892 Juta SC 33. See, also, Dale 1979: 301, 334.

62 The price of diamonds also decreased as result of the large number of diamonds found, and consequently flooded the European market. See Worger 1987: 21; Davenport 2009: 52-54.

63 William Hall, who was regarded as a monopolist and who was the owner of the first steam engine on the diamond fields, stated the following in his written submission to the 1873 Diamond Fields Commission: "(T)he benefits to the community is the same whether the claims are owned by one man or a hundred. To restrain the investment of capital in the mine would be injurious to the present holders of ground, opposed to advancement and by adopting principles that are far behind the age and have always failed. It would also drive all our most intelligent and enterprising men from our midst and would be a permanent injury to a new state like this. By restricting what a man may acquire an end is put to all progress which is the very soul of a new country. If a man is only to hold two claims why not prevent him from holding more than two farms or two houses or two stores or two carts, in fact, if 'individual levelling' is going to be adopted we had better at once call ourselves 'Chartists' or 'Fenians' or 'Communists' or the latest improvement 'internationalists' and redivide the claims in Colesberg Kopje' [Kimberley Mine] every month." See Turrell 1987: 35.

64 It was still not an appropriate time for the Government of the Cape Colony to annex Griqualand West as part of the Cape Colony. A bill for the annexation of Griqualand West was passed on 18 Apr 1872 by the Government of the Cape Colony. The bill was withdrawn without putting it to the vote. This was because there was a dispute between the members of Parliament as to whether Griqualand West should be annexed as part of the Cape Colony. Some members of Parliament supported the Government of the Orange Free State's claim to Griqualand West and they were in favour of a united South Africa. They feared that the annexation of Griqualand West would result in hostility from the Government of the Orange Free State.

65 By Griqualand West Procl 75 of 30 Nov 1872.

66 By Griqualand West Procl 76 of 30 Nov 1872.

the territory of Griqualand West would be designated the Province of Griqualand West. He also proclaimed Richard Southey as the Lieutenant-General of Griqualand West.[67] In the first few months, following the appointment of Richard Southey first as administrator and thereafter as Lieutenant-General, he had to rule by proclamation since no constitution for Griqualand West had been drawn up.[68]

3 1 Suspension of the "jumping" system

Southey issued two of the very first proclamations dealing with the mining of diamonds immediately after his appointment as Administrator of Griqualand West. In the first Griqualand West Proclamation 2 of 31 January 1873, he suspended the operation of sections 11 and 16 of the 1871 GW Diggings Proclamation until 15 March 1873.[69] Roberts[70] states that, although the majority of the diggers supported the suspension of the "jumping" system, it was one of the very first indications of the direction in which Southey wanted the diamond diggings to move, namely to destroy the authority of the Diamond Diggers' Committees. Southey viewed the "jumping" system as part of the rules emanating from the Diggers' Committees which prevented capitalist enterprise.[71]

In the second Griqualand West Proclamation 5 of 26 February 1873, Southey appointed a Commission to report to him on the status of the diamond fields at Colesberg *Kopje*, De Beers, Dutoitspan and Bultfontein, together with the regulations under which the diamond fields were being worked. The Commission was also instructed to recommend future measures for their management.[72] In 1873,

67 By Griqualand West Procl 21 of 5 Jul 1873.

68 This was contrary to previous promises made by Sir Barkly to the diggers, that Griqualand West would have a representative Government. See Meredith 2007: 33, 41-42; Roberts 1984: 115-119.

69 Section 11 of the 1871 GW Diggings Proclamation provided that where a person became disentitled to a claim, the Inspector could grant the claim to any other person who applied for such claim, provided that the licence fee was paid. Section 16 of the 1871 GW Diggings Proclamation provided for the "jumping" system and stated that if the holder of a claim failed to *bona fide* work a claim for eight days, it was deemed that the holder was disentitled to the claim. Southey hereafter continued to issue proclamations providing for the suspension of ss 11 and 16 of the 1871 GW Diggings Proclamation until Jan 1874.

70 Roberts 1984: 113.

71 *Idem* 112-113 describes Southey's views as follows: "In his view the Diggers' Committees were both dangerous and subversive. He openly admitted to his 'object of curbing or getting rid of the Diggers Committees' and establishing the blow, Southey then announced his intention to set up a commission to 'determine more definitely what officers or bodies should be entrusted with the control of matters' on the diamond fields. Five prominent diggers, including leading members of the Diggers' Committees, were appointed to the commission. This was to be the first step towards establishing Mining Boards. Significantly the commission was headed by J.B. Currey." According to Roberts, Currey also disliked the Diggers Committees, he regarded them as a mob rule with their main purpose to destroy the privileges of the affluent miners. Currey was shortly thereafter appointed as Government Secretary to assist Lieutenant-General Southey.

72 Roberts 1984: 112-113.

the Commission concluded that the "jumping" system did not ensure or contribute to the uniform working of a pit. They did, however, realise that the "jumping" system should be retained in one form or another to avoid that a small number of diggers dominate the diamond diggings. The Commission recommended that the "jumping" system be amended to provide that the forfeited claims could only be auctioned after a notice of demand had been given.[73]

The diggers insisted that an election be held and that a representative government for Griqualand West be elected.[74] Contrary to the previous promises of Sir Barkly, namely that Griqualand West would have a representative government, the Legislative Council of the Province of Griqualand West comprised of eight members, of which only four members would be elected, two from the district of Kimberley and one each from the districts of Barkly and Hay. The Government of Griqualand West would nominate the remaining four members. Southey was left with a casting vote and had the power to veto legislation. The Legislative Council of Griqualand West met for the first time on 30 December 1873.[75]

The Province of Griqualand West passed its first ordinance, Griqualand West Ordinance 1 of 1874 on 30 January 1874, in which the recommendations of the Commission were adopted.[76] Griqualand West Ordinance 1 of 1874 provided for the suspension of section 11 of the 1871 GW Diggings Proclamation insofar as it provided that the Inspector of Claims was obliged to grant licences for forfeited claims or to put up such claims to public auction. It was stated in the preamble that Griqualand West Ordinance 1 of 1874 was passed, pending the passing of an ordinance for the better management of mines and diggings in Griqualand West.

73 Turrell 1987: 34-35.

74 The diggers insisted that an election be held and that a representative government for Griqualand West be elected. The British Secretary for the British Colonies, Lord Kimberley, insisted that before electoral divisions could be defined, the areas should receive decent and intelligible names. According to Roberts 1984: 115-119, Lord Kimberley – "declined to be in any way connected with such a vulgarism as New Rush and for Vooruitzigt … he could neither spell nor pronounce it. Klipdrift and Griquatown were not much better and he requested that English speaking names might be given to the Districts round the Mining Camps". Lord Kimberley's request was passed on to Southey, who handed it to Currey. Sir Barkly issued Griqualand West Procl 22 of 1873 dated 5 Jul 1873 to make provisions for the change of names and towns within Griqualand West. The proclamation was divided into three electoral divisions, Kimberley, Barkly and Hay. The name of the previous district of Pniel was changed to the district of Kimberley, in honour of Lord Kimberley. The encampment previously known as Colesberg Kopje or the New Rush, was called the town of Kimberley. The name of the previous district of Klipdrift was changed to the district of Barkly, in honour of the Governor Sir Barkly and it included the diggings along the Harts River and the Vaal River. The name of the town of Klipdrift was changed to Barkly. The name of the district of Griquatown was changed to the district of Hay, partly in memory of a Scottish town that Currey had known in his youth and partly in honour of the previous acting Governor of the Cape Colony. See Doughty 1963: 97.

75 Meredith 2007: 41-42.

76 Griqualand West Ord 1 of 1874 took effect on 9 May 1874.

Section 16 of the 1871 GW Diggings Proclamation which provided for the "jumping" system, was not suspended with the result that claims would have lapsed if the holder thereof ceased *bona fide* to work the claims for a period of eight days.[77]

3 2 Public diamond fields on Vooruitzigt, Dutoitspan and Bultfontein

Almost three years after the proclamation of diamond fields on the farms Vooruitzigt, Dutoitspan and Bultfontein, the Legislative Council of the Province of Griqualand West passed Griqualand West Ordinance 5 of 1874 on 11 March 1874 in order to make provision for the repeal of the three earlier Proclamations establishing diamond fields on the privately owned farms Vooruitzigt, Dutoitspan and Bultfontein. It was recorded in the preamble of Ordinance 5 of 1874 that doubts had arisen as to whether the three earlier Proclamations[78] had been duly and lawfully promulgated and further that the Government of the Griqualand West Province had been advised that the titles to the farms Vooruitzigt, Bultfontein and Dutoitspan were indeed subject to reservations of minerals and precious stones in favour of the Crown.[79] Two months later, seven areas situated within the District of Kimberley were proclaimed as public diamond fields by virtue of the Griqualand West Proclamation 6 of 4 May 1874. These areas included the farms Vooruitzigt, Dutoitspan and Bultfontein.[80] The effect

77 The Legislative Council of the Province of Griqualand West adopted Griqualand West Ord 3 of 1874 on 26 Feb 1874 to provide for the leasing of Crown land and for the purchase thereof (hereafter the 1874 GW Crown Land Ord). Sections 1-4 of the 1874 GW Crown Land Ord provided that the Governor of the Province of Griqualand West could – by public auction – let certain "waste" Crown Lands for a period not exceeding twenty-one years, subject to conditions imposed by the Governor and agreed to by the lessee and subject to the payment of an annual rental. Section 5 of the 1874 GW Crown Land Ord specifically reserved the rights to all minerals and precious stones found in the leased areas to the Crown. A lessee could furthermore in terms of s 6 of the 1874 GW Crown Land Ord, at any time during the duration of the lease, convert the leasehold to perpetual *quitrent* tenure, at such price as may be agreed to between the lessee and the Governor. The conversion of the leasehold to perpetual *quitrent*, was *inter alia* subject to the following conditions: Firstly, the purchaser, in addition to the payment of a purchase price, had to pay in perpetuity, an annual *quitrent* of two pounds sterling for every hundred pounds or fraction of hundred pounds, on the purchase price. Secondly, the purchaser was on payment of the purchase price entitled to require a grant of perpetual *quitrent* title to the land previously held by him under lease. The land held under perpetual *quitrent* title was also subject to the reservation of precious stones and of gold and silver found therein, in favour of the Crown.

78 Griqualand West Procl 30 of 17 Nov 1871, Griqualand West Procl 31 of 17 Nov 1871 and Griqualand West Procl 32 of 17 Nov 1871. See Cape of Good Hope *Report* 1882: par 32.

79 Section 2 of Griqualand West Ord 5 of 1874 provided that the Governor of the Griqualand West Province could, with the advice of the Executive Council, proclaim such areas throughout the province as may be necessary, to be public diamond fields in accordance with the 1871 GW Diggings Proclamation.

80 The first three areas were situated on the farm Vooruitzigt, the fourth and sixth on the farm Bultfontein, the fifth on the farm Dutoitspan. A seventh area was proclaimed on the farm Alexanderfontein.

of the latter proclamations was that the landowners of these farms were no longer entitled to receive any rental or royalties in terms of section 29 of the 1871 GW Diggings Proclamation.[81]

The proprietary status of the farms Vooruitzigt, Dutoitspan and Bultfontein later came under scrutiny in a number of cases before the High Court of Griqualand West.[82] In *Webb v Giddy* the agent (Webb) of the landowner of the farm Dutoitspan instituted action against the Government on 5 November 1875 for the payment of all licence monies, royalties or rents collected by the Government from 17 November 1871 in respect of the diggings situated on the farm Dutoitspan, and for an account of the amount which the Government retained to defray the public expenditure for the maintenance of order and good government at the farm Dutoitspan. The Government (represented by Giddy, one of the Commissioners appointed in respect of Griqualand West) pleaded that the farm Dutoitspan was held under perpetual *quitrent* and that it was therefore subject to a reservation of precious stones and minerals to the State as *dominus directus* of the soil and that all rights that formerly vested in the Government of the Orange Free State were vested in the British Crown. The Government further contended that all payments which had been made to the landowners in terms of section 29 of the 1871 GW Diggings Proclamation had been made in error. It was common cause that the Government of the Orange Free State had previously granted the farm Dutoitspan to its first owner and that the following condition was contained in the initial grant:

> That the said land will further be subject to all conditions and regulations as are already, or may in future, be fixed, referring to lands granted on the same conditions; and, lastly that the owner shall be bound to the prompt payment of a yearly quitrent of the sum of £1.10*s* sterling.

The Privy Council agreed with the judgment of the High Court of Griqualand West in which it was held that the landowner of the farm Dutoitspan was entitled to receive a portion of the licence fees as provided for in section 29 of the 1871 GW Diggings Proclamation. On 13 May 1874, the Legislative Council of the Province of Griqualand West adopted the Griqualand West Ordinance 10 of 1874 (hereafter

81 Griqualand West Ord 5 of 1874 was later disallowed by Queen Victoria of England in terms of Cape GN 35 of 5 Apr 1875. The legality of the mining areas that were constituted pursuant to Griqualand West Ord 5 of 1874 was later doubted as a result of the disallowance of Griqualand West Ord 5 of 1874. Griqualand West Ord 21 of 1880 dated 24 Sep 1880 was later passed to confirm the legality of the first three mining areas situated on the farm Vooruitzigt. Griqualand West Ord 21 of 1880 was confirmed by Queen Victoria in terms of Cape GN 33 of 10 Jan 1881.

82 In *London and SA Exploration Co Ltd v Trustees of Isaacs & Co* 1884 3 HCG 174, the High Court of Griqualand West accepted that the farm Dutoitspan was a privately owned farm and that the title deed of the land contained no reservation of the rights to diamonds in favour of the Crown. See also *Bultfontein Mining Board v Armstrong* 1890-1892 6 HCG 57, in relation to the farm Bultfontein.

the 1874 GW Mining Ordinance) [83] empowering the Governor of the Province of Griqualand West to make rules and regulations for the management of diggings and mines within the Province of Griqualand West[84] and to demand the payment of a prescribed sum of money from persons digging or mining for precious stones or minerals within the province.[85]

3 3 1874 GW Mining Ordinance

General rules and regulations for the management of diggings and mines were included in a schedule to the 1874 GW Mining Ordinance and applied until the cancellation or amendment thereof.[86] The schedule included rules regulating the prospecting for diamonds and the working of established and new diggings and further provided for the conversion of a digging to a mine. The 1874 GW Mining Ordinance was the first legislation in which the working of alluvial diggings and the mining of diamonds were separately regulated.

The 1874 GW Mining Ordinance repealed the 1871 GW Diggings Proclamation and all other legal enactments which may be repugnant or inconsistent with any of the provisions of the Ordinance.[87] Section 4 of the 1874 GW Mining Ordinance provided as follows:

> All and singular the provisions of the Proclamation of His Excellency Sir Henry Barkly, K.C.B., No 71 (No. 5) of the 27th of October, 1871, and of any other Proclamations, Government Notices, or other legal enactments, which may be repugnant to or inconsistent with any of the provisions of this Ordinance or of any Rules and Regulations now or hereafter to be enacted by the Legislature of this Province for the management of Diggings and Mines, or for regulating the searching for precious stones and metals, shall and the same hereby are cancelled and repealed.

There are two possible interpretations of section 4 of the 1874 GW Mining Ordinance. The first is that the whole of the 1871 GW Diggings Proclamation was repealed. The second, which appears to be the correct interpretation, is that only those provisions that were inconsistent with the 1874 GW Mining Ordinance and its rules and regulations were repealed. The whole of the 1874 GW Mining Ordinance

83 The 1874 Griqualand West Mining Ord was published in the Griqualand West GG of 4 Jun 1874 and was confirmed by Queen Victoria in terms of Cape GN 35 of 1875.

84 Section 1 of the 1874 GW Mining Ord; *Bank of Africa v Kimberley Mining Board* 1884 3 HCG 371 at 395 (hereafter the *Bank of Africa* case).

85 Section 3 of the 1874 GW Mining Ord.

86 Section 5 of the 1874 GW Mining Ord.

87 Section 4 of the 1874 GW Mining Ord.

88 Section 1 read with the first schedule of the Precious Stones and Minerals Mining Act 19 of 1883. Furthermore, s 9 of Griqualand West Procl 8 of 1880 dated 30 Sep 1880, specifically referred to ss 23-28 of the 1871 GW Diggings Proclamation insofar as it was still applicable. See, also, *London and SA Exploration Co Ltd v Dutoitspan Mining Board* 1883 2 HCG 154; *London and SA Exploration Co v Murphy* 1886-1887 4 HCG 125 at 330; *London and SA Exploration Co v Bultfontein Mining Board* at 217.

was only repealed on 27 September 1883 with the commencement of the Precious Stones and Minerals Mining Act 19 of 1883.[88]

There was no statutory reservation of the rights to diamonds in favour of the British Crown or the Government of the Cape Colony in the 1874 GW Mining Ordinance. The question as to who was entitled to prospect for diamonds or to work claims in diggings or to mine for diamonds continued to depend on the specific form of land tenure. The rules and regulations contained in a schedule to the 1874 GW Mining Ordinance only applied in respect of Crown land and reserved private land and not in respect of unreserved private land.[89]

3 3 1 Rights and obligations of a prospector

Any person that wanted to prospect for diamonds[90] on Crown land or reserved private land[91] first had to register as a miner and had to take out a prospecting licence at the office of the Civil Commissioner.[92] The 1874 GW Mining Ordinance did not apply to prospecting for diamonds on unreserved private land and it is submitted that the 1871 GW Diggings Proclamation read with the 1872 GW Prospecting Proclamation continued to apply in respect of the prospecting for diamonds on unreserved private land.

The discoverer, who discovered the diamonds under a prospecting licence, was entitled to select and to mark off the ground for his two claims.[93] The claims had to be measured and numbered, boundary lines determined, and a plan prepared. Notice was then given of a specific day on which claims would be allocated to certificated miners.[94] Once at least two-thirds of the claims applied for had been allocated and registered, the Inspector or Overseer had to define the reserved areas outside the claims which the miners could use in addition for mining purposes.[95]

89 The preamble of the schedule to the 1874 GW Mining Ord provided that it contained "General Rules and Regulations for the management of Diggings and Mines of Precious Stones and Minerals on Crown Lands, or on Private Properties in which the Precious Stones and Minerals belong to the Crown, in the Province of Griqualand West".

90 Item 1 of s 7 of the schedule to the 1874 GW Mining Ord referred to "precious stones or minerals".

91 Referred to in this article as privately owned land, the title of which contained a reservation of the right to diamonds in favour of the Government.

92 Item 1 of s 7 of the schedule to the 1874 GW Mining Ord referred to a "certificated miner". The certificated miner had to pay a monthly licence fee of one pound for a party of not more than one miner and two servants. Item 2 of s 7 of the schedule to the 1874 GW Mining Ord provided that a fee of ten shillings a month was payable for every additional miner and five shillings for every additional servant.

93 See item 4 of s 3 read with item 5 of s 7 of the schedule to the 1874 GW Mining Ord. Every claim had to be thirty square feet. The size of the claims could be amended by proclamation or by-laws, adopted in respect of the digging. See item 19 of s 1 of the schedule to the 1874 GW Mining Ord.

94 See item 5 of s 3 of the schedule to the 1874 GW Mining Ord.

95 Item 6 of s 3 of the schedule to the 1874 GW Mining Ord.

3 3 2 Rights and obligations of a claimholder and miner

In the case of the discovery of a new digging[96] on Crown land or on reserved private land, the Inspector or Overseer[97] had to attend at the specific area for the purpose of registering the claim. After six months from the date of proclamation of a new digging, all new diggings were deemed to be established diggings.[98] There was no definition of "established diggings" in the 1874 GW Mining Ordinance or in the schedule thereto. There were also no transitional provisions to confirm that diggings, which were proclaimed in Griqualand West under the 1871 GW Diggings Proclamation on Crown land and on reserved private land, would be established diggings as contemplated in section 4 of the schedule to the 1874 GW Mining Ordinance.[99]

The 1874 GW Mining Ordinance further provided for the conversion of a digging into a mine.[100] Once a digging is declared to be a mine, the Governor had to appoint a Registrar and Engineer or Surveyor for such mine.[101] In the case of the conversion of a digging to a mine, the Governor had to request all claimholders in the mine by notice in the *Gazette* to elect a Mining Board.[102] Each Mining Board was

96 The term "new diggings" was described in item 1 of s 3 of the schedule to the 1874 GW Mining Ord, as diggings that were proclaimed as such after the promulgation of the 1874 GW Mining Ord.

97 Item 1 of s 2 of the schedule to the 1874 GW Mining Ord provided that the Governor could appoint such Inspectors or Overseers of claims as he deemed necessary for all diggings.

98 Item 1 of s 4 of the schedule to the 1874 GW Mining Ord.

99 Item 7 of s 3 of the schedule to the 1874 GW Mining Ord provided that at every digging where there were more than fifty registered claimholders, the claimholders were entitled, after submitting an application signed by at least two-thirds of the total number of claimholders to the Government, to elect a Diggers' Committee consisting of not less than five and not more than nine members. The Diggers' Committee had to make by-laws for such digging, which had to be approved by the Governor and had to be published in the *Gazette*. In the event that the diggers failed to elect a Diggers' Committee or where the elected Diggers' Committee failed to make by-laws, item 8 of s 3 of the schedule to the 1874 GW Mining Ord provided that the Inspector of Claims for such digging could make by-laws for the digging which came into effect once approved by the Governor and published in the *Gazette*.

100 Item 1 of s 5 of the schedule to the 1874 GW Mining Ord.

101 Item 2 of s 5 of the schedule to the 1874 GW Mining Ord. Item 4 of s 5 of the schedule to the 1874 GW Mining Ord provided that the Engineer or Surveyor had the sole and entire control of the mining areas for which he was appointed. In terms of item 12 of s 1 of the schedule to the 1874 GW Mining Ord miners were obliged to comply with orders issued by qualified officers for the safe and proper working of the diggings or mines or by-laws drafted in respect of the diggings or mine. The Inspector or Engineer could – in terms of item 24 of s 1 of the schedule to the 1874 GW Mining Ord – issue a written notice to a miner to cease digging or to cease his mining operations. He could also compel the miner to perform certain specific work or prohibit the use of a machine, engine or appliance for raising or removing rock, soil or water in a digging or mine.

102 The Mining Board had to comprise of nine members who had to be re-elected every year. Once a Mining Board had been elected, item 2 of s 5 of the schedule to the 1874 GW Mining Ord provided that the powers, duties and functions of the Diggers' Committee ceased to exist. Each Mining Board had to draft its own by-laws for the management of the mine for which it was elected. Item 8 of s 6 of the schedule to the 1874 GW Mining Ord provided that the by-laws came into effect on the date of proclamation in the *Gazette* and were subject to the approval of both the Governor and the Executive Council for the Griqualand West Province.

entitled to determine the rate which miners had to pay yearly, quarterly or monthly in respect of each claim.[103]

Every person of good character and older than sixteen years was entitled to obtain a miner's certificate from the Resident Magistrate for the relevant district.[104] During the first six months following the proclamation of a new digging, each miner was entitled to hold only one claim which could not be transferred during the first three months.[105] If a claim was unregistered or unworked for a period of seven days, excluding a Sunday or a public holiday, the Inspector or Overseer would then declare the claim abandoned unless the holder of the claim had obtained a certificate of reservation from the Inspector or Overseer.[106] Any other certificated miner could apply in writing to have the claim registered in his name.[107] If there was at any time during the first six months after a digging had been proclaimed, less than twelve registered claimholders, the diggings could be closed by proclamation after notice of at least one month was given to this effect.[108]

A miner was entitled to the free and undisturbed possession of the claims registered in his name. All claims were issued subject to a servitude of not more

103 The rate determined by the Mining Board had to be approved by the Governor and the Executive Council. Each claimholder had to pay the fee within thirty days after the payment became due, failing which it was deemed that the claim was abandoned. Item 9 of s 6 of the schedule to the 1874 GW Mining Ord provided that the claimholders had to pay the licence fees to the Registrar of the particular mine, who in turn accounted to the Treasurer of the Griqualand West Province. The Treasurer paid the amounts to the Mining Board on submission of vouchers from the Engineer or Surveyor of the Mine. Item 10 of s 6 of the schedule to the 1874 GW Mining Ord provided that the Mining Board had to apply the money for public purposes of the mine as determined by the Engineer or Surveyor of the relevant mine and agreed to by the Minister Board or as determined in the by-laws. There was no prohibition on the content of the by-laws that could be adopted by the Digger's Committees or Mining Boards, with reference to the status of a *quitrent* tenant or lessee. See the *Bank of Africa* case in relation to the functions and powers of a Mining Board and Dale 1979: 219.

104 Item 1 of s 1 of the schedule to the 1874 GW Mining Ord. The Resident Magistrate could, in terms of item 2 of s 1 of the schedule to the 1874 GW Mining Ord, require someone who applied for a miner's certificate to produce two competent witnesses to the character of the applicant.

105 Item 9 of s 3 of the schedule to the 1874 GW Mining Ord. The holder of a prospecting licence who could prove to the satisfaction of the Resident Magistrate that he had found any diamonds, gold or silver under the prospecting licence, was entitled to two claims during the first six months. See item 5 of s 7 of the schedule to the 1874 GW Mining Ord.

106 If more than one certified miner applied for such claim, the claim was sold by public auction. See item 10 of s 3 of the schedule to the 1874 GW Mining Ord.

107 Claims were not forfeited if the holder thereof obtained a certificate of reservation from the Inspector or Overseer on the grounds of sickness, necessary absence or other sufficient cause. A certificate of reservation could not be issued for a period of more than twenty working days. A Saturday was regarded as a working day. See item 11 of s 3 of the schedule to the 1874 GW Mining Ord. If a certified miner who took up a claim, failed to register the claim within a period of ten days, the claim would also be declared abandoned and any other certified miner could apply to have an abandoned claim registered in his name. See items 4 and 7 of s 3 of the schedule to the 1874 GW Mining Ord.

108 Item 4 of s 3 of the schedule to the 1874 GW Mining Ord.

than seven feet six inches on one side of each claim for purposes of a roadway.[109] The Government was entitled to expropriate a larger portion of a claim if it required the use thereof for public purposes, subject to the payment of compensation to the holder of the claim.[110] Every claim had to be worked by the claimholder or an agent who was duly authorised in writing to work the claim on behalf of the claimholder and who had to be a certificated miner.[111]

Claims could be registered for periods of at least one month but not exceeding twelve months.[112] Claims could not be held in the name of a firm or joint-stock company and had to be registered in the name of the duly accredited agent of the firm or joint-stock company who had to be a certificated miner.[113] Each person, firm or joint-stock company (through its accredited agent) could hold a maximum of ten full claims in the aggregate at any digging.[114] This provided for limited amalgamation of claims but also protected the individual diggers from complete monopolisation.[115] The holder of a claim in a digging was entitled to transfer or hypothecate his claim and every transfer of hypothecation had to be registered.[116] Miners were entitled to subdivide their claims and to re-amalgamate their subdivided portions.[117]

Provision was made for the reservation of an area outside each claim for depositing ground, sifting or sorting soil and for machinery and staging. Each miner was obliged to remove any stone, rubbish or other matter which he deposited in the reserved area and failure to do so could result in penalties.[118] It was recognised that it was necessary for each claimholder to have access to an area on which the diamondiferous ground could be spread out.

109 Item 14 of s 3 of the schedule to the 1874 GW Mining Ord.

110 Item 12 of s 1 of the schedule to the 1874 GW Mining Ord.

111 Item 22 of s 1 of the schedule to the 1874 GW Mining Ord.

112 Item 15 of s 1 of the schedule to the 1874 GW Mining Ord. See Dale 1979: 342. In *London and SA Exploration Co v Murphy* at 330, the holder of a claim who had given up physical control of his claims was held liable as he was registered as the owner of the claims.

113 Item 9 of s 1 of the schedule to the 1874 GW Mining Ord. See, further, Dale 1979: 341.

114 Item 18 of s 1 of the schedule to the 1874 Mining Ord. This restriction was later repealed by Griqualand West Ord 12 of 1876 dated 20 Nov 1876.

115 Davenport 2009: 56-57. The provisions that applied in respect of diggings regarding the number of claims that could be held by claimholders (item 18 of s 1 of the schedule to the 1874 GW Mining Ord), the transfer of claims (item 16 of s 1 of the schedule to the 1874 GW Mining Ord), the subdivision of claims (item 36 of s 1 of the schedule to the 1874 GW Mining Ord) or the re-amalgamation of claims (item 37 of s 1 of the schedule to the 1874 GW Mining Ord), and the hypothecation of claims (item 16 of s 1 of the schedule to the 1874 GW Mining Ord) applied similarly in the case of mines.

116 Item 16 of s 1 of the schedule to the 1874 GW Mining Ord. Prior to the proclamation of the 1874 GW Mining Ord, there was no provision for the hypothecation of claims. See *SA Loan Mortgage and Mercantile Agency v Cape of Good Hope Bank and Littlejohn* 1888-1889 6 SC 163.

117 Items 36 and 37 of s 1 of the schedule to the 1874 GW Mining Ord.

118 Item 30 read with item 26 of s 1 of the schedule to the 1874 GW Mining Ord.

3 3 3 Interests of the quitrent tenant or lessee

As stated above, a person who wanted to prospect for diamonds on Crown land and on reserved private land had to obtain a prospecting licence. There was no requirement that the consent of the owner of reserved private land had to be obtained for the granting of the prospecting licence.[119] The owner of reserved private land was referred to as a *quitrent* tenant and the word "owner" was used in the schedule to the 1874 GW Mining Ordinance to refer to the owner of a claim and not to the owner of the land.[120]

The interests of a *quitrent* tenant[121] or lessee were protected in that the certificated miner who applied for a prospecting licence in respect of Crown land or reserved private land, had to take out a bond for the sum of £100, with two sureties which the Civil Commissioner had to approve in the sum of fifty pounds each for the proper repair of any surface damage done on any land or right occupied by any quitrent tenant or lessee.[122] If the holder of a prospecting licence found any diamonds while prospecting under the prospecting licence, he was obliged forthwith to report the finding to the Civil Commissioner.[123] The discoverer of the diamonds was entitled to two claims at the place where such diamonds, gold or silver had been found.[124]

3 4 Conversion of the diggings on Vooruitzigt and Dutoitspan to mines

On 2 June 1874 Richard Southey issued Griqualand West Proclamation 7 of 1874 in terms of the schedule to the 1874 GW Mining Ordinance to convert the diggings known as "Colesberg *Kopje*" or "De Beer's New Rush" to a mine, to be known as the Kimberley Mine.[125] The diggings known as "Old De Beer's" or "*Kopje* No 1"

119 The position was similar under the 1872 GW Prospecting Proclamation, with the exception that unreserved private land was also regulated under the 1872 GW Prospecting Proclamation, but Crown land was excluded.

120 See item 12 of s 1 of the schedule to the 1874 GW Mining Ord.

121 The reference to a *quitrent* tenant was a reference to the owner of reserved private land.

122 Item 3 of s 7 of the schedule to the 1874 GW Mining Ord. In terms of s 5 of the 1872 GW Prospecting Proclamation the holder of a prospecting licence was only required to provide security in the sum of twenty pounds.

123 Item 4 of s 7 of the schedule to the 1874 GW Mining Ord.

124 Item 5 of s 7 of the schedule to the 1874 GW Mining Ord. The position was similar under s 6 of the 1872 GW Prospecting Proclamation. In terms of s 6 of the 1872 Prospecting Proclamation the discoverer of diamonds on unreserved private land was also entitled to the free grant of two claims at the place where the diamonds had been discovered.

125 In *SA Loan Mortgage and Mercantile Agency v Cape of Good Hope Bank and Littlejohn* at 163, the Supreme Court of the Cape of Good Hope simply accepted that the land on which the Kimberley Mine was situated, was Crown land. Griqualand West Procl 7 of 2 June 1874 was repealed more than a century later in terms of the Pre-Union Statute Law Revision Act 36 of 1976 (hereafter the Pre-Union Statute Law Act). See Welsh 1976: 227.

were converted to a mine known as the De Beers Mine. The diggings on the farm Dutoitspan were converted to a mine known as the "Dutoitspan Mine". It is submitted that the *de facto* status of the diggings known as Colesberg *Kopje,* Old De Beer's and Dutoitspan, was that they were situated on unreserved private land and therefore not subject to the rules and regulations contained in the schedule to the 1874 GW Mining Ordinance. They were, however, according to the Griqualand West Proclamation 7 of 1874, which was issued a few days after the commencement of the 1874 GW Mining Ordinance,[126] *de jure* proclaimed as public diamond fields.[127]

3 5 Griqualand West Ordinance 15 of 1879

The claimholders of the claims in the Dutoitspan Mine and the Bultfontein Diggings denied that the general rules and regulations contained in the schedule to the 1874 GW Mining Ordinance applied to the Dutoitspan Mine and the Bultfontein Diggings. They accordingly refused to pay the rates levied by the Mining Board for the Dutoitspan Mine and the Inspector of Claims at the Bultfontein Diggings. They also refused to obey any orders from Inspectors.[128] It is submitted that this view was correct, because the purpose of the rules and regulations of the schedule to the 1874 GW Mining Ordinance was to manage diggings and mines of precious stones on Crown lands and on reserved private land in the Province of Griqualand West and not on unreserved private land.[129]

The Griqualand West Ordinance 15 of 1897 was enacted on 26 November 1879. This Ordinance determined that certain of the rules and regulations contained in the schedule to the 1874 GW Mining Ordinance, relating to Mining Boards and the duties of the Engineer or Surveyor at a mine or the Inspector or Overseer at a digging, were made applicable to the Dutoitspan Mine and the Bultfontein Diggings in so far as they did not conflict with any private rights.[130]

3 6 The end of the Southey administration

The majority of claimholders in Griqualand West were not satisfied with the provisions of the 1874 GW Mining Ordinance. According to Turrell,[131] their main complaint was that the 1874 GW Mining Ordinance placed significant areas of diggings in the hands of an Engineer or Surveyor, who was responsible to the Government and not the newly elected Mining Boards. The claimholders wanted

126 On 13 May 1874.

127 The Bultfontein diggings were later proclaimed as a diamond mine in terms of Griqualand West Procl 201 of 1881 and Griqualand West Procl 210 of 1882. See *Bultfontein Mining Board v Armstrong and the London and South Africa Exploration Co* 1890-1891 8 SC 236 at 243.

128 Preamble of Griqualand West Ord 15 of 1879.

129 Preamble of the schedule to the 1874 GW Mining Ord.

130 Section 1 of Griqualand West Ord 15 of 1879. See also *Goldschmidt & Co v Du Toit's Pan Mining Board* 1883 2 HCG 195; *Queen v Town* 1884 3 HCG 143.

131 Turrell 1987: 58-59.

to be able to adjudicate claim disputes and to decide where machinery had to be placed, the rates to be levied and the money to be spent in respect of the mines. The claimholders were not satisfied with the powers of the Engineer, who could prohibit the working of a claim if he was of the view that it was dangerous to do so. There was also a lack of security of tenure. Claimholders of unreserved private land were in particular concerned that landowners of unreserved private land could increase the monthly licence fees payable with regard to the claims.[132]

There were complaints from the claimholders on the farm Vooruitzigt on which the De Beers Mine and the Kimberley Mine were situated.[133] A syndicate from Port Elizabeth, represented by Alfred Ebden, purchased the farm Vooruitzigt from the De Beer brothers. The new landowners of the farm Vooruitzigt were, however, not satisfied with the monthly rental that they received from claimholders working claims at the De Beers Mine and the Kimberley Mine. The new landowners gave notice that they were going to raise the monthly licence fee to ten pounds.[134] This occurred while Griqualand West was under the control of Richard Southey. Southey refused to pay the landowner any money collected and, in addition, demanded a refund of all the money paid to the landowners of the farm Vooruitzigt. A long legal battle ensued, which was finally resolved when the landowners of the farm Vooruitzigt agreed to sell the farm to the Government for £1000.[135] The Griqualand West Ordinance 7 of 1875 was promulgated on 3 August 1875 to sanction the purchase of the farm Vooruitzigt by the Government of the Griqualand West Province. It was recorded in the preamble that it was expedient for public purposes that the Government acquire the farm Vooruitzigt. The terms and conditions for the purchase were set out in a schedule to Griqualand West Ordinance 7 of 1875.[136]

132 It is submitted that this concern was not valid. The monthly licence fees which a landowner of unreserved private land could charge was – in terms of s 8 of the 1872 GW Prospecting Proclamation – fixed at one pound per month. See, also, Rotberg 2002: 80-81.

133 See Turrell 1987: 68. Chilvers 1939: 27-28 describes the conditions at the diamond fields as follows: "Endless disputes arose. With the claims at so many different levels there were ceaseless falls of ground, encroachments and serious accidents. None had anticipated that diamonds would be found so far down. Diggers, syndicates and companies constantly amalgamated, not only to lessen their difficulties but also to be better able to purchase the more expensive equipment now required. The calamitous falls of reef, as the barren soft rock encircling the pipe on all sides is called, ruined many workers at Kimberley, De Beers, Bultfontein and Dutoitspan. Titles, too, seemed insecure, and there was much heart-burning about that. Added to this came the increasingly activity of diamond thieves."

134 This supports the submission that the *de facto* status of the De Beers Mine and the Kimberley mine was that they were situated on unreserved private land and that the provisions of s 29 of the 1871 GW Diggings Proclamation read with s 8 of the 1872 GW Prospecting Proclamation applied in respect thereof.

135 See, further, Roberts 1984: 122; Turrell 1987: 68-69.

136 It was recorded in s 1 of the schedule to Griqualand West Ord 7 of 1875 that Alfred Ebden ceded, assigned and made over all his rights, title, claims and interest in the farm Vooruitzigt, together with all documents minerals and property of every description in or upon the farm Vooruitzigt. See, also, Newbury 1989: 36-37; Lenzen 1970: 145; Buchanan 1882: par 26.

In 1875, the majority of claimholders in Griqualand West revolted against the administration of Richard Southey. It was necessary for British troops to be dispatched to Griqualand West to disarm the rebels and to dissolve the rebellion which became known as the "black flag rebellion".[137] Richard Southey was dismissed in 1875, following the black flag rebellion. Major William Owen Lanyon replaced him as Administrator.[138] A contributing factor for Southey's dismissal was the declining financial position of the Griqualand West Province.[139] According to Worger,[140] Southey had misconstrued his role in the administration of Griqualand West and he implemented the wrong form of diamond mining legislation.

Major Lanyon was instructed to clear the land problems of Griqualand West and to prepare the way for annexation of Griqualand West to the Cape Colony.[141] Colonel Crossman was appointed to investigate Griqualand West's finances and the grievances that led to the black flag rebellion.[142] Crossman began his enquiry and in January 1876 he reported on the financial position of Griqualand West.[143] In May 1876 Crossman furthermore reported on the causes of the black flag rebellion.[144] One of the recommendations he made was that the restriction of each claimholder to only hold ten claims[145] should be abolished and that provision should be made for the amalgamation of claims.[146] Crossman was – according to Worger[147] – influenced by the submissions of a mining engineer who held the view that the subdivision of the Kimberley Mine into quarters, eighths and sixteenths of claims made profitable working of the mine impossible. The restriction of the number of claims that

137 Davenport 2009: 59. The name of the rebellion was derived from an incident that triggered the rebellion which was described by Roberts 1984: 130 as follows: "At one o'clock in the afternoon of Saturday 15 August 1874, a horse-drawn van paraded solemnly through the streets of Kimberley. Seated in the van was a string band, above which fluttered a flag bearing the inscription 'the earth is the Lord's and the fullness thereof'. But what riveted the attention of most spectators was the pile of diggers' implements, ominously topped by a rifle, stacked at the foot of the flagstaff. The symbolism of the gun covering the mining equipment was unmistakable. Kimberley was being treated to its first whiff of organised revolution." See Roberts (n 1) at 45.

138 Currey, the Government Secretary, was also dismissed. Roberts 1984: 130-140; Turrell 1987: 73.

139 Roberts 1984: 130-140; Turrell 1987: 73.

140 Worger 1987: 29.

141 Major Lanyon presided over Griqualand West until 1878. He was succeeded by Sir Charles Warren in 1879, who in turn was succeeded by James Rose-Innes in 1880 before Griqualand West was annexed as part of the Cape Colony. Turrell 1987: 73-74.

142 Turrell 1987: 73.

143 "Preliminary Report by Lieutenant-Colonel Crossman on the Financial Condition of Griqualand West" 5 Feb 1876. Crossman found that the structure of the Government's administration at the diamond fields in Griqualand West was too large and expensive for the community of Griqualand West. See Worger 1987: 29-30.

144 "Report of Lieutenant-Colonel Crossman, RE, on the Affairs of Griqualand West" 1 May 1876.

145 Item 18 of s 1 of the schedule to the 1874 Mining Ord.

146 Turrell 1987: 73.

147 Worger 1987: 30.

each person could hold was abolished in the Griqualand West Ordinance 12 of 20 November 1876.

4 Third period: The annexation of Griqualand West

In terms of the Griqualand West Annexation Act 39 of 1877 the entire Province of Griqualand West was annexed as part of the Cape Colony on 15 October 1880. Two of the legislative measures adopted during 1880 were important from a diamond mining perspective. The first was the Griqualand West Ordinance 6 of 1880[148] of 1 June 1880 (hereafter the 1880 GW Fixity of Tenure in Mines Ordinance) that made provision for security of tenure in certain mines and diggings in Griqualand West. The second is the Griqualand West Proclamation 8 of 1880[149] (hereafter the 1880 GW Mining Proclamation) which James Rose-Innes issued on 30 September 1880. Herein, he cancelled the general rules and regulations contained in the schedule to the 1874 GW Mining Ordinance and replaced them with a new set of rules and regulations for the working of mines on Crown land and on reserved private land.[150]

There was uncertainty as to whether the 1880 GW Mining Proclamation repealed and substituted the schedule to the 1874 GW Mining Ordinance. In *London and South African Exploration Company Limited v Dutoitspan Mining Board*[151] the High Court of Griqualand West held that

> [w]ith regard to the argument as to the effect of Proclamation 8 of 1880 on the schedule to Ordinance 10 of 1874, so far as that schedule refers to mines on other than Crown lands, it has certainly been always understood in this Court that the Proclamation did not repeal the application of the schedule to such mines. This point, however, it is unnecessary to decide now …

148 Referred to in s 12 thereof as the "Fixity of Tenure (Mines and Diggings) Ord".

149 Referred to as "Rules and Regulations for the Working of Diggings and Mines on Crown Lands or on Private Properties in which the Precious Stones and Minerals belong to the Crown, in the Province of Griqualand West".

150 Item 1 of s 7 of the 1880 GW Mining Proclamation. The preamble of the 1880 GW Mining Proclamation stated as follows: "Whereas under and by virtue of Ord No. 10 of 1874, it is provided that it shall be lawful for the Governor of the Province of Griqualand West … to make general Rules and Regulations for the management of Diggings and Mines within the said Province, and such Rules and Regulations from time to time to alter, amend, cancel and re-enact; Now, therefore, I, under and by virtue of the powers in me vested … do hereby cancel the General Rules and Regulations contained in the Schedule annexed to the aforesaid Ord, No. 10 of 1874, and I do hereby proclaim, declare and make known that the Rules and Regulations contained in the Schedule hereunto annexed shall, until the same be cancelled, altered, or amended, be the General Rules and Regulations for the working of Diggings and Mines on Crown Lands or on Private Properties in which the Precious Stones and Minerals belong to the Crown in the Province of Griqualand West."

151 At 154.

In *Queen v Town*[152] it was argued that the rules and regulations contained in the schedule to the 1874 GW Mining Ordinance continued to apply as they were not cancelled by any act of the Legislature. The High Court of Griqualand West, without giving reasons, confirmed that the rules and regulations in the 1874 GW Mining Ordinance continued to apply.[153] Four years later, in *SA Loan Mortgage and Mercantile Agency v Cape of Good Hope Bank and Littlejohn,*[154] the Supreme Court of the Cape of Good Hope held that the schedule to the 1874 GW Mining Ordinance was indeed repealed by the 1880 GW Mining Proclamation.

4 1 The 1880 GW Fixity of Tenure in Mines Ordinance

The purpose of the 1880 GW Fixity of Tenure in Mines Ordinance was to provide for secure titles for claimholders in mines and diggings on Crown land and on reserved private land.[155] The 1880 GW Fixity of Tenure in Mines Ordinance provided that holders of claims in any mines or diggings situated on Crown lands could exchange such licences for a perpetual *quitrent* title which had to be registered in the Deeds Registry of Griqualand West.[156] The holder of the perpetual *quitrent* title was entitled to the property in the soil of the claim in perpetuity, including the right to search and take for the holder's own benefit, all precious stones and minerals that could be found therein. In return for the granting of the perpetual *quitrent*, the holder had to pay, in advance, a perpetual *quitrent* of six pounds per annum for every claim.[157] Every claimholder was entitled to the free and undisturbed possession and enjoyment of all claims granted under the 1880 GW Fixity of Tenure in Mines Ordinance, subject only to the provisions of the regulations and by-laws in force at the mine or diggings.[158]

152 At 143.
153 See, also, *Goldschmidt & Co v Du Toit's Pan Mining Board*.
154 At 163.
155 Preamble of the 1880 GW Fixity of Tenure in Mines Ord.
156 Section 3 of the 1880 GW Fixity of Tenure in Mines Ord provided that every mortgage, hypothecation or transfer of any claim in respect of which a perpetual *quitrent* title was granted, had to be registered in the Deeds Registry in the same manner as required in respect of immovable property.
157 Sections 1 and 2 of the 1880 GW Fixity of Tenure in Mines Ord. The farm Vooruitzigt, on which the Kimberley Mine and the De Beers Mine were situated, became Crown land when it was purchased by the Government of the Province of Griqualand West. In 1903, perpetual *quitrent* titles were issued to De Beers Consolidated Mines Limited, who was then the holder of all the claims in the two mines. These perpetual *quitrent* titles were in the form of Certificate of Registered Title T8935/1903 (in respect of the De Beers Mine) and Certificate of Registered Title T8936/1903 (in respect of the Kimberley Mine) registered in the Kimberley Deeds Office. Section 2 of the 1880 GW Fixity of Tenure in Mines Ord provided that every title deed would – as far as applicable – be subject to the same conditions, regulations and charges and would have the same force and effect as an ordinary *quitrent* title.
158 Section 7 of the 1880 GW Fixity of Tenure in Mines Ord.

In the case of reserved private land, the holder of a licence in mines or diggings situated on the reserved private land could exchange the licence for a lease for a period not less than three years.[159] It was expressly stated in the 1880 GW Fixity of Tenure in Mines Ordinance that[160]

> [n]othing in this Ordinance contained shall be taken or construed as affecting, or interfering with, the rights of the properties or owners of private properties as aforesaid.

Provision was further made for a Mining Board to allocate to every claimholder sufficient space on the edge of a mine for the erection and maintenance of hauling and other machinery necessary for the working of the claims. The allocation of the additional space was subject to the approval of the Inspector of Mines in respect of the safety of the relevant site.[161]

4 2 The 1880 GW Mining Proclamation

There was no statutory reservation in the 1880 GW Mining Proclamation of the right to diamonds in favour of the British Crown or the Government. This was not necessary as the rules and regulations contained in the schedule to the 1880 GW Mining Proclamation regulated the prospecting for precious stones or minerals and the working of diggings and mines situated on Crown land and on reserved private land and did not apply to unreserved private land.[162]

4 2 1 Rights and obligations of the prospector

Any person who wanted to prospect or search for diamonds or minerals on Crown land or on reserved private land[163] could take out a licence at the office of the Civil Commissioner of the relevant division.[164] The consent of the owner of reserved private land was not required.[165] A person who wanted to prospect on unreserved

159 Section 8 of the 1880 GW Fixity of Tenure in Mines Ord provided that the lessee was entitled to renew the lease and the rental payable could not exceed six pounds per annum for every claim. The granting of the lease could not interfere with the rights of the owners of the reserved private land. The 1880 GW Fixity of Tenure in Mines Ord referred to the rights of the "proprietors or owners of such private property" and not to a *quitrent* tenant. In terms of the Griqualand West Registration of Leases (Mines and Diggings) Ord 16 of 1880 dated 22 Sep 1880 (hereafter the 1880 GW Registration of Leases Ord) provision was made for the registration of leases or leasehold titles to claims or portions of claims in mines or diggings. Griqualand West Ord 16 of 1880 was later repealed in terms of the Pre-Union Statute Law Act. See Welsh 1976: 227.

160 Section 10 of the 1880 GW Fixity of Tenure in Mines Ord.

161 Section 9 of the 1880 GW Fixity of Tenure in Mines Ord.

162 See *London and SA Exploration Co v Murphy* at 329.

163 Referred to in this article as land that was privately owned, but the title of which contained a reservation of the rights to diamonds in favour of the Crown.

164 Item 1 of s 1 of the schedule to the 1880 GW Mining Proclamation.

165 *Union Government (Minister of Mines) v Thompson* at 421.

private land had to obtain a prospecting licence in terms of the 1871 GW Diggings Proclamation read with the 1872 Prospecting Proclamation.[166] The 1880 GW Mining Proclamation did not specifically repeal the provisions of the 1871 GW Diggings Proclamation and the 1872 GW Prospecting Proclamation.[167] A person who wanted to prospect for diamonds on unreserved private land would have required the consent of the landowner and a prospecting licence. This was confirmed in the prescribed form for a prospecting licence in item 1 of section 1 of the schedule to the 1880 GW Mining Proclamation, wherein it was specifically noted that

> [t]his licence does not give any right to prospect on private property where there is no reservation of precious stones or minerals in favour of the Crown without the consent thereto of the owner or owners of such private property …

A person who wanted to prospect within 500 yards of any other person who was already *bona fide* prospecting and searching for minerals and diamonds under a prospecting licence, had to obtain the consent of such holder of a prospecting licence.[168] The holder of a prospecting licence had to be older than sixteen years and in possession of a miner's certificate.[169] One of the conditions for the issue of a prospecting licence was that the holder had to enter into a bond for the sum of a £100 with two sureties for the repair of any surface damage done by him on land occupied by any *quitrent* tenant or lessee.[170] A person who found any diamonds or minerals while prospecting under a prospecting licence, was obliged forthwith to report the discovery to the Civil Commissioner of the relevant division.[171] The person who discovered the diamonds or minerals under a prospecting licence, was entitled to select ten claims at the place where such precious stones or minerals had been found and received a certificate from the Civil Commissioner to this effect.[172]

166 This requirement was recorded in the prescribed format for a prospecting licence contained in item 1 of s 1 of the schedule to the 1880 GW Mining Proclamation.
167 On the contrary, item 4 of s 4 of the 1880 GW Mining Proclamation made provision for the reservation of depositing areas outside every mine or diggings on Crown land and on reserved private land, which reservation was subject to the rights of the owner of the property and the provisions, so far as the same apply, of ss 23 to 28 inclusive of Griqualand West Procl 71 of 27 Oct 1871.
168 Item 6 of s 1 of the schedule to the 1880 GW Mining Proclamation.
169 Item 12 of s 6 of the schedule to the 1880 GW Mining Proclamation. The position was similar under item 1 of s 1 of the schedule to the 1874 GW Mining Ord.
170 Item 3 of s 1 of the schedule to the 1880 GW Mining Proclamation. The position was similar under item 3 of s 7 of the schedule to the 1874 GW Mining Ord. In the case of unreserved private land, the prospector similarly had to enter into a bond to protect the interests of the landowner, but only for £ 20.
171 Item 4 of s 1 of the schedule to the 1880 GW Mining Proclamation.
172 Item 5 of s 1 of the schedule to the 1880 GW Mining Proclamation. Under the 1872 GW Prospecting Proclamation and the 1874 GW Mining Ord the discoverer was entitled to select two claims.

4 2 2 Rights and obligations of a claimholder

The Governor of Griqualand West had to appoint an Inspector of Mines for every new digging.[173] Once a new digging was discovered, the appointed Inspector of Mines had to visit the digging for purposes of allotting and registering claims.[174] The Inspector had to measure and number all the claims at the digging and prepare a plan after which he had to give notice of a specific date and time when claims would be allocated to certificated miners. The certificated miners had to attend in person on the specific date to have the claims registered in their names.[175]

At a new digging, each claimholder was – with the exception of the discoverer of the diggings – only entitled to one claim. No claimholder could transfer his claims during the first three months of the proclamation of the digging.[176] Any claim that remained unregistered or unworked for a period of seven days, which excluded a Sunday or a public holiday, had to be declared abandoned by the Inspector unless he had issued a certificate of reservation.[177] Where a claimholder failed to comply within seven days with an instruction from the Inspector to perform certain specific work in respect of his claim, the Inspector similarly had to declare the claim as abandoned.[178] The number of abandoned claims at a digging had to be posted at the digging or at a conspicuous place at the office of the Inspector of Mines.[179] Any certificated miner could apply to obtain abandoned claims and if more than one applicant applied, the claim was sold through a public auction.[180] Otherwise, a claimholder could abandon a claim by giving written notice of his intention to abandon the claim to the Inspector of Mines.[181]

173 A new digging was defined in item 1 of s 1 of the schedule to the 1880 GW Mining Proclamation as a digging which was proclaimed a digging after the proclamation of the 1880 GW Mining Proclamation.

174 Item 2 of s 2 of the schedule to the 1880 GW Mining Proclamation.

175 Item 3 of s 2 of the schedule to the 1880 GW Mining Proclamation. Item 5 of s 2 of the schedule to the 1880 GW Mining Proclamation provided that once two-thirds of the claims in a digging had been allocated and registered, the Inspector had to define an area outside the claims which was reserved for mining purposes. If the digging was situated on Crown land, the Inspector had to fix the site of the camp or township and issue regulations for the cutting of firewood, grazing of cattle and if necessary, the sinking of wells for water.

176 Item 8 of s 2 of the schedule to the 1880 GW Mining Proclamation.

177 A certificate of reservation could be obtained in the case of sickness, a necessary absence or other sufficient cause. A fee of one shilling was payable for each day that the certificate was issued, but excluding for Sundays and public holidays. A certificate of reservation could not be issued for a period longer than twenty working days. Seenitem 13 of s 2 of the schedule to the 1880 GW Mining Proclamation.

178 Item 9 of s 2 of the schedule to the 1880 GW Mining Proclamation.

179 Item 10 of s 2 of the schedule to the 1880 GW Mining Proclamation.

180 Item 11 of s 2 of the schedule to the 1880 GW Mining Proclamation.

181 Item 12 of s 2 of the schedule to the 1880 GW Mining Proclamation. See *London and SA Exploration Co v Bultfontein Mining Board* at 220.

Only persons older than sixteen years and who had received a miner's certificate[182] were entitled to be registered as or to be a claimholder in any new diggings. Every claimholder was entitled to the free an undisturbed possession of any claim or claims registered in his name, but subject to a general reservation of seven feet and six inches on one side of each claim for roadways.[183]

If there were at any time less than twelve registered claimholders at a new digging, the digging could be closed by proclamation after at least one month's notice had been given. The Governor could also – if a digging ceased to be worked in a *bona fide* manner – declare the digging to be closed.[184] Unless a new digging was proclaimed to be closed, every new digging had to be proclaimed as an established digging after the expiry of six months from its initial proclamation as a new digging.[185] The Governor could by proclamation proclaim any digging to be a mine.[186] He also had to appoint a Registrar for each proclaimed mine. The Registrar of a mine had to keep a register of the claims and claimholders in the mines. This did not apply to mines in respect of which the provisions of the 1880 GW Fixity of Tenure in Mines Ordinance applied. The Registrar further had to perform the same functions as an Inspector of Mines with regard to registration at a digging.[187] Mines were under the control of a Mining Board, which consisted of twelve persons elected by the claimholders.[188] Each Mining Board had to draft by-laws for the management of the relevant mine for which it was elected.[189]

182 A miner had to obtain a certificate from the Resident Magistrate of the relevant district. The cost to obtain such a certificate was one pound for a period of twelve months, ten shillings for six months, or five shillings for three months. Item 14 of s 2 of the schedule to the 1880 GW Mining Proclamation.

183 Item 15 of s 6 of the schedule to the 1880 GW Mining Proclamation provided that in the event that a larger quantity of ground was required for public purposes or for digging or mine, such ground could be taken by the Governor subject to the payment of compensation to the owner of the claim.

184 Item 17 of s 2 of the schedule to the 1880 GW Mining Proclamation.

185 Item 1 of s 3 of the schedule to the 1880 GW Mining Proclamation. Where there were more than fifty registered claimholders at a new digging, item 6 of s 2 of the schedule to the 1880 GW Mining Proclamation provided that the claimholders were entitled to apply to the Government to elect a Diggers' Committee comprising of not less than five and not more than nine members. The Diggers' Committee had to make by-laws for the relevant diggings and the by-laws became effective once they had been approved by the Government and published in the *Gazette*. Provision was also made in item 2 of s 3 of the schedule to the 1880 GW Mining Proclamation for the establishment of Diggers' Committees at established diggings where there were more than fifty registered claimholders and for the adoption of by-laws. Item 5 of s 3 of the schedule to the 1880 GW Mining Proclamation provided that in the absence of elected Diggers' Committees, the Inspector of Mines for a specific digging could make by-laws for the digging, which became effective once they had been approved by the Governor and published in the *GG*.

186 Item 1 of s 4 of the schedule to the 1880 GW Mining Proclamation.

187 Item 3 of s 4 of the schedule to the 1880 GW Mining Proclamation.

188 Items 1-5 of s 5 of the schedule to the 1880 GW Mining Proclamation.

189 Item 10 of s 5 of the schedule to the 1880 GW Mining Proclamation.

Provision was also made for a depositing area outside every mine or digging on Crown land and on reserved private land. The reservation of a depositing area on reserved private land was expressly stated to be subject to the rights of the owner of such land and also to the provisions of sections 23 to 28 of the 1871 GW Diggings Proclamation in so far as they continued to apply.[190] The Governor therefore had to attempt to reach an agreement with the owner of the reserved private land on the terms on which the depositing areas would be used. However, if the owner did not agree to the terms, the Governor could simply cause the depositing areas to be reserved subject to the payment of reasonable compensation to the owner of the reserved private land.[191] The depositing area had to be as near as convenient to the mine and the Inspector of Mines had to divide it into zones or belts which ran parallel with the mine.[192]

Every claimholder was entitled to use an area which in total did not exceed one acre for each full claim held of the depositing area as a depositing floor.[193] The claimholder was entitled to sink wells within the depositing floor, which might be necessary for the purposes of working claims in the relevant mine or digging. In the case of Crown land, the consent of the Governor was required and in the case of reserved private land, the consent of the landowner was required for the sinking of wells.[194] Every claimholder of a mine situated on Crown land had to pay a monthly rental for the use of a depositing floor. The rental was payable for as long as the claim was registered in the name of the claimholder, irrespective of whether the depositing floor was being used. The rental was determined with reference to the position of the depositing floor and its distance from the mine.[195]

190 Item 4 of s 4 of the schedule to the 1880 GW Mining Proclamation. Sections 23-28 of the 1871 GW Diggings Proclamation provided that the High Commissioner could – in the case of reserved private land – agree with the landowner on the terms on which the diamond diggings situated on the land could be worked. If the landowner did not agree to the terms, the High Commissioner could simply – after giving notice to the landowner – enter the land or cause the land to be entered subject to the payment of reasonable compensation for all injury done to the surface and soil of the land.

191 Item 4 of s 4 of the schedule to the 1880 GW Mining Proclamation read with s 26 of the 1871 GW Diggings Proclamation.

192 Item 5 of s 4 of the schedule to the 1880 GW Mining Proclamation.

193 Item 11 of s 4 of the schedule to the 1880 GW Mining Proclamation provided that the health and safety at depositing floors were under the control of the Inspector of each mine, but it was regulated by the by-laws adopted by the relevant Mining Board which had to be approved by the Governor.

194 Item 6 of s 4 of the schedule to the 1880 GW Mining Proclamation.

195 The monthly rental could not exceed the amount of one pound per acre unless the claimholder specifically agreed thereto. See item 8 of s 4 of the schedule to the 1880 GW Mining Proclamation. Claims in mines or diggings within the Province of Griqualand West had to be registered by the Registrar of Deeds in terms of the 1880 GW Registration of Leases Ord. Cessions, assignments, transfers, surrenders, mortgages and hypothecations of claims or cessions had to be registered in terms of s 1 of the 1880 GW Registration of Leases Ord. Section 7 of the 1880 GW Registration of Leases Ord provided that a lease did not cease or terminate in the case of insolvency of the person entitled to the lease.

Although there was no requirement that the consent of the landowner of reserved private land be obtained for the grant of a prospecting licence,[196] no person was entitled to prospect within 200 yards of any house or building occupied or upon land under cultivation without the consent of the owner or occupier of the relevant land.[197]

5 Conclusion

In this article, the diamond mining legislation that was enacted in Griqualand West during the period 1871 until its annexation as part of the Cape Colony in 1880 was discussed. During this period, Griqualand West was under the control of three different administrations, each of which enacted different diamond mining legislation. There were at least four factors that influenced the development of diamond mining legislation in Griqualand West during the period 1871 to 1880.

In the first instance – and perhaps the most important factor – was the form of land tenure. From the discussion of the diamond mining legislation which each of the three administrations enacted, it appears that the question as to who was entitled to prospect or search for diamonds or to work claims at the diamond fields depended on the specific form of land tenure, and in effect the common law holder of the rights to diamonds.

The second factor is the governing authority. In all instances where there was a change in the governing authority, one of the very first pieces of legislation that was amended and/or repealed, was the diamond mining legislation. Since the very early years following the proclamation of Griqualand West as a British territory in 1871, the relevant Government had played a regulatory role in respect of diamond mining.

The third factor which contributed to the development of diamond mining legislation in Griqualand West was the habitat or the source of the diamonds, in other words whether the diamonds occurred in alluvial form or in a kimberlite pipe. The 1874 GW Mining Ordinance which was enacted in Griqualand West was the first diamond mining legislation in which the working of alluvial diggings and the mining of diamonds were regulated separately.

The fourth factor which impacted on the development of diamond mining legislation is the developments in diamond mining technology and in particular – with reference to the early years following the discovery of the first diamonds – the method of diamond mining. The early diamond mining legislation had to make provision for depositing floors or sites where mined material could be deposited and left to be pulverised by the sun because of the imperfections in the early primitive diamond mining methods. A further change in diamond mining legislation brought about by the method of diamond mining was the removal of the statutory prohibition

196 The position was similar under the 1874 GW Mining Ord.

197 Item 7 of s 1 of the schedule to the 1880 GW Mining Proclamation and recorded in the prescribed format for a prospecting licence in s 1 of the schedule to the 1880 GW Mining Proclamation.

on the number of claims that could be held and allowing claims to be amalgamated. This was in particular necessary in Griqualand West where diggers who owned individual claims removed the soil within each claim at their own time, resulting in ground slides between adjoining claims.

After the annexation of Griqualand West as part of the Cape Colony in 1880, new challenges emerged. Not only were the claims in the four large diamond mines amalgamated, but the diamond mining legislation was also consolidated.

BIBLIOGRAPHY

Beet, G & Terpend, TL (1917) *The Romance and Reality of the Vaal Diamond Diggings* (Kimberley)

Boyle, F (1873) *To the Cape for Diamonds: A Story of Digging Experiences in South Africa* (London)

Buchanan (1882) "Memorandum on the early legislation in diamond matters" in the Cape of Good Hope *Report of the Commissioners Appointed to Inquire into and Report upon the Working and Management of the Diamond Fields or Griqualand West 1881-1882* (Cape Town)

Chilvers, HW (1939) *The Story of De Beers* (London)

Dale, MO (1979) *An Historical and Comparative Study of the Concept and Acquisition of Mineral Rights* (LLD-thesis, University of South Africa)

Davenport, J (2009) *Colonial Mining Policy of the Cape of Good Hope: An Examination of the Evolution of Mining Legislation in the Cape Colony, 1853-1910* (MA-dissertation, University of Cape Town)

Davenport, J (2013) *Digging Deep: A History of Mining in South Africa* (Johannesburg)

Doughty, O (1963) *Early Diamond Days: The Opening of the Diamond Fields of South Africa* (London)

Herbert, I (1972) *The Diamond Diggers: South Africa 1866 to the 1970s* (London)

Hornsby, AH (1874) *The South African Diamond Fields: A Practical Matter-of-Fact Account* (Chicago)

Lenzen, G (1970) *The History of Diamond Production and Diamond Trade* (London)

Machens, EW (2009) *Platinum, Gold and Diamonds: The Adventure of Hans Merensky's Discoveries* (Pretoria)

Marquard, L (1955) *The Story of South Africa* (London)

McNish, JT (1968) *The Road to El Dorado* (Cape Town)

Meredith, M (2007) *Diamonds, Gold and War: The Making of South Africa* (Jeppestown)

Millin, SG (1933) *Rhodes* (London)

Newbury, C (1989) *The Diamond Ring Business, Politics and Precious Stones in South Africa 1867-1947* (Oxford)

"Preliminary Report by Lieutenant-Colonel Crossman on the Financial Condition of Griqualand West" 5 February 1876

"Report of Lieutenant-Colonel Crossman, RE, on the Affairs of Griqualand West" 1 May 1876

Roberts, B (1972) *The Diamond Magnates* (London)

Roberts, B (1984) *Kimberley Turbulent City* (Cape Town)

Rotberg, RI (2002) *The Founder: Cecil Rhodes and The Pursuit of Power* (Johannesburg)

Simons, PB (2004) *Cullinan Diamonds: Dreams and Discoveries* (Vlaeberg)

Turrell, RV (1987) *Capital and Labour on the Kimberley Diamond Fields 1871-1890* (Melbourne)

Welsh, RS (1976) "Mining law" *Annual Survey of South African Law*: 227-232

Williams, GF (1905) *The Diamond Mines of South Africa* vol 1 (New York)

Worger, WH (1987) *South Africa's City of Diamonds Mine Workers and Monopoly Capitalism in Kimberley 1867-1895* (Craighall)

Legislation

Amendment of Land Court Ordinance 13 of 1876

Cape GN 35 of 5 April 1875

Cape GN 33 of 10 January 1881

Griqualand West Annexation Act 39 of 1877

Griqualand West Ord 1 of 1874

Griqualand West Ord 3 of 1874 (1874 GW Crown Land Ordinance)

Griqualand West Ord 5 of 1874

Griqualand West Ord 10 of 1874 (1874 GW Mining Ordinance)

Griqualand West Ord 3 of 1875 (1875 GW Land Court Ordinance)

Griqualand West Ord 7 of 1875

Griqualand West Ord 12 of 1876

Griqualand West Ord 15 of 1879

Griqualand West Ord 6 of 1880 (1880 GW Fixity of Tenure in Mines Ordinance)

Griqualand West Ord 16 of 1880 (1880 GW Registration of Leases Ordinance)

Griqualand West Ord 21 of 1880

Griqualand West Procl 68 of 27 October 1871

Griqualand West Procl 69 of 27 October 1871

Griqualand West Procl 70 of 27 October 1871

Griqualand West Procl 71 of 27 October 1871 (1871 GW Diggings Proclamation)

Griqualand West Procl 72 of 27 October 1871 (1871 GW Quieting Proclamation).

Griqualand West Procl 73 of 27 October 1871

Griqualand West Procl 30 of 17 November 1871

Griqualand West Procl 31 of 17 November 1871

Griqualand West Procl 32 of 17 November 1871

Griqualand West Procl 33 of 28 November 1871

Griqualand West Procl 34 of 28 November 1871

Griqualand West Procl 35 of 8 December 1871

Griqualand West Procl 39 of 10 January 1872

Griqualand West Procl 47 of 23 July 1872

Griqualand West Procl 53 of 4 September 1872

Griqualand West Procl 59 of 7 November 1872 (1872 GW Prospecting Proclamation)

Griqualand West Procl 75 of 30 November 1872

Griqualand West Procl 76 of 30 November 1872

Griqualand West Procl 2 of 31 January 1873

Griqualand West Procl 5 of 26 February 1873

Griqualand West Procl 21 of 5 July 1873

Griqualand West Procl 22 of 5 July 1873

Griqualand West Procl 6 of 4 May 1874

Griqualand West Procl 7 of 2 June 1874

Griqualand West Procl 8 of 30 September 1880 (1880 GW Mining Proclamation)

Griqualand West Procl 201 of 1881

Griqualand West Procl 210 of 1882

Ord to Establish a Court to Adjudicate on Claims to Land in the Province of Griqualand West of 1875 (1875 GW Land Court Ordinance)

Pre-Union Statute Law Revision Act 36 of 1976 (Pre-Union Statute Law Act)

Precious Stones and Minerals Mining Act 19 of 1883

Sir John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure 6 of 1813 (Cradock Proclamation)

Case law

Bank of Africa v Kimberley Mining Board 1884 3 HCG 371 (*Bank of Africa* case)

Beaconsfield Municipality v London and SA Exploration Co Ltd 1884 3 HCG 183

Botha v Minister of Lands 1965 (1) SA 728 (A)

Bultfontein Mining Board v Armstrong 1890-1892 6 HCG 57

Bultfontein Mining Board v Armstrong and the London and South Africa Exploration Co 1890-1891 8 SC 236

Carter v Van Niekerk and Union Government (Minister of Lands) 1910-1917 GWLD 445

Goldschmidt & Co v Du Toit's Pan Mining Board 1883 2 HCG 195

Kimberley Divisional Council v London and SA Exploration Co Ltd 1885-1906 2 Buch 84

London and SA Exploration Co v Bultfontein Mining Board 1888-1889 6 SC 201

London and SA Exploration Co Ltd v Dutoitspan Mining Board 1883 2 HCG 154

London and SA Exploration Co Ltd v Trustees of Isaacs & Co 1884 3 HCG 174

London and SA Exploration Co Ltd v Kimberley Divisional Council 1884 3 HCG 125

London and SA Exploration Co v Murphy 1886-1887 4 HCG 322

Minister of Mineral Resources of the Republic of South Africa v Sishen Iron Ore Company (Pty) Ltd 2013 (4) SA 461 (SCA)

Murtha v Von Beek 1880-1884 1 Buch AC 121

Queen v Town 1884 3 HCG 143

Reed v De Beers Consolidated Mines Limited 9 1892 Juta SC 33

SA Loan Mortgage and Mercantile Agency v Cape of Good Hope Bank and Littlejohn 1888-1889 6 SC 163

Union Government (Minister of Mines) v Thompson 1919 AD 404

Van Niekerk and Union Government (Minister of Lands) v Carter 1917 AD 359

Webb v Giddy 1878 3 App Cas 908

JUSTINIAN'S WELCOME TO THE CONSTANTINOPLE LAW SCHOOL

David Pugsley*

ABSTRACT

This paper starts with Justinian's speech welcoming the new first year law students. They will not have to study *antiquae fabulae* compiled by Tribonian, Theophilus and Dorotheus contrary to the emperor's wishes, but Institutes following his clear instructions. Tribonian, who originally had total delegated authority, was reduced to strict obedience to the emperor's instructions. The *antiquae fabulae* were preserved by adding them on at the end of the Digest after 50 15, to form titles 50 16 and 17. That explains why they have the appearance of having been tacked on at the end, and why they contain so many twin texts when repetitions were prohibited in the Digest but would have been quite suitable in a first year student work.

Keywords: Justinian; Institutes; Tribonian; *antiquae fabulae*; *de verborum significatione*; *de regulis juris*

Imperatoriam[1]

1. It is good to see so many freshers[2] keen to study law.[3]

2. And when we had organised the venerable constitutions of the emperors, which were previously in a muddle, and set them out in a clear and methodical order, we

1 21 Nov 533. This is a speech, *oratio nostra* (*Tanta* 11, last sentence).

2 *Juventus*.

3 *Cupida legum*.

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Fundamina
Volume 24 | Number 1 | 2018
pp 57-68

DOI: 10.17159/2411-7870/2018/v24n1a3
Print ISSN 1021-545X/ Online ISSN 2411-7870

then turned our attention to the enormous volumes of the old jurisprudence as well. It was a daunting task, but we jumped in at the deep end and, thank heavens, we have already completed it.

3. When, thank God, this was completely finished,[4] we summoned his Excellency Tribonian, past chamberlain[5] of our sacred palace, and also Theophilus and Dorotheus, the illustrious scholars.[6] We already knew from our own experience their legal skill and knowledge, and their loyalty and obedience to our instructions. We told them in no uncertain terms[7] to compile the Institutes at our command and following our instructions; so you may start studying the law, not from what the ancient jurists said (*antiquae fabulae*),[8] but from your splendid emperor, and you may hear and learn nothing that is not useful or is out of place, but only the actual substance of the law. Previously your predecessors only read the imperial constitutions after four years, but you have shown that you deserve the great honour and the great pleasure of studying them straight away, so that both the beginning and the end of the law course are pronounced by the voice of the emperor.

4. So, after the fifty books of the Digest or Pandects, containing the whole of the ancient law (compiled for us by his Excellency Tribonian and other illustrious and brilliant men), we ordered the said Institutes to set out in these four books the basic principles of the whole legal system.

5. They set out briefly both what was previously in force and what was later obscured by disuse and brought back to light by us.

6. They have been compiled from all the Institutes by the ancient authors and especially from our Gaius' commentaries, both his Institutes and his common legal problems,[9] and lots of other commentaries. Those three wise men presented them to us, and we have read and considered them, and decided to give them exactly the same legal authority as our constitutions.

4 *Peractum*.

5 *Exquaestore*.

6 *Antecessores*. Normally translated into modern languages as "professors". But the Justinianic sources have both *antecessores* and *professores*. The *antecessores* were brilliant (*facundissimi*) and illustrious; the *professores* were not. The *oratio ad antecessores* (*Omnem*) was addressed to them in Latin only, which they all understood; the *constitutio ad professores* was sent to them in Greek as well, in case they could not understand Latin. In *Dedoken* the *professores* are translated into Greek; the *antecessores* are transliterated, which suggests that they could not be translated. The confusion arose when they became *professores constituti*, professors designate, in *Omnem*. Since the *antecessores* were not translated into Greek, it might be better not to translate them into English either, but to keep the Latin word. Alternatively we might use the English word, "scholars", whose general meaning is clear enough, but whose precise meaning is elusive, just like *antecessores*.

7 *Specialiter*.

8 *Antiquorum juris auctorum responsa*, Cujas.

9 *Res cottidianae*.

Deo Auctore 11[10]

And so we order that everything should be governed by those two *codices*, one of constitutions, the other of jurisprudence abbreviated and compiled in the future *codex*; ... or if anything else is promulgated by us to take the place of the Institutes (*institutionum vicem optinens*), so that freshers, having been taught the basics, may be brought more easily to the understanding of the higher learning.[11]

Tanta 11[12]

But we saw that the burden of so much knowledge was too heavy for freshers[13] standing in the first reception rooms of the laws and in a hurry to enter into their secrets. So we decided that a shorter version[14] should be prepared ...[15]

And so we summoned Tribonian, the eminent man who was chosen for the government[16] of the whole work, and also Theophilus and Dorotheus, illustrious men and brilliant scholars, and instructed them to make a separate collection (*libris separatim collectis*) of the books by the old authors containing the first principles of the laws and called Institutes. Whatever was found in them that was useful and most appropriate and polished in every way and in accordance with modern practice, should be carefully excerpted and re-arranged in four books to set out the basic and elementary principles of the whole learned work; so that freshers could build on them and support the heavier and more detailed rules of law.

10 15 Dec 530, addressed to Tribonian, and through him to the other compilers, *jubemus igitur vobis*.

11 The second half of this text fits very badly with the first. The two *codices* are there because they set out the whole law; the Institutes, or their replacement, are there because they are useful for students. And the second half does not link grammatically to the first. It would fit much better in *Deo Auctore* 12: commentaries are forbidden; but *quaedam admonitoria* are permissible, *vel si quid aliud a nobis fuerit promulgatum institutionum vicem optinens*. It is perhaps a hasty annotation by Justinian on Tribonian's original draft: the Digest is to be compiled (by the compilers), the Institutes may be promulgated (by Justinian). That does not affect the argument in this article.

12 16 Dec 533. This and its Greek version, Dedoken, were speeches, *orationes*, addressed to the Senate and the whole world (*Omnem pr*).

13 *Homines rudes.*

14 *Mediocris emendatio.*

15 Here there is an extraordinary set of mixed metaphors, which cannot be meaningfully translated and which do not appear in the Greek version in Dedoken:"So that, thereby tinctured and so to speak imbued with the first elements of the whole subject, they might proceed to the innermost recesses thereof and take in with eyes undazzled the exquisite beauty of the law" (Monro). "So that they, receiving a new coloration from it and, so to speak, imbued with the first fruits of the whole subject, might be able to proceed to the innermost parts of it and absorb with eyes undazzled the exquisite beauty of the law" (Watson).

16 *Gubernatio.*

We also told them to keep in mind our constitutions, issued for the amendment of the law, and to insert the amendments in the Institutes straight away, to make clear both the previous differences of opinion and the later fixed rules.

The completed work was presented to us and re-read; we gave it our approval because it was not in breach of our instructions. And we ordered that those books should have the force of constitutions, as our speech, inserted as a preface to those books, formally announces.

1 Who was in charge, Tribonian or Justinian?

According to the traditional view Tribonian was in charge of everything. He had been a member of the commission for the first Code, and he was the senior member of the commissions for the Institutes, the Digest and the second Code. He was the leading figure in Justinian's law reforms.

The picture in *Imperatoriam* is rather different. He appears as a brilliant lawyer, but the emphasis is on his loyalty and obedience and on Justinian's commands and authority. Justinian insisted that the students should have his Institutes and not a collection of *antiquae fabulae*. Presumably Tribonian and his colleagues had produced a collection of *antiquae fabulae* (we shall come back to this point later), and Justinian overruled them very firmly. It is therefore appropriate to take a fresh look at the question: "Who was in charge?"

In *Deo Auctore*, the official announcement of the Digest programme in December 530, the position is clear and unambiguous: Tribonian was in charge. He had authority to choose the compilers (he presented them to Justinian for his approval, but this seems to have been a pure formality), and the whole project proceeded under his control (*gubernatio*) and his supervision (*vigilantia*).[17] He was in charge of the manuscripts and distributed them to the other compilers.[18] The same idea of *gubernatio* appears at the beginning of the constitution in the relationship between Justinian and his empire: *nostrum gubernantes imperium*, governing our empire. Justinian was an absolute ruler, in complete control of the empire. Similarly Tribonian was in complete control of the whole operation, with Justinian's permission, *totam rem faciendam permissimus*.

In *Tanta*, the official conclusion of the Digest in December 533, the emphasis has been totally reversed. Tribonian no longer had permission to do what he wished but instructions, *omne ministerium huiuscemodi ordinationis imposuimus*, to do what the emperor wanted, *ut nostrum desiderium adimpleret*. Tribonian's *gubernatio* has gone, so has his *vigilantia*. It is now Justinian who is vigilant,[19] asking questions all the

17 *Deo Auctore* 3.

18 *Tanta* 17: *praebuit*.

19 He had previously shown *vigilantia* in the constitutions: CJ 7 31 1 *pr*. But that was natural in the case of law reform.

time, *semper investigando*, and keeping a close eye on everything that is happening, *perscrutando*.[20] Tribonian, said Justinian, thought nothing more important or dearer to his heart than the emperor's commands.[21] This is very much in line with what we have seen in *Imperatoriam*.

Deo Auctore and *Tanta* were published together as prefaces to the Digest in 533 and as title 1 17 in the second Code in 534. It is the natural tendency of lawyers to interpret such documents together to reconcile any differences between them. But "lawyers are no good as historians; they have no sense of time".[22] They were originally published three years apart, and, as historians, we should consider the possibility that the differences between them were due to events during those three years.[23]

Something must have happened between December 530 and December 533 to cause such a radical change in the management of the project. One possibility is the *Nika* riots in January 532, when Tribonian was sacked as *quaestor* and perhaps also as a compiler, so that when he came back he did so on different terms. Another possibility is that Tribonian and the compilers had done something of which Justinian strongly disapproved, causing his change of attitude. That might have been the compilers' collection of *antiquae fabulae*.

2 Why did the Institutes start so late?

It was only after the Digest was completely finished that Justinian summoned the three compilers of the Institutes and gave them their instructions. That is surprisingly late; and indeed Bluhme says: "But it seems that this last piece of information should not be taken absolutely literally, as otherwise the publication of the Digest would certainly have taken place earlier; and Justinian only really talks of the disposal of the main difficulties, namely excerpting all the works and excluding all the obsolete laws."[24] And he suggested that after book 34 had been completed Tribonian, Theophilus and Dorotheus started to work on the Institutes and left the other compilers to edit the last sixteen books of the Digest on their own. There is no justification for that suggestion in *Imperatoriam*, which clearly states that everything had been completed.

20 *Tanta pr.*
21 *Tanta* 9.
22 David Starkey, Radio 4, 23 Apr 2015, debating with Helena Kennedy QC, who did not disagree.
23 This is true of other issues as well. For example, *Tanta* tells us that there were seventeen compilers and lists their names. It is generally assumed that they were all there from beginning to end. But *Deo Auctore* does not give the number or the list, and there is no evidence that they were all there at the beginning. Some may have started later on, like the workers in the vineyard, where all were treated equally at the end: Matthew 20, 1-16.
24 Bluhme (2008): 374-375.

The question is: why did Tribonian and his colleagues not start sooner? Why did Justinian not give them clear instructions to start sooner? He had made it clear in *Deo Auctore* that he wanted an elementary introduction for the benefit of first year students; and the compilers working on the Sabinianic Mass had read and excerpted all the classical Institutes immediately after the Digests of Julian and Alfenus and related works. They could have started on the Institutes straight away. That would have been quicker and easier for them, and more convenient for their readers and for us. They could have drafted I 4 1 at the same time as they drafted D 47 2. Then they could have had the same definition of *furtum* in both places instead of two variants: *lucri faciendi gratia* included in the Digest but omitted in the Institutes. They could have drafted I 4 3 at the same time as they drafted D 9 2. Then they could have had the same account of *actiones utiles* and *in factum* in both places instead of the conflict that appears between them.

But Justinian's complaint was not simply about the delay. It was that they had actually produced the wrong thing: they had produced *antiquae fabulae*, instead of Institutes.

For an explanation we must go back first to *Deo Auctore* 11. The instructions were not simply to produce a set of Institutes, but to produce something *institutionum vicem optinens*. Does that mean some sort of Institutes, or something instead of Institutes? Does it mean Institutes (in which case the language is odd) or something other than Institutes?[25] Modern translations struggle to find a satisfactory interpretation of *vicem*: something "to serve the use of" institutes (Monro); something "serving the purpose of" institutes (Watson); something "to replace" the elementary works (Honore); "in forma di" istituzioni (Bianchini). As lawyers we are trained to find the correct interpretation of disputed texts. The question is: what do those words mean? As historians we should consider a different possibility, namely that the words are ambiguous, so that we should ask: what did the writer mean, and what did the reader understand? Justinian clearly thought he was going to get institutes, but perhaps Tribonian meant something other than institutes.

Next we must re-examine *Tanta* 11. Justinian summoned the three compilers and instructed them to compile a short student-friendly work in four books. In *Imperatoriam* 3 we are told that he summoned them and instructed them to compile the Institutes. The two accounts overlap in part and diverge in part; and the first question that arises is: are they two accounts of the same event, or accounts of two separate events? For it would not be surprising if Justinian had summoned the compilers more than once during the course of their work.

If there are two accounts of the same event, then, after the completion of the Digest, the compilers were instructed to make a separate collection of the classical institutes, *libris separatim collectis*. You can imagine the reaction of the compilers:

25 Something that is *legis vicem* is not *lex*.

"But Justinian we have already done that once in the course of compiling the Digest; do you really want us to go through that process again?! How long is that going to take?" And the phrase *libris separatim collectis* is odd, as is clear from the modern translations: "to collect the books one by one" (Monro[26] and Watson); "les livres rassemblés un a un" (Gaurier); "opere raccolte autonomamente" (Bianchini); "Bücher gesondert zu sammeln" (Behrends *et al*). What does *separatim* mean? What does it add to *collectis*? How else do you make a collection? When I pick a bunch of flowers I pick them one by one, but I do not say so.

If there were two separate summonses the text makes good sense. We know that the compilers made a separate collection of Institutes inside the Sabinianic Mass. While many works were grouped by author – Papinian, Modestinus, Pomponius, Javolenus – the Institutes were grouped separately by subject matter. Justinian told the three compilers to make a separate collection of Institutes. It is reasonable to assume that the instruction preceded the performance. In that case Justinian summoned the compilers at least twice, once early in 531 and once sometime in the middle of 533. That is confirmed by an important difference between the two accounts. In *Tanta* 11, Tribonian still has the *gubernatio* of the whole operation, and Theophilus and Dorotheus are, as usual, illustrious and brilliant, *illustres et facundissimi*. In *Imperatoriam* 3, there is no mention of Tribonian's *gubernatio*; and the word *facundissimi* does not appear. The compilers are still clever and knowledgeable, but they are also loyal and obedient. That is in line with the fundamental change between *Deo Auctore* and *Tanta*.

The three compilers did not produce the Institutes that Justinian wanted, but something which he described as *antiquae fabulae*. You can imagine the scene when Tribonian and the other two took the collection to Justinian:

"Justinian, here is the new introductory work which we have just compiled for first year students." And Justinian, glancing at it: "This is not what I wanted. I told you to produce a set of Institutes."

Tribonian, in some trepidation, "No, your Majesty, you told us to produce something instead of the Institutes. Look, here are your instructions in *Deo Auctore*. They say quite clearly *institutionum vicem optinens*, and that is what we have done."

Justinian, furious: "That is not what I meant. These are *antiquae fabulae*. I do not want them. Go away, and compile a set of Institutes. Is that clear?"[27]

After that Justinian kept a close eye on everything that his loyal and obedient compilers were doing. When the new version was presented to him, he personally read and examined it to make sure that it was in accordance with his instructions, and only then did he give it his approval and the same status as a constitution.

26 Followed by Blume in his translation of CJ 1 17 2.

27 *Specialiter mandavimus*!

3 What were the *antiquae fabulae*?[28]

Justinian rejected what he called *antiquae fabulae* without telling us much about them. But we can deduce something from the words and something from the contrast with the Institutes on which Justinian insisted.

The words, *antiquae fabulae*, might mean "ancient fables". Peter Birks has "obscure old stories". Bianchini has "chiacchiere degli antichi", ancient gossip or chit-chat. But why should Justinian tell the students that they need not read ancient fables? Had previous students read ancient fables? No, they had read Gaius, and his Institutes were not ancient fables. Had anyone suggested that they should read ancient fables? Had the three compilers made a collection of ancient fables? That is most unlikely. So we need to look to see if there is another, and more plausible, interpretation of the words.

The word, *fabula*, occurs twice, and only twice, in the Justinianic sources: once here, and once in CJ 7 40 1 1d (18 March 530). Blume translates it as follows: "So no one must interpret that an action ... for theft, robbery or any other personal action has a longer life than thirty years, but it ceases to have life when the period mentioned, after it has accrued and come into existence, has expired and is not brought to life again to be finished after the stated time, according to idle prattle, as, for instance, has been stated in connection with actions for theft." If this is right then *fabula* means "idle prattle". But it is a very bad translation. It omits *ab initio*, *semel*, *iteratis* and *saepe*; *memoratum tempus* appears twice; and the word order is completely distorted. And we may wonder what is the point of the reference to idle prattle?

Here is my translation: "(B)ut it is from the moment when the action first begins (*ab initio*) and when it has been once (*semel*) born, and not after it has been re-created over and over again (*saepe*) by repeated *fabulae* (*iteratis fabulis*), as used to be said of theft, that the said period brings it to an end." Now an action cannot be re-created over and over again by repeated idle prattle. We need to find another translation and interpretation of *fabula*. Looking at other meanings of *fabula* and related words like *fabulor*, I suggest the neutral translation "statement". If I tell you that certain things are mine and you have stolen them, time runs from that point, and the action cannot be revived over and over again by repeated statements to the same effect.

We can now return to *Imperatoriam* 3. If *antiquae fabulae* means "ancient statements", what the ancient lawyers said, it could refer to something similar to the Digest, with authors' names (inscriptions) and text: in fact "ancient quotations". Is it plausible that the three compilers might have compiled an introductory work for first year students in that way, at the same time as they were compiling the Digest itself,

28 *Cf* Knütel (2013): 169-183. He translates *Imperatoriam* 3 so that henceforth the students will no longer (*hinfort ... nicht mehr*) have to study *antiquae fabulae*, which implies that they had previously had to do so. Actually the text merely says that they will not have to study them, which does not. And he rejects Cujas' interpretation: *ab ipso ore principis, non ab antiquorum juris auctorum responsa,* without any reason.

instead of the Institutes? Why not? Did Justinian disapprove of it? Yes, we know that he did: he wanted Institutes in his own name, without inscriptions; *imperialis splendor*, not *antiquae fabulae*. He wanted nothing that was not useful, nothing that was out of place in an introductory work (*nihil inutile nihilque perperam positum*), just the substantive law (*quod in ipsis rerum optinet argumentis*). The inscriptions were not useful. Why should first year students worry about the names of the classical jurists? Let them just learn the law. (First year students in case-law systems today agree: why do we have to remember the names of the cases? Why can we not just learn the law?)

4 What happened to the *antiquae fabulae*?

Our final question is: (W)hat happened to the *antiquae fabulae*? Of course, since Justinian had rejected them, they might have disappeared without trace. But one can imagine Tribonian saying to Justinian: "Justinian, we have spent a lot of time and energy preparing these introductory materials. They are really basic and useful. It would be a pity to waste all our hard work. If they cannot be used for first year students, can we put them somewhere else?"

Justinian: "How are you going to do that?"

Tribonian: "We could have a separate publication, *diversae fabulae juris antiqui*, for example."

Justinian: "That will not work. *Deo Auctore* 11 said that the whole law should be set out in the two *codices, constitutionum* and *juris enucleati*. You cannot have anything else."

Tribonian: "Perhaps we could add them on at the end of the Digest."

Justinian: "You cannot do that. The Digest is already finished. You cannot add anything else now. In any case I told you in *Deo Auctore* 5, that there should be 50 books. So you cannot have 51."

Tribonian: "But we could add them on at the end of book 50. You said 50 books, but you did not say how long a book should be. Some books are very short, like D 6, because you abolished *res mancipi* and *mancipatio* and the *actio auctoritatis*; some are average; and some are very long: books 40 and 48 are nearly twice as long as the average. We could do the same with book 50."

Justinian (who has many more important things to do): "OK, go ahead."

And there they are. If we look for basic materials which seem to be out of place we can find them in D 50 16 and 17: definitions and legal rules. Forget for a moment the twin texts and Bluhme's Masses; forget the details; think of these two titles as a block. The end of the Digest as we have it is most remarkable. If it had ended at D 50 15 there would be nothing surprising. Books 49 and 50 are composed of lots of small titles (18 in book 49, 15 in book 50) on the most miscellaneous and insignificant topics, as if there was nothing important left to say; D 50 15 is quite a good place to

end, with its list of cities in which the *jus italicum* applies; and if book 50 ended at that point it would be more or less the same length as the average book in the Digest.

And then we have two major titles, by far the longest in the Digest in the number of fragments, apparently of great importance, and which double the length of book 50. This does not look as if it was planned. Those two titles look as if they were tacked on at the end at the last moment.[29] Digest 50 16 is particularly striking because there was already a separate section of book 32 on the meaning of words, which the repetition of Bluhme's Masses shows was intended to be a separate Digest title. And both titles, but particularly 50 17, are remarkable for the number of *leges geminatae*, which Justinian had expressly forbidden in *Deo Auctore*.[30]

On the other hand in both titles the fragments, with very few exceptions, follow Bluhme's order, so they must have been drafted at the same time as the rest of the Digest while the compilers were working on the texts in their original order. That means that they were drafted before the completion of the rest of the Digest.[31] And the question is: Where did they come from? The answer is that they had been drafted by the three compilers as an introductory work for first year students at the same time as, but separately from, the Digest itself. That explains the repetitions. Repetitions were forbidden in the Digest, and between the Digest and the Code; but there was no objection to repetition in the first year introductory work, which was not intended to say something different but to cover the same ground in simpler form, without long factual cases or complicated legal argument. The compilers were expressly told to include references to Justinian's constitutions in the Institutes, which also repeat passages from the Digest, like the definition of *furtum*, though without the inscriptions. First year students like legal rules without having to work them out from the cases. (That is still true today: why do we have to read the cases? Just give us the rule.)

Justinian insisted on having his Institutes. Tribonian did not want his work wasted. If there was no other possibility it could be added at the end of the Digest, after 50 15. The compilers' *antiquae fabulae* became the Digest titles 50 16 and 17.

Postscript

There could be no objection to a title on the meaning of words since there was already a section on that in the Digest itself. It was too late to expand book 32,

29 Hofmann 1900: 113-114 n 7, describes them as *Anhänge*, with an academic origin, but he does not explain where they came from or why they were added.

30 Stein 1966: 122-123: "The precise function of the last title of the Digest is not clear today and was probably not clear to the compilers themselves ... The compilers no doubt attributed to the title a certain ornamental function. It rounded off the Digest in a neat and conclusive manner. Yet 211 ornaments are a little excessive even for Byzantines."

31 Verrey 1973: 103: "*Que cette ordre soit demeuré parfaitement immuable démontre bien que les titres 16 et 17 furent rédigés longtemps avant l'achèvement du Digeste lui-même, à un moment où les compilateurs avaient sous les yeux les textes extraits dans une forme peu ou pas élaborée*."

because the Digest had already been completed (up to the end of 50 15), but there was no objection to adding it on at the end. The situation with regard to 50 17 is less clear. It is just a collection of miscellaneous rules. It is possible that Justinian did not want them but Tribonian did.

But, as we know, 50 17 was added as well. It was unlikely that Justinian would read the whole Digest and notice it. There was, however, a problem with *Tanta* 8c, which records the contents of book 50. It was quite likely that Justinian would read that; at any rate it was a serious risk, enough to worry Tribonian. All translations are the translator's interpretation of his original text. Let us, therefore, look at some of the modern translations of *Tanta* 8c. The translations by Monro, Watson, Bianchini and Gaurier all omit any reference to *regulae juris* and 50 17. The Bianchini translation is particularly striking because it ends with the words *significato delle parole*. The German translation, on the other hand, includes them: *und das, was die alten Juristen über die Bedeutung der Wörter gefunden und was sie als Regel definiert haben*.

It seems that some people can see 50 17 in *Tanta*, 8c, and others cannot. How are we to explain this extraordinary phenomenon? The answer lies in the words *quaeque regulariter definita* near the end of the text. Monro[32] moves them to the beginning and translates: "whatever else we find devised by the ancients *and strictly laid down* ..."; Watson varies it slightly: "whatever else has been found in the ancient works *or has been laid down by statutes* ..."; Bianchini has: "ogni altra disposizione *e ogni definizione formulata dagli antichi* ..."; and Gaurier says: "Tout le reste qui a ete trouvé dans les anciens livres *et qui a été régulièrement défini* ..."

The German translation faithfully follows the order of the Latin text,[33] and recognises that *quaeque regulariter definita* refers to 50 17. Similarly Peter Stein translates: "whatever is expressed in the form of a *regula*."[34]

It seems that those who look for 50 17 in *Tanta* 8c, find it; but those who are not looking for it do not find it. We might ask: who is right? What do those words mean? Or we may ask: what did Tribonian mean, and what did Justinian understand by those words? If Justinian had rejected the *regulae* as *antiquae fabulae*, he would not be expecting to find them and, if he read the text, might not have noticed them. Tribonian, who wanted to include *antiquae regulae*, intentionally chose words which did include them but which could easily be overlooked. Hence the rather obscure wording which carefully avoids the word *antiquae*. The Greek version in Dedoken is much clearer: "and what has been said by the jurists of old on the maxims of law."[35] Justinian would have noticed that; but, while he might have read the Latin

32 Followed by Blume in his translation of CJ 1 17 2.

33 So the last word of the Latin text is *perfectus*, the last word of the German translation is *vollendet*.

34 Stein 1966: 115.

35 Watson edition, translation by Olivia Robinson.

version before he approved it, it was most unlikely that he would proof-read the Greek version.

Summary

1. Who was in charge, Tribonian or Justinian? Answer: Tribonian at the beginning, Justinian at the end. The incident of the Institutes may have been the turning point.
2. Why did the Institutes start so late? Answer: because the three compilers had been making a collection of what Justinian called *antiquae fabulae* and it was only when that was rejected by Justinian that they started on the Institutes.
3. What were the *antiquae fabulae*? Answer: a collection of quotations from the ancient jurists, with inscription and text, giving pithy definitions and legal rules suitable for first year students.
4. What happened to the *antiquae fabulae*? Answer: They were tacked on at the end of the Digest after D 50 15 to form the last two titles, namely 50 16 and 17.

BIBLIOGRAPHY

Bluhme, Friedrich (1820) "Die Ordnung der Fragmente in den Pandectentiteln. Ein Beitrag zur Entstehungsgeschichtliche Rechtswissenschaft" in *Zeitschrift für geschichtliche Rechtswissenschaft*, vol 4, 257-472

Blume, Fred Heinrich (2008) *Annotated Justinian Code* (Wyoming)

Hofmann, Franz (1900) *Die Compilation der Digesten Justinians* (Vienna)

Knütel, Rolf (2013) "*Constitutio Imperatoriam, 3: fabulis oder tabulis*" in *Liber Amicorum Guido Tsuno* (eds) Fritz Sturm, Philip Thomas, Jochen Otto & Hikaru Mori: 169-183 (Frankfurt)

Stein, Peter (1966) *Regulae Juris* (Edinburgh)

Verrey, Olivier (1973) *Leges Geminatae* (Lausanne)

THE EMERGENCE OF LAW IN ANCIENT EGYPT: THE ROLE OF *MAAT*

NJ van Blerk* **

ABSTRACT

In this article, the emergence of ancient Egyptian law out of religion and specifically arising from the concept of *maat* is discussed, as well as the important role played by religion, and specifically *maat*, in the ancient Egyptians' understanding and development of the law. An attempt is made to indicate that the ancient Egyptians indeed had law and to explain what the ancient Egyptians understood by law, followed by a discussion of the development of ancient Egyptian law and key jurisprudence elements of ancient Egyptian law.

KEYWORDS: Ancient Egypt; emergence of Egyptian law; importance of religion; *hp*; *hpw*; *maat*; jurisprudence; justice; balance; impartiality; tradition; precedent; custom

1 Introduction

Law has existed as long as organised human society, but its origins are lost in the mists of prehistory.[1] The advent of writing left a record from which the living

1 See Westbrook 2003a: 1.

* This article is based on ch 4 of my PhD thesis titled "Aspects of succession law in ancient Egypt with specific reference to the testamentary disposition".

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Fundamina
Volume 24 | Number 1 | 2018
pp 69-88

DOI: 10.17159/2411-7870/2018/v24n1a4
Print ISSN 1021-545X/ Online ISSN 2411-7870

institutions of the past may be reconstructed. In many instances the emergence of truly legal concepts was derived from religion, although over time law emerged separately from religion.[2]

Religion was present in every aspect of the Egyptians' life; it was embedded in society, rather than being a separate category.[3] Every aspect of the world was seen as being governed by a divine power which established and maintained order.[4] Their beliefs and practices assisted the ancient Egyptians to understand and respond to events in their lives.[5] It was religion, and the cult actions deriving from those beliefs, that held ancient Egyptian society together and allowed it to flourish for more than three thousand years.[6] Addendum A (at the end of this article) gives a summary of ancient Egypt's timeline.

2 Religious background

The law stood above all humans and was personified by the goddess *Maat*, with the concept of *maat* representing truth, justice, righteousness, the correct order and balance of the universe.[7] Egyptian law was essentially based on the concept of *maat*, which was about morality, ethics and the entire order of society.[8] The goal of *maat* was to keep the chaotic forces at bay, with the idea of order as the *Grundlage* of the world, upon which the legal system was based in turn.[9] The ancient Egyptians saw no difference between human and divine justice.[10] *Maat* represented a sense of moral responsibility.

3 The emergence of law in ancient Egypt

The organisation of the legal system in ancient Egypt was governed by religious principles and it was believed that the law had been handed down from the gods to mankind at the time of creation and that the gods were responsible for maintaining the concept of law.[11] Egyptian law was based on a common-sense view of right and wrong, following the concept of *maat*.[12]

2 Allam 2007: 265.
3 Shaw & Nicholson 2008: 273.
4 Allam 2007: 263.
5 Gahlin 2007: 339.
6 Teeter 2011: 11.
7 David 2002: 288.
8 See Helck & Otto 1980: 1110; Allam 2007: 263; Shaw & Nicholson 2008: 178.
9 Helck & Otto 1980: 1110-1111.
10 Van Blerk 2010: 584.
11 David 2002: 288.
12 Van Blerk 2006: 26.

In ancient Egypt, religion has always been significant in terms of legal relations between people.[13] This close relationship and interdependency between religion and law had one very important consequence: since the gods were perceived as the guardians and source of the established order, they were consulted for a proper decision in doubtful cases. The ancient Egyptians therefore employed, alongside the usual legal process, also divine judgement which placed the omniscience of a divinity at the service of judicial proceedings.[14]

Law emerged as a mechanism to maintain *maat* on earth with the king playing an important part by "making" law.[15] The king, as a king god, was the supreme judge and law giver.[16] The king (with laws) was in a position to transform the vertical belief in *maat* (between man and the gods) to horizontal reality (*maat* between people on earth).

The king's primary duty was to uphold the order of creation which had been established on the primeval mound at the time of creation and kingship in Egypt therefore represented the effective power of *maat*.[17] As the son of the Sun-god he was entrusted with the task of upholding *maat*.[18] The pharaoh's duty was to defend *maat* in order to maintain and restore order, which he did by issuing appropriate laws.[19] Law was therefore tied up with a religious world view and represented the rules regulating the behaviour of members of society.

The king upheld the law and was also subject to the law.[20] He had to live his life according to the principles of *maat* and furthermore he had to maintain *maat* in society. He was therefore expected to "rule by *maat*" and in order to attain *maat* on earth he had to make law.[21] The word for law was *hp* (and the plural *hpw*) and "*hp*" was also later translated to include "regulations" and "statutes".[22] It was essentially *maat* that necessitated the need for law and the king was therefore the link between law and *maat* (religion).

It would appear that the king, the vizier (who fulfilled the role of a "prime minister" in our modern terminology) and the great courts located at Memphis had jurisdiction over crimes against the state. The king was the head of the judicial administration, but unfortunately no evidence survives from the Old Kingdom to suggest that the king could hear and decide cases himself.[23] The purpose of law in

13 See Allam 2007: 264.
14 *Ibid*.
15 See Van Blerk 2010: 597.
16 Helck & Otto 1980: 1110.
17 Tobin 1987: 115.
18 See Bleeker 1967: 7.
19 Allam 2007: 263.
20 David 2002: 288.
21 Goebs 2007: 276.
22 See Kruchten 2001: 277; Lesko 1994: 82.
23 *Cf* Muhs 2016: 25.

ancient Egypt was to realise *maat* on earth and the king was the link between law and *maat*.[24] Kingship in ancient Egypt therefore effectively represented the effective power of the order of *maat*.

The king was seen as a source of law since the ancient Egyptians regarded him as a god. His word therefore had the force of law and he was also regarded as the primary source of law.[25] The king's duty to make laws is summarised in texts by the phrase "putting *maat* in place of injustice" and, on temple walls, by images of the king presenting the symbol of *maat* to the gods.[26] This scene of the presentation of *maat* first appears as an iconographic device in the time of Thutmose III, where her effigy was presented to the gods by the king as sustenance.[27]

The ancient Egyptians believed that only the king knew the requirements of the *maat* principle and that his laws were identical to the will of the creator god, which was why the king could maintain law and order and why these laws and rulings of the king reflected the world in harmony.[28] It was the king's duty towards the gods and the people to maintain *maat* by means of promulgating law. The vizier was the king's delegate and the High-priest of *maat* as well as head of the courts of justice.[29]

Sometimes the king had to delegate his authority and it is believed that the legal official then wore a golden *maat* pendant.[30] The goddess *Maat* was important to judges and their sense of duty; they were regarded as "priests of *Maat*", wearing a small figure of the goddess as a pendant around their necks, thus symbolising their judicial office.[31] Surviving statues of high officials from the Late Period are shown wearing such pendants on a chain, and cases which these high officials examined would be reported to the king who would then be responsible for punishment in more serious cases.[32]

When the law was obeyed, the principle of *maat* was applied, but when one went against *maat* by committing an offence, the law could be applied against the wrongdoer.[33] The ancient Egyptians' lives were therefore governed by *maat*, with their law being justice in action. *Maat* became the focal point of the legal system (*hpw*) and if the laws (*hpw*) were obeyed, one would be following the principles of *maat*.

Law asserted its autonomy as early as the age of the pyramids, whereafter the role of religion in legal matters began to diminish. Religion then no longer determined the

24 Van Blerk 2006: 17-18.
25 See Versteeg 2002: 5; Westbrook 2003a: 26.
26 Allen 2004: 117.
27 See, further, Teeter 1997: 83.
28 *Cf* Helck & Otto 1980: 1115.
29 See David 2002: 288.
30 Shaw & Nicholson 2008: 178.
31 Versteeg 2002: 21.
32 Shaw & Nicholson 2008: 178-179.
33 Bedell 1985: 12.

legal standing of a matter, but it was rather the juridical mechanism which became authoritative – even in the religious sphere.[34] A well-known example of this is one of the central myths in ancient Egypt, namely "The Contendings of Horus and Seth", known from *Papyrus Beaty* dated to the mid-twelfth century BCE.[35] It is a satirical account of the lawsuit between the god Horus, the rightful heir to the crown of Egypt, and his uncle, the god Seth, who usurped the crown by murdering Horus' father Osiris. Even the gods themselves had to appear before a court in order to resolve their disputes. This myth is an expression of important Egyptian values such as justice and family solidarity.

Explicit sources of law from the Old Kingdom are rare, although there is considerable indirect evidence in the form of titles and references to legal institutions or situations.[36] There must have existed an abundance of archival documents from the Old Kingdom since people, animals and crop yields all had to be counted, and we see, from scenes in the Old Kingdom tombs, scribes carefully recording the quantities.[37] According to Muhs the Old Kingdom saw diversification of uses of writing compared to the preceding Early Dynastic Period: The first narratives from this period appear in the form of religious texts inscribed in royal tombs (so-called Pyramid Texts), biographies inscribed in the tombs, letters (both royal and private), agreements and court proceedings.[38]

The first discovered legal code dates from the late period (747-332 BCE)[39] and according to Teeter there were only a few codified laws since the king was the highest judge from whom ancient Egypt and all laws emanated.[40]

Throughout its long history the skilful ancient Egyptian government had guaranteed certain rights to the individual, which may be described as the Egyptian "law" of the period. According to Theodorides this "law" was embodied in statutes and protected by courts.[41] Religious life was expressed in legal terms, like the setting up of foundations, contracts and donations. Law regulated the entire day-to-day business of existence in the Nile valley.

According to Allam[42] an ultimate development in Egyptian history was the emergence of law as a notion separate from religion. He argues that the secularisation of law did not necessarily imply a blasphemous profaning of legal usages, for in

34 Allam 2007: 266.
35 See Sweeney 2002: 143.
36 Jasnow 2003c: 93.
37 See Lorton 2000: 345.
38 2016: 22-23.
39 Diodorus mentions that there was a Pharaonic legal code set out in eight books (see Shaw & Nicholson 2008: 178).
40 Teeter 2011: 4.
41 1971: 320.42
42 2007: 265.

many instances the emergence of truly legal concepts derived from religion. A good example of this is the emergence of private pious foundations.[43]

Theodorides questions whether one can talk about law before its elaboration by the Romans since there is a lack of documentary evidence.[44] There is no collection of laws from ancient Egypt, unlike Sumerian, Akkadian, Hittite and New Babylonian law collections, and – to make it even more difficult – the ancient Egyptians used everyday language regarding their legal concepts.[45]

Theodorides submits that by the beginning of the third millennium BCE the social and administrative system in ancient Egypt was based on the family.[46] The Palermo Stone illustrates the ancient Egyptian Nile flood, the annual census of the population and a biennial census of "gold and fields" from at least the Second Dynasty onwards. It is furthermore important to note that this implies that the transfer of personal and landed property from one owner to another was known. Documentary evidence in funerary inscriptions confirms that private property did indeed exist and that it was transferable, with equality between husband and wife in the eyes of the law.

When the Persians conquered Egypt, the fundamentally Egyptian institutions, based on the individual, were revived.[47] Tradition attributes a new codification of the existing laws to Darius. Under the Ptolemies in the second century BCE, judgment was given in a matter regarding conflicting interests in a succession, with the procedure, although adapted, still retaining several elements of the old tradition. Law was a living entity and therefore did not remain unchanged over the centuries; it changed because human aspirations, conditioned by new circumstances, necessitated change. This change evolved between the poles of equality and liberty on the one hand and that of inequality on the other.[48] What is striking about ancient Egyptian law, according to Theodorides, is its modernity.[49] Although remote in time, it furnished the ancient Egyptian civilisation with a structure close to that with which we are familiar today.

Theodorides states that the application of law was coherent despite peculiar features of procedure.[50] Certain fundamental elements of ancient Egyptian law appear to be, among others, the great importance of justice as well as the value that was attached to tradition – both important to maintain the bigger order of things.

43 *Ibid*.
44 1971: 291-292.
45 *Idem* 291-291.
46 Theodorides 1971: 292.
47 *Idem* 319.
48 *Idem* 320.
49 *Ibid*.
50 *Idem* 292.

4 Development of the law

Although sources of law in the Old Kingdom are rare, Jasnow states that there are indirect references to law in the form of titles as well as to legal institutions.[51] The corpus of royal decrees of a legal nature in the Old Kingdom and the First Intermediate Period may be divided into seven categories, namely:

- decrees regarding administration
- decrees regarding tax exemptions
- endowments of offerings
- endowment decrees for immovable property
- decrees for appointments
- stipulations for the benefit of private individuals
- letters

The main sources of law in the Middle Kingdom and the Second Intermediate Period derive from royal inscriptions, administrative papyri, private documents, private inscriptions and literature.[52] Although no law codes have been found for the Middle Kingdom and the Second Intermediate Period, some texts imply the existence of – if not an extensive code –, then at least limited systematic collections of "laws" (*hpw*). Furthermore, *papyrus Brooklyn* 35.1446 (Thirteenth Dynasty) refers *inter alia* to "the law pertaining to those who desert" and to "the law pertaining to one who flees the prison".[53]

Some of the most important Middle Kingdom archives and documents in terms of their legal content are the Lahun archives, the Hekanakhte letters (for leasing and land holdings) and the Djefa-Hapi contracts (mortuary provisions).[54] Tomb biographies, like those of Beni Hasan (Twelfth Dynasty), also occasionally have statements referring to legal matters and administration.[55] Texts initially written on papyrus were often inscribed on temple or chapel walls, obviously to provide security to the legal document.

Literary texts from the Middle Kingdom, such as the "Tale of the Eloquent Peasant" and the story of Sinuhe also include legal material, and in a passage from "The Admonitions of an Egyptian Sage", which describes a society in chaos, the speaker says: "Lo, the laws (*hpw*) of the chamber (prison?) – are thrown out, men walk on them in the streets, beggars tear them up in the alleys."[56] Religious texts, such as the Coffin Texts, often also contain certain elements relating to law.[57]

51 2003a: 93.
52 Jasnow 2003b: 255.
53 *Ibid*.
54 *Idem* 256-257.
55 *Idem* 257.
56 *Ibid*.
57 Jasnow 2003a: 97.

The New Kingdom has an abundant and a more varied corpus of legal texts than the Old and Middle Kingdoms. Although it did not produce a legal code, detailed royal edicts like the *Nauri Decree*, together with possible references to systematic law collections, exist.[58] For example, in the *Decree of Horemheb* the King states: "I have given to them (the judges) oral instructions and law(s) in their books" and in *Papyrus Bulaq* 10, for instance, one party cites the "law of pharaoh" as a precedent and in *Papyrus Turin* 2021 a man introduces a law with the following words: "The King said …"[59]

The New Kingdom documents are concerned with sales, loans, leases, disputes, litigation, marriage, adoption, partnerships and inheritance. Most of this material derives from Thebes in southern Egypt, while other documents, like the *Legal Text of Mes*, are from Memphis in the north of Egypt and contain references to court disputes, confirming the existence of government archives.[60]

The lexical texts that were found comprise a mixture of paragraphs with some appearing to be excerpts from a law code while others apparently derive from clauses in standard contracts.[61] This mixture of law-code paragraphs and contractual forms is found in the Demotic *Codex Hermopolis* (*Papyrus Mattha*) dated to the Hellenistic period which provides evidence that similar scholastic traditions must have existed in ancient Egypt despite the fact that none have been found yet.

According to Manning the so-called *Codex Hermopolis* is a collection of texts, or rather a manual, which provides guidance for legal solutions in unusual or difficult cases.[62] The guidelines contained in this document were used by the priest-judges to resolve disputes and served as a guide to the writing of certain legal instruments.

Theodorides affirms that although ancient Egypt did not provide a legal code, the application of law is coherent despite peculiar features of procedure.[63] It is important to realise that there was a procedure in existence with laws to govern its use. It is not clear how the ancient Egyptians defined their various legal categories, but apparently they proceeded as though these were similarly defined to those in modern times. For instance, a property transfer on death (law of succession) is clearly distinguished from a property transfer between living persons, in particular by the fact that the property does not change hands at the same time. A surviving spouse is not automatically an heir, but can be made one (a legatee) owing to the freedom to make a will. This, in turn, led to new social and legal circumstances and subsequently the creation of new law, and with this will, the person making the settlement modifies the legal destination of the property.[64]

58 Jasnow 2003c: 289.
59 *Ibid.*
60 See Jasnow 2003b: 292.
61 See Westbrook 2003a: 11.
62 See Manning 2003: 821.
63 See Theodorides 1971: 292.
64 *Idem* 321.

According to Theodorides[65] ancient Egypt does not present an example of the secularisation of law. On the contrary, however, it attained from the onset (during the Old Kingdom) a high level of institutional and juridical development.

It is known that classical writers, such as Diodorus, wrote respectfully of law and justice in ancient Egypt, and other law-makers, including probably Plato, travelled to Egypt in order to, *inter alia*, study law.[66] It is noteworthy that the Persian king Darius I is believed to have held Egyptian law in such high esteem that he ordered the collection of all that was known of Egyptian law prior to the Persian conquest and produced a codification written in Demotic script.[67] It is interesting to note that the history of law, which played itself out over millennia in the Mediterranean, had its foundation and origin in pharaonic Egypt.

5 Jurisprudence

Jurisprudence is described as "the science of philosophy of law".[68] One of the greatest Roman-Dutch jurists, Hugo de Groot (Grotius) wrote the following in his book *Introduction to the Dutch Jurisprudence*:

> Jurisprudence is the science of living according to justice. Justice is the moral virtue of doing what is just. That is just which is in accordance with right.[69]

Grotius further states that the term "right" is used in both a wide and a narrow sense. In its wider sense, "right" is the agreement of the act of a reasonable being with reason in as far as another has an interest in such an act, and in its narrow sense "right" is the relation which exists between a reasonable being and something that belongs to the same being.

Allam argues that judging from the ancient texts, it appears that the ancient Egyptians had no concept of jurisprudence as a discipline since there is no attestation for theoretical deliberations as the basis of substantive law.[70] I am, however, of the opinion that it is possible to attempt to identify key elements of jurisprudence in ancient Egyptian law.

The Egyptian word for law is *hp* ( ), which admits the same range of translations ("rule", "regulation", "habit", "rite", "ceremony", "cycle") as *nt* (translated as "custom").[71] The underlying idea of both these terms is the idea of recurrence, exemplified by the cosmos and the behaviour of earthly beings.[72] Both *nt* and *hp*

65 *Ibid*.
66 See Allam 2007: 272.
67 *Ibid*.
68 See Pollard 1995: 435.
69 See Maasdorp 1878: 1.
70 Allam 2007: 268.
71 Kruchten 2001: 277.
72 *Ibid*.

resorted under *maat*, which literally means "the one who steers", the embodiment of order, which is the reason why both supposedly existed from the beginning of time.[73]

The *Codex Hermopolis*, dated to the third century BCE, proves that the consideration of legal questions in isolation and abstract elaboration of legal norms were known to the ancient Egyptians.[74] This Code was not confined to local use and several copies might therefore have existed, circulating throughout ancient Egypt towards the onset of the Hellenistic era. The mention of harvest time provides a clue to its date of origin. Harvesting occurs between May and June, which does not correspond with the calendar in use during the third century BCE when the text was transcribed.[75] The harvest time mentioned in the papyrus corresponds rather to the calendar of the eighth century BCE, to the time when a fluctuating calendar was used. It may therefore be assumed that the relevant paragraphs were taken from a much older manuscript reflecting conditions of the eighth century BCE.[76] 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.[77] As the author proceeds from *inter alia* earlier sources, without stating this explicitly, it is possible that he may have reworked laws of earlier kings, using them as the basis for his own decisions. Many papyri show that laws from pharaonic times were still valid in the early Hellenistic era.

The *recto* contains texts dealing with an unusual subject, namely theoretical legal discussions divided into approximately 200 articles grouped into four sections and according to Allam the first of these sections deals with tenant farming arrangements and disputes between the tenant and the owner/lessor.[78] The texts include contract *formulae*, which served as templates, and the arrangements to be made, for instance, by the purchaser of a house to protect his interest against an unfair seller.[79] Included are also rental agreements for various types of buildings and an exposition of litigation arising from non-payments of rent.

A partial marriage settlement is discussed in detail in this papyrus.[80] In this case the woman ceded a considerable part of capital to her husband, who in turn guaranteed her an endowment. The concern was not with the marriage settlement as such, but rather in respect of the disputes that could arise between father-in-law and husband in case the contract was not honoured.[81]

73 *Ibid*.
74 Allam 2007: 268.
75 Pestman 1983: 17.
76 *Idem* 17-18.
77 See Allam 2007: 270.
78 *Idem* 268.
79 *Ibid*.
80 *Ibid*.
81 *Idem* 268-269.

This is followed by cases regarding immovable property, for example when a person built a dwelling on a plot of land and the title to said land was later claimed by another; the procedure is then described to be applied in order to settle the dispute; and is thereafter followed by a discussion of various disputes among neighbours.[82] The final texts of the *Codex Hermopolis* deal with the law of succession and more specifically with the position of the "eldest son" in disputed cases, and it furthermore addresses various actions regarding inheritance.[83]

From the following discussion of Allam it is evident from contemporary documents that all issues treated in the text are cases which reflect daily life issues.[84] Procedures for the admission of evidence, on which the judge would make his decision, are mentioned. Several types of admissible evidence, like oaths or entries in official registers, are known from other contemporary texts and the papyrus therefore provides valuable overviews of law in Egypt during the early Hellenistic period.

Importantly, as Allam then notes, only questions relating to private property are discussed, omitting matters of criminal law and it appears that the author was only interested in matters pertaining to the property rights of individuals.[85] The author therefore classified formulations in sections according to subjects with appropriate subdivisions and the arrangement of the material indicates an author who knew very well how to systematically treat legal questions, although it might not entirely correspond to our systems today. In order to discuss the topics, the author conceived apparent theoretical disputes and situations designed for guidance in the judgment of a relevant case; he also provides definitions for "defendant" and "plaintiff"; and in addition he makes use of abstract classification, developing – for example – the notion "thing" (*neket*) which the later Roman jurists would call *res*.

The author thereupon argues that when studying legal history it is important to realise that the author (of the *Codex Hermopolis* text) shows himself to be qualified as a jurist; he was a true jurisprudent.[86] Previously it was doubted whether there were scholars in ancient Egypt who could qualify as jurists in the strict sense of the word, but today their existence is undisputed.

Ancient Egyptian jurists treated legal material systematically and clearly followed a specific principle of organisation with subdivisions in every category. A deepening of juristic thought took place, which may be regarded as the point of departure for law as a rigorous scientific discipline and the beginning of genuine jurisprudence.[87]

82 See Allam 2007: 269.

83 *Ibid*.

84 *Ibid*.

85 *Ibid*.

86 *Ibid*.

87 *Idem* 270-271.

Regarding elements of legal philosophy the following section from the "Instruction of the Vizier", Rekhmire (*ca* 1479-1425 BCE), is of importance:

> I judge both (the insignificant) and the influential. I rescue the weak man from the strong man; I deflected the fury of the evil man and subdued the greedy man in his hour … I succoured the widow who has no husband; I established the son and heir on the seat of his father. I gave (bread to the hungry), water to the thirsty, and meat, oil and clothes to him who had nothing … I was not at all deaf to the indigent. Indeed, I never took a bribe from anyone.[88]

In Rekhmire's instructions it is laid down that justice is to be rendered in public and in such a way that every person shall at all times be able to secure his rights.[89] In this regard, an appeal is made to a sense of equity and by implication to jurisprudence, as it is pointed out that the records of all judgments are kept in the archives of the vizier to be consulted. The composition of these instructions must go back to the Thirteenth Dynasty, but the best copy we have is that of Rekhmire's *Instructions*.[90]

Among the most influential precepts and values in the Egyptian jurisprudence are a strong preference for tradition, a view that theoretical skill should be admired and a desire to achieve impartiality and social equity – as Rekhmire's inscription demonstrates.[91]

Taking everything thus far said into account, it is my opinion that two very basic and fundamental elements of ancient Egyptian law may be identified and will now be discussed in the following subsections.

5 1 Justice, balance and impartiality

According to Allam "*maat* subordinated the social order to a broad concept of equity", and since the ancient Egyptians had a well-developed sense of justice, the choice of "taking the law into one's own hands" was out of the question.[92] The only admissible means of defending disputes was by due process in the courts, and with their sense of justice and social responsibility they did not only advocate their own rights, but also those of others.

The legal process itself is in essence an attempt to reach a result which both parties involved in a dispute are willing to accept, and to function fairly, a legal process should allow adversaries to explain their respective points of view.[93] Because of the ancient Egyptians' keen interest in – and love for – rhetorical speech, this

88 See James 1984: 57.

89 See Theodorides 1971: 307.

90 *Idem* 307-308.

91 It was believed the world was basically secure and operating in a fixed, regular, routine and natural order (as embodied by *maat*): see Versteeg 2002: 23.

92 Allam 2007: 264.

93 See Versteeg 2002: 26.

could facilitate a robust legal process, enhancing the capacity for the Egyptian courts to reach just verdicts.

Law was therefore essentially based on a concept of justice which was antonymous to falsehood and injustice.[94] The courts were governed by the principles of *maat* and the vizier in control of the law courts had the title of "priest of *Maat*".[95]

Breasted observes as follows:[96]

> [T]he social, agricultural and industrial world of the Nile dwellers under the Empire was therefore not at the mercy of an arbitrary whim, on the part of either the king or court, but was governed by a large body of long respected law, embodying principles of justice and humanity.

Social equality and impartiality are basic components of fairness and these concepts dictate that everyone should be treated equally and the same before the law.[97] In ancient Egypt the pinnacle of concern for legal neutrality occurred during the First Intermediate Period (*ca* 2200-2040 BCE) and the Middle Kingdom (*ca* 2024-1674 BCE). From the instructions of the vizier Merikare it is clear that it was seen as important to judge objectively.[98] In the Middle Kingdom, a legal perspective was developed that everyone had equal rights and opportunities, or at least that everyone should have them and that everyone should also have access to social justice.[99] This is a unique idea in human history, existing in ancient Egypt more than a thousand years before evidence of similar thinking by the Greeks and Hebrews.

5 2 Tradition, precedent and custom

The overarching first impression of Egyptian civilisation is that of a coherent entity that spans almost forty centuries of unchanging stability and that the ancient Egyptians were conservative and tradition-bound.[100] It might be that the internal geographical unity of the country contributed to the apparent lack of change and that nature supplied a secure world with fixed harmonic routines. The topography of the Nile valley protected them from invasion while the consistent annual inundation of the Nile assured them of the orderliness of life which probably dictated recurring rituals, farming practices and legal proceedings, like the redrawing of property boundaries.[101]

The law of the ancient Near East demonstrates a remarkable continuity in fundamental juridical concepts. The appreciation and respect for the past influenced

94 Shupak 1992: 15.
95 See McDowell 1999: 166.
96 1909: 242.
97 Versteeg 2002: 26.
98 *Ibid*.
99 *Idem* 27.
100 See Grimal 2000: 17.
101 See Versteeg 2002: 24.

the development of law in at least two ways: In the first instance, judges kept records of their legal decisions in the archives of the vizier in order to consult them later as precedent; and, secondly, because of the admiration for tradition, Egyptian law was very slow to evolve.[102] The obvious consequence of vigorously following precedent meant that laws remained in force for very long periods of time without modification.

The ancient Near Eastern systems belonged – in varying degrees – to a common legal culture which was, however, very different from what we have today. These systems shared a way of looking at the law that reflect the world view of the cultures from which they evolved.[103] The law probably changed and developed over a long period of time, although one should not assume that this was necessarily the case. Today our law changes often, but in the ancient Near East different conditions existed, and the basic features of law did not undergo any radical changes for a very long period.[104]

In the Old Kingdom, the king was in supreme control of legislation, and laws were conceived as expressions of ideal justice. A law promulgated remained in force as long as it was not modified or repealed.[105] The judges, officials or parties responsible for the law did not read the law in the same way as we do today, and there was no interpretation of the exact wording of a text since it was not regarded as autonomous or exhaustive.[106]

General decrees could be divided into three main areas, namely constitutional law, administrative law and law concerning economic activities. In the ancient Near East references to decrees attest to their existence although they are not citations of the texts; the closest the early sources came to citations were the references to actions or decisions being in accordance with the words of the *stele* or tablet.[107]

According to Westbrook it would appear that statutes, in the form of edicts, orders and decrees, dealt with specific matters of immediate interest, and that they did not establish a source of the basic principles of law in a court.[108] The majority of the law would have been customary in nature and is it here that "the law codes, either in the written forms that we possess or as a larger oral canon from which the extant codes were drawn, could serve a vital function".[109] The achievement of these law

102 *Ibid*.
103 See Westbrook 2003a: 4.
104 *Idem*: 22.
105 See Theodorides 1971: 294.
106 Westbrook 2003a: 20.
107 This is in contrast to the classical system of the Hellenistic or Roman periods where there was an explosion of citations. Here, the statutes' exact words are quoted, analysed and obeyed and a legal ruling is justified by referring to the exact wording of the statute. As in modern law, the words of the text become the eventual point of reference for the law's meaning (see Westbrook 2003c: 19).
108 *Idem* 21.
109 *Ibid*.

codes was to constitute an intellectualisation of the mass of information that would have constituted customary law in the ancient Near East. Westbrook states that there is evidence that previous decisions were regarded as a source of law, and that most of the law applied by the courts was probably customary law which derived from timeless tradition.[110] According to him legislation included all orders issued by the king, his officials or local authorities. Ancient Near East orders were rather *ad hoc* commands, often regarding the rights of individuals or a temporary device to address a current problem.[111]

6 Conclusion

The ancient Egyptians' belief in the concept of *maat* led to the development of law in ancient Egypt. Religion played a fundamental role in the ancient Egyptians' understanding and development of law. Law, therefore, emerged and developed out of religion, and specifically out of the notion of *maat*. The purpose of law was to maintain *maat* on earth, and in order to achieve *maat*, it was necessary to have mechanisms in place. Law therefore developed out of religion. A study of ancient Egyptian law should therefore always allow for the close relationship between law and religion. It was the purpose of law to achieve order, balance, truth and justice (*maat*).

Although no law code has been found and it appears that the ancient Egyptians did not have specific legal terminology or legal categories, as we have today, there is ample proof that law existed and that legal ideas and concepts were applied as early as the Old Kingdom. The most fundamental elements of ancient Egyptian jurisprudence were the importance of justice (which includes associated elements of balance, harmony, fairness, and impartiality) and tradition (which includes associated elements of custom and precedent).

BIBLIOGRAPHY

Allam, S (2007) "Law" in Wilkinson T (ed) *The Egyptian World* (London): 263-274

Allen, JP (2004) *Middle Egyptian: An Introduction to the Language and Cultures of the Hieroglyphs* (Cambridge)

Bedell, ED (1985) *Criminal Law in the Egyptian Ramesside Period* (unpublished PhD dissertation, University of Michigan)

Bleeker, CJ (1967) *Egyptian Festivals: Enactments of Religious Renewal* (Leiden)

Breasted, JH (1909) *A History of Egypt: From the Earliest Times to the Persian Conquest* (London)

David, R (2002) *Religion and Magic in Ancient Egypt* (London)

110 *Idem* 14.
111 *Idem* 14-15.

Gahlin, L (2007) "Private Religion" in Wilkinson T (ed) *The Egyptian World* (London): 325-339

Goebs, K (2007) "Kingship" in Wilkinson T (ed) *The Egyptian World* (London): 275-295

Grimal, N (2000) *A History of Ancient Egypt* (trl by Ian Shaw) (Oxford)

Harris JR (ed) (1987) *The Legacy of Egypt* (Oxford)

Helck, W & Otto, E (1980) *Lexicon der Ägyptologie* vol 3 (Wiesbaden)

James, TGH (1984) *Pharaoh's People* (London)

Jasnow, R (2003a) "Egypt: Old Kingdom and First Intermediate Period" Westbrook, R (ed) (2003) *A History of Ancient Near Eastern Law* vol 1 (Leiden): 93-140

Jasnow, R (2003b) "Egypt: Middle Kingdom and Second Intermediate Period" in Westbrook, R (ed) (2003) *A History of Ancient Near Eastern Law* vol 1 (Leiden): 255-288

Jasnow, R (2003c) "Egypt: New Kingdom" in Westbrook, R (ed) (2003) *A History of Ancient Near Eastern Law* vol 2 (Leiden): 289-360

Kruchten, J (2001) "Law" in Redford, DB (ed) *Oxford Encyclopedia of Ancient Egypt* vol 2 (Oxford): 277-282

Lesko, LH (1994) *Pharaoh's Workers: The Villagers of Deir el-Medina* (Ithaca, New York)

Lorton, D (2000) "Legal and Social Institutions of Pharaonic Egypt" in Sasson, JM (ed) 1995 *Civilizations of the Ancient Near East* (New York): 345-362

Maasdorp, AFS (1878) *The Introduction to Dutch Jurisprudence of Hugo Grotius* (Cape Town)

Manning, J (2003) "Egypt: Demotic Law" in Westbrook, R (ed) *A History of Ancient Near Eastern Law* vol 2 (Leiden): 819-862

McDowell, AG (1999) *Village Life in Ancient Egypt* (Oxford)

Muhs, B (2016) *The Ancient Egyptian Economy: 3000-30 BCE* (Cambridge)

Pestman, PW (1983) "L'origine et l'extension d'un manuel de droit égyptien" *Journal of the Economic and Social History of the Orient* 26 (1): 14-21

Pollard, E (ed) (1995) *The Oxford Large Print Dictionary* 2nd ed (Oxford)

Redford, DB (ed) (2001) *Oxford Encyclopaedia of Ancient Egypt* vol 2 (Oxford)

Sasson, JM (ed) (1995) *Civilizations of the Ancient Near East* (New York)

Shaw, I & Nicholson, P (2008) *The British Museum Dictionary of Ancient Egypt* (London)

Shupak, N (1992) "A new source for the study of judiciary and law of ancient Egypt: The tale of the eloquent peasant" *Journal of Near Eastern Studies* 51 (1): 1-18

Sweeney, D (2002) "'Gender and conversational tactics' in the contendings of Horus and Seth" *Journal of Egyptian Archaeology* 88 (1): 141-162

Teeter, E (1997) *The Presentation of Maat, Ritual and Legitimacy in Ancient Egypt* (Michigan)

Teeter, E (2011) *Religion and Ritual in Ancient Egypt* (Cambridge)

Theodorides, A (1971) "The Concept of Law in Ancient Egypt" in Harris JR (ed) *The Legacy of Egypt* (Oxford): 291-322

Tobin, V (1987) "*Maat* and *Dike*: Some comparative considerations of Egyptian and Greek thought" *Journal of American Research Center in Egypt* 24: 113-121

Van Blerk, NJ (2006) *The Concept of Law and Justice in Ancient Egypt with Specific Reference to the Tale of the Eloquent Peasant* (unpublished MA dissertation, University of South Africa)

Van Blerk, NJ (2010) "The manifestation of justice in ancient Egyptian law, with specific reference to the tale of the eloquent peasant" *Journal of Semitic Studies* 19 (2): 584-598

Versteeg, R (2002) *Law in Ancient Egypt* (Durham)

Westbrook, R (2003a) "Introduction: The Character of Ancient Near Eastern Law" in Westbrook, R (ed) (2003) *A History of Ancient Near Eastern Law* vol 1 (Leiden): 1-92

Westbrook, R (ed) (2003b) *A History of Ancient Near Eastern Law* vol 1 (Leiden)

Westbrook, R (ed) (2003c) *A History of Ancient Near Eastern Law* vol 2 (Leiden)

Wilkinson, T (ed) (2007) *The Egyptian World* (London)

Wilkinson, T (2016) *Writings from Ancient Egypt* (London)

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, and Senusret III, 1836-1818)	Golden age of literature
Thirteenth Dynasty, 1755-1630	
Second Intermediate Period, 1630-1539	Civil war
Fourteenth Dynasty, c 1630	
Fifteenth Dynasty 1630-1520	Hyksos invasion

PERIOD / DATES (BCE) / DYNASTY / KING	DEVELOPMENTS IN EGYPT
Sixteenth Dynasty, 1630-1565	
Seventeenth Dynasty, 1570-1539 (several kings, ending with Kamose, 1541-1539)	
New Kingdom, 1539-1069	
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; and Horemheb, 1319-1292)	Reunification Battle of Megiddo Amarna revolution
Ramesside Period, 1292-1069	
Nineteenth Dynasty, 1292-1190	
Twentieth Dynasty, 1190-1069 (ten kings, including Ramesses V, 1150-1145; and Ramesses XI, 1099-1069)	
Third Intermediate Period, 1069-664	
Twenty-first Dynasty, 1069-945; Twenty-second Dynasty, 945-715; Twenty-third Dynasty, 838-720; Twenty-fourth Dynasty, 740-715; and Twenty-fifth Dynasty, 728-657 (five kings, starting with Piankhi, 747-716)	Political division Kushite conquest
Late Period, 664-332	
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	
Twenty-ninth Dynasty, 399-380	
Thirtieth Dynasty, 380-343	
Thirty-first Dynasty (Second Persian Period), 343-332	

PERIOD / DATES (BCE) / DYNASTY / KING	DEVELOPMENTS IN EGYPT
Macedonian Dynasty, 332-309	
Alexander the Great, 332-323	
Ptolemaic Period, 309-30	Death of Cleopatra

BROWN V LEYDS NO (1897) 4 OR 17: A CONSTITUTIONAL DRAMA IN FOUR ACTS. ACT THREE: THE KING'S VOICE SPEAKS THROUGH THE 1858 *ZAR* CONSTITUTION TO PRESIDENT AND CHIEF JUSTICE (1884-1895)

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ABSTRACT

This is the third in a series of articles on the historical and jurisprudential background to the well-known case of *Brown v Leyds NO* (1897) 4 OR 17. Chief Justice Kotzé's judgement in this case was his ultimate expression of the centrality of the 1858 *Grondwet* (Constitution) of the *Zuid-Afrikaansche Republiek* to determine the extent and nature of legislative, executive and judicial powers in a constitutional democracy. The judgement set in train a series of events that led to the Chief Justice's dismissal from office by State President Kruger in 1898. This article traces Chief Justice Kotzé's gradual conversion, over a ten-year period, from a judge who uncomfortably acknowledged judicial subservience to unfettered legislative authority, to an activist judge (influenced by *Marbury v Madison*) who was confidently prepared to assert judicial independence and constitutional supremacy over presidential and legislative

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Fundamina
Volume 24 | Number 1 | 2018
pp 89-133

DOI: 10.17159/2411-7870/2018/v24n1a5
Print ISSN 1021-545X/ Online ISSN 2411-7870

fiat. This conversion is described by means of an analysis of a series of judgements from the 1880s and early 1890s. The analyses also embed the judgements in the social, economic and political events (chief among which was the discovery of the main gold reef on the Witwatersrand in 1886) that shaped and ultimately determined Kotzé's damascene conversion from positivist lawyer to activist constitutional judge within a ten-year period. An attempt is also made to describe the personalities of the three main characters in the unfolding drama (Paul Kruger, John Kotzé and the state secretary, Willem Leyds) and how their respective ambitions, fears and prejudices influenced Kotzé in his judgements. This background knowledge is essential for a full understanding of why Kotzé adopted his radical stance in the *Brown* case, why it had such powerful political repercussions, why Kruger subsequently reacted in the way he did, and why Kotzé's approach was, in the final analysis, wrong in law.

Keywords: 1858 *Grondwet*; constitution; constitutional democracy; *Volksraad*; *Boers*; supreme authority; sovereign authority; highest authority; *volk*; *uitlanders*; judicial independence; Paul Kruger; John Kotzé; John Austin; Hugo Nellmapius; freedom of the press

1 Introduction

The *Boers* had gone to war in December 1880 to fight for their independence from Great Britain. The British had sued for peace in March 1881 and the peace terms were eventually captured in the Pretoria Convention, formally agreed to by both parties in October 1881.[1] The Convention provided for the retrocession of the *Zuid-Afrikaansche Republiek* (*ZAR*), that is, full self-government, subject, though, to British suzerainty over the affairs of – what the British continued to call – the Transvaal. This meant that Great Britain controlled the foreign affairs of the *ZAR*, its relationships with its African inhabitants and neighbours and also protected the interests of British citizens resident in the *ZAR*. The government and the *Volksraad* of the *ZAR*, though they chafed at being treated as suzerains of the British, deemed themselves to be *de facto* independent. For this reason they set about rebuilding and strengthening the pre-1877 republican institutions and creating the conditions for economic independence. One such institution was the Supreme Court of the *ZAR*. In August 1881 John Kotzé was therefore sworn in as chief justice. Piet Burgers and Christoffel Brand were sworn in as additional judges in December 1882 and January 1883 respectively.[2]

The government and the *Volksraad* of the *ZAR* faced huge obstacles to creating conditions in which the economy could flourish. The war and its aftermath left the majority of the *Boers* (those in the rural areas in particular) in the same straitened

1 Kotzé 1934: 784-802 provides much detail in the dual capacity of first-hand observer of and participant in the political events that led to the Pretoria Convention. The Dutch text of the Pretoria Convention appears in Jeppe & Kotzé 1887: 996-1009.

2 See Kotzé 1941: 18-23. On Burgers and Brand see Roberts 1942: 352 and 350 respectively.

circumstances as before, and as unwilling and unable as ever to pay taxes; many foreigners (*uitlanders*) had left in the wake of the war, taking commercial activities and business acumen with them; the goldfields in the Lydenburg mountains had yielded about as much as they could; and the Africans continued their aggression towards the European usurpers of their land. When the *Volksraad* first met in August 1881, the desperate need to improve state revenue was a dominant theme. Two decisions in particular, taken under conditions of real economic hardship, were to have far-reaching consequences.

The first was the approval, as general economic policy, to grant to individuals or companies the sole right to produce, manufacture or distribute products or goods for a specified period and against payment to the government of stipulated licence fees or a share in the profits generated. This was the so-called concessions policy.[3] It was hardly unknown in the pre-1877 republican economy to grant to individuals sole rights to large chunks of the national economy (prime examples include Piet Marais's sole right to prospect for gold in the 1850s[4] and Alexander McCorkindale's arrangements with MW Pretorius and an (initially) willing *Volksraad* for sole control over large swathes of land).[5] Nevertheless, it was a novel decision to elevate to a formal policy the granting of sole commercial rights without a competitive process to facilitate the industrialisation of the economy and to make it less reliant on expensive (largely British) imports. Alois Hugo Nellmapius is credited with introducing this notion to State President Paul Kruger and his government.[6]

Hungarian-born Hugo Nellmapius had come to the *ZAR* via Delagoa Bay in 1873 with a group of young Dutch adventure seekers after completing his engineering studies in the Netherlands. They were lured by the promise of good money to be made on the recently discovered Lydenburg goldfields. Nellmapius soon gained a reputation for entrepreneurial enterprise and gained the confidence of the republican authorities when he devised a workable transport system between the Lydenburg goldfields and Delagoa Bay through the malaria-infested Lowveld. Later he applied his skills and expertise in many fields of endeavour and by the time of the retrocession in 1881 he was a successful farmer to the east of modern Tshwane and a confidant of the State President, Paul Kruger, and the commandant-general, Piet Joubert. He therefore had little difficulty in persuading Paul Kruger and his executive, and, later, the *Volksraad*, of the benefits of a concessions-based industrialisation policy for the struggling republic. In 1881 the first concessions were granted by the *Volksraad* to Hugo Nellmapius to distil liquor and to produce sugar in a factory on his Hatherley farm (appropriately called *De Eerste Fabrieken* – the first factories)

3 On which see, in particular, Nathan 1941: 185-194; Marais 1961: 23-45 esp 23-33; Kaye 1978: 37-41, 42-44; and Wheatcroft 1986: 124-127.

4 The agreement granting Marais the sole right to prospect for gold in the whole of the *ZAR* is published in *Volksraadsnotule II*: 519-521. On Marais, see, most recently, Davenport 2013: 76-79.

5 See Van der Merwe 2017b: 139-143.

6 On Nellmapius, see Kaye's compact, but informative, biography: Kaye 1978: *passim*.

and to manufacture gunpowder and ammunition. These concessions alone would make him and his business associates very rich, very quickly. Soon he would become an important interlocutor between the Kruger government and foreign entrepreneurs seeking risk-free commercial and industrial opportunities in the republic. He even lent the state money and, so it was rumoured, paid for the construction of the new presidential home in Church Street in 1884.[7] A myriad of concessions for every conceivable commercial opportunity was awarded by the *Volksraad* in the 1880s (including one to a Dutch consortium for the building of the much-anticipated railway line between Pretoria and Delagoa Bay). These concessions were to become really lucrative and extremely contentious when the vast Witwatersrand goldfields came into full production from 1887 onwards. The favoured few became rich and the rest continued to be excluded from competing for commercial benefit.

The second decision taken by the *Volksraad* in its 1881 session concerned the estate of Alexander McCorkindale. He had died insolvent in 1871 and left his financial affairs in a mess.[8] After years of trying to make sense of McCorkindale's dealings with MW Pretorius and the *Volksraad*, a settlement agreement regarding the extent of the landholdings of the estate in the New Scotland region and what needed to be returned to the state had been reached in January 1877 between the government of the *ZAR* (represented by Paul Kruger and EJP Jorissen) and the executors of the estate.[9] Upon retrocession, the *Volksraad* decided, in November 1881, to enforce the settlement agreement which had been in abeyance during the annexation years.[10] The state needed the resources badly.

When the executors (different from those who had signed the agreement in 1877) disputed the interpretation of the terms of the settlement, the Executive Council launched an investigation. In January 1884 it consequently demanded that forty-five farms in the region of Londina in New Scotland (in what is today the Ermelo district of the Mpumalanga Province), the subject of a dispute since 1868, must be transferred to the state. When the executors continued to dispute the state's right to demand the transfer of these farms, the Executive Council, impatient of the matter that had been dragging on for thirteen years, passed a resolution in March 1884, directing the registrar of deeds not to transfer any of the farms or register a mortgage over any of them, and further directing the surveyor-general not to approve diagrams for any of the farms.[11]

In May 1883 Paul Kruger was elected state president of the *ZAR*, after having secured substantially more votes than his opponent, Piet Joubert. In August of the same year Kruger led a delegation to London to negotiate better terms for the *ZAR*

7 *Idem* 45.

8 See Pelzer 1970: 161-162.

9 *Ibid*.

10 The terms of the settlement agreement are contained in *Staatsprokureurstukke* 25/1877; see, too, *ZAR Staatskoerant* 52 (art 92: *Volksraad* meeting minutes of 29 May 1876).

11 See *ZAR Staatskoerant* 57 of 1881 (art 343: *Volksraad* meeting minutes of 4 Nov 1881).

than those set in the Pretoria Convention.[12] They won a number of concessions from the British, important among which was the removal from the Convention of any reference to the much-resented term "suzerainty" (although Great Britain still retained a veto right over treaties concluded by the *ZAR* with other countries). The revised Convention (it became known as the London Convention) was signed between the *ZAR* and Great Britain in February 1884. Apart from the removal of the term "suzerainty", it also recognised the name of the Transvaal as the *Zuid-Afrikaansche Republiek* and redefined the south-western boundary of the republic. The republican government had good reason to feel that, politically if not economically, the *ZAR* functioned at enough of an arm's length from Great Britain to satisfy its nationalist sentiments.

Kruger also, during a visit to the Netherlands, managed to secure the appointment of twenty-five-year old WJ (Willem) Leyds, who had recently graduated *doctor iuris* from the University of Amsterdam, as state attorney for the *ZAR*.[13] Leyds would play an important role in the build-up to the constitutional crisis generated by Chief Justice Kotzé's 1897 judgement in *Brown v Leyds*, not least because of the mutual animosity between him and Kotzé.

When Kruger returned to the *ZAR* in September 1884, there was a confident air about the government: peace had been established not only with the African tribes, but also among the tribes; planning was underway for the construction of a railway line to link Pretoria with the Delagoa Bay harbour; and the concessions policy had begun to create wealth, even if only for a privileged minority.

2 Kotzé upholds *Volksraad* supremacy: *Executors of McCorkindale v Bok NO* (1884) 1 SAR 202

The executors of the McCorkindale estate were not going to relinquish control of forty-five farms without a fight.[14] When the Executive Council's resolution was published in the *Government Gazette* in March 1884, they applied to the Supreme Court for a rule *nisi*, calling upon the government (represented by the state secretary, WE Bok) to provide reasons why it should not be ordered to withdraw the notice that contained the resolution directing the registrar of deeds not to allow the transfer of any of the forty-five farms or to register mortgages over any of them, and further directing the surveyor-general not to approve any diagrams of the farms; and why it should not be ordered to rather bring an action in law against the McCorkindale

12 On the above, see *Executors of McCorkindale v Bok NO* (1884) 1 SAR 202 at 203-204.

13 On Kruger's election as state president and the negotiations leading up to the London Convention, see, *inter alia*, Nathan 1941: 197-200 and 200-209. The Dutch text of the London Convention appears in Jeppe & Kotzé 1887: 1250-1259.

14 See Van Niekerk 1985: 16-19; and Bossenbroek 2014: 3-13.

estate. In other words, why it should be allowed to exercise arbitrary executive authority to resolve a legal dispute, long-standing though it was.

Brand J granted the rule *nisi*. On the return day the court expressed the view to the government representative that the Executive Council had exceeded its powers in passing the resolution and should rather have applied to court for an interdict to prevent the registrar of deeds and the surveyor-general from executing requests from the estate's executors on the basis that the government's rights would be infringed. The court, in fact, gave the government time to consider withdrawing the notice in the *Gazette* and to rather apply for an interdict to protect its rights. The acting state attorney informed the court that the government had no desire to withdraw the notice, upon which the court expressed its regret and reserved its judgement. Before the judgement was given, however, the *Volksraad*, having convened for its 1884 session, resolved in September to confirm the earlier resolution of the Executive Council on the basis that the government had no choice other than to execute the earlier *Volksraad* resolution on the matter taken in 1881. It further authorised the government to take the legal steps necessary for the forty-five Londina farms to be returned to the state.

On 17 September 1884 the government argued before Kotzé CJ and Burgers J that the matter had been dispensed with by the resolution of the *Volksraad*. The executors requested, and were granted, leave to argue that, constitutionally, the *Volksraad* resolution had no force of law and that the court was therefore not bound to recognise it; the more so as it had been passed on a matter that was the subject of a pending judgement.

For the executors appeared Fred Kleyn, a former state attorney during the pre-1877 dispensation (and lead representative of the *ZAR* in the 1872 arbitration proceedings that had led to the Keate Award) and SG Jorissen. The latter was the son of EJP Jorissen and was married to a daughter of the former state president, Thomas Burgers. He had qualified *doctor iuris* in Holland and was among a number of young, professional Hollanders who had emigrated to the *ZAR* after the retrocession.[15]

Kleyn and SG Jorissen advanced four arguments in support of their contention that the *Volksraad* had no constitutional authority to pass its September resolution and that it therefore had no legal force:

(i) Article 12 of the 1858 *Grondwet* (the Constitution) – read with article 66 – was pivotal in this regard. Article 12 provided as follows (translated from the original Dutch):[16]

> The people assign legislative authority to a *Volksraad*, the highest authority in the land, comprising representatives or mandatories of the people, elected by enfranchised citizens; however, only to the extent that the people will be given a period of three months to provide

15 For the background information that follows, see *McCorkindale* (n 12) at 203-205.

16 On SG Jorissen, see Roberts 1942: 366; see, too, Kahn 1991: 104-106 and sources cited.

> its comments to the *Volksraad* on a proposed law should it wish to do so; except those laws which brook no delay.[17]

This provision prescribed the mode in which an enactment of the *Volksraad* can become a law "in the true sense of the term". The *Volksraad* resolution did not conform to the requirements for law-making provided for in article 12: it had not been published for public comment three months prior to its discussion, nor was it of such a nature that the notice period could be dispensed with, because it brooked no delay. The resolution, therefore, had no force of law. It is true that section 2 of the 1859 second appendix to the *Grondwet* prescribed that a court shall respect ("eerbiedig") all *Volksraad* resolutions as law and no court would be allowed to pass any judgement over it or subject it to scrutiny.[18] The context in which this provision appears in the second appendix made it clear that this provision had reference only to matters concerning property disputes that had arisen prior to the approval of the *Grondwet* and had been or were in the process of being dispensed with by the *Volksraad*. It had no bearing on *Volksraad* resolutions passed in other contexts, such as the one under discussion.[19]

(ii) The *Grondwet* is the constitution of the state and therefore stands on a different footing to other laws. By means of its provisions, the people (the *volk*) entrusted legislative power to the *Volksraad*, subject to certain constraints (as primarily provided for in article 12). The *Volksraad* was bound by these constraints, since the *volk* and not the *Volksraad* are the "sovereign or supreme" power in the state. The *Volksraad* cannot legislate by means of resolutions, since it does not have the constitutional authority to do so. If it were to do so, as in the present case, the judicial authority has the power to nullify the legal effect of the resolution.[20]

(iii) Even assuming that a *Volksraad* resolution has the force of law, the *Volksraad* cannot *tacitly* alter a law as fundamentally important as the *Grondwet*; passing a resolution with the intention to create valid law amounts to a tacit amendment of the terms of article 12 of the *Grondwet*. This cannot be done.[21]

(iv) Even if it has the force of law, no *Volksraad* resolution may interfere in a matter pending before a court of law. Such interference would amount to a violation of the independence of the judiciary, guaranteed by the *Grondwet*.[22]

17 The legislative process described in art 12 was confirmed in ss 71-72 of the 1882 *Volksraad* rules of procedure.

18 See Jeppe & Kotzé 1887: 117.

19 This argument is reflected in the judgement of Kotzé CJ in *McCorkindale* (n 12) at 207-208. The report contains the English translation of the original Dutch judgement.

20 The argument is reflected at *idem* 209.

21 *Idem* 215-216.

22 *Idem* 216. Judicial independence was guaranteed in arts 15 and 62 of the *Grondwet*.

Kotzé CJ delivered the judgement of the court (Burgers J concurred). His judgement began with the assertion that the question before the court was "of the greatest importance" and "embraces a very serious constitutional doctrine".[23]

He made short shrift of the first argument.[24] A *Volksraad* resolution passed as law under circumstances where it could not have been delayed for the prescribed three-month period, would no doubt be contrary to the *spirit* of the *Grondwet*. It is, however, in the nature of a resolution that it cannot be published for three months beforehand. Nevertheless, this does not mean that it has no force of law. Reference to the statute book would make it abundantly clear that resolutions had always been regarded as having the force of law. Furthermore, the wording of article 220 of the *Grondwet*, namely that "[*a*]*ll prior laws and resolutions, contrary to the tenor of these laws, are hereby repealed*", was confirmation that the *Grondwet* itself placed laws and resolutions on the same footing. In article 1 of the 1859 first supplement, too, it is stated that the "wetboek" of Van der Linden[25] would remain the "wetboek" (that is, a primary source of the common law of the *ZAR*) of the state, unless it conflicted with the *Grondwet*, other laws *or* Volksraad *resolutions*; clearly, here too laws and resolutions were treated the same. He agreed with counsel's contention that article 2 of the second supplement referred to specific transition measures in 1858 and 1859 and had no application in present circumstances.

According to Kotzé CJ the proper conclusion was that, since resolutions had always been considered to have the force of law, resolutions properly passed and published have the force of law "by our local laws".[26]

His response to the second argument was the essence of the judgement.[27] Does the *Grondwet* have a higher standing than other laws? If so, the people (the *volk*), using the *Grondwet* as its instrument, entrusted law-making powers to the *Volksraad* subject to certain restrictions, which makes the *volk*, and not the *Volksraad*, the "sovereign or supreme power" in the state. If the *Volksraad* makes laws contrary to the restrictions imposed upon it by the *volk*-through-the-*Grondwet*, it exceeds its authority and a court can declare such actions invalid in law.

This argument was four-square in line with the constitutional doctrine that applies in the United States of America. The US Constitution determines the law-making powers of the US Congress; as such, Congress is not the so-called sovereign or supreme power in the state. If Congress exceeded its powers, the US Supreme Court had the power to void its unconstitutional actions. The US Constitution and the *ZAR Grondwet*, wrote Kotzé CJ, were different creatures. The *Grondwet* did not occupy a position higher than any other law in the *ZAR* ("It ought not to be so,

23 *McCorkindale* (n 12) at 207.

24 *Idem* 208-209.

25 Namely the *Regtsgeleerd Practicaal en Koopmans Handboek*, first published in Amsterdam in 1806.

26 *McCorkindale* (n 12) at 209.

27 *Idem* 209-215.

but such is unfortunately the case").[28] Having existed for many years prior to the *Grondwet*, the *Volksraad* created the *Grondwet* at Rustenburg in February 1858, not the other way round. It was not a subservient creature of the constitution, as Congress is in the United States, the latter having been created by the US Constitution. The constitutional position of the *Volksraad* was more in line with that of the Queen-in-Parliament in Great Britain or of the Crown-and-States-General of the Netherlands, in that its power to make laws resided in its sovereignty, its supreme power in the state.[29]

The *Grondwet* itself states (in arts 12 and 29) that the *Volksraad* is the highest power ("*hoogste gezag*") in the state and repeatedly, since 1859, it has amended the *Grondwet*, by law and by resolution. There is no law that prohibits it from doing so, "even though it may be most desirable that the *Grondwet* should not be treated and altered in the ordinary way". Even if there were such a legal prohibition, the *Volksraad* – the highest power in the state – would not be legally, but only *morally*, bound by it. The Supreme Court does not have the power to annul a law because it deems it to be unconstitutional. If it were to do so, it would raise itself above the *Volksraad*, which would be unconstitutional.[30]

Highest or sovereign power limited by law was a contradiction in terms; a sovereign power is above the law. What was the source of the *Volksraad*'s power, if not the law? Accepted political wisdom among the *Boers*, wrote Kotzé CJ,[31] was that in the *ZAR* the people are King ("*de volk heeft de Koningstem*"). This, he said, was "true in a *moral*, but certainly not in a *legal*, sense".[32] This judicial opinion represented a major departure from *Boer* political convention since *Voortrekker* times. *Boer* wisdom would have it that in their republic, the people (the *volk*) would be governed by the people for the people. Sovereignty resided in the people, nowhere else. That, said Kotzé CJ, was only true in a moral sense, not in a legal sense. Actions of the *Volksraad* at variance with the "opinion and sentiment of the people" (as could be found in the *Grondwet*) exacted moral sanction only.[33]

Kotzé CJ was driven to adopt this contrary line of thought and to reinforce the distinction between the moral and the legal throughout his judgement, because he was strongly influenced by the writings of John Austin.[34] Austin, who died in 1859, was Professor of Jurisprudence at the University of London, where John Kotzé graduated LLB in 1872. Austin's *Lectures on Jurisprudence, or the Philosophy of Positive Law*, published posthumously in 1869, the year Kotzé arrived in London, was the primary vehicle for the propagation of his so-called command theory of law.

28 *Idem* 210.
29 *Idem* 211.
30 *Idem* 210-211.
31 *Idem* 211.
32 *Ibid*.
33 *Idem* 217.
34 See Kotzé 1934: 44-45 and 117-118.

A legal positivist to the core, he extolled a "scientific jurisprudence" that greatly appealed to the young Kotzé who studied his writings avidly.

It was from Austin's *Lectures on Jurisprudence* that he extracted the notion that the US Congress with the US president is only a subordinate power of the US government (and therefore clearly distinguishable from the British Queen-in-Parliament); that the supreme power to make laws and the notion of sovereignty are "convertible terms"; that the sovereign, not subject to any legal limitation, is above the law (and that therefore the notion that "the people are sovereign" – *de volk heeft de Koningstem* – is true only in a moral sense); that the laws passed by a supreme legislature might be *immoral* or *irreligious* or *unconstitutional* "in the broad sense", but they cannot be *illegal*; that no legislature can bind its successor, but can merely "recommend or advise") its successor; and that the US Supreme Court can test the constitutional validity of laws passed by Congress, because the US government is in the form of a federal union, and because this is not the case in Great Britain, courts cannot test the validity of laws passed by the sovereign legislature.[35]

Since the *Volksraad* is the supreme power in the state, it is under no legal obligations, "[i]t is merely obliged by moral sanctions, by the opinion and sentiment of the people".[36] As such, no *Volksraad* can be bound by its predecessor, and therefore the provisions contained in article 12 of the *Grondwet* for law-making can be no more than a directive to a subsequent legislature which it was free to follow or not.[37] If the *Volksraad* of 1884 passed a resolution that, though not in the form of a law as provided for in the *Grondwet*, it had clearly intended to be observed as a law, then it is a law, for the will of the legislator is law.[38]

In his judgement he dismissed the opposing view expressed by a Dutch jurist, CW Opzoomer of Utrecht University.[39] Opzoomer's view, influenced by American constitutional scholarship, was that the legislature was bound to comply with the provisions of the constitution (the Dutch Constitution in his case) and equally a court was duty-bound to declare invalid laws passed in an unconstitutional manner. Kotzé CJ rejected this view (as did other Dutch authorities he referenced), because he "confounds what *is* with what *ought* to be" (quoting John Austin).[40] Opzoomer,

35 On the above references to Austin, see Kotzé CJ's judgement in *McCorkindale* (n 12) at 210-211 and 215. Aware of his obligation not to stray too far from Roman-Dutch authority, Kotzé CJ cited De Groot's *De Jure Belli ac Pacis* 1 3 7 and 2 4 12 for the contention that supreme power and sovereign power are convertible terms and that a legislature therefore cannot bind its successor.

36 *Idem* 217.

37 *Idem* 212.

38 *Ibid*. In support of the contention that the will of the legislator is law, he cited as authority his own translation of Simon van Leeuwen's *Het Rooms-Hollands-Regt*, namely *Roman-Dutch Law* 1 4 1 ("The bare will and pleasure of the sovereign power are a law to its subjects"). The translation, dedicated to Sir Henry de Villiers, Chief Justice of the Cape Colony, was published in London in 1881.

39 See his lengthy discussion of Opzoomer's views at *idem* 212-215. Opzoomer was a jurist, philosopher and theologian, attached for many years to Utrecht University.

40 *Idem* 213.

wrote Kotzé CJ, seems to have been unacquainted with the "doctrine" of Austin "regarding the true and real position of a supreme or sovereign legislature", namely that the legislature's supreme authority can never give way to a judge's view on whether or not a law conforms to constitutional provisions.[41]

The third argument advanced on behalf of McCorkindale's executors was that, even assuming that the *Volksraad*'s resolution was a law properly so called, it could not *tacitly* alter a law as important as the *Grondwet*, which is in effect what it did when it ignored the *Grondwet* provisions for law-making. Kotzé CJ swept aside this argument. A resolution has the force of law, and the *Grondwet* is like any other law passed by the *Volksraad*; the ordinary rule of interpretation therefore applies, namely that a prior law may be repealed by a later law, both expressly and by clear and necessary implication, that is, tacitly.

The fourth argument was that no law is binding if it interferes with a pending case. This is because, were it not so, judicial independence would be undermined, which in turn "jeopardises the liberty of the citizens".[42]

This "most eloquent" argument, wrote Kotzé CJ, "mixes up the *legal* with the *moral*".[43] The *Volksraad* is the highest or supreme power in the state, therefore a court cannot curb or restrain it, however much the legislature is "morally bound not to encroach on the domain of the Court".[44] If it were to neglect this moral obligation, then it might lead to forced resignation of the judges, loss of confidence in the legislature, loss of citizen liberty and the replacement of independence with despotism.[45] Fourteen years later, in the aftermath of Kotzé CJ's *Brown v Leyds* judgement, the perceived violation of the proper relationship between legislature and judiciary led to Kotzé's dismissal and to accusations that citizens' liberties were endangered and that despotism reigned.

In the concluding portion of his judgement, Kotzé CJ acknowledged that English jurists of the eminence of Blackstone and Broom held the view that a law or statute that is "contrary to public right and reason, the law of nature, or the law of God", is void and should not be observed. This view, said Kotzé CJ, with reference to his favourite dogma, lost sight of the distinction between law and morality. John Austin in his *Lectures* convincingly refuted that view. A judge's duty is to explain and enforce the law, not to make law.[46]

Clearly uncomfortable with the *carte blanche* his judgement had bestowed upon the government of the *ZAR*, Kotzé CJ returned to the theme of judicial independence at the end of his judgement. The Executive Council, he wrote, was not competent to take the resolution it did in March 1884. In fact, it was not necessary to do so, as it

41 *Idem* 214-215.
42 *Idem* 216.
43 *Ibid*.
44 *Ibid*.
45 *Idem* 217.
46 *Idem* 217-218.

could have approached the court for an interdict to protect its rights (as in fact the court had intimated during argument) or it could have waited for the *Volksraad* to assemble and for it to pass the required resolution. When the *Volksraad* confirmed the Executive Council resolution in September, it created the appearance of an interference by it in a case that was pending, although – Kotzé CJ hastened to point out – it was clear that the *Volksraad* did not intend to do so, but merely meant to bring to final conclusion a matter that had dragged on for longer than a decade. In the same careful vein of expression, Kotzé CJ saw fit to make the point that "even the semblance of interference" should be "studiously" avoided, as judicial independence was one of the pillars of the state and the "inviolability of the Court is inseparably connected with the welfare and independence of the Republic".[47]

Kotzé CJ had no desire to antagonise the executive (Paul Kruger was in Europe at the time of the passing of the resolutions, but would surely have agreed with the approach adopted by the Executive Council then led by Piet Joubert), hence the careful language. Too careful, it would seem: in fact, the *Volksraad* resolution did not merely "appear" to interfere with a pending case, it was a clear infringement, whatever the intention of the legislature. Kotzé CJ was at pains, at the conclusion of the judgement, to send a message to the government to heed the rule of law (he did not use this expression, though) and not to overstep its boundaries, however diplomatically he couched his remonstration. In subsequent years, the government would not heed the warning and Kotzé would develop the confidence to shed the language of diplomacy.

Kotzé CJ thus rejected all four arguments made on behalf of the executors of McCorkindale's estate.

Burgers J concurred in the judgement of Kotzé CJ. A year earlier he, with Brand J, had had occasion to decide a claim for damages for wrongful dismissal instituted by one Nabal against the state.[48] Nabal, employed in the civil service during the annexation period, continued in employ after the retrocession, but such employment was deemed provisional. At the end of 1881, the *Volksraad* resolved to terminate his employment (along with a number of others in a similar position). It provided no reasons and offered no compensation. Burgers J dismissed Nabal's claim for damages. He did so on the grounds (specious, as it turned out in light of Kotzé CJ's judgement in *McCorkindale*) that article 2 of the 1859 second supplement to the *Grondwet* provided that all *Volksraad* resolutions were deemed to be law and could not be the subject of judicial contestation. So, his view was then, as in *McCorkindale*, that a *Volksraad* resolution was law, only his reason was different. No wonder he had nothing to add to Kotzé's judgement.

Kotzé CJ's judgement in *McCorkindale* was executive-minded – albeit grudgingly – but it did exhibit one important departure from accepted political

47 *Idem* 219.

48 *Nabal v Bok* (1883) 1 SAR 60 at 60-62.

wisdom in the *Boer* Republic. This was in respect of the importance attached to the voice of the people (the *volkstem*). The fathers of the 1858 *Grondwet* (the likes of MW Pretorius, Stephanus Schoeman, Cornelis Potgieter, William Robinson and Paul Kruger), though they held very different political convictions, were united in their belief that the *volkstem* was the sovereign voice (*de Koningstem*) and that ultimate sovereignty resided in the people.[49] Inspired by John Austin, John Kotzé's view was that supreme (sovereign) power attached, not to the people, but to the *Volksraad*, that the people had moral sanction only over the *Volksraad* and that the *Volksraad* could therefore not be dictated to by the views of the people expressed in the *Grondwet*. Only later, when it became apparent to Kotzé that his judgement in *McCorkindale* had created the political conditions for the unbridled use of power to achieve ends by means more despotic than democratic, did he readjust his thinking and appeal to the *volkstem* as the definitive sovereign voice.

At the time, though, he sought rather for additional authority to shore up his view that the *Volksraad* was, in a very real sense, above the law. He found it in a judgement of the Cape Supreme Court, handed down in 1864. In compiling the first edition of the published law reports of the South African Republic (the industrious Kotzé had prepared the judgements himself (and translated them from the original Dutch), he inserted a footnote at the end of his judgement in *McCorkindale*. It was a reference to a decision of the Cape Supreme Court, decided in 1864, but only published in 1885, namely *Dean and Johnson v Field*,[50] a decision that supported the line he had taken in his own judgement.

In that case the Cape customs authorities had refused to release goods, stored in the customs shed at Cape Town harbour, until the owners had paid the required customs duties and, importantly, until they had also signed a guarantee to pay such increased duties as the Cape Legislative Assembly would pass at its next session. The owners refused to sign the guarantee, their goods were not released and they then sought a court order to enforce delivery. At an initial hearing, the court expressed the view that the arrangement was unjust and that the Legislative Assembly would reconsider their approach. The court's view was disregarded and an act was passed that increased the customs duties and indemnified the customs authorities from damages for actions such as those undertaken by the customs authorities. The court, at its second hearing, found that they were faced with a *fait accompli*. Whatever the injustice of the matter – legislating *ex post facto* and doing so in respect of a pending matter – as long as the formal requirements for law-making had been met, the provisions were law and the court was bound by the provisions and "utterly

49 See the discussion in Van der Merwe 2017a: 161-163. This same view was expressed in writing in 1884, only four months before the *McCorkindale* judgement, in an editorial in the first edition of the *De Republikein* newspaper of 8 Aug 1884. In a true republic (like that of the *ZAR*), he wrote, the people had the government of the state in its hands, the legitimate voice of the people was heard and acted upon. See Kleynhans 1966: 23.

50 (1885) 1 Roscoe Reports 165 at 165-178.

powerless"[51] to change the law. Whatever the court's views on the justice of the matter, wrote Bell J, an order that would bring the judiciary into conflict with the executive would be "a state of affairs which every wise and prudent person would, on reflection, exceedingly lament".[52] Kotzé CJ found himself in good judicial company and must have taken solace from it.

3 The Nellmapius Affair of 1885-1886

By 1885 Hugo Nellmapius was a man of great influence, an owner of many concessions, a facilitator of the purchase and sale of many concessions and an esteemed consultant to Paul Kruger and his executive on commercial opportunities in the Republic.[53] However, he was also financially stretched. Three years earlier he had ceded his concession to manufacture gunpowder and ammunition in the *ZAR* to Samuel Marks and Isaac Lewis, themselves influential confidants of Paul Kruger and his executive.[54] They had established a London-based company, the *South African Pioneer Powder Factory*. In terms of the concession arrangement, the government had a 25 per cent shareholding in the company. Nellmapius was the manager of its affairs in South Africa. A London representative of the company, sent to Pretoria to investigate its business interests, found evidence that Nellmapius had embezzled the company out of £3 500 and laid a charge of fraud against him in September 1885. Willem Leyds, the young Hollander appointed as state attorney in August 1884 after Kruger's visit to the Netherlands, conducted a preliminary investigation and found sufficient evidence to justify Nellmapius's prosecution. The government and its business associates were alarmed. State Secretary Bok, who represented the government on the board of the company, made representations to Leyds to drop the charges; Isaac Lewis wrote to the Executive Council on behalf of the directors of the company, intimating that the directors wished for the charges to be dropped; the Executive Council wrote to Leyds and informed him that it would be in the interests of the government if the charges were dropped; and Kruger himself spoke to his young protégé.

Leyds, though, was made of stern stuff. Although it took a full year after the charges had initially been laid, Leyds eventually prosecuted Nellmapius before Judge Brand and a nine-man jury in September 1886. Nellmapius was found guilty of theft by means of embezzlement and sentenced to eighteen months' hard labour.

51 At 171 of Bell J's judgment in *Dean and Johnson v Field*.

52 *Idem* 172. Bell J quoted with approval (at 173) from Sir Edward Coke's *Institutes of the Lawes of England* of 1628 that "it was possible for the Parliament to make an Act which was illegal by being contrary to natural justice, but which yet would be law, because the authorities and the subject would be bound to give effect to it".

53 On what follows, see Kaye 1978: 50-52. See, too, Van Niekerk 1985: 34-37.

54 On Marks and Lewis and their influence on Paul Kruger, see Nathan 1941: 187-188 and 313. See, too, Wheatcroft 1986: 69-70 and 86.

His conviction and the heavy sentence imposed were sensationalised by the local press.

Nellmapius appealed against the finding and the sentence. Brand J gave leave to appeal and reserved six points of law for the consideration of the full bench of the Supreme Court. Injudiciously, as it turned out, he refused Nellmapius' request to be released on bail pending the hearing of the appeal. This refusal set in train a quite remarkable series of events, avidly reported on by the press, representing both pro- and anti-Nellmapius views.[55]

Nellmapius petitioned the State President and his Executive Council on the following day for a full pardon. Article 83 of the *Grondwet* prescribed the conditions under which a petition for a pardon could be considered, namely only after it had received the advice of the sentencing court on the matter.[56] State Secretary Bok duly wrote to Judge Brand on that same morning, requesting his "urgent" advice on the matter; he wrote to him again later that afternoon when the judge had still not responded to the "extremely urgent" note. Brand played a waiting game: he replied only the next day, expressing his surprise that the petition itself had not been sent to him and that his opinion was being sought on a matter that was *sub judice*. Brand received the petition almost immediately and a further request to have his advice ready by the time the executive met that afternoon.

Brand, not having the benefit of Kotzé's collegial advice (the latter being on circuit) went to see Kruger. Kruger told him in no uncertain terms that he expected him, at the very least, to release Nellmapius on bail pending the appeal. Brand refused and on the next day he returned the petition with a note indicating that the matter was out of his hands. Bok's response was to write a note to Brand indicating that Nellmapius had withdrawn all six points reserved for appeal, which, in effect, meant that the matter was no longer *sub judice*. He had instructed the messenger to await the judge's advice. Again Brand waited until the following day before he replied. The executive, he wrote, continues to interfere in an ongoing legal process (withdrawal of the appeal is therefore not the end of the matter), which it has no authority to do.

Yet again Bok wrote to Brand. The executive has resolved to grant Nellmapius a pardon, having consulted State Attorney Leyds (who, it must be said, advised neither for nor against the pardon, merely indicating that he thought it premature). A sentence had been pronounced, everything possible had been done to secure advice from the sentencing judge and the legal process (the appeal) could still run its course; therefore the constitutional provisions had been complied with. Brand then resigned his position as a judge, informing Bok that as an independent judge and a man of honour, he could not accept the executive interference in the judicial process. The

55 On the following, see Kotzé 1941: 87-107. See, further, the note to the published judgement of *State v Nellmapius* (1886) 2 SAR 121 at 133-134; Kaye 1978: 52-54; and Van Niekerk 1985: 37.

56 See Jeppe & Kotzé 1887: 45.

executive, of course, readily accepted Brand's resignation. At no stage did Kruger seek an audience with Brand, nor even with the Chief Justice, on circuit in Heidelberg at the time. It spoke volumes about his attitude towards the presidency and the exercise of his executive powers. On 8 October 1886 Nellmapius was released from prison.

In the meantime, Chief Justice Kotzé had returned to Pretoria (on 6 October), having heard of the judicial/executive stand-off. He met with Brand, read the correspondence and decided that Brand had acted appropriately. The validity of the conviction and sentence was still subject to judicial scrutiny, even if the points of appeal had been withdrawn. The pardon was premature, an interference in the judicial process and therefore unconstitutional. To his credit, Kotzé then acted with the courage of his convictions, amid the swirl of press-inflamed public opinion. He had Nellmapius rearrested on the strength of the original warrant of arrest. He also wrote to State President Kruger, informing him of his view that the independence of the judiciary had been unduly interfered with. Petitions did the rounds, either in support of Kotzé and the judiciary or of Kruger and his executive.

Kruger called for a special sitting of the Executive Council. The councillors were in a belligerent mood, some calling for Kotzé's dismissal. Kruger, increasingly reliant on Leyds's advice, approved a letter from the executive to Kotzé with Leyds's input. It repudiated Kotzé's view and confirmed its own view, namely that no interference with the judiciary had taken place. It chastised Kotzé for the rearrest of Nellmapius without even consulting the government on the matter. It further informed him that the executive decision was that it would acquiesce in the rearrest of Nellmapius and would allow the appeal to run its course; however, the magistrate (*landdrost*) of Pretoria had already been instructed to release Nellmapius upon conclusion of the appeal, on the basis of the pardon that had already been issued. In other words, the law would be allowed to run its arcane and inconsequential course, but the executive would have its way regardless.

Prudently, Kotzé did not immediately respond to the executive notification. He first needed to populate a denuded Bench. Burgers had resigned in July 1886 and had been replaced on 1 August by the charismatic twenty-seven-year old Ewald Esselen.[57] Esselen, while a medical student at the University of Edinburgh, had served as secretary/interpreter to the *ZAR* delegation that had negotiated the London Convention in 1883 (he was also an ambulance driver for the *Boer* forces in the 1880-1881 war), had studied law in London and practised as an advocate in Cape Town before coming to the *ZAR* in 1886. SG Jorissen, son of EJP Jorissen and son-in-law of the former president, Thomas Burgers, was appointed to replace Brand in October 1886, in the midst of the Nellmapius affair. He died in 1889.[58] EJP Jorissen

57 Esselen was born in 1858 and died in 1918. On his fascinating career as judge, advocate and progressive politician in the *ZAR*, see Van der Merwe 1984: *passim*. See, too, Roberts 1942: 352 (on Burgers's resignation) and 358-359 (on Esselen's appointment and his subsequent career); Van Onselen 2017: 232-236.

58 See Roberts 1942: 366.

was permanently appointed as a judge in the Supreme Court of the *ZAR* in 1889, a year after his son's death.[59]

Kotzé sought advice on how to deal with the judicial-executive stand-off beyond the republic's borders. Sir Henry de Villiers, Chief Justice of the Cape Supreme Court and a regular correspondent of Kotzé's, advised him[60] that in his view the rearrest of Nellmapius was invalid and that, as the six points of law reserved for appeal had been withdrawn by the appellant, the appeal had effectively been withdrawn. Kotzé, together with Esselen and SG Jorissen, pondered this and other advice. They eventually rejected the advice. In a lengthy letter to State President Kruger on 17 November 1886, some six weeks later,[61] they informed the executive that it had interfered with the independence of the judiciary. The sentence pronounced by Brand J was not final – it was still subject to appeal; the withdrawal by the defence of their appeal was not an end to the matter, as the court itself had ordered the six points of law to be argued before a full bench and only the court could vary that order, having heard argument. They further pointed out that the rearrest of Nellmapius merely placed him in the position he was in after sentence had been passed, his rights were not impaired; granting a pardon pending an appeal was premature and amounted to a conditional pardon, for which the *Grondwet* made no provision. The executive reply of 19 November was brief: we stand by our opinion; let judicial events take their course.[62]

The appeal was heard in November 1886 by Kotzé CJ, Esselen J and Jorissen J and judgement (written by Kotzé CJ) was handed down on 24 December 1886.[63] The court dismissed five of the six points of law reserved for appeal, but upheld the sixth point. It concerned the question whether the preliminary investigation conducted in October 1885 had been procedurally flawed. The prosecutor had been absent for the first two days, so the *landdrost* himself acted as prosecutor in this period. The defence argued that this failure to observe the distinction between judicial officer and prosecuting authority not only contravened the 1864 Criminal Procedure Ordinance,[64] but fatally contaminated the evidence presented at the trial. This was because the individual whose evidence had been taken down in the first two days had died and had therefore not testified in person at the trial. The trial court should not have admitted the improperly obtained evidence; once admitted, it contaminated the whole of the evidence, particularly since a lay jury could not be expected to discriminate between that evidence and the rest of the (properly obtained) evidence. "The fountain of justice," wrote Kotzé CJ, "must remain pure and unpolluted, and this can alone be ensured by a strict observance of the provisions of the law".[65] The

59 *Ibid*. He was appointed a special judge of the Johannesburg Circuit Court in 1889.
60 See Kaye 1978: 57.
61 See Kotzé 1941: 96-104.
62 *Idem* 104-105.
63 See *State v Nellmapius* (n 55) at 121-133.
64 See Jeppe & Kotzé 1887: 271-295, esp sections 44-58 at 279-282.
65 See *Nellmapius* (n 55) at 129.

conviction, therefore, was set aside. Kotzé CJ was at pains to point out that the court had not found that no crime had been committed, merely that the trial court should not have found Nellmapius guilty on the evidence presented to it.[66]

It is difficult to escape the conclusion that the result of the appeal was contrived, that the politics of appeasement trumped a search for justice, pure and simple. Kotzé faced a political dilemma. It would have been feasible to argue (as State Attorney Leyds forcibly did) that the improperly obtained evidence should have been struck from the record and the rest of the evidence subjected to scrutiny, rather than to assume that all of the evidence had been contaminated. Kotzé CJ (and his brother judges) chose, however, to adopt an approach satisfactory to all parties. The course of justice ran its full course. Nellmapius, if not actually found guilty of a crime, was made to understand in no uncertain terms that he could count himself very lucky not to have served a prison sentence; the executive could take comfort from the fact that their close business associate had not in fact been found guilty of any wrongdoing (thus exposing some less than salubrious business practices acquiesced in by the government) and that the court's quashing of the conviction was a victory for the executive who would not be dictated to by the judiciary. As in the *McCorkindale* matter, Kotzé wanted to signal his commitment to judicial independence and judicial integrity, but to do so in a manner that did not create a rift between the strong-willed, powerful Paul Kruger and his government and a young, inexperienced and vulnerable judiciary. This soft approach adopted by Kotzé would harden considerably in the years ahead and precipitate open conflict between state president and chief justice some ten years later. It was an approach that did not endear him to Leyds; the latter was convinced that Kotzé had acted in a cowardly fashion and that political manipulation underpinned the judgement.[67]

Christoffel Brand continued to practice law, but with no great success. He was "not a man of temperate habits" and his stand against executive interference was "the one great episode in [his] life".[68] Nellmapius continued to serve as the government's business consultant and to be the recipient of governmental concessions-based largesse. With the discovery of the vast riches of the Witwatersrand gold-bearing reef in May 1886, he became a valuable interlocutor between the mining magnates and the government. He established a farming enterprise south of Pretoria, called Irene (named after his eldest daughter) that became a byword for agricultural acumen and innovation. He never became better at business, however, and his influence waned in later years. When he died in 1893, aged forty-six, he was insolvent.

66 *Idem* 132.

67 See Van Niekerk 1985: 38; see, also, Kaye 1978: 58-59.

68 The two quotes are from Nathan 1932: 14 and Nathan 1941: 239 respectively. On Brand see, too, Cohen 1976: 117-119.

4 *Trustees in the Insolvent Estate of Theodore Doms v Bok NO* (1887) 2 SAR 189

4 1 The discovery of the Witwatersrand goldfields in 1886

While a political storm brewed over Pretoria in the latter months of 1886 when the Nellmapius affair played itself out, a very different and far greater storm was brewing some sixty kilometres south of Pretoria. In May of that year, George Harrison and George Walker, while doing odd-jobs for the widow Oosthuizen on her farm *Langlaagte* on the eastern edges of the Witwatersrand, discovered gold in the rocky outcrop on her farm. It was soon confirmed to be a section of a massive gold-bearing reef that ran for 100 kilometres east to west. It was the biggest discovery of gold in the country, dwarfing into insignificance the goldfields of Lydenburg and Barberton. In the coming years it would prove to be the richest goldfield ever discovered anywhere on earth.[69] Within weeks, hundreds, and then thousands, of foreign fortune-seekers (the "*uitlanders*") and also *Boers* had swamped the Witwatersrand, lured by the promise of untold riches. By September 1886 the Witwatersrand had been declared a public digging and by October the township of Johannesburg had been proclaimed.

It soon became clear that the political and economic landscape of the South African Republic, in fact of the entire southern African region, would be transformed by the vast riches to be had on the Witwatersrand. It was not only individual fortune-seekers who flocked to the Witwatersrand, most of whom would be bitterly disappointed when it became clear that significant capital would be needed to mine for the gold. Rich and influential businessmen, who had become rich as a result of Kimberley diamond mining, made their way to the Witwatersrand (some via Barberton): men like JB Robinson (younger brother of William Robinson), Cecil Rhodes, Alfred Beit, Julius Wernher, Abe Bailey, Barney Barnato, Hermann Eckstein, Samuel Marks and Isaac Lewis.[70] It was to their commercial enterprise and business acumen that the Witwatersrand goldfields owed its massive wealth-generation.

Inevitably, the diggers soon organised themselves into a representative committee and met with State President Kruger in February 1887 to discuss with him the many socio-economic grievances they had already built up against the republican government a mere six months after they had established themselves on the "Rand". The *uitlanders'* (most of whom were British or British-colonial) sense of grievance against the *Boer* government never dissipated, nor did Kruger and his government's

69 A plethora of publications exist on the early years of the discovery of the Witwatersrand goldfields and the establishment of Johannesburg in the late 1880s. I consulted primarily the following sources for general information: Cartwright 1965: 1-84; Wheatcroft 1986: 86-91 and 111-123; Meredith 2007: 176-193; and Davenport 2013: 145-182.

70 The best discussion of these men – the Randlords – and their times remains that of Wheatcroft 1985: 92-195.

antipathy towards the alien and deeply intrusive influence on their chosen lifestyle lessen over time.

The establishment, on the doorstep, as it were, of the republican capital, of an *uitlander*-dominated mining colossus, producing unimagined wealth and mushrooming by the month, could not but influence the characters of the two personalities that would ultimately clash head-on in the late 1890s over the *Brown v Leyds* judgement.

Paul Kruger, the archetypal *Boer*, had a political and religious mind-set that belonged to the early nineteenth, rather than the late nineteenth century: his mistrust of the so-called English was deeply ingrained, as was his desire to maintain the old ways of the *Boers* against foreign intrusion; and his faith in the Almighty's divine purpose for his *volk* and their divine right to determine their own destiny remained unshakeable. He sought, and found in the person of WJ Leyds in particular, Dutch political and cultural protection from the Johannesburg foreigners and it was to the Netherlands and Germany that he looked to strengthen his government, the administration of the state and civil society.[71]

John Kotzé, Cape Dutch born and bred, educated in England, married to an Englishwoman, and thus an avowed Anglophile, had not Kruger's antipathy towards the British *uitlanders*. He was no radical and, empathetic towards the *Boers* and their struggle for survival and recognition, inclined towards a closer political union between the English, the Cape Dutch and the *Boers* in southern Africa. He was resistant to the narrow sectarian politics practised by Kruger and to the strong influence the Dutch bourgeoisie class had over Kruger.[72] It also made him consider carefully the jurisprudential *carte blanche* he had given the Kruger government and the *Volksraad* in *McCorkindale* and the soft approach he had adopted towards executive overreach in *Nellmapius*.

4 2 John Kotzé begins his jurisprudential swerve in *Doms*

Theodore Doms, agent *extraordinaire*, died in 1886.[73] He died insolvent. The trustees of his insolvent estate claimed from the state twenty-one farms on the Harts River in the Bloemhof district, said to have been promised to him by the late president Thomas Burgers in 1874 for services rendered by him to the state. Doms had, just prior to his death, asked the *Volksraad* to transfer the farms into his name. The *Volksraad* passed a resolution in August repudiating Doms's claim to the farms. In April 1887 the trustees again demanded the transfer of the farms and again the *Volksraad* refused. When summons was issued against it for the transfer of the farms, the *Volksraad*

71 See, eg, the character sketch by Marais 1961: 5-11.

72 This thumbnail sketch of his character is based on the views expressed by him in his memoirs: see Kotzé 1934: *passim*, and Kotzé 1941: *passim*.

73 On Doms's chequered career, see Van der Merwe 2017b: 145-147.

again passed a resolution, in May 1887, that Doms's estate had no claim to any farms and that the resolution was their final decision on the matter.[74]

Law agent Auret then instituted an action against the government for the transfer of the twenty-one farms. The matter was heard in August before a full bench of the Supreme Court (Kotzé CJ, Esselen J and Jorissen J) and judgements were handed down (by all three judges) on 24 December 1887 (the day before Christmas, as had also happened in *Nellmapius* a year earlier).[75]

Kotzé CJ found himself unable to depart from his judgement in *McCorkindale*.[76] He did, however, praise Auret for the "very able manner" in which he had argued that *Volksraad* resolutions did not meet the requirements for law-making of article 12 of the *Grondwet* and therefore did not have the force of law. He also wrote that "I will gladly admit that it is desirable, yes, necessary, that our Constitution should be revised" to insert a provision "of the greatest importance" that would give a court the authority to test whether a law or resolution passed the test of "constitutionalism". His judicial duty, however, was to apply the law as he found it and not to make the law that in his opinion most benefitted society.

In *McCorkindale* his view had been that American constitutional jurisprudence that allowed the US Supreme Court to test the constitutionality (and therefore validity) of laws passed by Congress, was a desirable state of affairs, but unachievable, because the federalist state structure of the USA meant that a supra-norm like a constitution was needed to regulate the activities of Congress (thus John Austin). Now, in *Doms*, it had become "necessary" for the court to be given a testing right, this despite the fact that the *ZAR* (like Great Britain and the Netherlands) did not have a federalist structure.

Esselen J concurred with "the Chief" in a brief judgement.[77] He "perfectly" agreed with Kotzé CJ's *McCorkindale* judgement. It was clear, he wrote, that "the people [*volk*] have given the *Volksraad* the fullest power to make laws as it thinks fit, and that it was never the intention of the people or the *Volksraad* that the High Court should have the power to test those laws according to the Constitution". It was desirable that change should be effected, but this could only be done by the *volk* and the *Volksraad*, not the court. Esselen J correctly (and contrary to Kotzé CJ's approach in *McCorkindale*) emphasised that the *volk* was the source of the *Volksraad's* supreme authority to make laws and that its intent, expressed in the *Grondwet*, was that the court should not have a testing right. Framed differently: "[T]he people have the King's voice," in a legal and not only a moral sense (the view espoused by Kotzé CJ in *McCorkindale*).

74 On this background to the judicial proceedings, see *Trustees in the Insolvent Estate of Theodore Doms v Bok NO* (1887) 2 SAR 189 at 189-191.

75 *Idem* 189-204.

76 *Idem* 191.

77 *Idem* 192.

Jorissen J, bravely, wrote a dissenting judgement,[78] one that would later influence Kotzé CJ's own approach to no small extent. He had appeared for the executors of McCorkindale's estate in 1884 and now had the opportunity to express his judicial opinion on the validity of *Volksraad* resolutions. He wrote a lengthy judgement, not in all respects a model of clarity, that was in the nature of a careful analysis and considered refutation of Kotzé CJ's judgement in *McCorkindale*.

Clearly, he wrote, the *Volksraad* had the power to amend the *Grondwet*, and had often done so, even though no special procedure existed for this to happen. This did not mean that the *Volksraad* was above the *Grondwet* (as *McCorkindale* would have it). This much was clear from the oath of office of *Volksraad* members, in terms of which a member swore that he would conduct himself in accordance with the *Grondwet*.[79] It might be that, in terms of historical fact, the *Volksraad* "created" the *Grondwet*, although "the driving force" behind it was in fact the combined military councils of MW Pretorius and Stephanus Schoeman, convened to engineer approval of a *Grondwet* in February 1858.[80] This did not mean, however, that the *Volksraad* was above the *Grondwet*, as the *Grondwet* in fact determined, if not its actual existence, then its manner of functioning.[81]

In *McCorkindale*, Kotzé CJ had cited John Austin as authority for the view that the sovereign power possessed by the *Volksraad* could not be subject to legal limitations as a limitation of highest authority or sovereign power was, scientifically speaking, a contradiction in terms. In *Doms*, SG Jorissen J cited the Swiss-German international and constitutional lawyer, Johan Bluntschli,[82] as authority for his contention that sovereign power can indeed be limited in law. Sovereign power is not the same as absolute power.[83] "Sovereignty" meant independence from any higher state authority; it did not mean an arbitrary renunciation of its obligations to other states and to the protection of the individual or civil liberties enjoyed by humanity in general. The independence inherent in sovereignty must be understood in a relative sense – relative to the context within which that sovereignty is exercised, namely the foundational principles of international law and of the civil rights of individuals and organisations.[84]

Once it is recognised that sovereign power is a relative concept, it becomes possible to understand the sovereign power exercised in the *Volksraad* by the representatives or mandatories of the people within the context of the *Grondwet*, that is, by virtue of the *Grondwet* and in accordance with its provisions.[85] Therefore, the

78 *Idem* 192-204.
79 Art 40 of the *Grondwet*: see Jeppe & Kotzé 1887: 40.
80 See Van der Merwe 2017a: 159-161.
81 *Doms* (n 74) at 195.
82 Bluntschli's (1808-1881) work was cited by the judge is *Deutsche Staatslehre und die heutigen Staatenwelt* (1881).
83 *Doms* (n 74) at 197.
84 *Ibid*.
85 *Idem* 196-197.

constitutionally ordained power the *Volksraad* indubitably has to alter the *Grondwet* (to change the way in which it reveals or expresses its legislative will) must originate from the *Grondwet*.

An expression of legislative will – a law – is, in the language of John Austin, a command given by a competent authority, which those subject to that authority are obliged to obey.[86] However, it is important to note that there are two types of commands (thus Austin): those that have general application, and those that have particular application only. The former are laws or rules properly so-called, the latter are occasional or particular commands, not laws. They are in the nature of what in Roman and Roman-Dutch law are called *rescripts*, particular dispensations granted by a sovereign to individuals, susceptible to judicial review only if they caused prejudice to third parties.[87]

A *Volksraad* resolution was in the nature of *an occasional or particular command*. The resolutions routinely passed by the *Volksraad* were primarily in the nature of responses to particular sets of circumstances presented to it for consideration and decision. These resolutions were passed on the basis of the powers granted to the *Volksraad* by the *Grondwet*, and were in addition to its power to make laws. Resolutions, for the most part,[88] had binding administrative force in respect of the government (the executive), but they did not and could not bind judges, as they did not have general application. The resolution in the instant case was not a law, as it did not comply with the law-making requirements prescribed in the *Grondwet*. It was a special resolution passed in favour of the government to deprive a private subject of its right to have its case decided by the court. This it could not do, as it did not have judicial power and could not act as a judge in its own cause.[89]

At the very end of 1887, therefore, when judgement in *Doms* was handed down, one finds the Chief Justice still clear in his own mind that a court cannot as of right challenge the validity of laws passed by the sovereign legislature. However, he is now of the view that it was not only desirable, but indeed necessary, in the dramatically changed socio-economic conditions of the country, that the Supreme Court should have the right to determine the constitutional validity of laws passed by the *Volksraad*. Judge Jorissen had also presented a judicial case for a declaration of invalidity of the legislative activity of the sovereign legislature. At his weekly meetings with State President Kruger[90] Kotzé would surely have mentioned the need

86 See, for what follows, *idem* 197-199.

87 Jorissen J consulted the *Codex* of Justinian; Van Leeuwen's *Het Rooms-Hollands-Regt* (1664); Savigny's *System des heutigen römischen Rechts* (1840-1849); and the *Utrechtsche Consultatien* (1676-1700) as authority for his discussion of the legal status of rescripts.

88 Some resolutions, though called thus, were in reality laws, as they had been proposed, discussed and published in a manner that was prescribed for law-making: see *Doms* (n 74) at 202.

89 *Idem* 203-204.

90 See Kotzé 1941: 126.

for a review of the Constitution to allow for a judicial testing right. Kruger would have noted the Chief Justice's views with concern.

5 The winds of change blow in the *ZAR* and Paul Kruger's and John Kotzé's political attitudes harden

5 1 Introduction

Already by 1888, when John Kotzé's jurisprudential conversion was underway, the Witwatersrand goldfields had proven themselves to be the source of spectacular wealth for the privileged few, a source of income and of unbridled speculation for thousands, and a means to scrape a living for many thousands more.[91] Large, capital-intensive, expertise-rich mining companies had absorbed the scores of small, inefficient companies formed early on and decisions taken by their directors and financiers directly influenced the lives of many. Most influential of all was Hermann Eckstein and Co (colloquially called "the Corner House") – who represented London-based Wernher, Beit and Co – and Cecil Rhodes's Consolidated Goldfields. For a period in the early 1890s, a serious depression set in, when mining had to "go deep". Once new and sophisticated mining techniques had been developed and implemented to extract the gold from the ore deep in the bowels of the earth, Alfred Beit established the biggest mining company of all, Rand Mines Ltd. The boom then continued and the Witwatersrand was truly the "richest spot on earth".[92] The enormous wealth controlled by the directors of the large mining houses (who came to be referred to as the "Randlords") gave the latter political as well as economic influence. This they often used against Kruger and his government, particularly in respect of the deleterious effects of the monopolistic concessions policy employed by Kruger. Enduring sources of contention were that they were forced to buy poor-quality dynamite at inflated prices from overtly corrupt men, such as Edouard Lippert, Alfred Beit's cousin, and the difficulties in seeking to secure a constant and cheap supply of African labour to the mines. Keeping costs as low as possible was a massive problem in mining a commodity with a fixed international value.

The income generated by gold production was a valuable source of revenue (through taxes, licence fees and levies) for a perennially cash-strapped *Boer* government. It, and the multitude of businesses and industries it spawned, also, however, led to a burgeoning parallel economy that dwarfed and threatened the primarily agriculture- and concessions-based formal economy. The mining and

91 Of the many sources in this regard, see the following accessible overviews provided by Cartwright 1965: 85-133; Wheatcroft 1986: 120-137; Meredith 2007: 291-310; Davenport 2013: 175-182 and 225-237.

92 By the end of 1893 some two-thirds of the gold mining companies had collectively produced more than 40 000 kg of gold at a value of £5 2m (roughly £500m in today's monetary values: see Van der Merwe 2015: ix-x). See, further, Davenport 2013: 232.

related industries also introduced into the *ZAR* cultural and social attitudes, activities and appetites (both elevating and sordid) that was alien to the *Boer* psyche.[93] Most importantly, from a political perspective, the foreigners (*uitlanders*) – mostly British – who lived in and around Johannesburg and whose numbers continued to grow, posed a numerical threat to the *Boer* citizens of the *ZAR*.[94]

These *uitlanders*, recognising their potential politico-economic dominance over the *Boers* and unwilling to have their lives and livelihoods determined by a class of people to whom they felt themselves superior in every way, organised themselves into lobby groups and were increasingly strident in voicing their grievances against Kruger and his government. Their grievances were varied and included some of the following: not enough political representation in the corridors of power; a too heavy tax burden; not enough cheap labour; insufficient resources spent on improving living and working conditions on and around the mines; inadequate educational facilities; and Dutch as official language at the expense of English.

Paul Kruger and his government had their own grievances: the *uitlanders* were foreigners, earning good money, not because they had a right to do so, but because the *Boer* government allowed them to; their lifestyles were alien to, intrusive upon and in some instances an open affront to the sedate, Bible-governed lifestyles chosen by the *Boers* and jealously guarded by them; they were predominantly British and therefore in the eyes of the *Boers* inherently untrustworthy; Great Britain had begun to exhibit an uncomfortably close interest in the goldfields and in the territories surrounding the *ZAR*; and, not least, there were too many of them,[95] they were greedy, loud and brash and they complained too much and too often.[96] Great Britain was beginning to cast an ominous imperial shadow over republican affairs.

In May 1888 the second presidential election took place. Paul Kruger accumulated 85 per cent of the vote and comfortably beat his opponent, Commandant-General Piet Joubert.[97] Kruger's political mantra had always been, was then and would always be, the safe-guarding of the independence of the republic and of his people. Their voice, their *volkstem*, would not be silenced, it would remain sovereign. It was his single, dominant concern and he perceived, already in 1888, that the goldfields of

93 In 1895 there were ninety-seven brothels in Johannesburg. Olive Schreiner famously called Johannesburg (in 1898) "a great, fiendish hell of a city" and Kruger called it "duivelstad" (devil's town). See Meredith 2007: 293.

94 There are no reliable census statistics for these years. Paul Kruger opposed any form of counting of people as unbiblical: see Kotzé 1941: 126.

95 See, eg, Marais 1961: 1-3. Undoubtedly white, male *uitlanders* would soon become numerically dominant as opposed to the enfranchised *Boers*.

96 When, in March 1890, Kruger addressed a group of disgruntled *uitlanders* in Johannesburg who was clamouring for economic reforms, he was said to have addressed them as "burghers, friends, murderers, thieves and robbers": see Nathan 1941: 265-267; and see, further, Kotzé 1934: 112-113.

97 See Nathan 1941: 241-242.

the Rand and the men it attracted would be the most dangerous threat to his cherished independence.

In June of that year Kruger had WJ Leyds, then state attorney, appointed as state secretary, the second-most powerful position in the republic and also responsible for foreign affairs.[98] Henceforth the coarse, wily old *Boer* and the refined, sharp, hard-working young Hollander would work very closely together. They made a formidable pair,[99] and seldom did the Executive Council and the *Volksraad* take decisions not decisively influenced by them. To his own cost, John Kotzé would find out just how formidable a pair they were politically.

5 2 The *uitlander* presence triggers differing conceptions of people's sovereignty by Kruger and Kotzé

State President Kruger's attitude towards the political threat posed by the *uitlanders* of Johannesburg and the Rand was based on a simple political philosophy. In the *Zuid-Afrikaansche Republiek* the *volk* (the people) had the King's voice; their voice and theirs alone was sovereign. It had been the dominant political creed among the *Boers* since they first organised themselves politically in the trans-Vaal area and underpinned the 1858 *Grondwet*.[100] Paul Kruger, deeply immersed in *Boer* politics from early on, had adopted this creed since he first made himself available for high office in 1877.[101] When he accepted the leadership of the triumvirate on the eve of the first Anglo-Boer War of 1880/1881, he attributed the divine authority of God to the sovereign *volkstem* (the voice of the people).[102] So, in effect, the statements in articles 12 and 29 of the *Grondwet*, namely that the *Volksraad* was the highest authority in the state, meant that it exercised that authority as a result of the sovereign will of the people, who in turn were granted such sovereignty by the grace of God – whatever contrary views Kotzé CJ expressed in *McCorkindale* (and *Doms*).

Kruger introduced a new strand into this political philosophy in the 1880s, no doubt strengthened in his convictions by the *uitlander* threat to the *volk*'s sovereignty. When engaging in debates in the *Volksraad*, he often cautioned the members not to vote in favour of a matter if there was uncertainty whether the *volk* would approve. Rather delay adoption of a particular measure until the *Volksraad* members had gained the unquestioning support of their constituents for the measure. This was so even if the representatives themselves supported the measure and even if the benefit

98 See Van Niekerk 1985: 60 and 63-64.

99 Eugène Marais, editor of the progressive newspaper, *Land en Volk*, wrote in 1892 that Leyds was the "left-right hand and head of Kruger": see Van Niekerk 1985: 61.

100 See the discussion in the first article of this series: Van der Merwe 2017a: 131-138, 143-145 and 162-164.

101 See the discussion in the second article of this series: Van der Merwe 2017b: 155.

102 *Idem* 163-164.

for the public was palpable.[103] Public sentiment must trump *Volksraad* deliberations: the public was King and its representatives were merely their servants.[104] The most complete statement of his conviction on this matter of *volk* sovereignty is contained in an address to the *Volksraad* in June 1889. He said the following (translated from the original Dutch) in respect of the proposed construction of certain railway links around the Witwatersrand:[105]

> [I]f the goldfields were to suffer a setback the whole country suffers a setback. If, notwithstanding all the advantages, the public countrywide remained opposed to the matter, it must, however, not be pursued … Even if the enterprise collapsed, even if the state fell, even if the gravest harm were to follow, we must listen to the *volk* … Even if the people were wrong, the government must still obey their voice … we live in a Republic where the people have the King's voice (*we wonen in een Republiek waar het volk de Koningsstem bezit*).

Two months later, in August, he would again urge this approach upon a compliant *Volksraad*.[106] "The *volk*", to be sure, was not all of the *volk*, but the majority; to the majority belonged the *koningstem* (the King's voice).[107]

This overtly populist approach adopted by Kruger held sway in the *Volksraad* through the sheer force of his personality and was different from the approach adopted by the founding fathers of the 1858 *Grondwet* (among whom counted Kruger himself). The *Grondwet* had been the result of hard-fought political compromise. The premise on which the basic principles of the *Grondwet* had been founded, was that the people were sovereign; in the exercise of their sovereign will they assigned the highest authority ("hoogste gezag") in the state to their mandatories in the *Volksraad*; the *Volksraad* made laws, passed resolutions and held the executive in check on behalf of the people; the people retained their sovereignty over the *Volksraad* by exercising their right to petition the *Volksraad* on draft laws that had to be published three months prior to their discussion in the *Volksraad*, by biennial elections of the *Volksraad* members and, in practice, by voicing their displeasure at legislative provisions after the fact. The dominant desire was that neither populist sentiment, nor *Volksraad* authority would dominate, but rather that the *Volksraad* would exercise its highest authority according to the dictates, not of the raw will of the majority, but of law and justice (*wet en regt*).[108]

Kruger's populist approach flew in the face of this political compromise. It denuded the *Volksraad* of its claim to being an assembly of the mandatories of the people, exercising the highest authority in the state subject to certain checks and

103 See Smit 1951: 20-22.

104 He made this comment during the *Volksraad* session in mid-1887, when the Witwatersrand had already established itself. See, further, Smit 1951: 21.

105 *Idem* 21-22. See, too, Kleynhans 1966: 23.

106 See Smit 1951: 20-21.

107 *Idem* 22-24, 125-126, 128-130 and 135-136. See, also, Kleynhans 1966: 26.

108 See the discussion in Van der Merwe 2017a: 158-164; and Van der Merwe 2017b: 129-135.

balances. In effect, it demanded from the *Volksraad* that its legislative deliberations should not be *guided* by, but be *determined* by, the majority voice of the people (extracted from regular constituency consultation).

It seems reasonable to conclude that this deeply conservative, protectionist approach by Kruger was informed (if not wholly, then substantially so) by his desire to preserve the independence of the people's republic at all costs from the *uitlander* threat – even at the expense of efficiency and progress.[109] The *volk's* full participation in affairs of state (impractical, forced, uninformed, unnuanced and abuse-rich though it was) could erect a bulwark against outside influence. It also allowed him and his supporters to invoke the divinely supported *volkswil* (will of the people) when it suited them, knowing full well that there was no constitutional means to accurately and regularly gauge popular sentiment on a particular matter. It became a useful political tool.

Chief Justice Kotzé was well aware of this and strove to impart his own particular conception of the people and their exercise of the sovereign will. At the opening of Edouard Lippert's cement factory in August 1890, he was called upon to respond to a toast to the Republic's judiciary. The establishment of industries such as the cement factory, he said, was not only to the benefit of the burghers and other inhabitants of the *ZAR*, but would serve to cement(!) all nationalities in South Africa[110] and realise the hope of one land, one people and one nationality.[111] This was an expression of political sentiment that was the linear opposite of Kruger's.[112]

5 3 Kruger establishes a Second *Volksraad* in 1890

At the beginning of the nineties, State President Kruger and his government had serious political and economic issues to concern themselves with. The concessions policy, though frequently refined, remained not only a cornerstone of republican independence, but also a source of friction between the mining magnates and the *Boer* government. It also spawned widespread corruption in the civil service and among the *uitlanders*. *Uitlander* grievances, particularly in respect of the dynamite monopoly, increased, rather than abated.[113]

109 See the comments made by Nathan 1941: 242-248 on Kruger's political approach towards the *uitlanders*. Manfred Nathan was a contemporary of Kruger and was not unsympathetic towards Kruger.

110 He meant all white nationalities.

111 See Kaye 1978: 63.

112 See, eg, Kotzé 1941: 191.

113 On the dynamite monopoly as a permanent source of major economic and political grievance, see, eg, Marais 1961: 28-33; Wheatcroft 1986: 125-128; Van Niekerk 1985: 124-129; and Meredith 2007: 297-300.

Kruger would also not budge on calls for the introduction of a customs union and the conduct of free trade between southern African states/colonies. Negotiations between the *ZAR* government and Great Britain on issues, such as rail links, the establishment of a harbour at Kosi Bay and control over Swaziland, continuously floundered. Any economic foothold for Great Britain in the *ZAR* was assiduously countered, as it was perceived to be but the overture to political union and the eventual loss of republican independence.[114]

Sustained political pressure from the Rand *uitlanders* led Kruger to concede on internal political reforms. In 1890 the *Grondwet* was revised to make provision for amendments to the franchise requirements for *ZAR* citizenship and for the introduction of a Second *Volksraad*.[115]

In 1890 the franchise requirements for permanent residents that had been in effect since 1882 had been amended. A white male older than twenty-one years and who was born in the *ZAR* still had the right to vote. A permanent resident now acquired the right to vote if he had been resident in the *ZAR* for five years. This meant that large numbers of male *uitlanders* who resided permanently in the *ZAR* since 1886, when the Rand gold-rush began, would become citizens and conceivably gain a numerical majority over the indigenous *Boers* from 1891 onwards. Permanent residents acquired the right to vote only if they had resided in the *ZAR* for fourteen years and were forty years and older.

In 1890 the *Volksraad* approved the introduction of a Second *Volksraad.* The brainchild of Kruger himself, drawn up by Leyds, it had taken Kruger all of his rhetorical skill to persuade the *Volksraad* to adopt the measure.[116] Those *uitlanders* willing to contribute to the wellbeing of the state, but who were not (yet) naturalised citizens, could vote for and become members of the Second *Volksraad*. To vote for the Second *Volksraad*, one had to have been a permanent resident for two years and older than twenty-one years. To be a member, one had to have been a permanent resident for four years, older than thirty years and a member of a Protestant church.

In terms of form and process, the Second *Volksraad* was to be a mirror image of the First *Volksraad*. Its legislative competence covered a wide range of matters of a broadly economic nature (the competence to regulate the mines and related commercial matters was especially important). The binding authority of laws and resolutions passed by the Second *Volksraad* was guaranteed. This provision would play an important role in the judicial deliberations in *Brown v Leyds* some six years later.

The Second *Volksraad* had no budgetary competence and its legislation could, at the president's discretion, be referred to the First *Volksraad* for final approval.

114 See, *inter alia*, Botha 1926: 201-211; Kotzé 1941: 175-192; Marais 1961: 49-52; Van Niekerk 1985: 106-111; and Meredith 2007: 238-243.

115 On the franchise reform and the establishment of the Second *Volksraad* see, *inter alia*, Van Oordt 1898: 502-505 and 513-514; Botha 1926: 323-326; Nathan 1941: 267-270; Smit 1951: 131-134; Marais 1961: 53-54; and Van Niekerk 1985: 129-130.

116 See Kotzé 1941: 110-112.

The latter, therefore, remained the highest authority in the state, it represented the voice of the (majority of the) *oude bevolking* (the *Boers*) in whom resided the *koningstem*.[117] For this reason the Second *Volksraad* enjoyed limited legitimacy among *Boer* and *uitlander* alike, despite it functioning effectively within its limited scope and providing much-needed legislative oversight over the mining industry. In this, as in other areas, *uitlanders* continued to feel beholden to a central government and an administrative apparatus that were unable (and often unwilling) to meet their demands.[118]

5 4 John Kotzé hoists his political colours to the mast

One of the biggest beneficiaries of the riches unearthed from the gold mines of the Witwatersrand was the Bench and Bar of the *ZAR*. John Kotzé himself set the tone. He was co-editor of the massive compilation of all of the laws (and resolutions) of the Republic for the years 1849-1885, *De Locale Wetten der Zuid Afrikaansche Republiek*; his two-volume translation of Simon van Leeuwen's *Het Rooms-Hollands Regt* was completed and published in 1886; he edited and translated into English (or had translated) all of the judgements of the republican Supreme Court and had these published as annual law reports from 1886 onwards. He was the dominant judicial personality in the *ZAR* and soon acquired a reputation in southern Africa for judicial probity and learning, second only to Sir Henry de Villiers, the chief justice of the Cape Colony, with whom he conducted a regular correspondence.[119]

The gold mines led to a huge increase in the judicial workload and the size of the Bench grew with regular appointments of judges well trained in law, either in London or in the Netherlands. Herman Ameshoff and George Morice, who sat with Kotzé in *Brown v Leyds*, were appointed to the Bench in September 1889 and September 1890 respectively (Ameshoff replaced SG Jorissen who, tragically, died young; Morice replaced Esselen, who resigned to pursue a more lucrative and exciting career at the Bar and to indulge in progressive politics).[120] From as early as 1887 the Bar increased substantially in numbers, as young Cape-born, London-trained lawyers went to the *ZAR* to benefit from the huge increase in lucrative litigation brought about by the gold mining and related commercial activities on the Rand. Men such as John Wessels, JS Curlewis and (later) NJ de Wet were members of the Republican Bar in these years. All later became chief justices of the Union of South Africa.[121]

117 See, eg, Van Oordt 1898: 548 and 601; Nathan 1941: 403.
118 See Marais 1961: 54-55.
119 On his major contribution to South African jurisprudence, and case law in particular, see Zimmermann & Sutherland 1999: *passim*.
120 On Ameshoff and Morice, see Roberts 1942: 347 and 372.
121 Mellet *et al* 1982: 98. On Wessels see Roberts 1942: 382-383 (he became Chief Justice in October 1932); on Curlewis see Roberts 1942: 354 (he became Chief Justice in October 1936); and on De Wet see Roberts 1942: 358 (he became Chief Justice in July 1939).

A testimonial to the quality and reputation enjoyed by the Bench and Bar of the *ZAR* in the 1890s is provided by James Bryce (later Viscount Bryce). This leading British lawyer, historian and politician visited the *ZAR* in 1895. He wrote of the *ZAR* Bench and Bar in these years as follows:[122]

> They [the advocates] and judges … are the most cultivated and (except as regards political power) the leading section of society. It is a real pleasure to the European traveller to meet so many able and well-read men as the bench and bar of Pretoria contain.

5 4 1 Judicial independence and integrity questioned

John Kotzé, then, as the head of the judiciary and the leading jurisprudent in the country (and, for that matter, enjoying a deserved reputation in southern Africa) was a man of influence and stature in the *ZAR*. He and his fellow judges were not, however, immune from the (sometimes vitriolic) criticism levelled against the *Boer* state apparatus by the press on the Rand. It was known that John Kotzé himself not only held shares in the *Rand Mines Company* (controlled by the Corner House), but that he was also indebted to the Corner House.[123] He was not, though, the target of the *uitlander* press. Their targets were Judge Benedictus ("Benny") de Korte and Judge EJP Jorissen (father of SG Jorissen, who had died in 1889), both known to be indebted to Rand money lenders.

An article that appeared in the robustly anti-government newspaper, *The Star*, in February 1891, forcefully made the case that some judges, being underpaid by the state and having no security of tenure, were prone to running up debts.[124] Their poor salaries and lack of tenure meant that they had to be executive-minded in their judgements in order not to incur the wrath of Paul Kruger and his executive. Their indebtedness meant that their neutrality and independence could not simply be assumed. In the language of modern political discourse, the judiciary was captured, neither independent from the executive nor, conceivably, from litigants that appeared before it.

The editor, Francis Dormer, former editor of the *Cape Argus* (controlled by Cecil John Rhodes),[125] was charged with contempt of court. He was found guilty by a bench comprising Kotzé CJ, EJP Jorissen J and Morice J (the latter wrote a dissenting judgement) and fined heavily.[126] In the course of a long and learned exposition of the Roman-Dutch law of contempt of court, Kotzé CJ posed the following rhetorical question in response to a defence claim that the court had no

122 See Bryce 1897: 387.

123 The shares were given to him as a so-called "friend" – and to State Secretary Leyds – at the launch of the company. See Cartwright 1965: 131; Wheatcroft 1986: 161; Meredith 2007: 303.

124 The article was published in full in *In re Dormer* (1891) 4 *SAR* 64 at 65-66.

125 On *Dormer*, see Meredith 2007: 115 and 197.

126 See *In re Dormer* (n 124) at 64-90.

authority to exercise summary jurisdiction when contempt was allegedly committed beyond the courtroom:[127]

> Shall the dignity and authority of this Supreme Court, so necessary for the proper discharge of its functions and duties – *a portion, in fact, of the sovereignty entrusted to its keeping by the sovereign people* [own emphasis added] – be left to the discretion of the Attorney-General [*sic*] for that officer to decide whether there should be a prosecution …?

This was a very different approach to the issue of sovereign power as adopted by him in his Austin-inspired judgement in *McCorkindale* (and confirmed by him in *Doms*). In the first place, he now recognised that the people (the *volk*) were sovereign, that the *Boer* political credo, *de volk heeft de Koningstem* (the people have the King's, that is, sovereign, voice) was not, as he had held in *McCorkindale*, merely "true in a *moral*, but certainly not in a *legal*, sense".[128] Secondly, his view now was that the *Volksraad* was not the supreme or sovereign power in the state, to which all state power was subservient, but that the people had entrusted a "portion" of its sovereignty to the judicial authority.

5 4 2 The presidential elections of 1893

A presidential election was scheduled for early in 1893 and for the first time there was the real possibility that Kruger could lose the election. In the absence of a political party system, the progressives campaigned vigorously for Piet Joubert, the commandant-general and runner-up to Kruger (by some distance) in the previous election. Joubert's campaign chairman was Ewald Esselen, who was the moving spirit of the progressives. John Kotzé also made himself available as a candidate. His ticket was one of moderation. He wished to promote a *true* republicanism (not Kruger's republic of the *volk*), one that was governed in word and in deed by a constitution that functioned at a higher plain than ordinary laws, that provided sufficient guarantees for individual freedom and against the abuse of power. His campaign was therefore built around constitutional reform.[129]

Kotzé was never really in the race (which is probably why he did not resign his seat on the Bench).[130] In the febrile political atmosphere of the 1893 election, one chose sides and vilified the opposition, one did not call for moderation and constitutional reform. He received all of eighty-one votes, Kruger and Joubert each receiving in excess of 7 000 votes.

127 *Idem* 87.
128 See *McCorkindale* (n 12) at 211.
129 See Nathan 1941: 282; see, too, Kotzé 1894: 11.
130 He said he could not resign because there were important outstanding cases awaiting his decision: Nathan 1941: 282.

Kruger and his so-called conservatives won the election, although by a mere 600 votes. Accusations of election-rigging prompted more than one recount, but the results stood.[131] It was a bitter blow to the progressives (and to Kotzé) and defined political events for the next seven years.

In his inauguration address in May 1893, Kruger preached the virtues of unity and harmony among the *volk* (*tweedracht* – dissension – was anathema) and encouraged the *uitlanders* to serve one master only (the republican cause).[132] He told his audience that he stood before them, obedient to the call of the *volk*, in which he recognised the call of God.[133] In effect, then, he was chosen by God and, because God revealed himself through the *volkstem* (the voice of the people), due deference had to be paid to the sovereign people. He would continue to insist on this article of political faith. In an address to the *Volksraad* in 1894, he stated the following (translated from the Dutch):[134]

> A pure republican principle was, the people have the King's voice and a free voice is God's voice.

So, the freer the people were to express their views, undiluted by the interpretations of their representatives in the *Volksraad*, the closer one got to the *real* voice, which was God's voice. Kruger – the populist – was still in full voice in the mid-1890s and real political reform still a long way off.

5 4 3 John Kotzé promotes constitution-driven democracy

Despite Dormer having been found guilty of contempt of court for his attack on the judges in *The Star*, the press, in their unrelenting campaigns for political and economic reforms, continued to target the judiciary and to accuse its members of financial impropriety and bias, and the government of a failure to remunerate the judges properly. This created a feeling of disquiet even among the *Boer* population.[135]

A petition asking for a formal inquiry into the judiciary was discussed in the *Volksraad* in June 1893. When the judges were informed of this, they closed the doors of the Supreme Court. They discontinued their industrial action (on the same day) when they heard that the *Volksraad* would not launch an official investigation. It also prompted the judges, led by John Kotzé, to request the *Volksraad* to adopt legislation providing for a formal process to deal with allegations of judicial misconduct, in order to protect the dignity and independence of the judiciary.[136]

131 *Idem* 283-284.
132 See Meredith 2007: 292.
133 See Smit 1951: 14; Kleynhans 1966: 23-24.
134 *Idem* 18 and 23-24.
135 For what follows, see Van der Merwe 1979: 242-251. On judicial salaries, see Kahn 1958: 409 (including n 41).
136 See *Anon* 1894 *CLJ*: 179.

In March and April 1894, Judge Benny de Korte became the prime target of a press onslaught. Henry Hess, editor of a Johannesburg weekly, the *Critic*, began a four-part series of articles exposing the financial affairs and extent of indebtedness of De Korte and the harm this did to the dignity and independence of the judiciary. Again, burghers petitioned the *Volksraad* to take action against De Korte and also against Jorissen, whom they accused of being rude, hostile and lacking in proper legal qualifications.[137]

The Kruger executive had decided in mid-June 1894 to raise a commando against a tribal chief in the Soutpansberg region, who resisted the tax yoke imposed on him by the government. A number of *uitlanders* were also commandeered for this purpose. Five British citizens refused to heed the call and sought a court order preventing them from being called up for commando duty. The matter was heard in June by Kotzé CJ, Jorissen J and Morice J.[138] The court found that there was no blanket prohibition in international law against the *ZAR* commandeering non-citizens to engage in military action and that the provisions of the Commando Law of 1882 were therefore valid. In the course of his judgement, Kotzé CJ made comments which confirmed the wholly different jurisprudential attitude he had begun to adopt since *McCorkindale* and *Doms*. In dismissing the objection by the state that the Supreme Court had no jurisdiction in what was essentially a military matter, he stated (in art 3 of the *Grondwet*), that the people (the *volk*) expressed the wish that it should be recognised by the civilised world as free and independent. He continued:[139]

> This fundamental principle – bequeathed to us by the founders of the State – each of the three great departments of the State (the legislative, executive, and judicial) is bound to reverence and maintain. It is only by our strict observance of law and justice, as put in sect. 8 of our Grondwet, that we can retain our position among the free and civilised nations of the earth.

This, then, some ten years after *McCorkindale*, was the new jurisprudence espoused by John Kotzé: the judiciary in a civilised nation has the right and the solemn duty to uphold the *Grondwet* and the freedoms that the people in the Republic enjoy in accordance with the international law recognised by all civilised nations. Civilised values, individual freedoms, conceptions of law and justice – these, and not legislative whim, dominate, and they dominate because the *volk* expressly ordained it in the *Grondwet* to be so. Gone are the notions that "the *Grondwet* cannot be said to occupy a different or higher position than any ordinary law", that "this provision [art 12 of the *Grondwet*] is purely directory and in the nature of counsel or advice given by the legislature to its successors", and that the people are king "in a moral, but certainly not in a legal, sense".[140]

137 See Van der Merwe 1979: 243-245.

138 See *Maynard v Field Cornet of Pretoria* (1894) 1 OR 214.

139 *Idem* 221-222.

140 See *McCorkindale* (n 12) at 210, 211 and 212.

By mid-June 1894, John Kotzé was becoming increasingly comfortable in his self-appointed role as defender of the constitution and as proponent of a constitution-based republican democracy. Revisions to the *Grondwet* had been discussed since 1893 and judges (including Kotzé) had been asked for their input by a specially appointed *Volksraad* committee. The process was fraught, but represented democracy in action.[141]

In June he and all of the judges addressed a memorandum to the State President.[142] In it they urged Kruger to see to it that urgent steps were taken to protect the dignity and independence of the judiciary. This would be achieved if revisions to the *Grondwet* then under discussion were to include a provision for the establishment of a special court to hear and dispose of allegations of judicial impropriety made by the press and public against individual judges; if judges were appointed for life; and if they were remunerated in terms of a special dispensation that was not subject to annual budgetary discussions. The memorandum stressed the vital importance to the stability and credibility of the state of preserving judicial independence from the head of state, who appointed the judges. Their duty, it was stated in the memorandum, should be discharged "in the name of the people [the *volk*] of the South African Republic":

> The dignity of the Judge consists in his complete independence [within the province of his authority] of every power that can exert influence over his judgement, which should be regulated in accordance with what conscience dictates, and the law requires.

Kotzé's influence is clear: the memorandum called for fidelity to the sovereignty of the people, to conscience and to the requirements of the law (including the *Grondwet*), rather than to legislative and executive whim.

In July, the Bar adopted a resolution supportive of the measures proposed by the judges to protect judicial independence and integrity.[143] The *Volksraad* heeded the calls from the influential Bench and Bar of the *ZAR*. It affirmed judicial independence as a cornerstone of republican democracy, approved a special procedure to investigate complaints made by the public against individual judges and appointed a committee to determine whether the complaints against Judges De Korte and Jorissen merited the invocation of the special procedure.

Confident in his role as the promoter of constitutional democracy and of judicial independence as an indispensable pillar of a constitutional state, Kotzé made two further extra-judicial forays into the cause of independence and constitutional probity before year end. In August 1894 the Second *Volksraad* sought to seize documents in possession of the registrar of the Supreme Court. Kotzé politely but firmly informed it that the documents could be perused at the registrar's office and, when he was

141 See Kotzé 1894: 12-13.

142 See, for an English translation of the memorandum, *Anon* 1894 *CLJ* 178-185.

143 *Idem* 176-178.

summoned to appear before it, equally politely and firmly informed them that judges did not get "summoned" to appear before an arm of the legislature. Interestingly, Kruger supported Kotzé in the stance he took.[144]

In the same year he addressed a public gathering in Pretoria and presented to them his mature political views.

5 4 4 Kotzé presents his political manifesto in 1894

Kotzé's 1894 address was entitled "*Het Stichting der Zuid Afrikaansche Republiek en Haare Grondwet*" (the Foundation of the South African Republic and its Constitution).[145] His purpose, in presenting an historical analysis of the establishment of the republic and the central role played by the *Grondwet*, was to inform his audience of the danger for the republic and its *volk – door wiens stem alles behoort gereld* [sic] *te worden* (through whose voice everything ought to be governed) – if there was a departure from the *Grondwet* on which it was founded. He presented to his audience a romanticised (and not entirely accurate) version of the events that led to the approval of the 1858 *Grondwet*, the "cornerstone of the Republic".[146] The great republican principle to emerge from these events was that the voice of the people is the *koningstem* of the state, not the will of one or other leader with his personal entourage.[147] Kotzé's historical version was that the *Grondwet* represented a triumph of the "*Volksraad* party" (the Lydenburgers of Hendrik Bührmann and Cornelis Potgieter) against autocracy and was recognised as a super force representing the sacred will of the people, to serve as a bulwark against autocratic decision-making.[148]

In present times, he said, there was too much autocratic rule, and too much of the *eenhoofdig bestier* against which the *volk* wished to protect itself in the *Grondwet*. If the *ZAR* wished to be taken seriously as a civilised nation, he said, then it needed to take its *Grondwet* seriously. The *Grondwet* recognised the separation of the three pillars of state, each exercising powers of state within the limits of their constitutionally delineated powers and obligations. The drafters were obviously influenced by the Constitution of the "Great Republic of North America". Respect for its constitution was what had made America a great country. In contrast, failure to recognise and implement these fundamental constitutional principles would imperil the independence of the state. Clearly, the *ZAR* was presently in danger of losing its independence. The best way to avert the crisis of governance in the country was to remain true to the provisions of the *Grondwet*. If the *Volksraad* were to cease from amending the *Grondwet* by mere resolution; to desist from passing hasty and "loose" (ie, imprecisely formulated) legislation without heeding the constitutional demand

144 See Van Oordt 1898: 599-600; Nathan 1941: 403.

145 See Kotzé 1894: *passim*.

146 *Idem* 10.

147 *Idem* 7.

148 *Idem* 8-10. On the real influence of Bührmann and Potgieter on constitution-drafting in the late 1850s, see Van der Merwe 2017a: 158-160.

for proper consultation with the public; to respect the *Grondwet* and its *volks*-based sovereignty, all would be well.[149]

Too often the people themselves were at fault in allowing Kruger, his executive and the *Volksraad* to ride rough-shod over constitutional provisions, all in the name of avoiding dissension (*tweedracht*) among the burghers. The honest and robust expression of contrary views should never be confused with promoting disunity; instead, it is a sign of a healthy democracy for the (whole of the) *volkstem* to be heard.[150]

Influenced by his political views, John Kotzé's jurisprudence had now come full circle since *McCorkindale*: the *volkstem* had *legal* value, not merely moral value; the *Grondwet* was indeed foundational and "higher" than ordinary laws; the Constitution of the USA was of inestimable comparative value, not different and therefore inapplicable; the *Volksraad* might have the *hoogste gezag* (highest authority), but that authority could only be exercised within its constitutionally endowed sphere of competence.

By the second half of 1894, Kotzé had saddled his constitutional high-horse and was forging ahead. His was still a lone voice, however. Inspired by Kotzé and his fellow judges, the *Volksraad* committee tasked with revisions to the *Grondwet* had proposed that the *Volksraad* could only amend the *Grondwet* ("amend" also meant ignoring the *Grondwet* and, for example, passing laws by means of resolutions) if the amendment had been published in the *Government Gazette* for twelve months, in order for the *volk* to discuss and approve it. Under Kruger's influence the *Volksraad* vetoed this proposal. The *Volksraad*, not the *Grondwet*, was the highest authority in the land.[151]

The battle-lines between Paul Kruger and John Kotzé had been drawn.

6 1895: Tensions between Kruger and Kotzé become palpable

6 1 Introduction

The year 1895 would prove to be eventful for the political future of the *ZAR* in so many respects. The much-awaited and long overdue railway line between Pretoria and Delagoa Bay was completed in 1894 and formally opened by State President Kruger in July 1895 amid much festivities. Its facilitation of direct access to the sea beyond British influence represented – symbolically if not in actual fact – a high-water mark of the *ZAR*'s goal to be independent of Great Britain and its colonies.[152]

149 Kotzé 1894: 10-11 and 14.

150 *Idem* 12.

151 See Van Oordt 1898: 587-588.

152 Kotzé 1941: 218-223 provides an interesting personal recollection of the event.

In September, Kruger and Leyds began to openly cultivate ties with Germany. They were well aware of how negatively Great Britain would react to such open invitations to Germany to involve itself in a part of the world in which Great Britain regarded itself as the paramount power.[153] From mid-year, Cecil Rhodes and others secretly began to plot the overthrow of the Kruger government. They fed off the many economic and political grievances of the mining fraternity and of the *uitlanders* in general. It would eventually lead to the Jameson Raid in late December and early January 1896. The failure of the Jameson Raid and the imperial machinations that underpinned it would have major political consequences and would generate much bitterness and recrimination among both the *Boers* and the British.[154]

In judicial and legislative affairs, too, 1895 would prove ground-breaking and set in train a series of events that would have grave consequences three years later.

6 2 John Kotzé signals his judicial conversion

The *Volksraad* committee that was appointed in 1894 to consider whether the allegations of impropriety made against Judges De Korte and Jorissen were substantive enough to trigger a special court process, and to report by the end of the year, failed to fulfil its terms of reference.[155] This was enough for Henry Hess to fire yet another salvo against De Korte in the January 1895 edition of the *Critic*.[156] In it he openly accused Judge De Korte of bias towards a litigant to whom he was indebted in a case over which he presided.

This stung Benny de Korte into action. He laid a charge of criminal libel against Hess. Hess was charged with a contravention of the Press Law 11 of 1893. The case was heard in April 1895 by Kotzé CJ, Ameshoff J and Jorissen J and judgement was delivered in May.[157] Although all three judges were of the view that Hess had not proved that De Korte was inappropriately biased towards the litigant in question, they found him not guilty: the section under which he was charged, namely section 3 of Law 11 of 1893, was poorly drafted and did not actually create an offence.

As one of his arguments, Hess had offered the defence that Law 11 of 1893 had no force of law, as it was passed in contravention of the procedural requirements for legislation prescribed in the *Grondwet*.[158] Although the court found for Hess on a different ground, Kotzé CJ felt it necessary to add *obiter* comments on this defence.[159]

153 On Kruger's rapprochement with Germany see, *inter alia,* Kotzé 1941: 212-217; and Marais 1961: 46-49.

154 The most recent comprehensive history of the Jameson Raid is by Van Onselen 2017: chs 6-22 in particular.

155 They eventually met in July 1895 and found that no reasonable grounds existed to prefer formal charges against Judge De Korte (Judge Jorissen was not investigated). See Van der Merwe 1979: 249-250.

156 *Idem* 247-248.

157 See *Hess v The State* (1895) 2 OR 112 at 112-129.

158 *Idem* 114-116.

159 *Idem* 115-116.

The *trias politica*, wrote Kotzé, was adopted in the *Grondwet* "and it is my duty as Judge, above all, to respect and maintain the *Grondwet*". The sovereign power of the people has been entrusted, through the *Grondwet*, "in various measures" to the legislature, the executive and the judiciary. The task of making laws was entrusted to the *Volksraad*, but "subject to certain limitations". This is not contrary to the notion of sovereignty, sovereign power or highest power. Huber[160] stated that sovereign power may be limited by fundamental laws; and "even Austin … does not deny the possibility that the exercise of this power may in some way or other be regulated by a constitution".[161] This, Kotzé said, somewhat intriguingly, "seems to follow from the very nature of the case", by which he probably meant the nature of a constitution as a declaration of the people that served as the basis of government in a state.[162]

He then made a mental leap that did not follow from the nature of the case, nor was it logically preordained: "Each of the three powers," he wrote, "can consequently exercise its functions only in accordance with the *Grondwet*." It was therefore incumbent upon the judiciary, entrusted by the *volk* through the *Grondwet* with the sovereign power to interpret and apply the law, to test whether a law is valid in accordance with the *Grondwet* provisions. The testing right was "a tacit and necessary outcome of a popular Government under a constitution".[163]

Law 11 of 1893 was passed by means of a *Volksraad* resolution and there was no evidence that it was law that brooked no delay. It therefore did not comply with the requirements prescribed by the *Grondwet* for it to be valid law. The will of the legislature was not "*duly* expressed" in "*due* form" and "*duly* promulgated".[164]

He concluded his radical *obiter* pronouncement with the statement that "[f]urther consideration and study have induced me to alter my previous view on this point".[165] The problem for Kotzé was that his altered view was not supported by the facts. The *Grondwet*, to be sure, was an expression of the King's voice of the people; it did serve as the basis of the government of the state; and it did grant to the legislature, the executive and the judiciary separate powers. But it did not have the foundational status that Kotzé, so recently enamoured of American constitutional doctrine, attributed to it. It was a malleable document that was amended time and again by the *Volksraad*, with the (overt and covert) acquiescence of the *volk*. The *volk* invested the highest authority in the *Volksraad* and it was up to the *volk*, not the judiciary, to determine whether the *Volksraad* exercised its highest authority appropriately or not.[166] The *Grondwet* was not, and was never meant to be, the

160 In (1686) *Heedendaegse Rechts-Geleertheyt, soo elders, als in Frieslandt Gebruikelijk* 4 7.

161 *Hess* (n 157): 115. He referred to pp 241 and 242 of ch 6 of his edition (the 3rd) of Austin's *Lectures on Jurisprudence, or the Philosophy of Positive Law*.

162 *Ibid*.

163 *Ibid*.

164 *Idem* 116.

165 *Ibid*.

166 On the attitude towards the *Grondwet* adopted by the *volk* in the years immediately following the approval of the *Grondwet* in 1858, see Van der Merwe 2017b: 129-134.

touchstone of a constitutional democracy as practised in the USA, however desirable Kotzé and many like-minded others wanted it to be. As long as the *Grondwet* was not revised to provide for its status as a super-norm, Kotzé's use of the *Grondwet* as his instrument for political reform, his campaign was misguided. Kotzé was committing the cardinal sin – a sin he himself had warned against in *McCorkindale* – of conflating what *is* with what *ought* to be.

6 3 Robert E Brown provides the opportunity for Kotzé to confront Kruger head-on

On 19 June 1895 two farms (Witfontein and Luipaardsvlei) on the western edge of the Witwatersrand (near the modern town of Randfontein) were proclaimed as public goldfields in the *Government Gazette*, to be opened to the public for the pegging off of gold claims on 19 July.[167] Since there was a widely held belief that a portion of the main reef ran through these farms, interest in these goldfields were at fever pitch.

Robert E Brown was one of those who believed in the potential wealth to be generated from these public diggings. He was a thirty-year old mining engineer from Philadelphia in the USA, who had come to the Rand in 1894 and was then working as a consulting engineer for one of the mining companies.[168] He planned meticulously in order to buy as many licences for the pegging off of the claims on the day as he could.

On the morning of 19 July, when Brown and others arrived early to buy their licences from the responsible clerk, it was clear that the officials were unprepared for the hundreds of aggressive prospectors who had descended on the public diggings. The mining commissioner telegraphed to the Executive Council in Pretoria, who took a resolution that same day to provisionally suspend the opening of the goldfields to the public until better arrangements could be made. Brown was not satisfied with this decision. He tendered his money to the official (as did others), who did not accept the money, but nevertheless acknowledged in writing that Brown had tendered the money to buy 1 200 claims. Brown and his team then proceeded to peg off the claims. Three days later he did the same at the second public digging, pegging off 800 claims despite the provisional suspension of the proclamation.

On the following day, 20 July, a proclamation dated 18 July and signed by the state president on that date, was published in an extraordinary *Gazette*, confirming the resolution of the Executive Council to suspend the opening of the goldfields. Two days later Brown instituted an action in the Supreme Court against State Secretary Leyds and the responsible clerk at the public digging. He sought an order declaring

167 For what follows see, in particular, *Brown v Leyds NO* (1897) 4 OR 17 at 17-18 and 19-22.

168 On Brown's background see, in particular, Van Onselen 2017: 80, 114-115 and 180. He immersed himself in the politics surrounding the Jameson Raid and the *uitlander* discontent, reputedly as an agent for the *Boers* (at least initially).

his pegging off of his claims to be lawful and that he was therefore entitled to mine them. On 26 July Kruger and his executive, having become aware of Brown's action, asked the Second *Volksraad* (it was responsible for mining affairs) to endorse the action taken by the Executive Council in issuing the 20 July proclamation. This it duly did, on the same day, and on 31 July authorised the executive to postpone the proclamation of the two public diggings for at least another three weeks in order to make proper arrangements. The First *Volksraad* confirmed these resolutions – by resolution – on 1 August 1895, which resolutions were duly published in the *Gazette* on the same day. The Witfontein farm was eventually reproclaimed a public goldfield on 30 August, at which date claims were issued on the basis of a lottery system. Brown did not participate.

To John Kotzé these circumstances must have been as manna sent from heaven. They provided a perfect opportunity for him to adjudicate on the constitutionality, and therefore validity, of resolutions passed by the *Volksraad*, and on the place and role of the *Grondwet* as a mechanism for the exercise of testing rights by the judiciary – in short, to assert the virtues of constitutional democracy in the *ZAR* of the 1890s.

Brown's application was heard in the Supreme Court in Pretoria from 15 to 19 November. The matter was argued before Kotzé CJ, Ameshoff J and Morice J. For Brown appeared Wessels and Curlewis, both later chief justices of the Union of South Africa. For the state appeared State Attorney Esselen (who was also the leader of the Bar at the time) and two juniors. It was to be a battle between the best legal minds in the *ZAR* at the time, presided over by another first-rate legal mind.

6 4 Kruger and Kotzé meet to discuss their differences

Kruger was astute enough to recognise the potential for real conflict between him and Kotzé posed by Brown's action, especially after Kotzé's *obiter* judgement in *Hess* in May. He invited Kotzé to meet with him on 7 September 1895.[169]

He had been made aware, he told Kotzé, that in his *Hess* judgement Kotzé had stated that his decisions in *McCorkindale* and *Hess* were wrong. He failed to understand how Kotzé could think that a court need not be bound by a resolution of the *Volksraad*. The law was clear: once a law or resolution had been signed by the state president and published in the *Government Gazette*, it had full force and effect. Only the *volk*, through petitions to the *Volksraad*, can force the *Volksraad* to reconsider. The brotherhood that existed between him and Kotzé must not suffer, but it would most certainly suffer if Kotzé persisted in the belief that a court can declare a resolution invalid. Then the *volk* and the *Volksraad* will rise against the court and that would place him (Kruger) in the invidious position of having to suspend him.[170]

169 Kotzé's notes of this meeting were published in 1898 *CLJ* 90-93.

170 To his credit, Kruger had always maintained in the *Volksraad* that the *Grondwet* was not a law to be trifled with and that it should be amended only if the *Volksraad*, as the highest authority, deemed it clearly appropriate to do so: see Smit 1951: 177-178.

Kotzé's reply did not placate Kruger: he would not promise, he said to Kruger, to always enforce *Volksraad* resolutions. He can only promise to do his duty in accordance with the dictates of the law and his conscience. The *volk*, he told Kruger, is too sensible to generate conflict between the judiciary and the legislature. There would be no problem if the court maintains the *Grondwet* and other laws.

The die was therefore clearly cast for the battle of wills that was to play itself out some eighteen months later between them against the background of the *Brown v Leyds* judgement.

After hearing argument in *Brown v Leyds*, Kotzé had occasion, in early December, to express himself judicially on the foundational importance he attached to the *Grondwet*. Johannes Esser had been sworn in by State Secretary Leyds as a judge to preside over the circuit court in the eastern part of the country.[171] Leyds had done so without consulting any of the judges. The validity of Esser's appointment, and therefore of his discharge of his judicial duties as circuit-court judge, was argued before a full bench in early December.[172] The court found that Esser had not been sworn in in accordance with the provisions of the *Grondwet*, that his appointment was therefore irregular, and that the conviction and imposition of the death penalty on one Snuif while on circuit had to be set aside. In the course of his brief judgement, Kotzé CJ commented that "[t]he only safeguard which the people have is the faithful observance of the Grondwet and of the pure principles of the Constitution".[173] Even after his interview with the state president in September, he was clearly not going to budge on what he believed to be his principled stance.

7 Concluding remarks

By the end of 1895 John Kotzé had done an about-turn on his views on state sovereignty as expressed in 1884 in *McCorkindale* and confirmed in 1887 in *Doms*. He had recognised that any case he wished to build for the supremacy of the constitution in the South African Republic needed to take seriously the insistence by the burghers of the *ZAR* that *de volk heeft de Koningstem* (the people have the King's voice) as a legal principle and not to attach mere moral value to it as he had done in *McCorkindale*. He believed their sovereignty to be captured in the 1858 *Grondwet* and proceeded to attach to the *Grondwet* overriding importance as a conduit of the sovereignty of the people in a republican democracy. In doing so he found himself able to build a case, carefully but inexorably, for a republican government of the people that had all the hallmarks of the well-established constitutional democracy of the United States of America. It allowed him to argue that the highest authority in the state, that of the *Volksraad*, could be limited. More particularly, it could be

171 He became a permanently-appointed judge soon after. On Esser, see Roberts 1942: 359.

172 See *Snuif v The State* (1895) 2 OR 294.

173 *Idem* at 297.

limited in a way that promoted law and justice and that acted as a counterfoil to the autocratic tendencies Paul Kruger and his executive were beginning to exhibit all too frequently by manipulating sentiment in the *Volksraad* and by passing legislation in any manner it deemed appropriate and in respect of any matter it deemed a threat to *Boer* independence.

Paul Kruger, long an adherent of the notion that *de volk heeft de Koningstem*, continued in these years to promote the supreme authority of the *volk* in all matters. His approach, however, differed crucially from that of Kotzé. To him, the *volkstem* (voice of the people) was a manifestation of the voice of God and he, as their duly elected leader, was the conduit through which the hopes and aspirations and, importantly, their independence as a God-fearing nation, was to be borne. He and the *Volksraad* were the servants of the people, ready to do their bidding. The *Grondwet* was an important expression of the voice of the people, but it had not the immutability Kotzé attached to it and, in any event, the *Volksraad* had explicitly been granted the highest authority in the state by the people.

By 1895 the fault-line between Kotzé's and Kruger's conceptions of the sovereignty of the people had become clearly delineated. When Robert Brown disputed the authority of the *Volksraad* to deny him his right to peg off claims on a proclaimed goldfield, by means of hastily drafted and implemented resolutions, the die was cast.

The strained atmosphere of conflict and grievance between *Boer* and *uitlander* and the spectre of imperial Britain seeking an opportunity for intervention in republican affairs all contributed significantly to the clash of wills between state president and chief justice that erupted after John Kotzé handed down his judgement in *Brown v Leyds* in 1897. These events will form the subject-matter of the next and final article in this series.

BIBLIOGRAPHY

Books and articles

Anonymous (1894) "What the position of the judges of the High Court of the South African Republic should be" *Cape Law Journal* 11: 176-185

Anonymous (1898) "Raad and Bench" *Cape Law Journal* 15: 94-108

Austin, J (1885) *Lectures on Jurisprudence, or the Philosophy of Positive Law* (London)

Bossenbroek, M (2014) *Die Boereoorlog* (Pretoria) (trl into Afrikaans by A-M Mischke)

Botha, PR (1926) *Die Staatkundige Ontwikkeling van die Suid-Afrikaanse Republiek onder Krüger en Leyds* (Amsterdam)

Breytenbach, JH (ed) (1950) *Notule van die Volksraad van die Suid-Afrikaanse Republiek II* (Cape Town) (cited as *Volksraadsnotule II*)

Bryce, J (1897) *Impressions of South Africa* (London)

Cohen, L (1976, reprint of 1924 ed) *Reminiscences of Johannesburg and London* (Johannesburg)

Cartwright, AP (1965) *The Corner House: The Early History of Johannesburg* (Johannesburg)

Davenport, J (2013) *Digging Deep. A History of Mining in South Africa 1852-2002* (Johannesburg)

De Groot, H (1625) *De Iure Belli ac Pacis* (Paris)

Huber, U (1686) *Heedendaegse Rechts-Geleertheyt, soo elders, als in Frieslandt Gebruikelijk* (Leeuwaarden)

Jeppe, F & Kotzé, JG (1887) *De Locale Wetten der Zuid Afrikaansche Republiek 1849-1885* (Pretoria)

Kahn, E (1958) "The history of the administration of justice in the South African Republic" *SALJ* 75: 397-417

Kahn, E (1991) *Law, Life and Laughter* (Cape Town)

Kaye, H (1978) *The Tycoon and the President* (Johannesburg)

Kleynhans, WA (1966) *Volksregering in die Zuid-Afrikaansche Republiek: Die Rol van Memories* (Pretoria)

Kotzé, JG (1894) *Het Stichting der Zuid Afrikaansche Republiek en haare Grondwet* (Pretoria)

Kotzé, JG (1934) *Biographical Memoirs and Reminiscences* vol 1 (Cape Town)

Kotzé, JG (1941) *Memoirs and Reminiscences* vol 2, ed by BA Tindall (Cape Town)

Marais, JS (1961) *The Fall of Kruger's Republic* (Oxford)

Mellet, HF, Scott S & Van Warmelo P (eds) (1982) *Our Legal Heritage* (Pretoria)

Meredith, M (2007) *Diamonds, Gold and War* (New York)

Nathan, M (1932) "The South African Bench and Bar" *South African Law Times* 1: 13-14

Nathan, M (1941) *Paul Kruger. His Life and Times* (Durban)

Pelzer, AN (1970) "Die Suid-Afrikaanse Republiek se ywer vir 'n eie hawe en A McCorkindale se rol in verband daarmee" *Historia* 15(3): 146-163

Roberts, AA (1942) *A South African Legal Bibliography* (Pretoria)

Smit, FP (1951) *Die Staatsopvattinge van Paul Kruger* (Pretoria)

Van der Merwe, C (2015) *Donker Stroom Eugène Marais en die Anglo-Boereoorlog* (Cape Town)

Van der Merwe, D (1979) "Skuld en skandaal in die Hooggeregshof van die ZAR" *De Jure* 12: 242-251

Van der Merwe, D (1984) "Enigmatic Ewald Esselen" *Codicillus* 23(2): 15-23

Van der Merwe, D (2017a) "*Brown v Leyds NO* (1897) 4 OR 17: A constitutional drama in four acts. Act one: The 1858 Constitution of the *Zuid-Afrikaansche Republiek*" *Fundamina* 23(1): 111-165

Van der Merwe, D (2017b) "*Brown v Leyds NO* (1897) 4 OR 17: A constitutional drama in four acts. Act two: The 1858 *ZAR* constitution, malleable instrument of Transvaal *Realpolitik* (1859-1881)" *Fundamina* 23(2): 118-175

Van Leeuwen, S (1664) *Het Rooms-Hollands Regt* (Amsterdam)

Van Niekerk, LE (1985) *Kruger se Regterhand* (Pretoria)

Van Onselen, C (2017) *The Cowboy Capitalist John Hays Hammond, the American West and the Jameson Raid* (Johannesburg)

Van Oordt, JF (1898) *Paul Kruger en de Opkomst der Zuid-Afrikaansche Republiek* (Cape Town)

Wheatcroft, G (1986) *The Randlords: The Men who Made South Africa* (Johannesburg)

Zimmermann, R & Sutherland, P (1999) "'… a true science and not a feigned one': JG Kotzé (1849-1940), Chief Justice der Südafrikanischen Republik (Transvaal)" *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 116: 147-194

Cases

Brown v Leyds NO (1897) 4 OR 17

Dean and Johnson v Field (1885) 1 Roscoe Reports 165

Executors of McCorkindale v Bok NO (1884) 1 SAR 202

Hess v The State (1895) 2 OR 112

In re Dormer (1891) 4 SAR 64

Maynard v Field Cornet of Pretoria (1894) 1 OR 214

Nabal v Bok (1883) 1 SAR 60

Snuif v The State (1895) 2 OR 294

State v Nellmapius (1886) 2 SAR 121

Trustees in the Insolvent Estate of Theodore Doms v Bok NO (1887) 2 SAR 189

Archival sources

National Archives Repository (Public Records of Former Transvaal Province and Its Predecessors as well as of Magistrates and Local Authorities) (TAB)

Staatsprokureurstukke 25/1877

ZAR Staatskoerant (*Government Gazette*) ns 52, 57 and 61

JUDGE JOHN HOLLAND AND THE VICE-ADMIRALTY COURT OF THE CAPE OF GOOD HOPE, 1797-1803: SOME INTRODUCTORY AND BIOGRAPHICAL NOTES (PART 2)*

JP van Niekerk**

ABSTRACT

A British Vice-Admiralty Court operated at the Cape of Good Hope from 1797 until 1803. It determined both Prize causes and (a few) Instance causes. This Court, headed by a single judge, should be distinguished from the *ad hoc* Piracy Court – comprised of seven members of which the Admiralty judge was one, and which sat twice during this period – and also from the occasional naval courts martial which were called at the Cape. The Vice-Admiralty Court's Judge, John Holland, and its main officials and practitioners were sent out from Britain.

Keywords: Vice-Admiralty Court; Cape of Good Hope; First British Occupation of the Cape; jurisdiction; Piracy Court; naval courts martial; Judge John Holland; other officials, practitioners and support staff of the Vice-Admiralty Court

* Continued from (2017) 23(2) *Fundamina* 176-210.

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Fundamina
Volume 24 | Number 1 | 2018
pp 134-169

DOI: 10.17159/2411-7870/2018/v24n1a6
Print ISSN 1021-545X/ Online ISSN 2411-7870

4 The personnel of the Cape Vice-Admiralty Court

The Vice-Admiralty Court at the Cape was staffed by a single judge, who, assisted by a registrar and his deputy, as well as a marshal, was in charge of its proceedings. Prosecutions were brought by the King's proctor, and practitioners (advocates and proctors[138]) appeared before it. It is to these and other officials that the spotlight will now turn.[139]

4 1 Judge John Holland

With the creation of a Vice-Admiralty Court at the Cape of Good Hope in January 1797, John Holland was appointed by Letters Patent, under the Great Seal of the High Court of Admiralty, to be its first and sole judge.[140]

Little is known of his early life. There is mention of a John Holland, probably our man, born in 1757 (other sources have 1758), "of Old Bailey", who was a lawyer in London in the 1770s and 1780s[141] and it is known that his father and one of his brothers – he was the third son – were architects.[142] In any event, John Holland arrived at the Cape on board the *Belvedere* more than a year later, on 3 February 1798, accompanied by his wife Catherine, née Eden.[143] His arrival, according to Lady Anne Barnard, had been "anxiously expected for some time past" as he was "to

138 In some Vice-Admiralty courts, including, it seems, the one at the Cape, advocates (the Admiralty equivalent of barristers) were also allowed to act as proctors (the Admiralty equivalent of solicitors). Admitted advocates of such courts were also on occasion appointed as surrogates to perform the ordinary or common (but no other) acts of the judge in his absence, eg, administering oaths, decreeing monitions, or taking bail.

139 For lists of those who served on or were involved with the Court, see the *African Court Calendar* for 1801 and for 1802.

140 See Philip 1981: 185.

141 He was admitted to Lincoln's Inn in 1773, and his name appears in the Law List for 1787 as counsel of King's Bench Walk, Inner Temple: see *Ed Pope History*, *sv* "Holland John", available at *http://www.edpopehistory.co.uk* (accessed 17 Aug 2015).

142 Barnard *Diaries* vol 1: 318 (4 Nov 1799) refers to Judge Holland being "the son of one architect & certainly the brother of one". The brother was the architect Henry Holland (1745-1806), eldest son of Henry Holland (1712-1785), who was a prosperous Georgian builder who executed much of the architectural work of the celebrated landscape gardener Lancelot (Capability) Brown. Henry jr was at first in partnership with Brown (until the latter's death in 1783), and had married the latter's elder daughter in 1773. Their collaboration resulted in several well-known buildings. He subsequently established himself independently and received several royal commissions (including Carlton House in Pall Mall, Brighton and York House in Whitehall, the Theatre Royal in Drury Lane, and the Covent Garden Theatre). Brother Henry was also a collector of antiques, especially of Italian origin, and it is said in a biographical note on him that "Holland's brother John, who also spent much time in Rome, acquired further antique fragments for him": see David Watkin "Holland, Henry" in *Oxford Dictionary of National Biography* (2004, online ed Sep 2013, accessed 19 Aug 2015); Stroud 1966, who states at 19 that Henry's brother, John, was borne in 1757, at 29 n 2 (incorrectly) that he became "an Admiralty High Court Judge", and at 147 that John acquired some antique pieces for Henry.

143 He had married her in Nov 1790 at St George's Church, Hanover Sq: see *Ed Pope History*, *sv* "Holland John" available at *http://www.edpopehistory.co.uk* (accessed 17 Aug 2015).

Judge on prizes in their nature doubtful". Holland, she continued, "seemed surprized that anyone should [have] looked for him with anxiety as he had supposed he should be quite an idle man, the more he has to do the better".[144]

Holland's salary as Admiralty judge was fixed at £600 per annum.[145] In addition, he was entitled to supplement his salary by what was called the "fees of office", a share in all fines levied and penalties imposed by his Court, an entitlement comparable at the time to that of the fiscal of the Court of Justice. However, the basic salary too had to be paid out of the penalties, fines and forfeitures generated in the colony by the seizure of enemy property and contraband, as had been envisaged in the Order-in-Council establishing his Court. Although London clearly thought that there would be sufficient funds from that source,[146] Holland soon complained about his salary. That gave rise to slightly acrimonious correspondence between himself and the Governor and to repercussions between the latter and London.

On 22 February 1798, Governor Macartney wrote to Secretary of State Henry Dundas in London[147] to inform him that the funds generated locally would fall far short of providing Holland with his approved salary and would necessitate the deficiency being paid out by the Treasury, as envisaged in his appointment, something that would subject the Judge "to very great inconvenience, uncertainty, and delay". Macartney suggested, though, that, unless it be decided to pay it fully from the Treasury, it would be simpler to pay his whole salary out of the general local revenue (rather than supplementing it by way of a percentage of the "penalties and seizures"), especially as he did not envisage "that so many seizures are likely to occur in future as ... would produce the £600 intended as a provision for the Judge of the Court of Vice Admiralty's salary".

In March 1798, no doubt in response to the salary issue, Governor Macartney, in formally re-establishing the post office, also appointed "John Holland Esquire … to superintend the duties thereof as Postmaster-General".[148] His office was in the

144 Barnard *Letters*: 99 (letter 3 Feb 1798 to secretary of war, Henry Dundas in London).

145 By comparison, at the time the President of the Court of Justice (Olaff de Wet) received the equivalent of Rds5 000 (£1 000) p/a, and its other members between Rds1 000 (£200) and Rds500 (£100): see, further, n 154 *infra*. The salaries of officials sent out from England were in pounds rather than in rixdollars: Freund 1989: 345.

146 See Theal *RCC* vol 2: 290 (letter Henry Dundas to Governor Macartney, 28 Jun 1797, referred to in a letter by Macartney to Holland, 13 Oct 1798, in which it was stated that "in the event of any surplus of fees" in the Vice-Admiralty Court, the Judge had to account for it to the local "fee fund").

147 See Theal *RCC* vol 2: 240-242.

148 See the Proclamation on the Re-establishment of the Post-Office, 6 Mar 1798 (in *Kaapse Plakkaatboek* vol 5: 128-129). The establishment of an official postal service – for overseas mail only – at the Cape was provided for in Sep 1789 with a "post comptoir" (open from 09:00 to 10:00 daily) in the Leerdam bastion in the Castle (where it remained until 1809). The envisaged service only came into operation in Dec 1791 when Adriaan Vincent Bergh was appointed the first postmaster. Shortly after the First British Occupation, the post office resumed its service, with Bergh initially remaining in his post at a salary of £400 per annum, until the formal re-organisation in 1798. See, further, "The rise of the General Post Office in Cape Town 1792-1910" available at *http://www.sahistory.org.za* (accessed 3 Feb 2017); Jurgens 1943: 11-13; Goldblatt 1984: 21-27; Moree 1998: 140-141, 246.

Castle, where two clerks assisted him. The position brought him an annual revenue of around £400,[149] the entitlement to which ran from the beginning of 1797, because, as Macartney explained to London, at that time "his appointment of Judge of the Vice-Admiralty Court commenced and he was ready to have proceeded to his destination, but was only prevented by a disappointment in the ship on board of which he had hoped to take his passage".[150]

In October 1798, the matter of Holland's salary came up again. Macartney wrote to him,[151] enquiring whether there was any surplus of fees generated by the Court (and which had to be accounted for and paid over to the Receiver General). Holland replied[152] that "no Fees to the Judge have yet been received for business done by virtue of that Commission [the one by which he was appointed], but they shall regularly be accounted for as they are". He continued by pointing out that in his view there was "a solid distinction on the question of Fees" between those received for business done in the Instance Court, in respect of which there was a restriction in the standing Commission appointing him as Judge of the Vice-Admiralty Court on his entitlement so that a surplus should be paid over, and those received for business done in the Prize Court, by virtue of a separate Prize Commission of appointment in which there was no such restriction and hence no need for any accounting. In fact, he had obtained "a professional opinion" on the matter from no less eminent an Admiralty lawyer than Sir William Scott.[153] Based on that opinion, Holland continued, "I have considered the Fees received in *Prize Causes* as applicable to my own use". He concluded by observing "that an increase of Salary, even tho' it were inferior to the Emolument arising from Fees, would be far more agreeable ... than a continuance of the receipt of them, as it excludes the possibility of a sinister motive being imputable to an Officer in my situation acting in the discharge of his Public duty". Macartney then informed Dundas of this correspondence.[154]

149 See Giliomee 1975: 99; Boucher & Penn 1992: 167 n 77.

150 See Boucher & Penn 1992: 200, reproducing a private letter by Macartney to Dundas, 3 Mar 1797.

151 Theal *RCC* vol 2: 290 (letter Macartney to Holland, 13 Oct 1798).

152 *Idem* 291-293 (letter Holland to Macartney, 14 Oct 1798).

153 Scott's opinion, dated 1 Nov 1797 (attached to Holland's letter to Macartney), was that if there was no limitation on the entitlement to fees in Holland's "Prize Commission", he was not restrained from taking fees as he was by the limitation occurring in his "standing Commission as Judge of the Admiralty", which had to be understood as referring to "the Ordinary business" of his office as Judge and not "the Extraordinary business" as Judge in the (Vice-Admiralty Court sitting as) Prize Court, a business "extraordinary both in its nature and its magnitude" and one that is "usually provided for by an increase in salary or by a receipt of fees". However, Scott suggested that Holland should clarify the matter with the Lords of the Admiralty, which Holland did on 16 Mar 1798. William Scott (1745-1836), the brother of John Scott, Lord Eldon (Lord Chancellor 1801-1806 and 1807-1827), was King's Advocate 1788-1789, Judge of the Admiralty Court 1798-1828, knighted in 1788, and created Lord Stowell in 1821. On Scott, see Bourguignon 1987.

154 See Theal *RCC* vol 2: 293-295 (letter 15 Oct 1798, attaching Holland's letter and Scott's opinion; the letter also contains a list of the principal officers of government in the colony with their salaries: Holland received £400 as Postmaster General and £600 (Rds3 000) as Judge of the Vice-Admiralty Court; the salary of Olaff Wet, President of the Court of Justice, was Rds5 000 (£1 000) and members of that Court received Rds1 000 (£200) each; the latter salaries were increased by Rds500 in Dec 1798 for those members appointed to superintend the issue of new paper money at the Cape. See, also, Theal *RCC* vol 2: 309-311 (letter War Office to Macartney, 15 Dec 1798).

Although instructions in 1797 had stopped the practice of adding to the fixed salaries of colonial officials with fees or other similar additional supplements,[155] that did not apply to Holland as Judge of the Vice-Admiralty Court, "who has received permission to take the usual fees as part of the salary of that Office".[156] Further developments in 1802 caused Holland to be restricted to his fixed salary and to lose the traditional additions to his salary in the form of fees of his office derived from receiving a portion of all fees levied and fines imposed by his Court.[157]

Apart from the issue of his salary, Holland also took up the quill to write to Henry Dundas about other matters coming to his attention as Judge of the Vice-Admiralty Court.

In January 1799 he raised observations "made in a leisure hour and solely with a view to public good" on the issue of the protection of the trade interests of the East India Company and the apparent lack of authority of the Vice-Admiralty Court under applicable legislation to act against infringements of its monopoly by British citizens operating under the guise of neutral ships.[158]

A short while later, in April of the same year, he wrote about what he termed a "difference of sentiment" between himself and the Governor on the matter of the

155 See Theal *RCC* vol 2: 35 (letter War Office to Macartney, 7 Jan 1797, informing that fees and perquisites received by public offices in the colony should not belong to the person(s) employed in those offices, but should be appropriated to the payment of the salaries of such appointees). Thus, fixed salaries could no longer be supplemented with fees: see Freund 1989: 345, pointing out that in 1797 Britain raised official salaries and created some where none had existed before, and also, in an attempt to curb corruption, suppressed certain perquisites which formerly had been the principal income of officials.

156 See Theal *RCC* vol 2: 433-434 (letter War Office to Governor Yonge, 30 May 1799) concerning the appropriation of fees and perquisites, and inclosing instructions issued to his predecessor which had to be strictly adhered to (ie no supplementation of salaries by fees) "except in the single instance of the Judge of the Vice Admiralty Court". See, further, Giliomee 1975: 99 n 57, who points out that after 1797 the only exceptions were the fiscal and the Admiralty judge, who also received a portion of fines levied in his Court.

157 In 1802 Holland was placed on the civil pay list and was paid directly by the paymaster: De Villiers 1967: 175; Giliomee 1975: 99.

158 See Theal *RCC* vol 2: 347-348 (letter Holland to Henry Dundas, 29 Jan 1799) and again n 50 in Part 1. He explained that a considerable portion, if not most, of all neutral ships (especially Danish ones) sailing to or from the East Indies that had entered, or had been captured and brought to, the Cape, had been commanded by Englishmen or Irishmen who had become naturalised Danes. As neutrals, they visited and traded from different settlements, including British ones and ones belonging to friendly nations. It was generally known that the greatest part of such ships and cargoes were, in fact, owned by British subjects residing in Britain or India and were merely coloured neutral. Their fraudulent trade (in monopoly goods) impacted on the Company's revenue. The problem was that, "[a]s the law stands at present (unless any act or regulation has taken place since I left England)", if a ship disguised as neutral was captured during a war on suspicion of having enemy property on board and was then brought into the Cape, but later appeared upon investigation to be the property of a British or Indian resident, and even though perhaps commandeered by a British subject or actually proved to be trading to or from India in violation of s 129 of the East India Co Act, 1792 (33 Geo III c 52), "yet the Vice Admiralty Court here would be bound to release such ship and cargo, having no power under the above Act to confiscate any property or to take any cognizance whatever of offences committed against it" (as it would if it were an enemy ship or a neutral ship carrying contraband). Holland therefore later raised the possibility "to invest the Vice Admiralty Court here with the same powers possessed by those in the East Indies and America" so as to enable it to deal with "the illicit encroachments on the Company's Trade". See, also, Theal *RCC* vol 2: 427-428 (letter Holland to Henry Dundas, 20 May 1799, in which Holland stated that his earlier sentiments had been fully justified by the case

Angelique which had been brought before his Court as a prize for adjudication, but where the government had "opposed the execution of the decrees of the Vice Admiralty Court", requiring the landing and sale of her cargo pending litigation to prevent its perishment.[159]

As to details of Holland's residence at the Cape, one is largely and fortuitously reliant on Lady Anne Barnard.[160] She and her husband, Colonial Secretary Andrew Barnard, frequently dined with Mr Hollande (as she tends to refer to him) and his wife.[161] She described him as "a man who was pleasant, almost handsome, though somewhat of the old Beau, rather clever but of a spirit too encroaching for influence",[162] and as an "upright judge", kindly,[163] but in "bad health"[164] and frequently argumentative because of asthma.[165] I can also attest that Judge Holland had a particularly bad and illegible handwriting.[166]

of the *Eliza*, an American vessel that had put briefly into the Cape for refreshments on an apparent voyage from Madras to New York; despite the absence of evidence in the colony, Holland himself had little doubt that the whole or greater part of her cargo, if not the ship herself, belonged to British subjects).

159 Theal *RCC* vol 2: 408-409 (letter Holland to Henry Dundas, 5 April 1799). See, again, at n 60f in Part 1.

160 On Lady Anne, see the wonderful recent biography by Stephen Taylor *Defiance. The Life and Choices of Lady Anne Barnard* (London, 2016).

161 There are several entries in her *Diaries* referring to dinner at the Hollands or to their coming over for dinner at the Barnards. The dinners were enhanced by local wines. She recounts (Barnard *Diaries* vol 1: 102-103, Sun 13 Apr 1799) that they went to Little Constantia – the owner of Constantia next door not being at home – which had some equally good (at least the white) wine, and that there the Barnards and the Hollands bought ½ aum (1 aum = 145l) of wine! Later that day, when the Hollands and others dined with the Barnards, the food was, to her sorrow, ill prepared by the servants without Lady Anne's earlier supervision, for, as she wrote, "a bad dinner is not an unimportant matter to Mr Holland".

162 Barnard *Journals*: 287.

163 Barnard *Diaries* vol 2: 105 (Apr 1800) tells what she calls "a homely little" tale: Holland had as Judge of the Vice-Admiralty Court condemned slaves to be prize property on the evidence of a "Black boy", who, on second examination of his evidence, prevaricated so much that Holland dismissed him, saying "your former evidence I see contains all you have to say, so you may go".

164 Barnard *Letters*: 176 (letter Sep 1798), writing that "we all like Mr Holland very much – I believe he is reckond by *impartial people* (which of course the *partys* seldom are) an upright judge – he has bad health, but I think he is a good humoured, agreeable man".

165 Barnard *Diaries* vol 1: 14 (9 Jan 1799), writing that when the Hollands came over for dinner, she observed that Mrs Holland has "of late been disposed to be rather more agreeable and companionable, he is always so, if his Health permit"; Barnard *Diaries* vol 1: 253 (25 Aug 7199), writing that when they dined at the Hollands with a number of other guests, the cold weather and heavy rains "agree ill with Mr Hollands asthma, he gasps and lives by aether". During the dinner, Holland "could not have resisted combatting [one of the guest's arguments] with legal ability, but he was not up to it"; Barnard *Diaries* vol 1: 315 (29 Oct 1799), describing dinner at the Pringles with the Hollands, where he had "a droll miff" with another (lady) guest "on the subject of cold pudding": there had been a very good plumb pudding at dinner and someone said it would be very good cold; Holland was "wheezing with the asthma & not much thinking what he was saying", as a result of which the lady guest left weeping; Barnard *Diaries* vol 1: 318 (4 Nov 1799), referring to Holland being agitated to such an extent by another guest's deceitful words as to "cut off six months enjoyment to his wheezing tenure of life"; Barnard *Diaries* vol 2: 240-241 (28 Sep 1800), describing dinner with the Hollands, "he asthmatic". Stroud 1966: 29 n 2 states that John Holland and his wife "lived mostly abroad because of his health" and at 147 that John "spent a great deal of time in Italy on account of his health" where he had many royal and artistic acquaintances.

166 Especially in his Court's correspondence in CA, BO 35; however, notary Rouviere's (see at n 207 *infra*) hand was, if at all possible, even worse (see, eg, CA, BO 35, 175-188).

Lady Anne's favourable opinion of Judge Holland was despite evidence of a fairly uneasy relationship between Holland and her husband's boss, the Governor, as well as other senior officials.[167] A little more than a year after his arrival she wrote[168] that she was beginning "to like him better than almost any man in the Cape, he is frank, says what he feels, without management or without fear of its being repeated & never shall it be repeated ... he really does not appear to me to be a bit wrong in any of the disputes or rather misunderstandings between him & Genl Dundas or Mr Ross". But whatever the relationship between Holland and the other British officials, he, and other members of his Court, were nevertheless clearly loyal to the Crown and the British cause.[169]

Although Lady Anne Barnard thought that Holland sought to influence her husband – she at one time feared that her husband was on occasion somewhat swayed by Holland, "who is not a temperate adviser"[170] – she realised that there was no danger of that "as he saw it too".[171]

But while Lady Anne Barnard was quite well disposed towards the Judge, she was less taken by his wife, describing her, at least initially, as less agreeable and companionable than her husband,[172] with manners that left much to be desired.[173] Although she later somewhat revised her opinion,[174] this was not to last, mainly

167 See, eg, the entries for 1 Mar and 10 Mar 1799 (Barnard *Diaries* vol 1: 57, 69), both cases where the Hollands had come over for dinner and where there was evidence of altercations between the Judge and Gen Francis Dundas and of his uneasy relationship with the latter.

168 Barnard *Diaries* vol 1: 81-82 (22 Mar 1799).

169 See Theal *RCC* vol 2: 333-334 (letter from various British colonial officials at the Cape to Gen Dundas, 5 Jan 1799, expressing their support for the war effort "at home" and offering their services to defend "this valuable Colony" against "a host of Foreign and domestic Enemies"; apart from John Holland, it was signed by other members of the Court, namely Thomas Wittenoon(m), George Rex, Peter Mosse, William Menzies and William Sturgis, all of whom we will encounter shortly).

170 Barnard *Diaries* vol 1: 204 (27 Jul 1799).

171 Barnard *Journals*: 287.

172 See Barnard *Diaries* vol 1: 13 (9 Jan 1799), describing Mrs Holland as of late disposed to be rather more agreeable and companionable; *idem*: 30 (27-30 Jan 1799), stating that she has hopes for Mrs Holland as she was beginning to act rational.

173 Barnard *Diaries* vol 2: 209-210 (Aug 1800), referring to a dinner party at which the tiresome comte Franchecoeur sang – "like a cow lowing to be sure, & so affectedly that it was ridiculous enough" – and messrs Holland and Blake began laughing "illbredly", so that "the evening did not pass pleasantly"; Barnard *Diaries* vol 2: 257 (Oct 1800), describing an attendance at a sale of dresses of all kinds, including of the kind in which Marie Antoinette had been beheaded – "robe a La victime"; Mrs Holland purchased one as she "loves a bit of any thing new, the Cape was quite convenient she said for being guillotined, it rose up so High – in order to fall down so low! But as she did not intend to have the ax around her head she had trimd it with point lace which she had taken from a cap, some boxes of wc were also sold, vastly cheap".

174 Barnard *Diaries* vol 1: 94-95 (1, 2 Apr 1799), stating that Mrs Holland has improved "certainly on closer acquaintance, the fine lady going off and the reasonable little woman I hope by degrees coming in its place". But then, later (Barnard *Diaries* vol 2: 240-241 (28 Sep 1800), she described her as being "an old miss and will be one all her life".

because of Mrs Holland's rather public infatuation with Major Peter Abercrombie,[175] which caused the Judge some embarrassment[176] and raised the suspicion of his having been made a cuckold of. This is supported, if not quite proved, by another incident involving the Hollands' French cook.[177]

175 Barnard *Diaries* vol 1: 210-211 (1 Aug 1799), describing how, at her ball, the company flirted, danced, ate, drank and, she was sorry to say, "one foolish woman wept – how can Mrs H[olland] become so very silly about a creature so contemptible as Major A[bercrombie]! one who asks but to show forth his power over this foolish *old girl*"; Barnard *Diaries* vol 1: 282 (26 Sep 1799), telling of an incident at a shop where Mrs Hogan had walked with Mrs Holland and her friend, the elder Mrs Losper (Laubscher?). When it was mentioned that Maj Abercrombie had arrived, Mrs Holland said nothing, but darted downstairs and pelted home as fast as she could, leaving Mrs Hogan without word of apology; Barnard *Diaries* vol 1: 283 (28 Sep 1799), describing that she visited "the poor foolish Holland who we found sitting in her chair in the attitude of thinking & expecting ... Major Ab, who followed us in; and very (exaggeratedly so) slight bow she made to him showed many things all very silly". Abercrombie later married the younger Laubscher daughter, Kaatje (Catharine Cornelia), but Mrs Holland's infatuation continued: Barnard *Diaries* vol 1: 311 (Oct 1799), writing that she saw a surprising thing: "a deluge of tears from the large blew eyes of Mrs Holland, Major Abercrombie by her side & his wife at the far end of the table ... how foolish it is in that little woman not to close the connection now, married as he is from choice to another"; Barnard *Diaries* vol 1: 315 (29 Oct 1799), describing dinner at the Pringles with the Hollands, and also with Maj Abercrombie, without his wife, and everyone being aware that Mrs Holland was "not cured"; Barnard *Diaries* vol 2: 47 (9 Feb 1800), describing how, on visiting, they found Mrs Holland in tears, Maj Abercrombie alone with her and Mr Holland sitting over a bottle with a gentleman in the Hall; she and the Major seemed so much disconcerted and so melancholy that the visit was cut short; on leaving, the Judge followed Lady Anne out, looked at his wife and with an appealing smile to Lady Anne shook his head in a way that she could see an uncle or father would do, but in a manner that did not seem to belong to a husband: how could he smile at tears so oddly bestowed, Lady Anne could not understand at all. Major Peter Abercrombie served at the Cape 1796-1802 and married Catherine Cornelia Laubscher in Nov 1799; she left with him when he went with his regiment to India, but returned as a widow in 1808: see Philip 1981:1.

176 Barnard *Diaries* vol 1: 234 (13 Aug 1799), describing how, after Holland had made "some common place jest of soldiers being careless of their wives", Gen John Henry Fraser (commanding officer of the troops at the Cape in the absence of Gen Dundas, Aug-Dec 1799: Philip 1981: 133) took it personally and replied that he thought soldiers took very good care not only of their own wives, but also of the wives of civilians, and then applied it "in flat & brutal terms to Mrs Holland and Major Abercrombie"; Lady Anne remarked that she thought "Mr H *was* hurt" by these remarks.

177 To her letter to Earl Macartney, dated 15 Feb 1800 (see Fairbridge 1924: 168-169), Lady Anne added "a bit of good jest" as an addendum. It concerned the Hollands' good French cook, a prisoner of war from the Battery, who was returned there. The reason, the Judge later explained, was because the cook was mad. But Mrs Holland later told Lady Anne that the poor man was certainly not so very mad, but mighty odd and tiresome. She explained that he had asked to be paid off and to be returned to prison because, so he told her, he loved her; he later sent her a letter, declaring his affection. "The poor cook's secret could no longer be concealed", Lady Anne continued, "but what is very provoking, everyone thinks him madder than Mrs Holland". Back in prison, the cook would go to no other employment the Judge would find him, calling loudly for death to end his sorrows and imploring the Judge's pardon on his knees for the presumption of his sentiments. But then Lady Anne concluded: "N. B.– Tho I tell this gayly, don't conceive the slightest ridicule or reflection on Mrs Holland by it." See, also, Barnard *Diaries* vol 2: 33-34 (Feb 1800), writing that her husband did not believe that any man would be so mad as to fall in love "with this poor pretty little woman unless he had been a little invited" and that Mrs Holland had certainly sighed when Lady Anne referred to "poor Cookie".

At one stage, the Hollands resided outside of town, some ten minutes' walk from the centre. They were no doubt quite disappointed that there was not room for them in the Castle, as there was for the Barnards.[178] In November 1800, Holland advertised the property, proposing to exchange it "on equitable terms" for a house in Cape Town or to sell it by private contract.[179] An arrangement was then made with one Carel Bester, by which the latter bought Holland's property and in exchange for which Holland bought Bester's property in town.[180] This house was situated at 47 Breede Street on the corner with Hout Street, between the properties of messrs Hermans and Hofmeyer,[181] and close to the Barnards.[182] Ironically, it seems, the house Holland bought may have been one he had lived in before.[183]

But the Hollands' sojourn at the Cape was not to last. With the approaching return of the Cape to the Dutch and the resulting closure of the Vice-Admiralty Court, Judge Holland and his wife departed from the colony in September 1802. As we will see, most of his colleagues, with a few notable exceptions,[184] left the Cape

178 See Fairbridge 1924: 225 (letter Lady Anne Barnard to Earl Macartney, 18 Oct 1800).

179 See *Cape Town Gazette* of 10 Nov and 13 Dec 1800, describing the house as "situate in the neighbourhood" of Cape Town, previously belonging to Mr Casper Loos and now the property of, and occupied by, Holland. It was advertised for sale by public auction, together with "several slaves, wagons, carts and sundry garden and husbandry utensils".

180 See CA, NCD 1/35/823 for the notarial protocol, dated 7 May 1801, by which Holland sold to "Pester" (*sic*: Bester) for Rds50 000 the property which had formerly belonged to, and which he had bought from, Johan Caper Loos, *and* by which Pester sold him his house in town for Rds80 000.

181 For the notarial protocol, dated 24 Jun 1801, pertaining to the obligation on Holland's part to pay the outstanding amount of some Rds30 000 to Bester, to be paid over period of a year, see CA, NCD 1/28/790 (1801), in Dutch together with a translation into English. See, also, *Cape Town Gazette* of 23 and 30 May 1801, advertising a sale in the garden of the house formerly belonging to Carel Bester and now to Holland. This exchange of properties caused Holland to send off a memorial, dated 3 Jul 1801, to Governor Dundas concerning the apportionment of transfer duties, which was allowed, duty being payable on the difference between the values of the two properties: see CA, BO 121/34/1 (1801).

182 Barnard *Diaries* vol 2: 49 (10 Feb 1800), describing how, after dinner, the Barnards "walked up to see Mr Hollands house wc is behind this – I did not much like it [it had "a very circumscribed view, sadly enclosed"] but as he has paid about 30,000 for it & has still much to do to render it convenient I did not say so". She expressed a similar sentiment when she visited it on 10 Mar 1800, after some improvements had been made: see Barnard *Diaries* vol 2: 69: "I did not like it so well as I did before it was fitted up with its bare clean walls, the paper was ugly and the roof painted so dark as to lose the chearful look it had before."

183 See Fairbridge 1924: 279-280 (letter Lady Anne Barnard to Earl Macartney, 27 May 1801, recounting that Holland had sold his country house and came to live in town again, "in the same house he was in before, which by a variety of manoeuvres now costs him 80 000 dollars").

184 These being Rex, who retired and went farming at Knysna, Rowles and Pontardent, who left but later returned to the Cape, and Ziervogel, who, being a local recruit, remained. More about them shortly.

around the same time. The house he had acquired was probably sold, as were the slaves he, like so many other Cape Town residents, possessed.[185]

The Hollands returned to England, but a little time later John Holland was appointed and took up the position of Chief Justice[186] of the Vice-Admiralty Court in Jamaica.[187] The Vice-Admiralty Court there, sitting either in Kingston or in Spanish Town, was the oldest such court in the British colonies, having been established in 1662.[188] Like colonial Admiralty courts elsewhere, it heard both ordinary, Instance causes and, in time of war, Prize causes.[189]

The Hollands arrived on Jamaica in late 1803.[190] As with the Cape, the main source of information about their stay on the island is the journal of a diarist, this time Lady Maria Nugent, the wife of the Governor, George Nugent.[191]

185 See, eg, CA, NCD 1/39/358 (1798) for a notarial protocol concerning the transfer by Adv Peter Mosse (see at n 248 *infra*) of the slave "Spasie van de Caab" to Holland in Dec 1798; CA, NCD 1/15/1400 and 1404 (1801) for a notarial protocol dated 21 Jan 1801, by which Holland gave a special power of attorney to Jan Bernhard Hoffman regarding a dispute in the Court of Justice with Jean Charles de la Harpe over the sale of a slave.

186 Chief justice rather than merely judge, presumably because there were other Admiralty judges in other locations on the island.

187 See *The New Jamaica Almanack and Register ... for ... 1801* (Kingston, 1801) at 109. An amount of £473 8s 1d was budgeted for Holland (as also for the chief justices of the Vice-Admiralty courts at the Bahamas and Barbados) from the consolidated fund for the year ending Jan 1804 with a future annual charge of £2 000 p/a, probably his salary: see House of Commons Parliamentary Papers *Accounts Respecting the Public Expenditure of Great Britain, for the Year Ended 5 January, 1804* (HCPP 1803-1804 (vol 23)) at 11; in *idem Accounts Respecting the Public Income of Great Britain, for the Year Ended 5 January, 1804*, at 87 there is mention of "Henry [*sic*] Holland, Esq, Chief Justice of the Admiralty Court in the Island of Jamaica, per Act 43 Geo III". The following year, during which he died, the amount was £328 1s 9d, maybe the part of his salary due on his death: see *Parliamentary Debates* vol 5: 15 May to 12 Jul 1805, "Account of the Charges upon the Consolidated Fund, in the year ending 5th Jan 1805" at ccxxxi.

188 See Crump 1931: 91-105; see, also, Leach 1960; Butterfield 1938: 97, distinguishing between the records of the Vice-Admiralty Court and those of "the special courts of oyer and terminer for the jurisdiction of the admiralty of the island of Jamaica, which tried ... felonies committed on the high seas, piracies, and murder". As Chief Justice of the Vice-Admiralty Court, Holland was also a member of the Court of Admiralty Sessions, the name for the Piracy Court there.

189 And like Vice-Admiralty courts elsewhere, the Jamaican one was relatively quiet outside of war. One of Holland's better-known predecessors, Edward Long (1734-1813), although reviled today (see Seth 2014), but nevertheless remembered as an historian and the author of *The History of Jamaica* (published in 3 vols in London in 1774), wrote (in vol 1 at 78) that "in time of peace, it is a court of no profit, and of very little business". On Long, see also Bridges 1828, vol 1: 26; SP 1933.

190 His immediate predecessor in 1801 was George Cuthbert: see *The New Jamaica Almanack and Register ... for ... 1801* (Kingston, 1801): 109. The well-known naval historian, William James, was a proctor in Holland's Vice-Admiralty Court in 1803: see AB Sainsbury "Duckworth, Sir John Thomas" in *Oxford Dictionary of National Biography* (2004, online ed Jan 2009, accessed 19 Aug 2015).

191 On Lady Nugent (1770/1-1834), see Rosemary Cargill Raza "Nugent [*née* Skinner], Maria" in *Oxford Dictionary of National Biography* (2004, online ed 2009, accessed 19 Aug 2015). Her diary was published in 1966, and reprinted in 2004: see Wright 2004. George Nugent (1757-1849) was appointed Lieutenant Governor of Jamaica in 1801, where he remained until 1806. Lady Nugent returned to England in 1805 for the sake of their children's health.

On 29 November 1803 she wrote that she had received several high-ranking visitors, "[a]mongst them was Mr Holland, just arrived as judge of the Admiralty". With him was his wife, formerly a Miss Eden, and, Lady Maria hoped, she would "be an acquisition to our society". The Hollands stayed for dinner and Lady Maria wrote that she and her husband "both like Mr Holland's manner much".[192]

As at the Cape, Holland proved a rather sociable dinner companion. A few days later, on 3 December, Lady Maria wrote that at a large dinner party "Mr Holland drank so many bumpers of claret, that he got into high spirits, and gave up, in the Court of Admiralty, every point of which he had been so tenacious in the morning".[193]

Sadly, Holland's tenure was cut short a few weeks later. On 12 January 1804, Lady Maria diarised the news of Holland's sudden death, "which shocked us very much".[194] He was buried in the St Andrew's Parish Church on the island, where the inscription on the commemorative white marble mural reads:

> SACRED TO THE MEMORY OF
> JOHN HOLLAND, ESQR.,
> JUDGE OF
> THE VICE-ADMIRALTY COURT IN JAMAICA.
> HE DIED ON THE 12TH OF JANUARY 1804,
> IN THE 47TH YEAR OF HIS AGE.[195]

Holland's quickly appointed successor[196] became one of the most illustrious of all colonial Vice-Admiralty judges: he was Henry John Hinchliffe, Judge of the Jamaican Vice-Admiralty Court from 1804 to 1812 and again from 1814 to 1818. He is today remembered, in appropriate circles, as the author of *Some Rules of Practice for the Vice-Admiralty Court of Jamaica Established [the rules] January, 5 1805*, which was published in London in 1813.[197]

192 Wright 2004: 184.

193 *Ibid*.

194 *Idem* at 192. She had learned, from Adam Dolmage, the Court's Deputy Registrar, that Holland had "just fired a Gun at some Cattle which had broken into his garden when a blood Vessel burst & he died"; *idem* at 192 n 1.

195 See Lawrence-Archer 1875: 234; Wright 1966: 57.

196 Lady Maria (Wright 2004: 194) wrote on 20 Jan 1804 that Hinchliffe, who came over for breakfast, was "full of gratitude for his appointment of Judge of the Admiralty Court". Hinchliffe, a barrister without any practical experience in England, had come to Jamaica in 1801, "to seek his fortune"; he practiced there, and was "eloquent at the Bar, but not considered well versed in the law": see Wright 2004: 302 (Index of Persons).

197 Judge Hinchliffe was the brother of John Hinchliffe (1731-1794), bishop of Peterborough: see JJ Caudle "Hinchliffe, John" in *Oxford Dictionary of National Biography* (2004, online ed 2008, accessed 18 Sep 2015). For an American decision in which Hinchliffe and the Jamaican Vice-Admiralty Court featured prominently, see *Yeaton v Fry* 5 Cranch 335, 9 US 335 (US Dist Col, 1809), a case concerning a claim on a marine insurance policy. Evidence was submitted of the proceedings in and the decree of the Jamaican Court, ordering a sale to pay for the salvage of the insured ship. An issue arose as to the proper authentication of copies of the Vice-Admiralty Court's proceedings that had been admitted in evidence. Reference was made in the documents of authentication to Henry John Hinchliffe, Esq, as "judge and commissary of the court of vice-

Mrs Catherine Holland,[198] unsurprisingly true to the picture Lady Anne Barnard had painted of her, married one George Simpson in London in March 1805, a little more than a year after her husband's death.[199]

4 2 Registrar John Harrison

Second in importance after Judge Holland at the Cape Vice-Admiralty Court, but of whom almost nothing certain is unfortunately known,[200] was John Harrison, who was appointed the Court's registrar (often also called its register) in January 1797.

The registrar, like the Court's marshal, was appointed by Letters Patent, under the Seal of the Admiralty, or by the Governor when there was no Admiralty appointment. The registrar was authorised to act by deputy, sharing the profits, or to act in person. As the keeper, in its registry, of the records of and created by the Court, the registrar attended the Court's sittings and was often present in the judge's chambers, drew up and signed Court documents, controlled the moneys received or expended by the Court, and taxed costs.

According to one genealogical source,[201] John Harrison was born on 20 November 1757 in Stantonbury in England, and married Irene Pearce on 11 September 1787, a marriage which produced no children. Before being appointed as registrar of the Cape Vice-Admiralty Court, he apparently served in the Commission of Peace for the Liberty and Borough of St Albans, was then also an alderman from 1788, and twice the mayor of that borough in 1789 and again in 1796,[202] and, possibly, sometime one of the Commissioners for the Victualling of the Navy.[203] Whether Harrison ever

admiralty in the island of Jamaica". There is also evidence that in 1804 Hinchliffe publicly sat as Judge of the Vice-Admiralty Court in Jamaica and in that capacity condemned the insured vessel. In *The Reward* (1818) 2 Dods 265, 165 ER 1482 at 270, 1484, Hinchliffe is described in the following glowing terms by no less an Admiralty giant than Sir William Scott (see n 153 *supra*): "The judge of the Vice-Admiralty Court at Jamaica (a gentleman of very considerable talents, and of singular judgment in the exercise of his functions) seems to have been perfectly right in putting a check to this practice [of allowing certain exceptions to a legal prohibition]."

198 Who inherited from her husband in accordance with a will drawn up in London in Aug 1790 and proved on 2 May 1804 before the Prerogative Court of Canterbury (see NA, PROB 11/1408/145, 367). The will that Holland and his wife had had notarially drafted (in Dutch) in Cape Town on 15 Oct 1801 (see CA, NCD 1/7/616/1) – and in which Holland is described as "Judge van zijn Groot Britaniasche Majesteits vice admiraliteyts Hof hier ter plaatse" – apparently did not feature.

199 See *Ed Pope History* "Holland John" available at *http://www.edpopehistory.co.uk* (accessed 17 Aug 2015).

200 *Cf* his entry in Philip 1981: 167.

201 See "Harrison, John" available at *http://www.clanmacfarlanegenealogy.info* (accessed 17 Aug 2015); also *www.stamplink.com/genealogy* (accessed 26 Apr 2012).

202 See the "Table of Mayors for St Albans Rural & City & District Council", available at *http://www.stalbans.gov.uk* (accessed 15 Oct 2015); Gibb 1890: 146, 147, 149-151.

203 On the victualling commissioners, of which there were seven, see, further, Knight 2008: 145, who lists as a member of the Victualling Board of Commissioners "*John Harrison*, 27 Mar 1799 – 22 Aug 1807: private secretary to Lord Spencer, 7 Feb 1800 – 29 Feb 1801"; see, also, Sainty 1975: 65, 129. These dates cast doubt on whether this was our registrar Harrison, or, if he was, whether he was then actually at the Cape.

came to the Cape and, if so, when he left, is not clear[204] and the date of his death is likewise uncertain.[205]

One possible explanation for the dearth of information on Harrison's activities at the Cape is that, as he was entitled to do, he performed his duties through a deputy, and that he never actually came to the Cape. If so – and the appointment of a deputy registrar gives credence to this possibility – he was certainly not the last of the Court's registrars to exercise his office in this manner.[206]

4 3 Deputy registrar Rouviere

BG Rouviere[207] was the Vice-Admiralty Court's deputy registrar and is also listed as its actuary[208] and later also as its examiner, although Rouviere and Judge Holland disagreed on what exactly his rights and duties in the latter capacity entailed.[209]

204 He is said to have subsequently been a director of the Royal Hospital (in the sense of "hospes") for Seamen at Greenwich: see *http://www.clanmacfarlanegenealogy.info* (accessed 17 Aug 2015) and also *A Report of the Proceedings of ... and John Harrison Esq, Directors of the Royal Hospital for Seamen at Greenwich* (London, c 1810), being a report on the visitation of the hospital's estates in the North in Aug-Oct 1805. However, two editions of *A Description of the Royal Hospital for Seamen, at Greenwich, ... with a list of the Directors ....* (London, 1797) at 55 and (London 1809) at 52 mention no Harrison as director at all.

205 He was alive, without issue, it is said, in 1809 (see *http://www.clammacfarlanegenealogy.info*, accessed 17 Aug 2015). There is a gravestone in the Somerset Rd Cemetery in Cape Town, inscribed "John Harrison. Died 15-04-1866" (see Genealogical Society of South Africa *Alphabetical Guide to Gravestones in the Somerset Road Cemetery, Cape Town, Cape* (1 ed 1993) unpaged), but this is probably not our man as that would have meant he was ninety years old when he died. There is a further suggestion that he died in Feb 1830: Gibb 1890: 181.

206 The sinecure office of William H Grey, registrar of the Cape Vice-Admiralty Court 1807-1817, was similarly exercised by deputies: see Van Niekerk 2015a: 157 n 81, 175-176.

207 He is in local sources, such as the *Cape Town Gazette*, invariably referred to by his initials, mostly "BG", but also on occasion "BW". He should be distinguished from French-speaking Swiss immigrants to the Cape bearing the same surname, such as Jan Auguste Rouviere (c 1783-1852) and Jeremie Auguste Rouviere of Neuchatel: see Linder 1997: 162, 201-202.

208 See the *African Court Calendar* for 1801. See, also, NA, HCA 49/33-11/c, containing a letter dated 26 Nov 1800 from Governor Yonge to Rouviere concerning his appointment as registrar and actuary in the Vice-Admiralty Court; Barnard *Diaries* vol 2: 13 n 11.

209 See the *African Court Calendar* for 1802. See, also, NA, HCA 49/33-11/c, containing a letter dated 8 Dec 1800 from Rouviere to the local King's proctor and former deputy registrar Wittenoom (as to whom more at n 225f *infra*), referring to the difference of opinion between Rouviere and Holland about the former's right of examining witnesses. He asked Wittenoom's advice on the matter and specifically on whether it was part of a registrar's duty to examine witnesses, or whether the judge had the right to appoint an examiner when the registrar and his deputy thought it proper for them to take the examinations themselves. On 9 Dec, Wittenoom answered, expressing the view that the taking of examinations of witnesses formed part of the regular and established duties of the registrar of an Admiralty court. He pointed out that the appointment of an examiner in the High Court of Admiralty in London was motivated by the fact that the business there was too great to allow the deputy registrar consistently taking examinations himself in addition to his other duties.

He was appointed as deputy registrar and actuary of the Vice-Admiralty Court in November 1800 in the place of Thomas Wittenoom.[210] There are many notices in the *Cape Town Gazette* during the period from 1800 to 1802, placed by "BG Rouviere, actuary", acting on behalf of the Court's registry and on the order of its judge, giving notice of when the "regular" Court of Vice-Admiralty or, less frequently, the "special" Court of Vice-Admiralty would be held.[211] There are also notices in his name involving the expenses of the Vice-Admiralty office, or calling for persons willing to supply the Court with government bills upon England to submit tenders to the registry as to the terms on which they were willing to do so.[212]

Rouviere was also appointed as registrar of the Piracy Court in March 1801 when the initially appointed one, George Rex, had to beg off because of his clashing duties as marshal of the Vice-Admiralty Court.[213] In that capacity, Rouviere had some difficulty in getting the government to meet the Court's expenses.[214]

Lady Anne Barnard was sufficiently shocked to diarise that "Mr Rouverie", as she called him, had arrived at the Barnards uninvited during dinner on 1 May 1800, but the relationship was not, as a result, permanently strained, for on 19 October she invited him and others, including the Hollands, to spend a few days with them.[215]

What exactly Rouviere did when the Cape Vice-Admiralty Court was closed in 1803, is not known, but he – and Wittenoom – surfaced in Malta as proctors practising before the local Vice-Admiralty Court there from around 1810[216] and

210 See Cape Town Gazette of 29 Nov 1800; Philip 1981: 469.

211 See, eg, Cape Town Gazette of 5 Sep 1801 for the first, and Cape Town Gazette of 2 Jul 1801 for the second. The "special" probably refers to extraordinary, unscheduled sittings of the Court and not to sessions of the Piracy Court.

212 See, eg, Cape Town Gazette of 8 Aug 1801.

213 See Brooks 1802: 45 where it is noted that the Court disposed of the attendance of Rex and that "Mr Brown George Rouviere, Notary Public, was appointed and sworn in as Register accordingly"; see again n 121 *supra*.

214 See CA, BO 122/78/1 (memorial dated 24 Dec 1801 from Rouviere to Governor Dundas concerning the considerable expenses incurred by him as registrar of the "Court of Piracy" in May of that year in the Chesterfield matter, which had been applied for, but was still not yet paid, placing him, Rouviere, in a "very unpleasant situation" as regards the "various pecuniary demands which are continually made upon [him]"; it is entered on the memorial that Dundas instructed that Rouviere be informed that his account could, for technical reasons, not be discharged at that time).

215 Barnard *Diaries* vol 2: 119, 266 (1 May 1800, 19 Oct 1800); Rouviere had been to dinner before, on 21 Jan 1800: *idem* at 13 n 1.

216 Rouviere and Wittenoom are mentioned as two of the four practising proctors in the Maltese Vice-Admiralty Court in the 1811-1816 (there is no mention of proctors in the 1818-1820) issues of the *Royal Kalendar, and Court and City Register for England, Scotland, Ireland, and the Colonies*; see, also, the *Gentleman's Magazine and Citizen's Almanack ... for 1815* at 156. The Admiralty Judge in Malta at the time was Sir John Sewell (d 1833), holding a DCL from Oxford, who is buried in the Marylebone New Church near Baker St in London (see "Monuments in Marylebone New Church" available at *http://www.speel.me.uk* (accessed 10 Feb 2015)). The writer and lawyer, Sir John Stoddart (1773-1856), also an Oxford DCL, was King's Advocate there 1803-1807 and after then practising in Doctors' Commons, he returned to the island to become the Court's Judge 1826-1838: see GC Boase, rev Nilanjana Banerji "Stoddart, Sir John" *Oxford Dictionary of National Biography* (2004, online ed 2009, accessed 2 Oct 2015).

possibly earlier.[217] On the island, Rouviere had a reputation as a prodigious imbiber of alcohol.[218]

The Maltese Vice-Admiralty Court was established in June 1803,[219] and is famous for its connection to the poet Samuel Taylor Coleridge[220] and most infamous for the attacks of corruption, bribery and outrageous fees – detrimental to the interests of naval captors – levelled against it in, and outside, the British Parliament by the controversial naval officer, Thomas Cochrane, in 1810 and 1811.[221]

217 In *Umbragio Obicini v Bligh* (1832) 8 Bing 335, 131 ER 423, there is mention of a "Rouverie" acting as proctor for one of the litigants in the Vice-Admiralty Court on the island of Malta in Feb 1809. And in Hassam 1880: 10-12 there is recounted the arrest in Aug 1809 of an American vessel, captained by Jonathan Hassam, by a British naval vessel and of her being taken to Malta to be condemned by the Vice-Admiralty Court there as a prize. The Court's decree of restoration, dated 2 Oct 1809, has it that Rouviere appeared as proctor for the claimants.

218 This from the journal kept by Joseph Arnold (1782-1818, naturalist and naval surgeon: see Charles Bateson "Arnold, Joseph" in *Australian Dictionary of Biography* vol 1 (1966)), in which he wrote that on 7 Jan 1813 he attended a dinner in Malta at which some excellent alcoholic refreshments were served ("Claret, porter, Madeira, Beccaria porter, Burton ale, Hoch, &c"). During dinner, the conversation turned to the Admiralty Court and he then mentions that "Mr Rouviere is a proctor, when he buys wine he sometimes orders 4 [... indecipherable] pipes – by himself ... he drinks a bottle of Burgundy or Champagne daily". The entry for 25 Jan 1813 refers to advice given on the treatment of the inflamed knee of a naval captain by "Mrs Rouviere wife of the rich proctor here". See "Joseph Arnold Journal", transcribed at *http://acms.sl.nsw.go.au* (accessed 20 Oct 2014).

219 See NA, WO 1/739; and, generally, Gregory 1996: 262-264, noting the (jurisdictional) conflict between the Vice-Admiralty Court and the Maltese civilian, criminal and commercial courts, the latter known as the Consolato di Mare.

220 Coleridge (1772-1834) – he of "Rime of the Ancient Mariner" (1798) fame – was acting public secretary on the island from May 1804 until Sep 1805, and in that capacity he fulfilled various legal and administrative functions, including organising the distribution of prize money and bounty and, allegedly, appearing in the Vice-Admiralty Court: see Hough & Davis 2008. The military officer and part-time actor, Tomas Sheridan (1775-1817), son of the dramatist and politician Richard Brinsley Sheridan, had, in 1803, rejected the registrarship of the Maltese Vice-Admiralty Court before pursuing a military career; in 1812, ill health moved him to accept the post of colonial paymaster or treasurer at the Cape from 1813 until his death of consumption in 1817: see AKM "Sheridan, Thomas" in *Dictionary of South African Biography* vol 2: 661-662; Philip 1981: 378; A Norman Jeffares "Sheridan, Thomas [Tom]" in *Oxford Dictionary of National Biography* (2004, online ed 2008, accessed 15 Oct 2009).

221 For the speeches by Cochrane (1775-1860) in the House of Commons on 6 Jun and 18 Jul 1811 on the "Vice-Admiralty Court of Malta" and the "Conduct of the Vice Admiralty Court at Malta" respectively, see *House of Commons Debates* 6 Jun 1811 and 18 Jul 1811, vol 20 cc464-470 and cc1017-1027, available at *http://hansard.millbanksystems.com* (accessed 10 Feb 2015). Cochrane names several of the Court's officers – including Judge Sewell, who himself drew up the Court's scale of fees, the (sinecure) registrar John Locker and his deputy William Stevens, as well as the marshal John Jackson, who simultaneously, but illegally, acted and charged fees as a proctor – but makes no mention of either Rouviere or Wittenoom. See, further, on Cochrane and the Maltese Court, Lloyd 1947: 102-105; Cordingly 2008: 225-228. See, also, the polemic *The Rape of the Table: or, Ten Honest Lawyers. A Poem in Two Parts. Comprising a Faithful Report of Some Extraordinary Proceedings in a Certain Court of Vice-Admiralty*, by "A Gentleman well acquainted with the different members of the Court", published in Dublin in 1811.

Only faint and inconclusive traces have been uncovered of what could be Rouviere's earlier[222] and later[223] life in England.

4 4 Marshall George Rex

George Rex was marshal of the Cape Vice-Admiralty Court from 1797 to 1802.[224]

4 5 King's proctor, deputy registrar and practitioner Thomas Wittenoom

One of the more interesting Admiralty lawyers at the Cape during the First British Occupation was Thomas Wittenoom.[225] He was born in London in 1759, the son of Cornelius Wittenoom – a vinegar maker of St Leonard, Shoreditch, himself the son of a Dutch immigrant – and his wife Elizabeth.[226] Thomas qualified himself as a civil lawyer, and practised as a proctor in the Ecclesiastical and Admiralty courts in Doctors' Commons in London.[227] For some time, Wittenoom practised in partnership

222 There is mention of a "George Brown Rouviere" as a notary public in the Ecclesiastical Courts in England in Apr 1800; see Lambeth Palace Library, item F I/U f 119.

223 See *Journals of the House of Lords*, vol 50, 1814 at 554, 605 and 718 where there is mention of Frances Henrietta Nash(?) and her husband "Brown George Rouviere" being involved in litigation in *Barrettt v Bourke et al*. See Q27/3/211 (1819) in the Hampshire Archives and Local Studies, which contains a document entitled "Justice Browne George Rouvière esq.; Property, Messuages and lands at Yateley". (This item is in the Archives' Records of Justices and Clerks of the Peace, etc, Hampshire Quarter Sessions (= Q), Justices of the Peace (= Q27), Certificates of qualifications of justices; messuage (or mesnage, a legal term for a dwelling house with outbuildings and land assigned to its use (= Q27/3)). See, also, *Parliamentary Papers* vol 43 "Accounts and Papers ... relating to Courts of Law ... etc" (1836) at 583: Justices of Peace (which is a list of persons appointed to act as such) where there is mention of "Browne George Rouviere" being appointed in the county of Southampton.

224 His career was considered in detail in Van Niekerk 2010.

225 Also spelt Wittenoon(e), Wittenome, or Wittemoon(e).

226 See NA, PROB 11/826/59 for Cornelius's will; and NA, PROB 11/1147/88 for that of Elizabeth Wittenoom, who is described as a widow of "Godliman Street, Doctors' Commons, London". They had five children: Cornelius, William Joseph, Thomas, Ann (Calvert), and Elizabeth (Caslon). Cornelius and William were appointed as executors of their mother's will, dated 5 Mar 1782. There is a record in the archives of the Court of Arches in the Lambert Palace Library (see Arches Aa 34, Arches Aa 83/37, and Arches Bb 95/23, available at *http://archives.lambertpalacelibrary.org.uk* (accessed 16 Sep 2015)) of litigation involving the brothers Cornelius and Thomas being sued by their sister Elizabeth concerning the legacy of their mother, Elizabeth, in 1788.

227 "Wittenoom, Mr Thomas *Knight-rider-street*" (which is where Doctors' Commons was situated) is listed in (1786) 4 – (1793) 11 *Transactions of the Society ... for the Encouragement of Arts, Manufactures, and Commerce* as one of the society's contributing members. The publication *Civilian Trials for Adultery: or the History of Divorces, being Select Trials at Doctors Commons for Adultery, Cruelty, Fornication, Impotency, etc* vol 6 (1780, London) at 58, mentions, in the case of *Edward Payne v Sarah Payne*, 15 May 1776, a "Mr Thomas Wittenoom, of Doctors Commons" as having proved the marriage of the parties involved. His petition in 1782 for admission as a proctor in the Court of Arches is in its archive in the Lambert Palace Library (Arches Kkk 4/33, Arches Kkk 16/39; and see, also, VB 1/11/319) as is his admission as a public notary in Sep 1780 (F I/P f 168V).

with Philip (de) Crespigny and his son[228] until a dispute between them ended in litigation and the termination of the partnership in 1792.[229]

Thomas Wittenoom arrived at the Cape in February 1798, on the same ship as Judge Holland[230] and, as a proctor entitled to practise in the Vice-Admiralty Court, he was at first appointed as the registrar and actuary of the Court. In that capacity he dispensed – was compelled to dispense – with the services of proctor Pontardent after he, because of his involvement in the Jessup affair,[231] had been banished from the colony.

There are several archival items giving further information on Wittenoom's tenure and duties as registrar,[232] and on correspondence to and from him in his official

228 See item VB 1/12/230 in the Lambert Palace Library, noting Wittenoom and Crespigny as practising as partners in 1790. Philip Charles Crespigny (probably the son, 1765-1851, the father having died in 1803) is mentioned as a proctor having an office in Doctors' Commons in 1809 *Royal Kalendar, or, ... Annual Register for England, Scotland, Ireland, and America for ... 1810* at 275, and as a proctor in the 1810 *British Imperial Calendar for 1811* at 229, which also mentions Wittenoom. Several Crespignys, of Huguenot immigrant stock, were civilian lawyers in England: grandfather Philip Champion (1704-1765) was a proctor in the Ecclesiastical and Admiralty courts and marshal of the High Court of Admiralty 1733-1745; father Philip Champion (1738-1803) was an advocate in Doctors' Commons in 1759, King's Proctor 1768-1784, and a member of Parliament 1774-1775 and 1780-1790. See Namier & Brooke 1964: 275; Anne Young "Philip Champion de Crespigny", available at *http://ayfamilyhistory.blogspot.co.za* (accessed 21 Sep 2015).

229 See *Crespigny v Wittenoom & Another* (1792) 4 TR 790, 100 ER 1304, which involved an agreement between Wittenoom, Crespigny snr, and his son Crespigny jnr, dated 1788. In terms of it, the parties had agreed that the business of the co-partnership as proctors would be carried on by them in the name of Wittenoom only, until Crespigny jnr should be admitted as a proctor, after which it would be carried on in both their names with Crespigny jnr becoming a partner in equal degree with Wittenoom. When Crespigny snr wanted to quit and give up the business, they agreed that the other two would pay him the annual sum of £400 during his life, by quarterly payments, and also a further sum of £371 10s every three months during the joint lives of himself and Mary Green, the widow of one J Green who was a former partner of Crespigny snr. The latter now sued the other two for breach of their agreement by the non-payment of the amounts in question. At issue were principles concerning annuities and the interpretation of statutes. The Court held that if an annuity was granted in consideration of the grantee's giving up his business to the grantor, it need not be registered under the Grants of Life Annuities Act, 1777 (17 Geo III c 26), which (by its preamble) sought to control the "pernicious practice of raising money by the sale of life annuities" by requiring the registration of grants of life annuities. The reason was that the Act applied only to an annuity granted or sold for a pecuniary consideration alone and not, eg, as here, for a consideration which was the giving up of a business. The decision subsequently became a leading one in the nineteenth century: see, eg, *Hood v Burlton* (1792) 2 Ves Jun 29, 30 ER 507; *Hutton v Lewis, Clerk & Others* (1794) 5 TR 639, 101 ER 356; *Doe, on demise of Johnstone v Phillips* (1808) 1 Taunt 356, 127 ER 871; and see, also, Hunt 1796: 334-343; Blayney 1817: 55-56; and Espinasse 1824: 39.

230 See Philip 1981: 469; CA, BO 122/60/1 (1801).

231 As to which see n 258 *infra*.

232 See, eg, NA, HCA 49/33-11/a for Wittenoom's bills, receipts, payments and accounts for the registry of the Cape Vice-Admiralty Court, Nov 1799-Jan 1801, containing some forty individual items, mainly receipts by the Court staff (about all of whom more shortly) for wages and reimbursements paid by Wittenoom. For instance, item 4, dated 9 Feb 1800, acknowledges the

capacity.[233] In November 1800, he was succeeded in that position by BG Rouviere, but continued to act in the Court not only as a proctor, but also as the King's Proctor.[234] In the latter capacity, he also took charge of the prosecution in the Piracy Court in June 1798 in the *Princess Charlotte* matter,[235] while in the proceedings in that Court in March 1801 in the *Chesterfield* matter, he acted for the defence.[236] In December 1800, he further applied on behalf of the firm of Walker & Robertson for a letter of marque for their ship, the *Lady Yonge*, signing the application as "Advocate & Proctor for the Petitioners".[237] In 1801, Wittenoom received permission to practise as a notary.[238]

After Wittenoom left the Cape, probably sometime in 1803, he is listed as a proctor having an office in Doctors' Commons in London,[239] and he and his former colleague, Rouviere, are then mentioned as proctors practising in the Vice-Admiralty Court on the island of Malta from at least 1810.[240]

receipt by Ziervogel of some Rds270 for his time and attendances at the Court up to that date; item 18 acknowledges the receipt by Halaran of Rds16, being one month's salary from 9 Feb-9 Mar 1800; item 21, reflecting payment of Rds8 to Menzies and Rds6 to Rankin for their attendances at the registry on 22 Feb and 9 Mar 1800; and in item 27, Rankin acknowledges the receipt of some Rds9 for his extra writing and attendance after hours on Saturdays and Sundays in Mar 1800. There are also items referring to payments to persons not (today known as) being (permanently) attached to the Court. For instance, item 35 reflects the payment of Rds40 to Thomas Carter (Philip 1981: 61 mentions that he was a former seaman, and at one time a tutor to the Rex family) for one month's wages on 6 Dec 1800, and item 40 reflects the payment of Rds36 to John Batten (see Philip 1981: 20), being three weeks' salary due on 10 Jan 1800.

233 See NA, HCA 49/35-2/a for official letters addressed to the Court's actuary (first Wittenoom and then Rouviere: see, again, n 208 *supra*).

234 See *Cape Town Gazette* of Sat 29 Nov 1800 concerning Wittenoom's replacement as registrar of the Vice-Admiralty Court, but indicating that he "will continue to act in that court as King's Advocate".

235 See CA, BO 36, 24; Mosse appeared for the defence: see, again, at n 101 *supra*.

236 See CA, BO 37, 17; Somers prosecuted: see, again, at n 111 *supra*.

237 See CA, BO 92, 43; earlier, in Jan 1799, he had applied as proctor for Capt Smart for a letter of marque for Hogan's *Collector*: see CA, BO 92, 27; as to these letters of marque, see again n 47 *supra*.

238 Philip 1981: 469, referring to a petition (CA, BO 122/60/1), dated 31 Oct 1801 from William Menzies (see n 299 *infra*), who had been instructed to apply again (an earlier request having been rejected) for permission for Wittenoon and George Rex to practise as notaries public. Menzies explained that Wittenoom had been appointed as actuary and examiner of the Vice-Admiralty Court. Both applicants, it seems, had refused to undergo any examination by the local Court of Justice in view of their English qualifications and had therefore not been admitted to practice before that and other civil courts in the colony, although they were, on the basis of those qualifications, naturally entitled to do so before the (British) Vice-Admiralty Court.

239 See the *British Imperial Calendar for 1811* at 229. However, that does not mean he was then actually practising there, for the list also mentions the proctor David Jennings, who was practising at the Cape at the time, as well as George Rex, who had long ago ceased practising as such.

240 See the *Royal Kalendar, and Court and City Register for England, Scotland, Ireland, and the Colonies* for the years 1811-1816 (there is no mention of proctors for the years 1818-1820); also, eg, the *Gentleman's and Citizen's Almanack .... for ... 1815* at 156; and see, again, at n 216 *supra*.

Where and when Wittenoom died, is still unknown.[241] His will, dated January1814,[242] provided that if he died in London, he wished to be buried in the parish church of St Leonard's in Shoreditch, in the family vault there, but an otherwise pleasant afternoon spent searching in the church, proved fruitless.

Thomas Wittenoom and his wife, Elizabeth Waters, had several children. The eldest son was John Wanstead Burdett Wittenoom, later to be appointed as the first clergyman in Western Australia[243] and the first in a long line of influential Australian Wittenooms.[244] Another son was Charles Dirck Wittenoom, an artist and journalist.[245] There was also a daughter, Elizabeth (or Eliza), who had accompanied the eldest son, John, to Australia.[246] The death of Thomas's widow in Australia on 27 June 1846 was announced as that of "Elizabeth, relict of Thomas Wittenoom, esq. Senior Proctor of the Vice-Admiralty Court of the Cape of Good Hope and Malta".

4 6 The practitioners

There were never many practitioners at the Cape Vice-Admiralty Court. In October 1801, for instance, there were only four – Wittenoom, Mosse, Rowles and Somers – when they collectively sent a letter to the deputy registrar, Rouviere, objecting to

241 His date of death is given as 1813 in O'Brien & Statham-Drew 2009: chart 1. However, a website devoted to South African theatres (see *http://esat.sun.ac.za/index*, accessed 9 Oct 2014) has it that one Thomas Wittenoom, a Cape Town businessman of (indirect) Dutch descent, who died in 1821, was one of the shareholders by whom a section of the "Boereplein" in town was donated for the building of a theatre, which later became the African Theatre; his five shares in the theatre were offered for sale from his estate on 17 Feb 1821.

242 See NA, PROB 11/1551/350 for the will of "Thomas Wittenoom of Southampton, Hampshire".

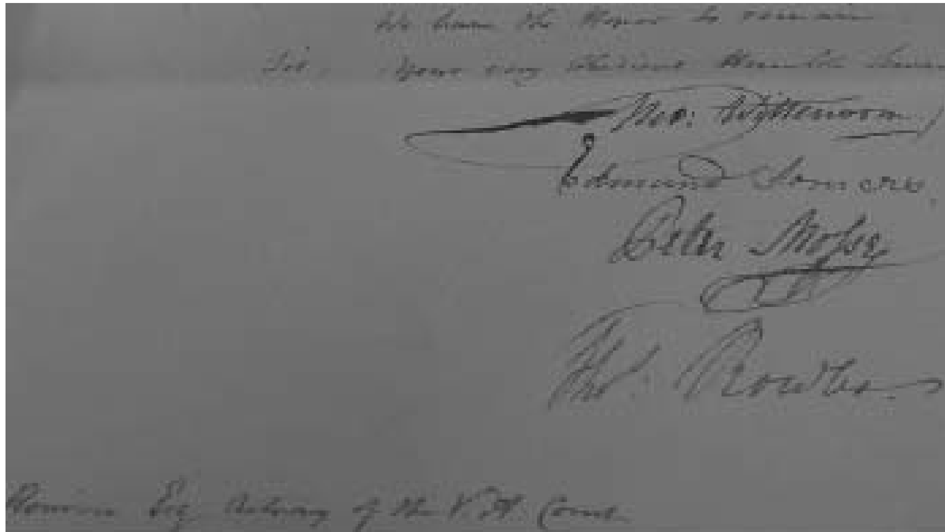
243 John Burdett Wittenoom (1789-1855) arrived in Perth in Jul 1829, accompanied by his mother, Elizabeth Waters (Thomas's wife, 1771-1845), his sister Elizabeth Burdett Wittenoom, and four children, his wife Margaret May having died in 1823. He was the only clergyman in the colony until 1836 and also established a classical school in Perth. The Wittenoom family became well-known in Western Australia for its commercial, farming and civic interests. Of John Wittenoom's children, the eldest son, John Wanstead Burdett, born in England in 1815, became a mounted policeman and later a prospector in Victoria, and died some time after 1851 in South Africa after his family had lost touch with him. Another son, Frederick Wanstead Dirck (1821-1863), became a public servant in the colony. And the youngest son, Charles Wanstead (1824-1866), was in turn the father of Edward Horne Wittenoom (1854-1936), who became minister of mines in Western Australia. The infamous and doomed asbestos-mining town of Wittenoom is named after him (or at least after the family).

244 On the Australian Wittenooms, see further Cranfield 1963; Cameron 1979; and O'Brien & Statham-Drew 2009; see also RE Cranfield "Wittenoom, John Burdett" in *Australian Dictionary of Biography* available at *http://adb.anu.edu.au/biography/* (accessed 9 Oct 2014).

245 There is a biography of him on the website "Design and Art Australia Online", available at *http://www.daao.org.au* (accessed 9 Oct 2014).

246 Her likeness is reproduced in O'Brien & Statham-Drew 2009: 63.

the possibility that the fees in Instance causes would no longer be permitted to be charged at the same rate as those in Prize causes.[247]



[Signatures to a letter from the practitioners at the Cape Vice-Admiralty Court, to deputy registrar Rouviere, 26 Oct 1801 (NA, HCA 49/35(2), bundle (4))]

Peter Mosse was an Irishman who had been a Protestant clergyman and then became a Catholic priest, but was too fond of horse-racing and other expensive pleasures and in consequence had to quit his home country. He came to the Cape where he made a livelihood by keeping a coffee-house and a billiard table in town. Later he was appointed as a clerk in the Colonial Secretary's office, and from there he rose to the practice of law, appearing as counsel in the Vice-Admiralty Court.[248] He is listed as an advocate in the Vice-Admiralty Court from 1800,[249] but may have been practicing before then.[250]

247 See NA, HCA 49/35(2) bundle (4), letter of 26 Oct 1801. They asked Rouviere to inform Judge Holland that, first, no complaint had been received from any parties involved in such litigation; secondly, that the issues were as complicated or more in Instance causes than in Prize causes; thirdly, that the same was true of the trouble in attending such causes; and fourthly, that there was great expense involved in conducting such business at the Cape. Accordingly, they requested that the fees in Instance causes should continue as before.

248 Lady Anne Barnard *Diaries* vol 1: 311 (Oct 1799) refers to him as "originally clergyman – then clerk – next lawyer – afterwards coffee house keeper"; see, also, Philip 1981: 290-291, who has him as clerk in the office of Andrew Barnard in 1797 at £72 p/a.

249 See the *African Court Calendar* for 1801; he is not mentioned in 1802. Mosse may also have been involved as a litigant: see CA, NCD 1/14/1125 (notarial protocol, special power of attorney granted concerning a case involving Peter Mosse, 1800).

250 Barnard Diaries vol 2: 115 n 45 refers to him in Oct 1799 as a lawyer in the Admiralty Court.

After he commenced practising in the Vice-Admiralty Court, Mosse continued acting as prize agent for the captors of prizes as he had done before;[251] occasionally he acted as an examiner (of witnesses on behalf) of the Court.[252] He also defended the accused before the Piracy Court in the *Princess Charlotte* matter in 1798.[253]

He was apparently on good terms with Judge Holland to whom he sold a slave in 1798.[254]

However, Mosse, who retained his fondness for horse racing and gambling,[255] became involved in the Jessup affair, which Lady Anne Barnard[256] referred to as "another Strange Higgleday Piggleday business going on" and which her husband[257] called "another strange piece of Business". The upshot of the affair was that the inspector of customs, Henry James Jessup, who had opposed an order from Governor Yonge,[258] and who further did not endear himself to the Governor by sarcastically

251 See Philip 1981: 290-291, acting as a prize agent in a May 1798 petition on behalf of naval capts Tod and Gardener respecting a prize being adjudicated in the Court: see CA, BO 112/66/1 (1798); for other legal involvements, see, eg, CA, NCD 1/26/492 (1799), NCD 1/48/374 (1799), NCD 1/48/421 (1799), and NCD 1/14/1125 (1800).

252 See, eg, his petition to Gen Francis Dundas, dated 27 Mar 1799 (referred to in Philip 1981: 290-291), stating that "the Judge of Vice-Admiralty Court here, having thought proper to appoint me Examiner of said court, and being of the opinion that its duty should be best performed by a notary, has desired me to apply to you for power to act as such"; Dundas replied that his application had not been made in the correct form.

253 See CA, BO 36, 23, where it appears that Mosse was willing and permitted to undertake conduct of the prisoners' defence (although they were not entitled to counsel) and that he promptly obtained an adjournment to allow him to prepare. Wittenoom prosecuted in this matter: see, again, at n 101f *supra*.

254 See CA, NCD 1/39/358 (1798).

255 Barnard *Diaries* vol 1: 311 (Oct 1799) noted that Mr Moss, as she referred to him, the advocate in the Admiralty Court, had bought a favourite horse of Col Cooke (Samuel Cooke, of the 8th Light Dragoons: Philip 1981: 74), "now dead of brandy, having run *his* race", and that even though his son rode his horse, Mosse lost at the races at the Turf Club.

256 Barnard *Letters*: 243 (14 May 1800).

257 Fairbridge 1924: 203-204 (letter Andrew Barnard to Earl Macartney, 14 May 1800).

258 Governor Yonge had granted permission to some merchants to ship and re-export to England certain Eastern goods on board the *Young Nicholas*. The goods had earlier, in 1798, been seized as prize on board the Danish ship, the *Christianus Septimus* (see NA, HCA 49/27 (1799) for the prize papers), and had then been restored to the merchants by the Vice-Admiralty Court. However, customs official and searcher, Jessup, thought that the Governor's order was contrary to the words and spirit of the applicable legislation and the monopoly granted by the charter of the East India Co. In Apr 1800, Jessup therefore took possession of the goods in question – worth some £12 000 – on board the *Young Nicholas* and, supported by a legal opinion he had obtained from Mosse (see Theal *RCC* vol 3: 161-162), he opposed the permission and the express orders of the Governor. The merchants immediately complained to Yonge. There was little doubt that Jessup had acted unlawfully and that Yonge did have the power to make the temporary arrangement he had until such time as a decision was received from London. By mid-1800, London had fully confirmed Yonge's actions, thus removing any uncertainty on the matter: see Theal *RCC* vol 3: 199-206 (letter War Office to Governor Yonge, 28 Jul 1800) at 204-205. On the Jessup affair, see further the documentation reproduced in Theal *RCC* vol 3: 152-184.

commenting on the latter's accompanying proclamation,[259] was simply suspended until the Crown's pleasure was known and ultimately did not leave the colony until 1803.[260] Mosse – as well as proctor Pontardent[261] – though, was banished from the Cape in April 1800, because the legal opinion he had given Jessup on the legality of Yonge's order and proclamation was considered improper and inflammatory.

Although Yonge was right and Jessup, and by association Mosse, wrong,[262] there was a feeling that for all his faults[263] Mosse's punishment was somewhat harsh; he had, after all, merely – in a professional capacity – drawn a legal opinion and should not have been censured because it turned out to be wrong.[264]

But Yonge clearly thought differently of Mosse. In explaining the affair to Henry Dundas, he wrote that he had been informed that Mosse was "a Man of Genius many ways" and that he had been practising in the Vice Admiralty Court "where", Yonge continued, "I am sorry to say there is a very great want of able Counsel".[265] After Mosse had fired off several petitions concerning his banishment,[266] he obtained

259 He said that Yonge's proclamation was "a *green* proclamation", alluding to the fact that the collector of customs, John Hooke Green (Philip 1981: 154), had boasted that he had had a share in drafting it, "under a *young* governor": see Fairbridge 1924: 204 (letter Andrew Barnard to Earl Macartney, 14 May 1800).

260 See Philip 1981: 208: Jessup, who may have been an American, was in 1798 appointed as the chief searcher in the Customs Department, but was suspended by the Governor for exceeding his authority and for acting in legal matters assuming the functions of an attorney. By May 1801, Jessup remained "on the watch for letters as he hopes to re-instate him, from England" (Fairbridge 1924: 280, letter Lady Anne Barnard to Earl Macartney, 27 May 1801). From Jun 1801 until Oct 1802 he sent various requests and petitions for the payment of his salary since his suspension, as well as for back-pay. He seems to have left the Colony in 1803: see Theal *RCC* vol 5: 167-168 (letter Governor Francis Dundas to Lord Hobart, 1 Mar 1803).

261 For his part in the affair, see n 278 *infra*.

262 Andrew Barnard regarded Yonge's treatment of Jessup as correct: officials had to obey the Governor's orders, even if they were illegal: see Barnard *Letters*: 243-244.

263 Lady Anne Barnard, for one, suggests (Barnard *Diaries* vol 2: 115 (28 Apr 1800)) that Jessup had hired Mosse as his counsel "as a sort of private negociator" to obtain a bribe from the merchants. See, also, Styles 2003: 149. Arkin 1960: 204 n 130 refers to Mosse as "the wily Irish advocate".

264 Lady Anne Barnard *Letters*: 243 (14 May 1800) explained that Mosse "as council" [to Jessup] gave an opinion that the Governor had infringed the relevant statutes and was "sent off for the terms in which his opinion is given"; Andrew Barnard (Fairbridge 1924: 203, letter to Earl Macartney, 14 May 1800) explained that Mosse had been approached by Jessup "for a *legal* opinion" and in it opined that the Governor had exceeded his powers by issuing a proclamation which was not binding.

265 See Theal *RCC* vol 3: 152-154 (letter Governor Yonge to Henry Dundas, 12 May 1800, which contains most of the details concerning Mosse referred to earlier). He added, somewhat unnecessarily, that, because of his high living, Mosse was virtually without means at the time ("He appears to be not worth £5 in the World").

266 See Theal 1880, vol 3: 16 May 1800 (Mosse petitions to be informed of the reason for the Governor's order that he should leave the colony); 23 Jul 1800 (Mosse requesting Andrew Barnard to procure a suspension of the order for him to leave the colony); 23 Oct 1800 (a further petition from Mosse concerning the order given to him to leave the colony); 9 Jan 1801 (a petition from Advocate Mosse not to be banished from the colony, giving an account of his life and the services performed); 28 Oct 1801 (Mosse solicits employment in connection with the suppression of disturbances in the interior).

permission early in 1801 to remain in the colony[267] and seems only to have left two years later.[268]

Another advocate and examiner in the Vice-Admiralty Court, at least in 1801, was one Edward Somers, of whom nothing more is known.[269]

Better known was Thomas Rowles, likewise an advocate and examiner practising in the Vice-Admiralty Court.[270]

Born in Westminster, London, in 1777, he first arrived at the Cape in 1800 and was granted final permission to remain in the colony in November 1801. Although slated to take charge of the prosecution before the Piracy Court in March 1801 in the *Chesterfield* matter, the registrar, George Rex, informed the Court that Rowles had declared his intention to resign his appointment by reason of another professional engagement and Edward Somers was then appointed as counsel for the prosecution in his place.[271]

Rowles left the Cape in 1803, but he returned in 1807 as the "King's Proctor, and Agent for the Receiver General Comptroller, and Solicitor of all the Rights and Perquisites of Admiralty at the Cape of Good Hope",[272] so becoming one of very few legal practitioners active in the Vice-Admiralty Court in both periods of British rule. He was in 1807 also appointed as secretary to the Court of Appeals for both Criminal and Civil Cases, a position he would hold until his death in 1826.[273]

On 29 December 1811, aged thirty-three, Rowles married the seventeen-year old Elisabeth Christina, the youngest daughter of the late Arend de Waal, a Company official. Three weeks later, on 19 January 1812, he became related to the Admiralty Judge at the time, George Kekewich, a widower likewise then aged thirty-three, when the latter married one of Elizabeth's older sisters, Catharina Cornelia;[274] the

267 Philip 1981: 290-291.

268 See *Cape Town Gazette* of 2 Jun 1803 for an advertisement by Mosse that, as he intended leaving the colony by the first convenient opportunity, those having claims upon him should apply to him for satisfaction at Hudson's Hotel.

269 He is mentioned in the *African Court Calendar* for 1802, but not in that for 1801; see, also, Philip 1981: 394. He is not to be confused with Dr Edmund Somers, a physician and director of the military hospital: see Barnard *Diaries* vol 1: 28 n 78; Barnard *Journals* 230 n 87; Barnard *Letters*: 252n.

270 See Philip 1981: 365; Pama 1992: 130.

271 See CA, BO 37, 4.

272 See the *African Court Calendar* for 1808; in that of 1809, he is referred to as the "King's Proctor, and Agent for Droits".

273 It is highly probable that the advertisement of the sale of valuable and scarce books belonging to his widow, Mrs Rowles, in *SA Commercial Advertiser* of 24 Feb 1827, referred to that of her late husband. The legal texts listed were Jacob's *Law Dictionary*; Grotius on *War & Peace*, and Beawes' *Lex Mercatoria*. Mrs Rowles had, in the *Cape of Good Hope Government Gazette* of 9 Feb 1827, made known her intention of leaving the colony for England, although the sale of the house of "Mrs, the Widow Thos Rowles" was advertised only in *Cape of Good Hope Government Gazette* of 9 Mar 1827. Rowles's will, dated 18 Jan 1812 and filed in 1826, is in CA, MOOC 7/1/98/01/23/1 (1812); in it he is referred to as the "secretary of the Court of Appeals".

274 See Botha 1962f: 266, 270.

two lawyers were witnesses at each other's weddings. On occasion Rowles would also act as Judge in the Vice-Admiralty Court in the absence of his brother-in-law, while both were active in the Court of Appeals.[275]

Another practitioner who, like Rowles, was active in judicial circles at the Cape during both periods of British rule, was David Pontardent.[276]

A descendant of a French Protestant family that had settled in London, Pontardent arrived at the Cape in 1797. He practiced as a proctor in the Vice-Admiralty Court and occasionally acted as its examiner until he, together with Mosse,[277] got into trouble with Governor Yonge for his part in the Jessup affair[278] and was banished from the settlement. In April 1800 Pontardent was also dismissed from his appointment as an examiner of the Vice-Admiralty Court on the instructions of Judge Holland.[279] Although Pontardent protested against his banishment,[280] generally considered to have been even more severe in his case than in that of Mosse,[281] that was to no avail.

275 Rowles as secretary and Kekewich as assessor. Rowles also appears to have been involved in local commerce: see CA, CO 3871/12/1 (1809) for an application by William Wilberforce Bird, Hamilton Ross and Thomas Rowles to sell coffee then on board the ship, the *Reliance*.

276 Also Pontardant or Ponterdant; see Philip 1981: 328.

277 See n 255 *supra*.

278 According to Lady Anne Barnard (*Letters*: 243-244 (14 May 1800)), he was banished "for endeavoring to negociate a compromise between the partys which would have purchased Mr Jessops silence"; Styles 2003: 149 refers to Pontardent's attempt to conciliate the dispute as an unwarranted attempt to silence Jessup; Andrew Barnard (Fairbridge 1924: 203, letter to Earl Macartney, 14 May 1800) referred to Ponterdent as someone "who came out here lately with a Passport from the Secretary of State" and who had acted as Jessup's agent in endeavouring to persuade the merchants whose property was under seizure, to compromise the affair with Jessup.

279 See Theal *RCC* vol 3: 174-175 (letter Wittenoom to Pontardent, 30 Apr 1800, informing the latter of Judge Holland's decision "to dispense with your further Services as Examiner of the Vice Admiralty Court of this Colony", and explaining that, despite the fact that because of his banishment such dismissal was unnecessary, he was nevertheless pertinently dismissed to express the Judge's "indignation" at the unjustified use of his name by Pontardent in the Jessup matter; that was because Pontardent was "a person holding an Official Situation in the Court over which he [Holland] presides"). Holland himself wrote to Governor Yonge on 30 Apr 1800, enclosing Wittenoom's letter, should it be thought necessary to take further action against Pontardent in London: see Theal *RCC* vol 3: 175.

280 See Theal *RCC* vol 3: 175-176 (letter Pontardent to Wittenoom, 4 May 1800, alleging misrepresentation in that he had used the Judge's name – by intimating that he had heard that a difference of opinion existed between the Judge and Governor Yonge as to the legality of Jessup's seizure – confidentially in "a private Conversation" with two merchants who had shipped goods on board the *Young Nicholas* and who had asked his opinion; he nevertheless apologised for any indiscretion). Holland passed his letter on to Governor Yonge on 8 May 1800: see Theal *RCC* vol 3: 178.

281 Lady Anne Barnard (*Letters*: 244 (14 May 1800)) thought Pontardent was, after all, "acting only as a private friend ... between the partys, was not bound to any particular rigidity of Maxim as a public man is, in matters connected with the Laws". See, also, Barnard *Diaries* vol 2: 115 (28 Apr 1800) and 180 (2 Jul 1800), describing that Governor Dundas was miffed at his wife for having invited to her ball Mr Pontardent, "a person under his displeasure" (Pontardent and Lady Dundas had come out in the same ship, hence their acquaintance), but, Lady Anne remarked, Pontardent had not committed any crime, but had only offended politically and she did not think Lady Yonge would be justified for treating him with the neglect she ought to bear him if he had misbehaved in any shape after the loss of his money.

Governor Yonge clearly did not regard him highly. In explaining the Jessup affair to Henry Dundas, Yonge wrote that he knew little of Mosse's accomplice, Pontardent, whom he did not name, apart from the fact that having "practiced as a lawyer in England", "he too practiced here as a lawyer in the Admiralty Court" and that those who know him "do not speak favourably of him".[282]

In April 1802, Pontardent, then in London,[283] sought, on the basis of the injury he had suffered at the hands of Governor Yonge, an appointment as British consul at the Cape, now that the settlement was about to be restored to the Dutch,[284] but his request seems to have been disregarded.[285]

Pontardent eventually arrived back in the colony in September 1806, without his wife and children.[286] He resumed his practice as a proctor in the Vice-Admiralty Court[287] and pursued his interests in matters botanical,[288] until his intestate death in May 1825 at the age of fifty-nine.[289] [290]

4 7 The support staff

Several persons were appointed as administrative personnel in the Vice-Admiralty Court. They are no less interesting than the officials and the practitioners whom they served.

282 See Theal *RCC* vol 3: 152-154 (letter Yonge to Dundas, 12 May 1800).

283 Which may explain why he is not listed in the *African Court Calendars* for 1801 and 1802.

284 See Theal *RCC* vol 4: 282 (letter Pontardent to Secretary of State, Lord Hobart, 21 Apr 1802).

285 In Feb 1803, John Pringle, formerly the East India Company agent at the Cape, was appointed as the British agent there: see Theal *RCC* vol 5: 151-154.

286 His permission to return was dated 29 Apr 1806: see CA, GH 1/1, no 7 (1806).

287 His obituaries in *Cape Town Gazette* of 28 May 1825 and in *Quarterly Oriental Magazine, Review and Register* of Jul-Dec 1825 at cxxxvii, both mentioned that Pontardent had built up "a respectable and valuable practice at the Cape" during the last war.

288 See (1810) 31 *Curtis's Botanical Magazine* ... at 1238, noting that in 1809 Pontardent had sent a specimen of a plant species from the Cape to a collection in Kensington.

289 See Botha 1962f: 297, 301 n 23. His gravestone at one stage resided in the former Somerset Rd Cemetery, Cape Town; it was inscribed "PONTARDENT, David Esq., Proctor in H.M. Court of Vice-Admiralty in this Settlement. d. 26.5.1825, age 59": see Genealogical Society of South Africa *Alphabetical Guide to Gravestones in the Somerset Road Cemetery, Cape Town, Cape* (1 ed 1993) unpaged; Botha 1962b: 72. Incidentally, also listed as being buried there is Jackson Perring, for eight years deputy King's Advocate in Ceylon, who died at the Cape in Dec 1837 *en route* back to England.

290 Pontardent's estate (of which Admiralty Judge George Kekewich was one of the executors) included "six books": see CA, MOOC8/41.10. Upon his death, his children (his wife had predeceased him) in England enquired after any inheritance, and one Pearson, a family friend, made enquiries from Sergeants Inn on their behalf in July 1826: see NA, CO 48/86/311.

Aegidius Benedictus (AB) Ziervogel[291] was the Court's sworn translator and interpreter and also at times the messenger at the Court of Justice.[292]

Born in Uppsala, Sweden, on 21 August 1762, the son of a well-known professor at the university there,[293] he left Sweden in 1786, moved to Amsterdam to learn commerce, and emigrated to the Cape of Good Hope in August 1789. There he was joined by his elder brother, Carel Ewald, and later by his cousin, Carel Samuel Fredrikzoon Ziervogel.[294]

In May 1800, he married a local widow, Beatrix Auret.[295] He had close personal ties with the Vice-Admiralty Court's marshal, George Rex.[296] Ziervogel died in June 1818, having only in the year before gotten around to requesting citizenship of the colony.[297] One of his descendants, his grandson, was the well-known Cape Judge, EB Watermeyer.[298]

When Scotsman William Menzies arrived at the Cape in 1827 to take up his appointment as senior puisne judge on the bench of the newly created Supreme

291 See the "Ziervogel Family Tree", available at *http://www.geocities.com/sa_stamouers/zievogel.htm* (accessed 22 May 2002); also at *http://family.itcouncil.biz* (accessed 26 Apr 2012); "Stamvader Ziervogel" available at *http://www.geocities.com* (accessed 22 May 2002).

292 See, eg, the advertisements for judicial sales ordered by that Court he placed in *Cape Town Gazette* of 15 May 1802, 8 and 15 Jan 1803, and 12 and 19 Feb 1803.

293 His father was Ewald (Evald) Benedictus Ziervogel (1728-1765), author, professor of literary history, and librarian at the Royal Academy and at the University of Uppsala. He was also a famous numismatist and the author of, amongst other works, *Dissertatio academica, de nummaria, eiusque in historia Suiogothica usu* ... (2 vols, 1745 and 1750, Uppsala) – see (1852) 1-5 *Notes and Queries* 462 – and *Dissertatio academica, usum rei nummariae in historia literaria domesticis examplis declaramus* (1754, Uppsala). I inspected copies in the British Library. AB had four siblings: Elisabeth Brigitta Christina (b 1752, who later married Andries Hemberg, a professor of law); Samuel Frederik (b 1756, who in 1803 became the secretary to the Court of Law after having studied in Edinburgh); Carel Ewald (b 1756); and Christina Juliana (b 1768).

294 In 1791, AB was a scribe in the naval victualling yard and also did duty as a postman: see Moree 1998: 140 and again n 148 *supra*. AB and Carel Ewald were also the local representatives of the Swedish East India Company, and an advertisement in *Cape Town Gazette* of 1 Oct 1801 directed claims on two company ships to be directed to them; they also acted as agents at the Cape for two Swedish ships – the *Vester Gothland* and the *Gustavus III* – in requesting permission to land and sell locally damaged cargo from the former and concerning the detention of the latter: see CA, BO 119/95 (1800), BO 119/98 (1800), and BO 119 /101 (1800). Carel Ewald died in Aug 1803: see *Cape Town Gazette* of 20 Aug 1803.

295 1800 *Cape Directory* 165.

296 Rex was the godfather of his cousin's daughter (Helena Elizabeth, 1803-1867); he advertised and then also bought Rex's property, Schoonder Zicht, in the Gardens: see *Kaapsche Courant* of 12 May 1804 and AB and Rex jointly owned the boat, the *Young Phoenix*, in 1809: see, further, Storrar 1974: 108.

297 See CA, CO 3907/186 (memorial from EB requesting burghership, 1817).

298 Egidius Benedictus Watermeyer (1824-1867) was the second son of Frederick Stephanus Joubert Watermeyer and his wife, Ana Maria (1804-1864), the eldest child and only daughter of AB Ziervogel: see Nathan 1934: 165; F St L S 1935: 142.

Court, he was not the first of that name to be involved with the administration of justice at the Cape.

In February 1798, the twenty-six-year old William Menzies[299] arrived here on the *Belvedere*, a fellow passenger of Judge Holland and proctor Wittenoom. After a brief stint in the customs office, he was appointed a clerk in the Vice-Admiralty Court's registry at an annual salary of £150.[300]

In April 1801, Menzies resigned from his duties at the Court and requested permission to be admitted to practise as a notary public.[301] His request was turned down on the grounds of his short period of local residence.[302] Further petitions followed in May and again in November 1801. Nevertheless, Menzies appears to have been active as a representative (the recipient of notarial powers of attorney) in several matters, including one involving prize agent William Proctor Smith.[303] Although Menzies signed an oath of submission to the Batavian government in November 1803, he gave notice in June 1805 of his intention to leave the colony.

William Menzies may have been the uncle of Judge William Menzies.[304]

299 He should be distinguished from Capt James Menzies, who served at the Cape 1800-1802: see Barnard: 197 n 19; Philip 1981: 278.

300 See Philip: 1981: 278. In Jan 1799, he signed a loyal address to Governor Dundas; in Feb 1799, his then boss, the collector of customs John Hooke Green (see n 259 *supra*), complained about Menzies' conduct when he reacted strongly to a reprimand from Green; this was followed up by a memorial from Menzies regarding his dispute with Green (see CA, BO 114/01/112/1 (1799)), to which Governor Dundas's favourable response elicited Menzies' gratitude (see CA, BO 114/01/121/1 (1799)).

301 He had also, earlier, applied for a certificate of eligibility for employment in the colony: see CA, BO 114/01/120/1 (1799).

302 See CA, BO 120/01/17/1 (1801). His memorial stated that he had resigned from his employment at the Court on the appointment of Rouviere as (deputy) registrar and examiner because of "finding himself disappointed in obtaining in the said Court of Vice Admiralty that promotion and countenance which [he] looks upon as entitled to from his long services". He applied to be admitted as notary on the basis of "[h]is personal knowledge of the Laws and Practice of this Colony", regarded himself as "fully adequate to undertaking the office of a Notary Public" and was ready to provide such security as would be required.

303 See CA, NCD 1/15/1530 (1801), in which Menzies acted on behalf of Samuel Hudson and appointed JB Hoffman to deal with a case involving Smith; see, also, NCD 1/16/1608 (1802), NCD 1/16/1624 (1802), NCD 1/16/1658 (1802).

304 See Botha 1962d: 20 n 19; Storrar 1974: 149. A search in the Menzies' family papers and correspondence in the Caird Library at the National Maritime Museum, Greenwich (NRA 8845 Menzies) and in the National Records of Scotland, Edinburgh (NRA 35726) may shed further light on this. I did not have access to a small work by Maraquita Fasson (the Judge's granddaughter), entitled *Some Family Notes Regarding the Late Mr Justice W Menzies* ... (n/d), nor to David Matthewes "American descendants of William Menzies, solicitor of customs at Leith", published in (1994) vol 17 *The Menzies Clan Magazine*, and mentioned on the Scots Genealogy Society website available at *http://www.scotsgenealogy.com* – and see, also, *http://www.menzies.org* (both accessed 30 Sep 2015). The latter William, solicitor of customs at Leith 1782-1793, was the Judge's grandfather and thus, possibly, clerk William's father. Grandfather William's eldest son (of twelve children), John (1763-1825), succeeded his father as first solicitor of customs in Leith, and was the Judge's father: see Botha 1962d: 3, who mentions the incident in 1814 in Edinburgh involving Sir Walter Scott dining with the future Judge at the latter's residence and in the company of Menzies' "worthy father and uncle" (see, also, Kahn 1976), which is probably as close as we are at this stage able to come to William the clerk.

Other clerks in the Vice-Admiralty Court during the First British Occupation were Thomas Spencer in 1797;[305] William Henry Sturgis, who arrived from England in 1796 and may have been appointed in Menzies' place in 1801;[306] and Joseph Ranken.[307] Finally, there was the Irishman Edward Halaran, the court's messenger and crier at least from 1800 until its closure in 1803.[308] Although persons are sometimes mentioned as the "vendu master of the Vice-Admiralty Court", it would appear that there was no such position; one of the several official auctioneers at the Cape merely also acted for the Court in its sales as and when required.[309]

5 The closure of the Vice-Admiralty Court

By the Treaty of Amiens of 27 Mar 1802,[310] concluded between England and the French and Batavian republics, article VI restored the Cape of Good Hope to the Dutch as it was before the war.[311] It was further agreed that "[t]he ships of every

305 See Philip 1981: 397.

306 *Idem* 1981: 408; and African Court Calendar for 1802. His appointment came to an end in 1803; in Nov of that year he signed the oath of submission to the Batavian regime and he is mentioned as a clerk in the victualling office from 1806-1810. He is not the Joseph Sturgis (1798-1838) who, in 1828, became a partner of attorney John Samuel (who was also a proctor in the Vice-Admiralty Court) in a Cape Town firm of attorneys later to be known as Fairbridge, Ardene & Lawton: see MacSymon 1990: 14, 17, 22.

307 See Philip 1981: 336-337. He was later a storekeeper in Long Market St (see *Cape Town Gazette* of 3 Oct 1810) and a partner in the firm of Ranken & (Alex) Scott, which advertised public sales (see, eg, *Cape Town Gazette* of 7 Jun 1811) at their premises in Long St. He died in 1827: see *Cape Town Gazette* of 31 Aug 1827.

308 Halaran (often also Halloran) arrived at the Cape in 1795 as a soldier, was discharged at his own request, remained in the colony with his wife when his regiment left it, and obtained his position at the Vice-Admiralty Court after a recommendation by Col Dundas. He stayed on after 1803 (his memorial to the *Raad van Politie* in 1803 concerned his having been left without employment on the closure of the Court), and died at the Cape in 1807: see Philip 1981: 159-160; Leibbrandt 1905: 598-599. Halaran is not to be confused with the Irish clergyman and military chaplain at the Cape from 1795, Edward Thomas Hallaran (d 1805: see Philip 1981: 162; Botha 1962f: 293; "Hallaran, Edward" available at *http://www.southafricansettlers.com* (accessed 17 Aug 2015)), although some sources referred to seem to do so as each has its own Irishman married to the same woman, Elizabeth Maria Orgo (Hugo?). Nor should he be confused with Dr Laurence Hynes Halloran, colonial (military and naval) chaplain, 1807-1810, and teacher: see Philip 1981: 162.

309 Thus, Clemen(t)s Matthiessen, a member of the Court of Justice and President of the Lombard Bank, was said to have been, by 1801, also "Vendu Master of the Vice-Admiralty Court" (Barnard *Diaries* vol 1: 39 n 14). While Matthiessen was indeed a vendu master (the official appointed to conduct public auctions) at the Cape in 1801, he was one of four (the others were Lind, Bergh, and Moulds) and may merely have been appointed, whether for the time being or on an *ad hoc* basis, also to conduct prize sales on behalf of the Vice-Admiralty Court.

310 See Theal *RCC* vol 4: 274-275; Eybers 1918: 12-13.

311 This had to happen within three months (see art XII), but the hand-over only took place on 21 Feb 1803: see Theal *RCC* vol 5: 156 for the relevant proclamation by Governor Francis Dundas.

description belonging to the other Contracting Parties shall have the right to put in there, and to purchase such supplies as they may stand in need of as heretofore, without paying any other duties than those to which the Ships of the Batavian Republic are subjected".

While local institutions continued as before, British institutions closed down and ceased operations. British subjects had the option of staying on, but most returned home. Thus, although officials charged with, for example, the administration of justice, were required to continue the functions of their offices, this naturally did not apply to the Vice-Admiralty Court which was not a local, but rather a British court. The Court ceased its operations and its officers and practitioners, with a few exceptions, left the Cape.

Those who left and who, like Judge Holland, received their salaries from the civil list, were paid in advance to 30 June 1803.[312]

In anticipation of the end of British rule, Judge Holland wrote to London about the effect that would have on the Vice-Admiralty Court.[313] He thought it would be necessary to make some provision, whether by an article in a treaty or in some other form, "for the termination of Causes pending in the Vice Admiralty Court of this Colony ... that will not in all Probability be finally determined upon previous to the Surrender of the Cape", as well as for cases then on appeal. The Court would cease to have jurisdiction unless special provision was made. The same applied to securities taken by the Court for various purposes, including for letters of marque. Finally, he assumed it would meet with governmental approval "that the Records of the Court should be transmitted to the registry of the High Court of Admiralty" and, unless instructed otherwise, he would make arrangements for that "previous to quitting the Colony".

Although nothing seems to have been arranged as regards pending cases, the matter was eventually resolved.

In *The Picimento*,[314] a Portuguese vessel was captured by a privateer in 1801 and brought for adjudication before the Cape Vice-Admiralty Court. The Court pronounced a sentence of restitution with costs and damages. The captor appealed against the sentence, but failed to prosecute the appeal in time. The Lords Commissioners of Appeal in Prize Cases then declared the appeal deserted and remitted the cause. However, before the Vice-Admiralty Court's sentence could be carried into final execution, the Cape was given up in terms of the Treaty of Amiens, the Court abolished, "and the records of the Court of Vice-Admiralty were removed, and deposited in the Registry of the High Court of Admiralty" in London. On an application that the High Court of Admiralty carry the Vice-Admiralty Court's

312 See Theal *RCC* vol 5: 162 (letter Governor Dundas to Lord Hobart, 1 Mar 1803) at 168.

313 See Theal *RCC* vol 4: 216-217 (letter Holland to Lord Hobart, 1 Feb 1802).

314 (1803) 4 C Rob 360, 165 ER 640; for the prize papers, see NA, HCA 49/21/4 (prize papers of the ship Picimento, otherwise Pensamento Felice.

decree into execution, the question arose whether the High Court of Admiralty had jurisdiction to interfere in a cause already determined in another court and to carry into effect the judgement of that other court.

After the Lords Commissioners had refused to give a ruling in the matter – they only had appellate jurisdiction and as they had dismissed the appeal, they could not become involved *de novo* – the High Court of Admiralty held that it did have a general jurisdiction sufficient to aid the process of the Cape Vice-Admiralty Court in order to prevent a total failure of justice.

As mentioned, the records of the Cape Vice-Admiralty Court were sent to London where they still reside,[315] leaving only an odd assortment of documents of the first Vice-Admiralty Court in the Cape Archives.[316]

315 The records of the Cape Vice-Admiralty Court, 1795-1805, are currently held in the National Archives in Kew (NA). In the archives of the High Court of Admiralty in the NA, the Cape Court's records (451 of them) reside in HCA 49/1-49/44. In the main, they are of Prize (and a few Instance) proceedings in the Court and include abstracts, affidavits, answers, appraisements, bills of lading, cargo lists, certificates of registration, claims, day books, decrees of delivery and possession, decrees of unlivery (ie, discharge), depositions, examinations, interrogatories, invoices, letters of attorney, libels, a list of adjudications, memoranda, monitions, passports, petitions, powers of attorney, powers of procuration, seamen's articles, ships' manifests, stipulation bonds, and translations. Miscellaneous papers are taken up in HCA 49/33(11), HCA 49/35(2), and HCA 49/40(2)-49/44. Also of interest are: HCA 49/38(1) (the Court's Muniment Book, 1797); HCA 49/38(2)-(7) (the Court's Assignation Book (Prize), 1798-1802); HCA 49/38(8) (its Bail Book (Instance), 1798); HCA 49/38(9) (its Letter Book, 1799); HCA 49/39(1)-(4) (the registers of powers of attorney, letters of marque and company); HCA 49/39(5)-(9) (the Court's Registry Account Books, 1798); and HCA 49/39(10)-(11) (its Registry Day Books, 1799). Appeals heard by the High Court of Admiralty are to be found in HCA 32/1836. Other holdings of interest in the NA are: ADM 5/43, 5/50 (Cape Vice-Admiralty Court); FO 95/640 (Cape Vice-Admiralty Court: captors' expenses); PC 1/65/34 (order for warrants appointing the judge and other officers, 1796); and PRO 30/42/16/11 (powers of and opinions on the Cape Vice-Admiralty Court).

316 In the Cape Archives (CA), the following are of interest. First there are the archives of the Vice-Admiralty Court (VAC), 1799-1887, in six vols (3 bound, 3 unbound). Only incidental and unsystematic records of the Court's activities during the First British Occupation remain. See *Guide to the Arranged Archives in the Cape Archives Depot* vol 1 (2 ed, Feb 1986, Pretoria) at 62-65; *Inventory 1/146: VAC Papers*, arranged by archivist JC Visagie (1967); and C Graham Botha *Brief Guide to the Various Classes of Documents in the Cape Archives for the Period 1652-1806* (1918, Cape Town) at 54-60. The VAC series comprises: (1) VAC 1: Miscellaneous Court Papers, 1800-1816, including letters received and despatched, 1799-1822; extracts from Court proceedings, Feb 1800-Dec 1822; documents that were exhibits in proceedings (249 pp); (2) VAC 2: Cases, 1800-1859, and also two undated letters addressed to Pontardent (25 separate folders); (3) VAC 3: Cases and contracts, 1799-c1806, including *R v Brooks & Mortlock*, Mar 1801 (in 5 separate folders); (4) VAC 4: Instance Assignation Book, 1825-1883 (277pp, indexed); (5) VAC 5: Ledger of Prize Cases, 1840-1887 (65pp); and (6) VAC 6: Bills of costs, registrar's accounts, c 1804-1823 (in 8 separate folders). Other items of interest in the CA include, in the BO (British Occupation, 1795-1803) series: BO 35: Letters received from the Vice-Admiralty Court, Feb 1799-Sep 1802 (1 vol; 189pp); BO 36: Proceedings of the Piracy Court, Jun-Jul 1798 (1 vol, 96pp); BO 37: Proceedings of the Piracy Court, Mar-Apr 1801 (113pp); BO 38: Correspondence with prize agents, Nov 1795-Jun 1798 (47pp); BO 92: Miscellaneous documents, no 2: applications for letters of marque, Jan 1799-Nov 1801 at 26-63 (130pp); and BO 230: Miscellaneous documents, no 5: (written, some printed) instructions to governors from the Secretary of State concerning ships having letters of marque, Jan 1797-Apr 1799 at 1-111 (111pp).

After the Batavian interlude, during which a Commercial Court ("Kamer van Commercie") settled commercial, including maritime, disputes,[317] the British returned in January 1806 and soon re-instituted their Vice-Admiralty Court.

BIBLIOGRAPHY

Albertson, L "Mutiny on the Princess Charlotte, 1798" (19 Jul 2002) available at *http://archiver.rootsweb.anchestry.com* (accessed 4 Aug 2014)

Albertson, L "Princess Charlotte and confusion at the Cape" (19 Jul 2002) available at *http://archiver.rootsweb.anchestry.com* (accessed 4 Aug 2014)

Anon (1963) "The order book of captain Augustus Brine, RN, 1797-1815" *Quarterly Bulletin of the SA Library* 17: 75-86 and *Quarterly Bulletin of the SA Library* 18: 17-26

Arkin, Marcus (1960) "John Company at the Cape. A History of the Agency under Pringle (1794-1815) Based on a Study of the 'Cape of Good Hope Factory Records'" *Archives Year Book for South African History* 2: 178-344

Arnould (2013) *Law of Marine Insurance and Average* 18 ed by Jonathan Gilman, Robert Merkin, Claire Blanchard & Mark Templeman (London)

Barnard, Lady Anne (*Letters*) (1973) *The Letters of Lady Anne Barnard to Henry Dundas from the Cape and Elsewhere 1793-1803 Together with Her Journal of a Tour into the Interior and Certain Other Letters* ed by AM Lewin Robinson (Cape Town)

Barnard, Lady Anne (*Journals*) (1974) *The Cape Journals of Lady Anne Barnard 1797-1798* ed by AM Lewin Robinson with Margaret Lenta & Dorothy Driver [*VRS Second Series* no 24] (Cape Town)

Barnard, Lady Anne (*Diaries*) (1799) *The Cape Diaries of Lady Anne Barnard 1799-1800* vol 1 ed by Margaret Lenta & Basil le Cordeur [*VRS Second Series* no 29] (Cape Town)

Barnard, Lady Anne (*Diaries*) (1800) *The Cape Diaries of Lady Anne Barnard 1799-1800* vol 2 ed by Margaret Lenta & Basil le Cordeur [*VRS Second Series* no 30] (Cape Town)

Blayney, Frederick (1817) *A Practical Treatise of Life Annuities; ...* (London)

Böeseken, AJ (1986) *Uit die Raad van Justitie 1652-1672* (Pretoria)

Botha, C Graham (1962a) "Cape records of the South Sea pirates" in *General History and Social Life of the Cape of Good Hope* [vol 1 *Collected Works*] (Cape Town): 42-52

317 The Court (or Chamber), consisting of a president (advocate Rogier Gerard van Polanen, succeeded by Rudolph Anthony de Salis) and four members (Oloff Godlieb de Wet, Clemen(t)s Matthiessen (see, again, n 309 *supra*), Johannes Andreas (later sir John) Truter, and David George Anosi), was instituted on 24 May 1804 to settle commercial disputes arbitrarily following "eene verkorte wyze van procedeeren" during which no legal representation was allowed, and against the outcome of which there was no appeal. The Court had jurisdiction in "[a]lle verschillen over zaaken den handel betreffende", whether between inhabitants, between them and foreigners temporarily present in the port or on board ships in the roadstead, or between such foreigners (the latter a wide jurisdiction familiar to Admiralty lawyers): see *Kaapse Plakkaatboek* vol 5: 143-145 (referring to the body as a "Handelshof"); Immelman 1955: 10, 23-25 (referring to it as a Chamber of Commerce).

Botha, C Graham (1962b) "Some monumental inscriptions Cape of Good Hope" in *General History and Social Life of the Cape of Good Hope* [vol 1 *Collected Works*] (Cape Town): 70-73

Botha, C Graham (1962c) "Administration of the Cape of Good Hope, 1652-1834" in *General History and Social Life of the Cape of Good Hope* [vol 1 *Collected Works*] (Cape Town): 231-244

Botha, C Graham (1962d) "The Honourable Willam Menzies 1795-1850" in *History of Law, Medicine and Place Names in the Cape of Good Hope* [vol 2 *Collected Works*] (Cape Town): 1-21

Botha, C Graham (1962e) "The public archives of South Africa 1652-1910" in *Cape Archives and Records* [vol 3 *Collected Works*] (Cape Town): 113-222

Botha, C Graham (1962f) "Extracts from register of deaths at the Cape of Good Hope, 1816-1826" in *Cape Archives and Records* [vol 3: *Collected Works*] (Cape Town): 290-301

Boucher, Maurice & Nigel Penn (eds) (1992) *Britain at the Cape 1795 to 1803* (Houghton)

Bourguignon, Henry J (1987) *Sir William Scott, Lord Stowell. Judge of the High Court of Admiralty, 1798-1828* (Cambridge)

Brenton, Edward Pelham (1837) *The Naval History of Great Britain from 1783 to 1836* 2 vols (London)

Bridges, George Wilson (1828) *The Annals of Jamaica* vol 1 (London)

Brooks, Michael Franklin (1802) *Trial of the Master and Supercargo of the Merchant Ship Chesterfield Charged ... with Treasonable Correspondence with the Enemies of Great Britain ...* (London)

Butterfield, Agnes M (1938) "Notes on the records of the Supreme Court, the Chancery, and the Vice-Admiralty courts of Jamaica" *Historical Research* 16: 88-99

Cameron, Catherine WM (1979) *Frederick Francis Burdett Wittenoom, Pastoral Pioneer & Explorer 1855-1939: A Biographical Sketch* (Perth)

Cordingly, David (2008) *Cochrane the Dauntless. The Life and Adventures of Admiral Thomas Cochrane, 1775-1860* (London)

Cranfield, RE (1963) *The Wittenoom Family in Western Australia: A Brief Account of the Lives of Members of the Wittenoom Family who left England in 1829* (place of publication not mentioned)

Crump, Helen J (1931) *Colonial Admiralty Jurisdiction in the Seventeenth Century* [*No 5 Royal Empire Social Imperial Studies*] (London)

Davey, Arthur (1988) "Naval headquarters, Table Bay, 1795-1803" *CABO. Historical Society of Cape Town* 4(3): 14-16

De Kock, MH (1924) *Selected Subjects in the Economic History of South Africa* (Cape Town)

De Villiers, Charl Jean (1967) *Die Britse Vloot aan die Kaap, 1795-1803* (MA, University of Cape Town)

De Villiers, Charl Jean (1969) "Die Britse Vloot aan die Kaap, 1795-1803" *Archives Yearbook for SA History* 32(1): 1-145

De Vos, Wouter (1992) *Regsgeskiedenis, met 'n Kort Algemene Inleiding tot die Regstudie* (Cape Town)

Dictionary of South African Biography (1968-1987) 5 vols (Cape Town)

Dugan, James (1966) *The Great Mutiny* (London)

Dunlap, Andrew (1836) *A Treatise on the Practice of Courts of Admiralty in Civil Causes of Maritime Jurisdiction ...* (Philadelphia)

Du Plessis, Willemien, and Nic Olivier (2014) "'n Samevloei van twee regstelsels: Siviele prosesreg in die Kaapse howe: 1806-1828" in Marita Carnelley, Shannon Hoctor & André Mukheibir (eds) *De Jure Gentium et Civili. Festschrift in Honour of Eltjo Schrage* (e-publication, Nelson Mandela University, Port Elizabeth): 9-44

Edwards, AB (1972) "A conflict of jurisdiction" *Codicillus* 12(1): 42-43

Espinasse, Isaac (1824) *A Treatise on the Law of Actions on Statutes, ...* (London)

Eybers, GW (1918) *Select Constitutional Documents Illustrating South African History 1795-1910* (London)

Fairbridge, Dorothea (1924) *Lady Anne Barnard at the Cape of Good Hope 1797-1802* (Oxford)

Featherstone, David (2009) "Counter-insurgency, subalternity and spatial relations: Interrogating court-martial narratives of the Nore mutiny of 1797" *SA Historical J* 61: 766-787

Feldbaek, Ole (1973) "Dutch Batavia trade via Copenhagen 1795-1807. A study of colonial trade and neutrality" *Scandinavian Economic History Review* 21: 43-75

Freund, William M (1989) "The Cape under the transitional governments, 1795-1814" in Richard Elphick & Hermann Giliomee (eds) *The Shaping of South African Society, 1652-1840* (Cape Town): 324-357

F St L S (1935) "Mr Justice EB Watermeyer" *SALJ* 52: 135-142

Gerber, Jill Louise (1998) *The East India Company and Southern Africa: A Guide to the Archives of the East India Company and the Board of Control, 1600-1858* Appendix: vol 2 (D Phil thesis, University College, London)

Gibb, Arthur Ernst (1890) *The Corporation Records of St Albans ...* (St Albans)

Goldblatt, Robert (1984) *Postmarks of the Cape of Good Hope: The Postal History and Markings of the Cape of Good Hope and Griqualand West, 1792-1910* (Cape Town)

Giliomee, Hermann (1975) *Die Kaap tydens die Eerste Britse Bewind 1795-1803* (Cape Town)

Gregory, Desmond (1996) *Malta, Britain, and the European Powers, 1793-1815* (Cranbury, NJ)

Griffiths, RJH (2002) "Navigator ... and inventor, discoverer, merchant, privateer .... The career of an eighteenth century seaman under White Ensign and Red and the tale of the discovery of two sets of 'Mortlock Islands'" *Mariner's Mirror* 88: 196-201, updated version available at *http://www.mortlock.info/encyclopaedia/slands* (accessed 1 Jun 2010)

Hall, John E (1809) *The Practice and Jurisdiction of the Courts of Admiralty ...* (Baltimore)

Hassam, John T (1880) *Notes and Queries Concerning the Hassam and Hilton Families* (Boston)

Heese, HF (1994) *Reg en Onreg: Kaapse Regspraak in die Agtiende Eeuw* (Bellville)

Horwitz, D (1997) *Disreputable Fellows: Prisoners and Graffiti from the Castle, Cape Town* (honours dissertation in Archaeology, University of Cape Town)

Hough, Barry, and Howard Davis (2008) "Coleridge as public secretary in Malta: The surviving archives" *The Coleridge Bulletin (NS)* 31: 90-101

Hunt, William (1796) *A Collection of Cases on the Annuity Act relative to the Enrolment of Memorials* (London)

Immelman, RFM (1955) *Men of Good Hope. The Romantic Story of the Cape Town Chamber of Commerce 1804-1954* (Cape Town)

Jurgens, AA (1943) *The Handstruck Letter Stamps of the Cape of Good Hope from 1792 to 1853 and the Postmarks from 1853 to 1910* (Cape Town)

Kaapse Plakkaatboek 6 vols (1944-1961) ed by MK Jeffrey (vols 1-3) and SJ Naude (vols 4-6) (Cape Town)

Kahn, Ellison (1976) "Sir Walter Scott and Menzies" *SALJ* 93: 94-95

Knight, Roger (2008) "Politics and trust in victualling the Navy, 1793-1815" *Mariner's Mirror* 94: 133-149

Laidler, PW (1939) *The Growth and Government of Cape Town* (Cape Town)

Lawrence-Archer, JH (1875) *Monumental Inscriptions of the British West Indies* ... (London)

Leach, MacEdward (1960) "Notes on American shipping based on records of the Court of Vice-Admiralty of Jamaica, 1776-1812" *American Neptune* 20: 44-48

Leibbrandt, HCV (1905) *Precis of the Archives of the Cape of Good Hope: Requesten (Memorials) 1715-1806* vol 1: A-E (Cape Town)

Linder, Adolphe (1997) *Swiss at the Cape of Good Hope 1652-1971* (Cape Town)

Lloyd, Christopher (1947, 1998 ed) *Lord Cochrance. Seaman, Radical, Liberator. A Life of Thomas, Lord Cochrane, 10th Earl of Dundonald* (New York)

MacSymon, RM (1990) *Fairbridge Ardene & Lawton. A History of a Cape Law Firm* (Cape Town)

Marshall, Samuel (1808) *A Treatise on the Law of Insurance* .... 2 ed (London)

Moree, Perry (1998) '*Met Vriend die God Geleide'. Het Nederlands-Aziatisch postvervoer ten tijde van die Verenigde Oost-Indische Compagnie* (Zutphen)

Namier, Lewis, and John Brooke (1964) *The History of Parliament: The House of Commons, 1754-1790 vol 1: Members A-J* (London)

Nathan, Manfred (1934) "The old Cape bench and bar" *SA Law Times* 3: 165-166

O'Brien [née Wittenoom], Jacqueline, and Pamela Statham-Drew (2009) *On We Go: The Wittenoom Way: The Legacy of a Colonial Chaplain* (Perth)

Oxford Dictionary of National Biography (2004, various subsequent online eds) available at *http://www.oxforddnb.com*

Pama, C (1992) *British Families in South Africa. Their Surnames and Origins* (Cape Town)

Percival, Capt Robert (1804) *An Account of the Cape of Good Hope* ... (London)

Philip, Peter (1981) *British Residents at the Cape 1795-1819. Biographical Records of 4800 Pioneers* (Cape Town)

Roos, J de V (1897) "The plakaat books of the Cape" *Cape LJ* 14: 1-23

Rosenthal, Eric (1954) "Mutiny at Simonstown" in Eric Rosenthal *Cutlass and Yardarm* (Cape Town): 67-75

Sainty, JC (1975) *Office Holders in Modern Britain. IV: Admiralty Officials 1660-1870* (London)

Schuhmacher, W Wilfried (1977) "Some Danish Indiamen at the Cape of Good Hope" *Mariner's Mirror* 63: 231-232

Seth, Suman (2014) "Materialism, slavery, and *The History of Jamaica*" *Isis. A J of the History of the Science Society* 105: 764-772

Smith, Herbert A (1927) “The legislative competence of the dominions” *SALJ* 44: 545-553

SP (1933) “Long family of Jamaica” *Notes & Queries* 165: 339-340

Spilhaus, M Whiting (1966) *South Africa in the Making 1652-1806* (Cape Town)

Stokes, Anthony (1783) *A View of the Constitution of the British Colonies in North America and the West Indies ...* (London)

Storrar, Patricia (1974) *George Rex: Death of a Legend* (Johannesburg)

Stroud Dorothy (1966) *Henry Holland: His Life and Architecture* (London)

Styles, Michael H (2003) *Captain Hogan. Sailor, Merchant, Diplomat on Six Continents* (Fairfax Station, VA)

Taylor, Stephen (2016) *Defiance. The Life and Choices of Lady Anne Barnard* (London)

Theal, George McCall (1880) *Catalogue of Documents Sept 1795-Feb 1803 in the Collection of the Colonial Archives, Cape Town* (Cape Town)

Theal, George McCall (1895) *Documents Copied by Theal* (London)

Theal, George McCall *Records of the Cape Colony* (*RCC*) (1897-1905) 34 vols (London)

Ulrich, Nicole (2011) *Counter Power and Colonial Rule in the Eighteenth-Century Cape of Good Hope: Belongings and Protest of the Labouring Poor* (PhD thesis, University of the Witwatersrand)

Ulrich, Nicole (2013) “International radicalism, local solidarities: The 1797 British naval mutinies in Southern African waters” *International Review of Social History* 58: 61-85

Van Blommestein, Joan (1998) “Lady Anne Barnard’s visit to Simon’s Bay 24-9-1797 and the RN Mutiny” *Bulletin of the Simon’s Town Historical Society* 20: 53-54

Van der Merwe, Petrus Johannes (1984) *Regsinstellings en die Reg aan die Kaap van 1806-1834* (LLD thesis, University of Western Cape)

Van Niekerk, JP (1994) “Marine insurance claims in the Admiralty Court: An historical conspectus” *SA Merc LJ* 6: 26-62

Van Niekerk, JP (2005) “The First British Occupation of the Cape of Good Hope and two prize cases on joint capture in the High Court of Admiralty” *Fundamina. A Journal of Legal History* 11: 155-182

Van Niekerk, JP (2010) “George Rex of Knysna: A civil lawyer from England and first marshal of the Vice-Admiralty Court of the Cape of Good Hope, 1797-1802” *Fundamina. A J of Legal History* 16(2): 486-513

Van Niekerk, JP (2015a) “Denis O’Bryen: (Nominally) second marshal of the Vice-Admiralty Court of the Cape of Good Hope, 1807-1832” *Fundamina. A J of Legal History* 21(1): 142-184

Van Niekerk, JP (2015b) “Of naval courts martial and prize claims: Some legal consequences of commodore Johnstone’s secret mission to the Cape of Good Hope and the ‘battle’ of Saldanha Bay, 1781 (Part 1)” *Fundamina. A J of Legal History* 21(2): 392-456

Van Niekerk, JP (2016) “Of naval courts martial and prize claims: Some legal consequences of commodore Johnstone’s secret mission to the Cape of Good Hope and the ‘battle’ of Saldanha Bay, 1781 (Part 2)” *Fundamina. A J of Legal History* 22(1): 118-154

Van Zyl, DH (1983) *Geskiedenis van die Romeins-Hollandse Reg* (Durban)

Visagie, GG (1969) *Regspleging en Reg aan die Kaap van 1652 tot 1806, met 'n Bespreking van die Historiese Agtergrond* (Cape Town)

Walker, Eric A (1957) *A History of South Africa* 3 ed (London)

Wells, Roger (1983) *Insurrection. The British Experience 1795-1803* (Gloucester)

Wilkinson, Clive (2005) "The non-climatic research potential of ships' logbooks and journals" *Climatic Change* 73: 155-167

Wright, Philip (1966) *Monumental Inscriptions of Jamaica* (London)

Wright, Philip (ed) (2004) *Lady Nugent's Journal of Her Residence in Jamaica from 1801 to 1805* 4 ed (Jamaica)

Yonge, CD (1863) *The History of the British Navy ....* 2 vols (London)

Case law

Angelique, The (1801) 3 C Rob (App) 7, 165 ER 497

Argun, MT v Master and Crew of the MT Argun 2004 (1) SA 1 (SCA)

Atalanta, The (1808) 6 C Rob 440, 165 ER 991

Boehm & Others v Bell (1799) 8 TR 154, 101 ER 1318

Carr & Josling v Montefiore (1864) 5 B & S 408, 122 ER 883

Crespigny v Wittenoom & Another (1792) 4 TR 790, 100 ER 1304

Doe, on demise of Johnstone v Phillips (1808) 1 Taunt 356, 127 ER 871

Hood v Burlton (1792) 2 Ves Jun 29, 30 ER 507

Hope, The (23 April 1803, HL), referred to in *The Atalanta* (1808) 6 C Rob 440, 165 ER 991 at 456-457, 997-998

Hutton v Lewis, Clerk & Others (1794) 5 TR 639, 101 ER 356

Picimento, The (1803) 4 C Rob 360, 165 ER 640

Reward, The (1818) 2 Dods 265, 165 ER 1482

Robertson v French (1803) 4 Esp 246, 170 ER 707 (KB)

Robertson & Thomson v French (1803) 4 East 130, 102 ER 779

Umbragio Obicini v Bligh (1832) 8 Bing 335, 131 ER 423

Yeaton v Fry 5 Cranch 335, 9 US 335 (US Dist Col, 1809)

THE PHRASE "SHOULD A CLAIMANT RAISE A CLAIM, HE WILL PAY ..." IN THE DIVISION OF AN INHERITANCE FROM OLD BABYLONIA TELL HARMAL*

Susandra van Wyk**

ABSTRACT

I investigate the *raison d'être* of an irregular clause in two inheritance divisions from Old Babylonia Tell Harmal. The free rendering of the clause reads that if a family member to the division transgresses with a claim, a certain monetary reward – measured in units of silver – needs to be paid. Is the payment clause a precautionary measure ensuring adherence to the execution of the division's terms; similar to the payment clause in sales and adoptions? Or does the clause serve another function? I show that the choices of the involved family members within their family relationship,

* This article is a revised and updated version of a draft paper presented at the annual meeting of the South African Society for Near Eastern Studies held at the University of Johannesburg (South Africa) on 1 September 2014. Sumerian terms are in bold font, Akkadian and Latin terms are italicised. The following abbreviations are used: OB = Old Babylonia/Babylonian; ANE = Ancient Near East/Eastern; LH = Law/Collection of Hammurabi; LL = Laws/ Law Collection of Lipit Ištar. Abbreviations for dictionaries cited in this article are as follows: *AHw* = *Akkadisches Handwörterbuch*; *CAD* = *The Assyrian Dictionary of the Oriental Institute of the University of Chicago*; *CDA* = *A Concise Dictionary of Akkadian*; *PSD* = *The Pennsylvania Sumerian Dictionary*.

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Fundamina
Volume 24 | Number 1 | 2018
pp 170-197

DOI: 10.17159/2411-7870/2018/v24n1a7
Print ISSN 1021-545X/ Online ISSN 2411-7870

as deduced from the recorded *ipsissima verba* of each division, dictate the unique *raison d’être* of the payment clause in the division. I argue that within the framework of maintaining family relationships, the payment clause serves as a possible future division in securing compensation, compliance and protection for the involved family members’ interests.

Keywords: Old Babylonia Tell Harmal; redemption; sanction; penalty; ancient inheritance; Old Babylonian contract; Mesopotamia

1 Introduction

The free rendering of the so-called payment[1] clause reads that if any family member to the division of an inheritance[2] transgresses with a claim, an agreed monetary reward – measured in units of silver – needs to be paid. The payment clause appears in two inheritance divisions excavated from the site of OB Tell Harmal.[3] Maria de Jong Ellis transcribed, translated and indexed the two division texts as Text B [IM 52599] and Text D [IM 52624] from her study of four OB Tell Harmal divisions and one dispute settlement regarding an initial division. In the other two divisions[4] the family members exclude the payment clause. In the dispute settlement there was no payment involved notwithstanding a dispute raised by the one brother.[5] In OB the latter entails a reappraisal and redistribution of the initial inheritance awards or else the witnesses to the division would suffice to testify and affirm to the initial inheritance awards. Also, I find no payment clause in my study of forty six divisions from the OB city-states of Nippur, Sippar and Larsa.[6] It seems that the payment clause is at least an irregular practice in the divisions from OB Tell Harmal, Nippur, Sippar and Larsa.

1 The “payment clause” is a coined term. Some scholars named the clause a “sanction” or “penalty clause”, “restitution”, “talion”, or “compensation”. It is recorded in different types of legal transactions. See, further, discussions under the heading Additional term: 6.2 (iii) Payment clause.

2 The “inheritance division from a deceased estate” is hereinafter referred as the “division/s” or “inheritance division”. Different names are assigned to this type of agreement. For example, in Mesopotamian sources, the names are: partition agreement, partition, allotment, redistribution, division, undivided inheritance and family division agreement. *Cf* Claassens 2012(1): 1-2.

3 Tell Harmal represents the ancient city Shaduppum and is today part of the expanding city of Baghdad, in Iraq. Excavations were conducted at Tell Harmal from the late 1940s and onwards. Numerous types of clay tablets were excavated, including geographical and mathematical lists, as well as the known Laws of Ešnunna, published and discussed by Goetze from Ellis 1974: 133-153. De Ellis 1973: 43-69 published some texts from the Museum’s general registrar, and compiled a catalogue as shown at 43-44. Other contributions pertaining to the Tell Harmal excavations include: Simmons 1959: 71-93; 1960: 117-125; Goetze 1958: 3-78; Ellis 1975: 130-151; and Harris 1955: 31-58.

4 Ellis *idem* indexed the two division texts as Text A [IM 51190] and Text C [IM 63305].

5 Ellis *ibid* indexed it as text E [IM 52590].

6 See my unpublished doctoral thesis in Claassens 2012(1) and 2012(2).

The following questions arise in the free rendering of the payment clause and in context with the terms of each division. Is the payment clause a precautionary measure ensuring adherence to the execution of the division's terms similar to the payment clause in sales and adoptions? Or does the clause serve another function?

In OB sales[7] and a family agreement such as an OB adoption,[8] the payment clause usually contains at least two denominators. The one denominator is the description of the transgression; and the other, an agreed fixed payment ranging from the confiscation of the transgressor's property, or payment, or abandonment, or even death. In general, the clause may constitute as a straightforward *deterrent* and/or *sanction* and/or *penalty* and/or a *redemption right* to serve as *compensation*, and/or *compliance* and/or *protection* for the family members' interest.[9] The OB adoption, that artificially creates family relationships,[10] contains a certain formula in the payment clause. Such formula includes a statement along the lines that if the adoptee renounces his adopter – stating that "you are not my father/mother" – then the adoptee shall forfeit properties such as a "house, field, orchard, female and male slaves, possessions, and as much as there is". The *raison d'être* for the clause depends on the type of adoption and the context of the text.[11] Such an adoption clause may constitute as a straightforward *deterrent* and/or *sanction* and/or *penalty* to at least ensure *compliance* with the reciprocal obligations in *protecting* the family members' interest. In the instance of transgression it serves as a *compensation*.[12] The OB sales do not include a generalised and/or unlimited "payment" usually present in the OB adoptions.[13] Rather in OB sales the contractual parties agree to a specific amount possibly for the sake of *compensation* and fairness to prevent an excessive one-sided penalty.[14] Some OB sales – due to special circumstances – include a *redemption* clause.[15] Redemption literally means "getting back something which has been lost".[16]

7 In the OB there is a vast array of legal transactions such as sale, lease, hire, loan, partnership, marriage, adoption, division of inheritance, etc. Usually the transaction contains at least a description of the transaction, witnesses list, a date formula, and sometimes seal impressions of the contractual parties and witnesses (Westbrook 2003: 362). *Cf* discussions by Westbrook 2003: 399-401 regarding the OB contract.

8 *Cf* ANE scholars' focus on the social and economic aspects of the OB adoption: Stone & Owen's 1991 study of the OB Nippur adoptions; Suurmeijer's 2010: 9-49 study of the OB Sippar adoptions; as well as Obermark's 1992 general study of the OB adoption.

9 *Cf W*estbrook 1991b: 90, 93-100; Stone & Owen 1991; Suurmeijer's 2010: 9-49; Obermark 1992; Greengus 1969: 515-518.

10 Suurmeijer 2010: 9.

11 *Cf* Suurmeijer 2010: 9-49; Westbrook 1991b: 90, 93-100; Greengus 1969: 515-518; and Obermark 1991.

12 *Cf* Greengus 1969: 515-518.

13 Westbrook 2003: 399.

14 *Cf* discussions by Westbrook *ibid* regarding this type of payment clause.

15 Westbrook 1991b: 90 refers to redemption as an "artificial transaction". Although a common phenomenon in ANE it is not general practice in OB (*idem*: 90).

16 Westbrook *idem*: 60.

When the parties cannot agree to a market-related price by means of the supply-demand bargaining process the sale is forced with the right of redemption.[17] The forced sale entails that the seller cannot withdraw from the sale and negotiations, because of an agreed fixed price – the redemption right – based on a specific law custom/decreed or circumstances.[18]

I will show that the choices of the involved family members within their family relationship, as deduced from the recorded *ipsissima verba* of each division, dictate the *raison d'être* of the payment clause in the division. I propose that unlike the payment clause in OB adoptions and sales, the clause in the two Tell Harmal divisions does not function as a deterrent, sanction, penalty and/or as a redemption right. I argue that the clause serves as a *possible* future division, which means that a family member may in the future bring in money, or in other words buy an asset, to acquire a part of the inheritance portion initially awarded to another family member in the original (initial) division.

First, I will explain how the management of the shared inheritance may end with the conclusion of a division. Thereafter I will discuss the division's requisites and terms that dictate the *raison d'être* of the payment clause. To facilitate my discussion and for ease of reference, Tables 1 and 2 in the Addendum reflect Ellis' transcription and translation of both texts. Finally, I will explain the clause's function as a *possible* future division within the framework of maintaining family relationships.

2 What is an inheritance division?

The division[19] is a complex agreement which entails lengthy discussions and negotiations between family members.[20] Before the family members finally agree on the terms, certain stages in an evolutionary sequence take place.[21] The schematic outline in Figure 1 below supports my explanation of the stages.

The first stage starts with the death of a family member. The inheritance devolves to the deceased's beneficiaries. The second stage commences when the family members share in the management and enjoyment of use, as well as in the profits of the shared inheritance property, acting in their capacity as co-owners in a kind of partnership. At a later stage, the family members may decide to divide certain

17 Westbrook *idem*: 117.

18 Westbrook *idem*: 93-100 reflects on some possibilities how the price was fixed. Usually in an OB sales transaction a buyer wants to redeem his family estate (Westbrook *idem*: 90) and as the potential heir, buy back his own inheritance which was once lost by the family (*idem*: 60-61).

19 *Cf* discussions by Westbrook 2003: 395-397.

20 See, too, Claassens 2012(1): 59-62.

21 I discuss the practical application of the division in Van Wyk 2013a: 152-54 and Claassens 2012(1): 117-120.

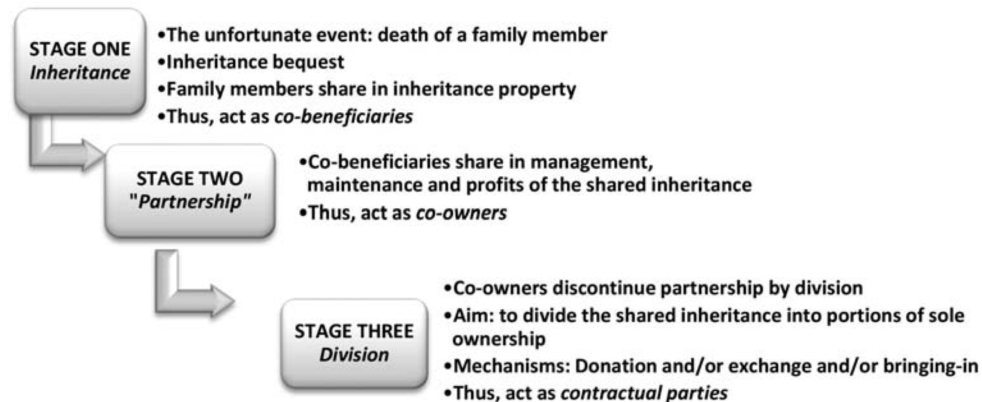

Figure 1: Evolutionary stages of a division

or all the shared inheritance property into portions of sole ownership (stage three). The process is based on creating obligations in maintaining family relationships rather than creating ownership's entitlements of exclusion, financial gain and competition to control. During the decision-stage of dividing the inheritance the family members enter into discussions, considering various factors and deciding on the application of certain legal practices. The scribe then records the terms on a tablet; however, the recording is an abbreviated version of the oral division.[22]

3 Requisites and legal practices[23]

A family in the Old Babylonian period commences with a distinction of the core family in anthropological terms, namely a married man and woman and their children who lived together as a core unit (in the first instance).[24] The core unit is part of an extended family consisting of several core unit families who shared a common ancestor (second and third instance). The extended family members connect and bind themselves, and each other, by contract and fulfilment of obligations, in maintaining the family relationships.[25]

The inheritance division was an agreement amongst family members in dividing the estate of a deceased family member. In the OB period, the inheritance division

22 Van Wyk 2013a: 152-154.

23 The length of this article does not permit a thorough discussion of the methodology. This section is only informative regarding the approach in the study of the two division texts. See, also, my discussion of the analysis-method in Van Wyk 2013b: 423-427 based on Claassens 2012(1): 107-150 wherein I made a content analysis of the forty-six division texts from OB Nippur, Larsa, and Sippar and then compare the texts typologically.

24 Leemans 1986: 15.

25 *Idem* 15-16.

was one type of division among other divisions, such as the *quasi*-adoption division, dissolution of a partnership and division of the estate assets of a living estate owner. The different divisions shared a common element, namely the dissolution of co-ownership by dividing the shared asset/s into portions of sole ownership. However, the types of divisions differed in the requisites needed to achieve the aim of dissolving co-ownership.[26]

The division of an inheritance deriving from the estate of a deceased family member has certain requisites that qualified the agreement as such, namely: (1) the family members involved; (2) the deceased owner of the estate or testator; (3) the estate assets or inheritance; (4) mutual consent, expressed with specific terms; and (5) the *raison d'être* with the option of three mechanisms in dividing the inheritance.[27]

The legal practices which the family members as contractual parties expressly or tacitly decided to exclude or include in the division depended on the family members' personal circumstances, architectural and agricultural factors.[28] Overall the values of certainty and economic sustainability underpin the family members' decisions in the dividing up of the inheritance awards and the foreseen consequences of the division's terms.

The recorded division's details and purpose were limited to the scribe's idiosyncratic style of recording[29] the terms onto a clay tablet.[30] The legal practices[31] which occur in the two texts are sub-categorised as follows:

26 I discuss the reasons for a distinction between the legal notions in Claassens 2012(1): 120-121. I also elaborate on this distinction in Van Wyk 2013a: 54-59 and explain what an OB inheritance division entails and give motivations for the distinction from other seemingly similar types of divisions.

27 Claassens 2012(1): 52-62, 216-225 and Van Wyk 2013b: 423-427.

28 Claassens 2012(1): 52-62, 127, 382-385. See Claassens-van Wyk 2013: 56-89 where I outline the different factors which the family members to a Nippur division must take into account, especially the practical hardship with the application of the eldest son's greater share (firstborn share), which in Text 2 the family members include in their division. See, also, Claassens-van Wyk 2013: 67-71, 77-78 concerning the various factors the family members may consider.

29 *Cf* Veldhuis 1997. Claassens-van Wyk 2013: 61-62 proposes the following outcomes of training: (1) an understanding of and insight into difficult terms; (2) the ability of the scribe to record in "clear, specific and focused details" and to "sequence logically, by chronology, the event and terms of the agreements"; (3) an "understanding of the whole design of the agreement details, terms and conditions before the recording" to capture the quintessential details; and (4) the ability of "cohesion" which means "put related terms together". See, further, Van Wyk 2013a: 160-169.

30 Bottéro 1992: 19, 21 explains our limitations in understanding the content of cuneiform tablets; restricted by discovery, preservation and translation. See, also, Claassens 2012(1): 27-29, 83-89, 102-104. Westbrook 2003: 22 mentions that the cuneiform tablets are "snapshots scattered at random in time and place".

31 See Claassens 2012(1): 361-370 regarding the categories of legal practices found in city-states such as OB Larsa, Nippur, and Sippar; for instance, (1) the practical procedure for managing a division by means of a division by lots is used in OB Nippur and Larsa, and (2) a symbolic expression such as "completely divided" is used in OB Larsa and Sippar; the expression "from straw to gold" and the trustee clause occurred in OB Sippar, while the expression of equal shares is used in the division texts of OB Larsa and Sippar. See, also, Claassens *idem* 346-347 for an abridged comparison table of the legal practices.

- As regular practices that are the formalities, implementation and enforcement of the division: the no claim, oath, and witnesses' clauses
- As irregular practices that are
  - symbolic expressions: the heart is satisfied[32] and equal shares[33] clauses; and
  - additional conditions and terms: the firstborn share,[34] *sui generis* usufruct[35] and payment clauses

Next, these requirements listed above for a division will be applied to Ellis' Text B [IM 52599] and Text D [IM 52624].

4 Both texts' requisites for qualifying as a division[36]

4 1 Family members involved

In both texts, identification of the type of relationship between the deceased owner/ testator and involved family members is possible by means of an analysis of the structure, context and terminology of the texts, as well as clues from other texts and taking cognisance of the application of an array of OB legal practices deduced from the texts.

References in both texts which show that an inheritance portion from a family estate is awarded to a family member are the Akkadian term *zi-it-ti*[37] in lines 6 and 11 of Text 1 and the Sumerian term **ḫa-la**[38] in Text 2, lines 7 and 11.

32 The symbolic expression heart is satisfied demonstrates that the family members are content with the terms (Claassens 2012(1): 346). See discussions under the heading of Irregular legal practices: subheading: heart is satisfied clause, *infra*.

33 The equal shares clause reflects the family members' agreement in equalising the values of the divided portions of the inheritance or a part thereof. See further discussions under the heading of Irregular legal practices: subheading: equal shares clause, *infra*.

34 The firstborn share referred to a certain percentage of/or asset awarded to the eldest son. See discussions under the heading of Irregular legal practices; subheading: firstborn share, *infra*.

35 A *sui generis* usufruct clause reflects the brothers' lifelong commitment to maintain their priestess sister. Van Wyk 2014b: 443-483 concedes that it is not a usufruct in the strict sense. The maintenance provision "shows a unique character" against the background of social institutions' land ownership. Within the framework of a time-limited interest the ultimate owner of the *nadītu*'s property is the patrilineal lineage, with the father and then the sons as the representative owners (Van Wyk *idem*: 474). Thus, I coined the maintenance-construct as a *sui generis* usufruct. *Cf* Claassens 2012(1): 384-385; Van Wyk 2014a: 195-236, esp 206. See, also, discussions under the heading of Irregular legal practices: sub-heading: *sui generis* usufruct, *infra*.

36 Claassens 2012(1): 216-225, 423-427.

37 In AHw 1533-1534 the terms *zittu(m)*, and *zīzātu(m)* are "Anteil" or "Teil", and in AHw 1517-1519 the term *zâzu(m)* is translated as "Teilen", "Verteilen" or "Anteil nehmen". This term derives from *zīsu (zēzu)*, an adjective which means undivided (held in shared ownership), also *ziztu* or *zâzu* which translates as: divided the shares, in CAD Z, 149, 446 regarding *zâzu(m)*.

38 See PSD online *http://psd.museum.upenn.edu/epsd/nepsd-frame.html* [cited 24 Feb 2014] the inheritance portion (share) clause: **ḫala**. *Ibid*: the root word, **ḫal**, means divide.

In Text 1, lines 12 and 13, the persons receiving the awards are Ipiq-Amurru and Ana-Šamaš-balaṭi; however, their family status has led to some controversy. I agree with Ellis[39] that the grammatical structure of the terms indicate that this is an inheritance division and that the involved parties are the sons or at least the grandchildren of the deceased parent. In addition, line 16 reflects the no claim clause stating that brother against brother (*a-ḫu-um a-na a-ḫi-im*) will not raise a claim (*i-ra-ga-mu*) suggesting an agreement between brothers.

Ellis[40] surmises that in Text 2 there are “no patronymic given” but refers[41] to other texts mentioning Igmil-Sin and Warḫum-magir as the sons of a “well-known” Damqanum. Ellis[42] concedes that it is “probable” that Nanna-mansum is the third brother, or at least a nephew.

I propose that Text 2 is a division between family members, and that the three male family members are brothers. This is suggested by the context of lines 3-4 which state that “his brothers will share equally” (read together with lines 16-18) in the no claim clause which state that brother against brother (*a-ḫu-um a-na a-ḫi-im*) will not raise a claim (*i-ra-ga-mu*). The family members’ names in the text are Nanna-mansum in lines 2 and 7, the brothers Igmil-Sin in line 13 and Warḫum-magir in line 11, as well as Zibbatum, a *nadītu* priestess of **Šamaš**,[43] in lines 1 and 3. As later discussed Nanna-mansum in line 2 receives a double share in the “property of Zimbatum” consisting of orchards and a house. Ellis[44] opines that it is Zibbatum’s estate that is divided and that she is either the deceased aunt or sister of the involved family members (the three brothers). In the next section I will argue that Zibbatum is still alive and not the estate owner. She is the priestess-sister who is receiving lifelong maintenance support.[45]

4 2 Deceased owner / testator: Family member / parent

I surmise that both texts omit the deceased owner’s name and gender and glean my interpretations from the structure, context and terminology of the texts and the OB practices applicable in and/or deduced from the texts.

39 Ellis 1974: 133-153.
40 *Idem* 144.
41 *Idem* 144 n 18.
42 *Idem* 145.
43 In northern Mesopotamia the cloistered *nadiātu* of Šamaš living in the *gagûm* of Sippar; while in southern Mesopotamia the cloistered *nadiātu* of Ninurta from Nippur lived in the “place of the *nadiātu*” (Harris 1975: 315, 325 n 36, 317-318). The cloistered *nadiātu* groups were unmarried priestesses, forbidden to have children. The *nadiātu* were from the “upper strata of society”, coming from the powerful, rich and even royal families. It was a position of prestige and also provided the opportunity for the family to advance their position in society, both socially and economically. *Cf* Harris 1975: 307, 315-317; Stone 1982: 62; and Van Wyk 2015: 95-122.
44 *Idem* 144-145.
45 In the article I explain the inclusion of the maintenance term for the *nadītu* (priestess) with references from LH, the inheritance settlements and divisions. I argue that by implication a kinship relationship is present in cases of a priestess-sister’s maintenance, coined as a *sui generis* usufruct. See also my discussion under the subheading “*sui generis* usufruct” *infra* and n 34 *supra*.

In Text 1, line 12 refers to "his sons" and the no-claim clause in lines 15-17 states that brother will not lodge a claim against brother (*a-ḫu-um* and *a-ḫi-im*). This implies that the deceased owner is possibly the deceased parent.

However, in Text 2, the framing of the deceased owner's identity, status and position is contentious. Ellis'[46] concedes that it is the estate of Zibbatum, a *nadītu* priestess of Šamaš, that is divided and presumes that the deceased Zibbatum is either the deceased aunt or sister of the beneficiaries/contractual parties. Ellis[47] mainly based this on her rendering of line 1, reading: "In the matter of the property of Zibbatum, the *nadītu* of Šamaš, of orchards and house Nanna-mansum will take his double share, and his brothers will share equally." I disagree with Ellis. In most OB divisions the written record starts with a description of the inheritance property, following with the name and usually the family status of the recipient.[48] At first glance it may therefore appear that Ellis[49] is correct assuming that the estate of Zibbatum, the *nadītu*, is divided. However, a recording is only an adaptation and abridged version of an oral division.[50] The details are mostly obscured, and we cannot base our interpretations only on the rendering of the text.[51] The *nadītu*'s position, status and her property ownership in OB society has a direct relevance on the understanding of the first line's meaning.[52] One of the functions/roles of the *nadītu*-institution is the continuation of the patronage.[53] In OB it was an accepted practice that a *nadītu* of the god Šamaš receives her inheritance from her father. Usually this is a *sui generis* usufruct over a certain portion of the family property. The property stays within the patrilineal group, the bare-dominium owner. At the death of the father, the portion of the family property devolves to the next line in the patrilineal group. However, the property is subject to a *sui generis* usufruct, as a lifetime of support in favour of the *nadītu*.[54] Hence in Text 2, Zibbatum holds the *sui generis* usufruct over the orchards and house as a lifetime of support. In addition the deceased owner is the deceased patron of the family, either the uncle or – more likely – the father of the family members involved in the division.

Thus, from the context of the texts, I deduce that both texts reflect a division between family members of their parental and/or great-parental estate (*ie* inheritance).

46 Ellis 1974: 144-145.
47 *Ibid*.
48 *Cf* Van Wyk 2013b: 421 illustrating a prototype of an inheritance division.
49 *Idem* 144.
50 Van Wyk 2013a: 152-154.
51 *Idem* 160-163.
52 See Stone 1982: 56.
53 Van Wyk 2015: 95-122.
54 *Cf* Sippar divisions in Van Wyk 2013c: 302-342; Claassens 2012(1): 384-385; Van Wyk 2014a: 195-236, and esp 206; Van Wyk 2015: 95-122.

4 3 Estate assets / inheritance: Fully or partially divided

Both texts give an abbreviated description of the estate assets (inheritance) which is in contrast to the detailed description of estate assets found, for instance, in the divisions from the city-state of OB Nippur[55] and in some OB Larsa texts.[56] The elaborate list of witnesses in the Tell Harmal texts may compensate for the abbreviated description of assets since the witnesses assisted in retaining knowledge about the identification of assets and terms of the division. In case of a later dispute they might have to testify to the details of the division.[57]

Text 1 consists of movable and immovable property. The recording regarding the movable assets includes a description of various kinds of wooden objects; however, concerning the immovable property, the scribe only describes a field. Table 1 (*infra*) shows the outline of the type of portions awarded to each family member and the mechanisms used, with the differences emphasised in small caps.

Table 1: OUTLINE OF AWARDS OF TEXT

	Ipiq-Amurru	**Ana-Šamaš-balaṭi**
Exchange and donation	1 BASALT millstone, 1 wooden table, 1 bundle of wood, 1 wooden EATING VESSEL, $^{2}/_{3}$ **sar**[58] house property next to the house of BADI-RANUM	1 STONE millstone, 1 wooden table, 1 bundle of wood, 1 wooden ...., 1 WOODEN DOOR, $^{2}/_{3}$ **sar** house property next to the house of WARAD-AKŠAK
Exchange: division in equal shares	A field divided equally between brothers and at their death to their sons in equal shares.	

Text 2 consists of an unidentified orchard and house; however, the scribe records the slaves by their names and, in the case of some slaves, the scribe includes their gender and a description of their social status, such as small girl or suckling child. Table 2 (*infra*) gives an outline of the mechanisms used and the type of portions awarded to each family member, with the differences emphasised in small caps.

55 Veldhuis 1997: 83 refers to the Nippur scribal schools which follow the tradition of an “overdose of highbrow Sumerian”. Claassens-van Wyk 2013: 62 shows that in the Nippur scribal tradition recording was done “neatly” in descriptive detail concerning the family members’ names, status, birth order, comprehensive description of the assets, special legal terms, etc.

56 Claassens 2012(1): 233-235, 273-275, 287, 372 and 403-405. See, also, Claassens-van Wyk 2013: 80 regarding the “strict disciplined Nippur scribal school tradition”.

57 *Cf* Westbrook 2003: 373-374. Text E [IM 52590] from OB Tell Harmal was a settlement of a dispute concerning an initial division’s awards. The witnesses’ testimonials were accepted as proof of the division’s awards (Ellis 1974: 133-153).

58 $^{2}/_{3}$ **sar** is 24 square metres. *Cf* 1 **sar** = 36 square metres: *cf* Potts 1997: 80.

Table 2: OUTLINE OF TEXT 2'S AWARDS

	Nanna-mansum (eldest)	Warḫum-magir	Igmil-Sin
Firstborn share	DOUBLE SHARE IN ORCHARD AND HOUSE: SUBJECT TO A *SUI GENERIS* USUFRUCT IN FAVOUR OF THE PRIESTESS-SISTER		
Exchange: division in equal shares	Remainder of orchards and house the brothers share equally: subject to a *sui generis* usufruct in favour of the priestess-sister.		
Donation	SLAVE GIRL and SLAVE, GROWN MAN and SMALL GIRL, as MANY AS EXIST which are: NAHMIA, IVTAR-BULLITI, UABIL-ABUM, and ALI-WAQARTUM, FOR TRAINING AS PERSONNEL	SLAVE: SAPḪUM-LIPḪUR and the SUCKLING CHILD	SLAVE: BELI-AŠARID

4 4 Mutual consent

In both texts, the expression *i-zu-zu* / *i-zu-uz-zu* / *zi-i-zu-ú* may be interpreted as "they mutually agree to the terms of the division".[59] In Text 1, line 13 contains the term *i-zu-zu* – and in context it may be interpreted as "they agree to the division". In both texts the mutual consent clause is strengthened by the statement that their hearts are satisfied, that is, they reached consensus regarding the terms of the division with the added assurance that each family member agrees not to claim in the future.

4 5 *Raison d'être*

The aim of the division, within the framework of family relationships, is to divide the shared inheritance into portions of sole ownership using three mechanisms, namely a donation and/or exchange and/or bringing-in (sale), as illustrated in Figures 2, 3 and 4 (*infra*).[60]

59 In CAD Z, 449 the Akkadian variants for the Akkadian term *zitti* is given as *zittu(m)/zīzātu(m)/zinātu,* which means share: denoting a division of the portion of the estate, division of other assets, the division, or a total division. See, also, CAD Z, 139, 146, 147 discussions of the Akkadian term *zittu* (under headings 1 and 4) and my discussion of the term in Claassens 2012(1): 158-159.

60 Van Wyk 2013a: 152-154.

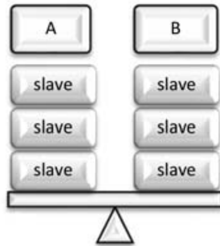

Figure 2: Exchange

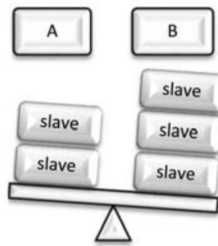

Figure 3: Donation

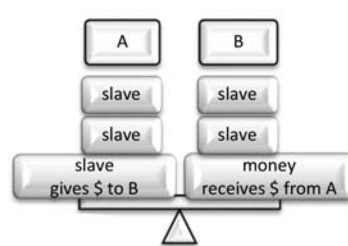

Figure 4: Bringing-in (sale)

Although, in both texts, the family members to the division used two of the three mechanisms, namely an exchange and a donation, there is a *variation* in the *description* of the *type* of mechanism used.

Thus, in Text 1 an exchange and donation between the brothers take place, deduced from the context of the text. The two brothers divide some wooden objects and a house of forty eight square metres[61] between them. The scribe, however, omitted the equal shares clause (*mit-ḫariš*). The wooden objects were not precisely divided. Thus, it seems that a donation took place (see Table 1 *supra*). While, in another term in Text 1, a field is equally divided, as may be seen from the inclusion of the term *mit-ḫariš*.[62]

The donation and exchange are also mechanisms used in Text 2. In line 1, from the context of the text, I deduce that the one brother received a firstborn share[63] concerning an orchard and house which is subject to a maintenance claim (*sui generis* usufruct) in favour of the priestess-sister. Then the remainder of the orchard and house is divided between the three brothers with the inclusion of the *mit-ḫariš*-term, stating that the division is made into equal shares. However, further on in Text 2, the brothers award interchangeably a donation *and* exchange, as deduced from the context of the text, without mentioning the equal shares clause (*mit-ḫariš*).

61 Each portion of the house is twenty four square metres, *ie* $^{2}/_{3}$ **sar** awarded to each of the two brothers. One **sar** is thirty six square metres. *Cf* Potts 1997: 80.

62 Ellis 1974: 139 opines that the text has an anomaly due to its word structure in line 12 – "their sons" and "his field" – which makes it difficult to establish whose estate it is and what the capacity of the contractual parties is. Either the division is a dissolution of partnership or a division of an inheritance. Ellis discusses the possible meaning of the line, mentioning that the sentence structure is "awkward". Ellis *ibid* is of the opinion that the verb is not in the present, and that the syntactic emphasis of *ma-la ib*-[*ba-aš-šu-ú*] refers to "their sons" rather than "his field" and thus concludes that the field is communally held until the third generation. Consequently, the family members who contract to a present division wish to ensure that the divided property remains in the family and include in the contract that each of their sons, however many there are, will inherit the divided paternal estate – probably at the time of death of each contractual party – who are all brothers.

63 Ellis *idem*: 139 translated the term as a "double share".

See Table 2 *supra* showing the equal (exchange) and unequal (donation) division of the awarded property among the brothers, reflecting as possibly the eldest Nanna-mansum who received the larger part of the assets, then the brother Warḫum-magir, and lastly Igmil-Sin, who receives the least assets of the three brothers.

5 General legal practices

5 1 Formalities, implementation and enforcement of the division

The three general legal practices enforce and strengthen compliance with the division's terms. The no-claim and oath clauses reflect the *viva voce* commitments by the involved family members to adhere to the terms. In addition the witnesses' clause identified the witnesses who will confirm the terms in the instances of a transgression/ dispute by any of the involved family members. Thus, the three practices serve as precautionary measures to prevent transgressions.

5 1 1 No-claim clause

The no-claim clause as a regular[64] term in OB divisions and other legal texts[65] occurs in both texts (Text 1, lines 15-16, and Text 2, lines 16-18) reading: "They will not return brother against brother they will not raise (or shout) a claim against the other."

5 1 2 Oath clause

Text 1,[66] line 19, translates as "to swear an oath to Tišpak and Ibal-pi-El". In Text 2, line 21, the oath clause translates as "they swear by the names of Tišpak and Daduša the King". Religion serves a vital role in the assurance for compliance. Although the oath clause is a general clause, it is not always included in the recorded agreements.[67]

5 1 3 Witnesses clause

The witnesses[68] appear in the presence of the contractual parties since in both texts, the Sumerian variant, **igi**, is inscribed before the names of the witnesses.

64 The no-claim clause occurred in ninety per cent of ten chosen texts from OB Larsa, as shown in Table 24 of Claassens 2012(2): 431. In OB Nippur the no-claim clause was present in fifty per cent of the ten chosen texts, as reflected in Table 25 (at 433) in the same source.

65 Claassens 2012(1): 182-184, 364-365, 380 and 402.

66 See Claassens *idem*: 184-186; 2012(2): 431-438 regarding those oath clauses found in the divisions from OB Larsa, Nippur and Sippar.

67 Magnetti 1979: 8, 22, 28; Westbrook 2003: 373-374.

68 See Claassens 2012(1): 184-186; Claassens 2012(2): 431-438 regarding those witnesses' clauses found in the divisions from OB Larsa, Nippur and Sippar.

According to PSD, **igi** means “face, in front of”, translated as “before”.[69] Thus, the witnesses witness the proceedings, after which they may testify and their function is consequently much wider than that of attestation.[70] For instance, in a settlement from OB Tell Harmal a dispute is resolved around the division of a field of unknown measurement. The solution necessitated the acquired “knowledge” of another brother, Ilšu-ibbišu, of the contested division and “anyone else” at the gate of Belgašer. The previous division is probably concluded at the gate and the witnesses of that division had to testify as to how the field was equally divided previously.[71]

Both texts contain long lists of witnesses. There are eleven witnesses in Text 1 and fourteen in Text 2.[72] In Text 1, lines 21-29, among the witnesses present are included two scribes (**dub-sar**) and a seal engraver (**bur-gul**). It is curious that two scribes were present, but they may have been professionals who participated in the recording of the division, together with the aforementioned seal engraver who engraved the seals. Other witnesses whose professions are mentioned, are an instructor, stone-cutter (**ugula**[73] **zadim**[74]) and a mature soldier (**aga-us**[75] **gal**[76]**-kud**). Thus, Text 1 includes an elaborate list of witnesses, of whom some held professions and the scribe deemed it necessary to include their professional status as part of their identification as witnesses. In Text 2, lines 25-36, the witnesses’ family status is mentioned. However, the witnesses’ family status from lines 21 to 24 is not mentioned: the only reference is to the *šakkanakku* of Zaralulu and the elders of his city, as well as the *šakkanakku* of Atašum and the elders of his city, who were high officials of the city.[77]

69 See PSD online *http://psd.museum.upenn.edu/epsd/nepsd-frame.html* (cited 24 Feb 2014).

70 Veenhof 2003: 147. The witnesses are thus actively involved in the application of the performance of legal traditions in the division communally shared assets into sole ownership. See, also, Claassens 2012(1): 87 n 94. *Cf* Westbrook 2003: 374.

71 Ellis 1974: 148-149 translates and briefly discusses the settlement (shown as “Text E”) as follows: “They asked Ilšu-ibbišu, his brother, and anyone (?) (else) in the gate of Belgašer for his knowledge, and as before the field is divided equally. They will not go back. Ipquša, son of Igmil-Sin, will not proceed against Ilšu-naṣir for the field which is his share. And Ilšu-naṣir will not proceed against Ipquša for the field which is his share. Oath: Tišpak and Ibal-pi-el. Should a claimant sue, he will pay five minas of silver. (Witnesses, mostly destroyed.) [*sic*]”.

72 See the discussion by Ellis *idem*: 145 regarding Text 2’s witnesses.

73 The term translates as an instructor, overseer and foreman. PSD online *http://psd.museum.upenn.edu/epsd/nepsd-frame.html* (cited 24 Feb 2014).

74 *Ibid* **zadim**/**za-dim**$_2$ is translated as a stone-cutter or bow-maker.

75 *Ibid*.

76 *Ibid*: the term translates as (to be) big, great; (to be) retired, former; (to be) mature (of male animals).

77 CAD Š, Part 1, 175 the *šakkanakka* is a governor or high official and in Sumerian the equivalent was a **gir-nita**. Ellis 1974: 145 surmises that the house and orchard property mentioned in Text 2 must have been in the towns Zaralulu and Atašum and that is the reason why the officials of those towns, the *šakkanakka*, acted as witnesses.

6 Irregular legal practices

6 1 Symbolic expressions

Charpin[78] remarks that the OB law contract involved "symbolic gestures engaging those who performed them and by the utterance of solemn words, all in the presence of witnesses who would remember the matter".[79] In both texts, the symbolic expressions of legal practices occur, namely the heart is satisfied and equal terms clauses, although these expressions are irregular legal practices.

6 1 1 Heart is satisfied-clause

The heart is satisfied-clause[80] (*li-ba-šu-nu-ú ṭà-ab*) indicates that the family members are satisfied with the agreement. This constitutes an example of legal symbolism and expression, which Westbrook considers to be one of the general terms in cuneiform documents.[81] Westbrook, in his discussion of the term, refers to LH paragraph 178 wherein an unmarried priestess concluded a division with her brothers and furthermore agreed to a maintenance award (*sui generis* usufruct). The priestess-sister receives "grain, oil and wool" for the value of her inheritance. However, the brothers shall satisfy her heart and if they fail to satisfy her heart, she may give the property to a farmer and take the full income.[82] Westbrook concluded that, in this text, the onus rests on the brothers to deliver the rations "proportionate to the inheritance share". Therefore, the burden of proof of satisfaction did not lie with the priestess-sister.[83]

In both texts discussed here, from the context, we can deduce that each brother has the burden of proof to show that his "heart" is satisfied with the terms and conditions of the division.[84]

78 Charpin 2010b: 42.

79 *Cf* Malul 1988; see, too, Hibbits 1992: 873-960.

80 *Cf* Claassens 2012(2): 435-438, Table 26, which is a comparison of twenty-six chosen divisions from OB Sippar and shows that thirty seven per cent of the chosen OB Sippar texts contain the heart is satisfied-clause.

81 This expression occurs, among others, in a sale, a named settlement of litigation (including a division of inheritance to form part of this group), and a receipt of a bride price (Westbrook 1991a: 219-224 esp at 219).

82 Westbrook *idem* 244.

83 Westbrook *ibid* considers the expression *prima facie* as "utterly superfluous". He continues by explaining his remark that the expression "is unnecessary both as a receipt (since it frequently follows an express statement that the receiver has been paid) and as a quitclaim (since it frequently precedes an express statement that no claims may be made)".

84 See discussions by Westbrook *idem* 219-224.

6 1 2 Equal shares-clause

The legal practice – *mitḫāriš*[85] – shows that the involved family members in both texts agree to divide the shared inheritance into equally divided assets[86] and in a reading together with the *i-zu-zu* (they divided), it indicates that the family members agreed to an equal distribution or division.[87]

6 2 Additional terms: Practical procedure of a division

The family members agreed to implement certain practical procedures and/or traditions which assisted them in the winding-up of the division.

In both texts, the family members applied the payment clause. However, only in Text 2 did the family members agree to the inclusion of the firstborn share and *sui generis* usufruct clauses.

6 2 1 Firstborn share-clause

The firstborn share[88] or privileged portion, or right of preference, denotes the situation where a family member, usually the eldest brother, receives an extra portion or percentage of the estate assets, before the division of the deceased paternal estate (inheritance) takes place.[89] In Text 2, line 2, as an interpretation of the text, a certain Nanna-mansum took “his double share” as a firstborn share.

6 2 2 *Sui generis* usufruct (maintenance)-clause

In Text 2, lines 1-2, the family members agree to burden the orchard and the house with a *sui generis* usufruct (income proceeds), provided that the brothers will become the ultimate owners after a lifetime responsibility of managing the burdened property and maintaining their priestess-sister.

85 The equal shares-clause is mainly found in texts from OB Larsa, and in one text from OB Sippar. My comparative study of ten chosen OB Larsa division texts showed that sixty per cent of the texts contain the equal shares-clause; see Table 26 in Claassens 2012(2): 435-438.

86 Claassens-van Wyk 2013: 67-75 considers the equal shares-clause together with the casting of lots as a practice to assist in the precise division of the communally shared inheritance.

87 The term *mitḫāriš* is defined in CAD M Part 2, 132, under heading 1, as “each one of two or more persons, objects etcetera, enumerated to the same extent or degree”. Concerning *mi-it-ḫā-ri-iš izuzzu*, in LH 165 the context of the text reads *ina makkūr bīt abim mi-it-ḫā-ri-iš izuzzu* that may be translated as “they (the brothers) take equal shares of the possessions of the paternal estate”.

88 See, also, Table 26 in Claassens 2012(2): 435-438 in the chosen study of 10 OB Nippur divisions, in seventy per cent of the texts the firstborn share was awarded to the eldest son; however, no firstborn share was found in the OB Sippar texts and in only one of the ten chosen OB Larsa texts.

89 Claassens *idem*: 176-179, 186-192: the use of the terms **gišbanšur** and/or **zaggulá** and/or **síb-ta** read together with **mu-nam-šeš-gal-šè**. Claassens-van Wyk 2013: 67-75 considers it as a practice to assist in the precise division of the communally shared inheritance.

The *sui generis* usufruct[90] is a practice whereby family members in a division agreed that certain members are burdened with the responsibility and obligation to support their priestess-sister.[91] As mentioned before, the *sui generis* usufruct, interpreting from the context of the text, is confirmed in various sources, for instance in LH 178, 180, 181 and LL 22; OB letters;[92] OB court case;[93] and divisions.[94]

6 2 3 Payment clause

In Text 1, the free rendering of the translation reads "should a claimant raise a claim, he shall pay two minas of silver", and in Text 2 "should a claimant raise a claim, he shall pay four minas of silver".[95] Silver is the medium of payment. However, the following question arises: Why are the amounts different? It is not a fixed price based on a specific law custom/decreed or circumstances. Thus, what was the basis and reason for such a calculation and/or payment? Are the variable amounts relevant in answering the posing question? What is the *raison d'être* of the payment clause in the two divisions? Are there any aspects present such as compensation and/or compliance and/or protection for the involved parties, similar to that of the payment clause found in sales and adoptions? And if so, does it dictate a similar or different *raison d'être*? In the following section I address these questions in my overall explanation of clause's *raison d'être* in the Tell Harmal divisions.

90 Van Wyk 2014a: 223-227. In Claassens 2012(1): 378-379 only in some OB Sippar texts and in none of the chosen texts from OB Nippur is a *sui generis* usufruct construction found in the divisions. *Cf* also Van Wyk 2014b: 443-483.

91 Although in the texts we may interpret that the *nadītu* of Šamaš holds a greater economic freedom than her Nippur counterpart, all the groups of *nadiātu*, especially the cloistered *nadiātu*, in many instances depend on their male family members for support: "There was a thin line between her dependency and presumed independency" (Van Wyk 2015: 117).

92 In Postgate 1992: 98 the priestess states her wish to appeal to judges because her brothers do not maintain her. Another example is a court case noted in King Hammurabi's letter to his successor, King Samsuilina, in Charpin 2013: 156-57. This decision contributes to LH 180-181 and illustrates the social norms and obligations of the family members to maintain their priestess-sister in such a way that she can financially afford to enter the cloister.

93 Greengus 2001: 257-267 mentioned a court case from OB Sippar, MHET 2, 4, 459. The court decided that the bare-dominium owners should forfeit their ownership because they forsook their duty to support the priestess family member.

94 Van Wyk: 2013a: 302-342 discusses three divisions reflecting a *sui generis* usufruct of a priestess-sister. *Cf* Van Wyk 2014a: 223-227; Claassens 2012(1): 378-379; Van Wyk 2014b: 443-483.

95 *Mina* is a unit of weight. The Akkadian variant is *manû* and translates as mina, which is *circa* 480 grams. See Powell 1996: 224-242; 1989-1990: 457-517. There is an ongoing debate regarding the value and usage of the different commodities in ANE through time and place. *Cf* Renger 1994: 157-208; Jursa 2010: 96.

7 Provision for a possible future division

Both texts qualify as inheritance divisions wherein the scribe noted general formalities and the legal practices as synoptically illustrated in an overview in Figure 5 (*infra*) with the differences between the texts emphasised in small caps.

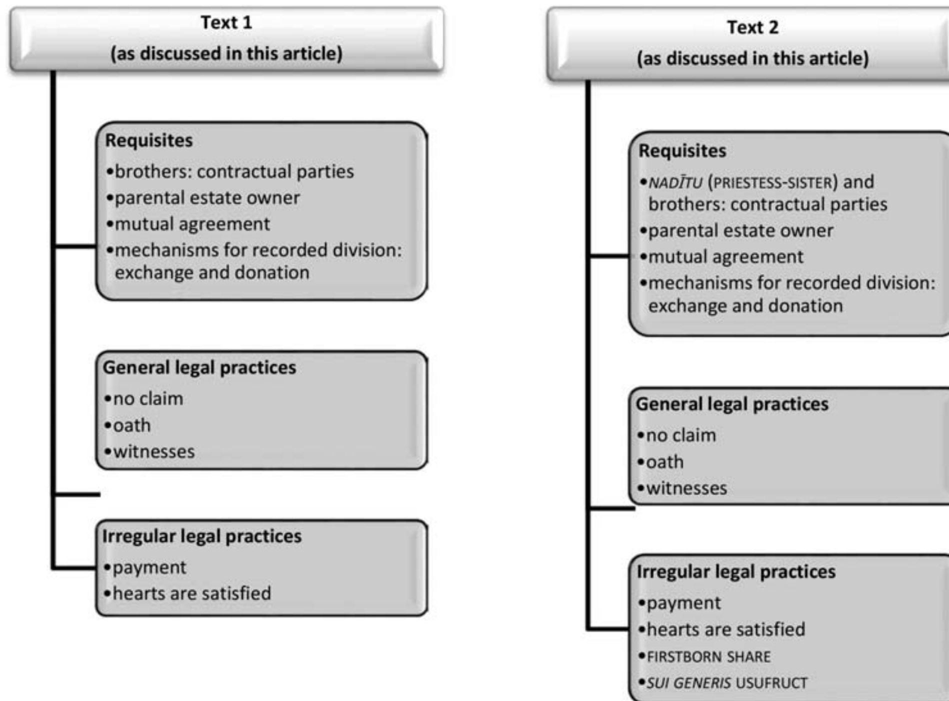

FIGURE 5: Comparison of the intrinsic elements of texts 1 and 2

The only two mechanisms used in Texts 1 and 2 are the donation and exchange and thus the family members exclude the application of the third mechanism, namely the bringing-in or sale.[96]

Two values, within the framework of family relationships, may have underpinned the family members’ decision as to which mechanism they decided to apply: (1) certainty, and (2) economic sustainability.

96 Normally the bringing-in or sale or buying of an asset can include something of monetary value such as silver, or a physical asset such as a slave or part of a house. The receiver of the awarded portion uses his or her personal asset/s, money or goods to purchase such portion to equalise the division of the shares; denoted by the **búr**-clause. In Sjöberg 1984: 91, 193-194 **búr** as a verb under the heading E, no 4 denotes “to pay in exchange; to compensate”. In the OB period, it occurs in “OB exchange and partition texts” (*idem* 193). See discussions by Claassens-van Wyk 2013: 72-73 where the contractual parties utilised the **búr**-clause in their attempt to “equalise” the division of the awarded inheritance-shares in “exact portions”.

The first value, certainty, entails the continuation of the division to ensure that the advantaged family member retains sole ownership of the awarded portion of inheritance and that the family members comply with the terms of the division. As previously discussed the family members implicitly confirm this value by the inclusion of the no-claim clause, stating that they will not transgress with a claim against one another. In addition, two other general practices, the oath and witnesses' clauses reinforce compliance with the terms.

Concerning economic sustainability when deciding on the application of mechanism/s, it did not necessarily imply the achievement of an equal awarding of portions. However, the family members had to – at least – enforce a practical and reasonable dividing-up of the shared inheritance. Subsequently, when a family member (usually a brother) receives his awarded portion, he and his immediate family (wife and children) acted as a core family unit (within the greater family group) regarding that awarded portion.[97] Consequently, it was essential that each award demanded reasonable economic sensibility to secure the future economic survival for each core family unit. This required that the awarded portion should hold equal economic value or at least the opportunity for the family members to have an equal opportunity for a sustainable income from the proceeds or use of the awarded portion.

The same principles apply in two other Tell Harmal divisions, translated, discussed and indexed by Ellis as Text A[98] and Text C[99]. See, in Figure 7 *infra*, the abridged intrinsic elements of Texts A and C and the differences stressed in small

97 As previously discussed, an extended family is defined as a group of nuclear families with a common ancestor connecting all the descendants (second and third instances). Within the group the family members bind themselves and each other by contract or obligations. *Cf* Leemans 1986: 15-16.

98 Ellis 1974: 133-153 translates the text as follows: "Apil-kubi, Erib-Sin, Sin-ippašram, Šamaš-bel-ili, Irra-imitti and Ṣilli-Adad, the sons of Adad-rabi, have divided the property of their paternal estate. $^1/_3$ **sar** house property ... and 5 (or 6) **gur** barley are the share of Apil-kubi; [$^1/_3$ **s**]**ar** house property and [...] are the share of Erib-Sin; $^1/_3$ **sar** house property and 5 sheep the share of Sin-ippašram; $^1/_3$ **sar** house property and 5 sheep the share of Šamaš-bel-ili; $^1/_3$ **sar** house property and 5 sheep the share of Irra-imitti; $^1/_3$ **sar** house property and 5 sheep the share of Ṣilli-Adad. They are divided; their hearts are satisfied. One will not raise a claim against another; a claimant who claims (will transgress) the oath by Tišpak and Ibal-pi-el [*sic*]".

99 Text C of Ellis 1974 refers: Ellis *idem*: 140-142 translates and briefly discusses Text C's discrepancies and differences of this division. It is an elementary recording; we can only ascertain that the estate belonged to the deceased father, who is named, and whose "total available estate" assets are divided between his sons. A long oath clause follows the elementary recording. The translation at *idem* 141 is: "The sons of Puzur-nunu have divided the total available estate, and are mutually satisfied. He will not return. One will not raise claims against another. They mutually swore oaths by the gods Belgašer, Aḫu'a and Amurru (witnesses) [*sic*]".

caps.[100] In these texts the family members implicitly fulfil the value of certainty by the inclusion of a no claim clause, stating that they will not in the future transgress with a claim. It seems that the family members satisfied themselves with the sustainability of the awarded assets by using the exchange mechanism. However, they *exclude* the payment clause.

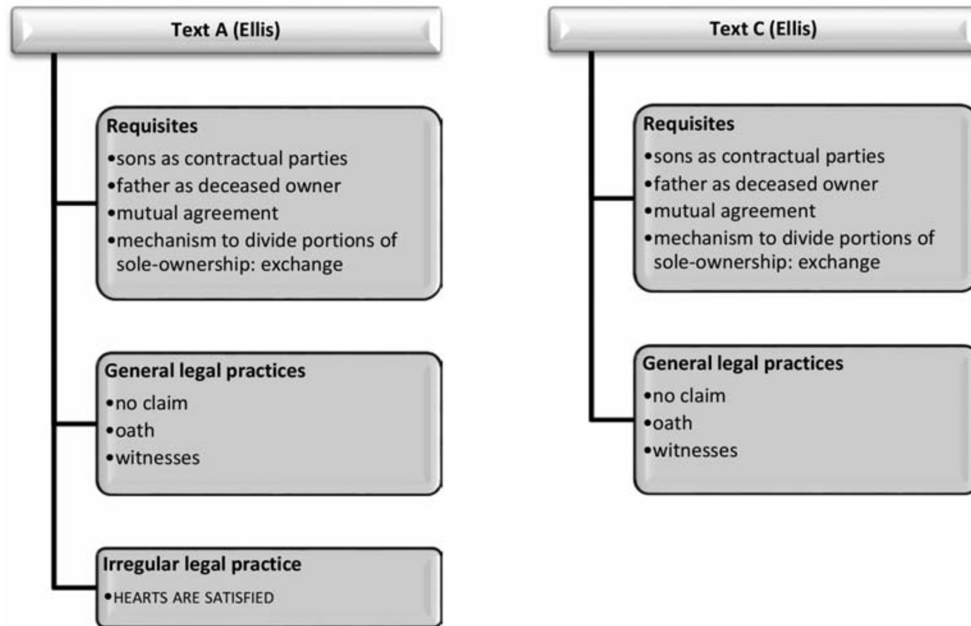

FIGURE 6: Intrinsic elements of text A (Ellis *idem* 133-138) and C (Ellis *idem* 140-142)

Thus, while in Texts 1 and 2 (the focus of this article), the inclusion of the claim clause deters a family member to transgress in the future to any of the terms, a problem may arise regarding the sustainability of some awarded portions divided by means of a donation.[101] One gets the better side of the deal – the higher value –

100 Ellis *idem*: 148 divided the four texts into two main groups. Texts C and D (Text 2 of the article) were regarded as "the completion of the legal act of division". However, the scribe did not record the agreement's specific terms in detail. The second group A and B (Text 1 of the article) were "deeds of a sort" wherein the scribe listed in detail the awarded shares observation. In addition, there is a distinct difference in the manner of the details of the recording of the terms of the divisions. Text A is a descriptive recording outlining the more exact portions of the inheritance, while Text C is only a protocol, a statement that the estate is divided. This is also the case with Texts 1 and 2 wherein Text 1 is a more descriptive recording. However, in Texts 1 and 2 the scribe found it necessary to capture the legal practices and to mention which divided inheritance shares are subject to an equal shares clause.

101 This is unlike Ellis' texts A and C where the family members use only an exchange as a division mechanism. See Table 1 and 2 *supra* showing an outline of Text 1 and 2's awarded portions.

and the other had to contend with awarded portions of a lesser value. This situation unjustly weakens the economic advantages of the latter's core family unit and adds to the ever-existing risk of hardship in agricultural and/or economic unforeseen and future unfortunate events.

However, in the event of a dispute over a division the end-result was not the payment for compensation. The settlement was either a reappraisal and redistribution of the initial inheritance awards or else the witnesses to the division would suffice to testify and affirm the initial inheritance awards.[102] Still, the complexity of the division and choices in a reappraisal and redistribution of the initial division could add fuel to the ensuing dispute.[103] This is in contradiction to family members' commitment to maintain their family relationships. The prevailing sensibility to avoid a family dispute is illustrated in an OB proverb stating as follows: "[I]f there be strife in the abode of relations, there is eating of uncleanness in the place of purity."[104] I propose that this holds the key why the family members agreed to a specific momentary award in the payment clause. The family members may have foreseen possible risk of hardship and/or disputes and therefor the payment clause served as a pre-arrangement for a possible future division.[105] This means that a family member may

102 The latter is the case in text E [IM 52590] of Ellis 1974: 133-153.

103 In my article, provisionally titled "Inheritance feuds in the Ur-Pabilsag Archive from OB Nippur" the family members in dispute settlements opt for the reappraisal and redistribution of their originally awarded inheritances.

104 See Langdon 1912: 231. He interprets this as "strife in a family is compared to defiling a holy place with filth and calumny".

105 I assess this pre-arrangement as applicable to the OB Tell Harmal divisions containing the option of a payment clause. For some reflection (at best) and in drawing inferences from our contemporary concept of fairness and deviations from a contract, in today's common wealth law systems – *eg* England, Wales and Australia – certain justified grounds for breach of contract are *prima facie* similar to the OB Tell Harmal payment clause. These grounds are "rescission", the "just compensation principle to liquidated damage agreed terms", and the "theory of alternative contracts". Rescission means that the contractual parties agree to undo the transaction: the contract is reversed or overturned as if the initial contract had never existed. (See O'Sullivan, Elliott & Zakrzewski 2008.) The "theory of alternative contracts" means that the agreement does not reflect specific damages, but rather an alternative contract in cases of deviation from the agreement's terms. See Goetz & Scott 1977: 576-578. However, in the Tell Harmal payment clause of Texts 1 and 2, provision is made for a possible future deviation or alteration from the initial contract because there is a certain amount included which I construed as a future selling price. Thus, the compensation principle to liquidated damage is *prima facie* more similar to the Tell Harmal payment clause. The principle is developed by contemporary courts because of "confusion between legal and moral ideas". *Prima facie,* there is a conflict between the contractual parties' duty to comply with the obligations of the contract and a prediction that, in the case of deviation, the breached party may by agreement been forced to overcompensate the injured party by means of an "unjust" payment. This constitutes "unjust" excessive recovery by the injured party. In such an instance, a party can also feel compelled to fulfil the obligations in an illusion of hope for compliance and to the party's excessive disadvantage for fear of the payment of an excessive payment (*idem* 558 n 20).

in the future *bring-in* money, or – in other words – *buy* an asset, to acquire a part of the portion initially awarded to another family member in the original (initial) division.[106]

Thus, it seems that the payment clause relieves the disadvantaged younger brother from the option of *bringing-in* money in the first instance of the original (initial) division, because of possible financial hardship. Then, at a later stage when he is financially capable, the clause affords the disadvantaged younger brother the opportunity to *bring-in* or *buy* a portion of the previously awarded inheritance from his advantaged brother. It is a fair situation for all the involved family members since prior to the original division they have already agreed to a specific amount of silver. Unfortunately, we cannot assess from the text how the family members calculated the compensation price (claim): whether it was based on sentimental and/ or economic value.

Thus, the clause’s *raison d’être* is not to serve as deterrent and/or sanction and/ or penalty, and/or a redemption right. All the family members are protected: the one is served by preventing unjust compliance due to hardship, but the other is by pre-arranged agreement compensated for alienating a portion of his previously awarded inheritance.

8 Conclusion

I investigate the *raison d’être* of a payment clause as it appears in the two divisions (Texts 1 and 2) from OB Tell Harmal.[107] I have shown that Texts 1 and 2 contain all the requisites for an agreement to qualify as a division wherein family members agree in accordance with Tell Harmal’s legal practices to initially divide the shared inheritance from the deceased parent’s estate into portions of sole ownership by means of a donation and exchange.

I submit that with the changing of co-ownership into portions of sole ownership, when a family member receives a lesser property, he may at a later stage be in a disadvantaged economic position. This situation unjustly weakens the economic advantages of his core family unit and adds to the ever-existing risk of hardship in agricultural and/or economic unforeseen and future unfortunate events.

Thus, by agreement in the original (initial) division, the family members in both texts may foresee the possible repudiation or variation of the initial division because of hardship. This is where the payment clause comes into play; offering the family members the opportunity in concluding a possible future division to afford the disadvantaged family member the option of altering the division since he will then be financially able to pay the compensation.

106 *Cf* Claassens 2012(1): 126-128, 175.

107 Ellis 1974: 133-153.

This compensation is pre-arranged by the calculation of a *bringing-in* or *buying* of inheritance shares to finally equalise the original division. Thus, the family members in the original division agree to a pre-arranged amount in silver, constituting the bringing-in/selling price.

Also, the compensation is fair for all family members concerned, for the brother who wants to alter the terms of the original division is forced to do so by means of a built-in payment. Consequently, in the interest of certainty, the payment clause defines the *bringing-in* of an asset and for adherence to economic sustainability allows for the possibility of an additional division to prevent hardship from an unsustainable awarded inheritance portion. Whilst, the no-claim, oath and witnesses' clauses serve as precautionary measures to prevent a family member from transgressing and at a later stage contesting the terms of the division.

In conclusion, the value of certainty is fulfilled by the compliance of the terms of the contract and the value of reasonable economic sustainability by the initial awarding of inheritance shares. These values are underpinned especially in the payment clause that serves the function of a possible future division in the compensation, compliance and protection of the family members' interests in maintaining their family relationships.

ADDENDUM TEXTS

Text 1[108]

1	1 **na$_4$-ḫ̮ar** *a-ba-r-i*	1 basalt millstone,
2	1 ^{giš}*ku-su-lu-um*	1 bundle of wood,
3	1 ^{giš}*pa-aš-šu-ru-um*	1 wooden table,
4	1 ^{giš}*ma-ka-al-tum*	1 wooden eating vessel,
5	$^{2}/_{3}$ **sar** *é* **da** *é Ba-di-ra-nu-um*	$^{2}/_{3}$ sar house property next to the house of Badi-ranum –
6	*zi-it-ti I-pí-iq-*^{d}**mar-tu**	the (inheritance) share of Ipiq-Amurru
7	1 **na$_4$-ḫ̮ar** *zi-bi-i*	1 stone millstone,
8	1 ^{giš}**ig** 1 ^{giš}*ku-su-lu-um*	1 wooden door, 1 bundle of wood,
9	1 ^{giš}*pa-aš-šu-ru-um* 1 ^{giš}*ma-na-ku-um*	1 wooden table, 1 wooden ....,
10	[$^{2}/_{3}$ **sar** *é*] *da é ìr [úḫ]*-**ki**	$^{2}/_{3}$ sar house property next to the house of Warad-Akšak –

108 Transliteration and translation by Ellis 1974: 136-137 as Text B. My translation is in parentheses. See Ellis *idem*: 150 the plate of the transcription: [IM 52599=B].

11	*zi-ti-ti A-na-*^{d}**Utu**-*ba!-lá-[ti]*	the share of Ana-Šamaš-balaṭi.
12	**a**-*šà-šu ma-ri-šu-nu ma-la ib-[ba-aš-šu-ú]*	his field (for) their sons, as many as there are,
13	*mi-it-ḫa-ri-iš i-zu-zu!*	equally divided.
14	*li-ba-šu-nu-ú ṭà-ab*	They are satisfied. (Their hearts are satisfied)
15 16	*ú-ul i-tu-ru-ma a-ḫu-um a-na a-ḫi-im* *ú-ul i-ra-ga-am*	They will not return, and one will not raise a claim against the other.
17	*ra-gi-im i-ra-ga-mu*	Should a claimant arise,
18	2 **ma-na kù-babbar ì-lal-e**	he shall pay 2 minas of silver.
19	*ni-iš* ^{d}*Tišpak ù I-ba-al-pi-el*	The oath: Tispak and Ibal-pi-el
20	**igi** *Ì-lí-ma-a-ḫi* **bur-gal**	(Before Ìlí-maḫi the seal engraver)
21	^{m}Ìl-šu-**illat**-*su** **ugula zadim**	(Before Ìlšu-Illat-zu the instructor stone-cutter)
22	^{m}*Šum-ma*-**an dub-sar**	(Before Šumma-an the scribe)
23	^{m}*Na-ap-zu-um**	(Before Nap-ap-zum)
24	^{m}*Gu-ḫa-du-um** **lú-ḫun**	(Before Guḫadum the hired man)
25	^{m}*[I]-[bi]-ì-í-šu**	(Before Ibi-an-šu)
26	^{m}[**Nanna**]-**tum***	(Before Nanna-tum)
27	^{m}Še-*le-bu-um**	(Before Še-le-bu-um)
28	^{m}*Im-gur-*^{d}**en-zu aga-uš gal-kud**	(Before Imgur-^{d}Sin the mature soldier)
29	^{m}**Ge**$_{6}$-*lí-*^{d}*Tišpak* **dub-sar**	(Before GE$_{6}$-lí-^{d}Tišpak the scribe)
30	^{m}*Ìr*-**tu-tu[ub-ki]**	(Before Ìr-tu-tub-ki)
	Seal on case: ^{d}*Tišpak-ga-mi-x* **dumu dumu-**^{d}**Utu** *ìr* ^{d}**utu**-*ši*-^{d}**im** Envelope sealed with seal of Tišpak-gamil, son of Mār-Šamaš, servant of Šamši-Adad[109]	Seals on the tablet: See asterisk, **kišib** written over impression lo.e: **kišib** Šelebum* **kišib** Guhadum* r.e. **kišib** Ìlšu-Illat-zu* **kišib** AN-x-tum? **kišib** Nap-ap-zum*;
		kišib Ibi-an-šu*

109 See Werr 1978: 62-64 regarding the text impression of the cylinder seal’s envelope. The impression contains an enthroned god who holds a ring and rod and rests his feet on a serpent or dragon. A goddess appears in front of the god and leads a worshipper, possibly a king, by the hand. In the sky is a sun disc in crescent and a star. The manner of excecution of the seal is according to Werr “alien to the Diyala region” because normally the face of the deity is in a profile position and the crown is in full view. Although Werr considers the tablet’s origin from the Upper Euphrates in the vicinity of Mari, he agrees with Ellis *ibid* that Tišpak-Gamil is the owner of the tablets and from the Diyala region.

Text 2[110]

1 2 3 4	*aš-šum ba-ši-tim* ša *Zi-ib-ba-tum* **lukur ᵈUtu** *i-na* **giš-sar** *ù é ši-it-ti-šu* **ᵈNanna-ma-an-sum** *i-li-iq-qé-e-ma a-aḫ-ḫu-šu* *mi-it-ḫa-ri-iš i-zu-uz-zu!*	In the matter of the property of Zibbatum, the *nadītu* of Šamaš, of orchards and house, Nanna-mansum will take his double share, and his brothers will share equally. (They agree to share equally.)
5 6 7	**gemé** *ù* **sag**-*ìr* **lú-gal** *ù* **tur-sal** *ma-la ib-ba-šu-ú* **ḫa-la ᵈNanna-ma-an-sum**	Slave girl and slave, grown man and small girl, as many as exist, the (inheritance) share (awarded to) Nanna-mansum is
8 9 10	*ᵐNa-aḫ-mi-ia* **ᵐeš + dar**-*bu-ul-li-ṭì* *ᵐḪa-bi-il-a-bu-um ù A-lí-wa-qàr-tum* *a-na tar-bi-it ṣé-eḫ-ḫe-ru-tim na-ad-na-ma*	Nahmia, Ištar-bulliṭi, Ḫabil-abum, and Ali-waqartum, [who] were given for training as personnel.
11 12 13	**ḫa-la tu-tu-ub**-*ma-gir* *ᵐSa-ap-ḫu-um-li-ip-ḫu-ur* *ù* **dumu-gaba ḫa-la** *Ig-mil-*ᵈ**en-zu**	The (inheritance) share (awarded to) Warḫum-magir is Sapḫum-lipḫur and the suckling child. The (inheritance) share of (awarded to) Igmil-Šin
14	*ᵐBe-lí-a-*ša*-ri-id*	is Beli-ašarid.
15	*zi-i-zu-ú li-ib-ba-šu-nu ṭà-ab*	They are divided (they agreed to the division). Their heart(s) is (are) satisfied.
16 17 18	*ú-ul i-ta-ar-ma a-ḫu-um* *a-na a-ḫi-im ú-ul i-ra-ag-ga-am* *ra-gi-im i-ra-ag-ga-mu*	He will not return. One will not raise a claim against the other. (Brother against brother will not return and will not raise a claim against another.)
19	4 **ma-na kù-babbar ì-lal-e**	Should a claimant raise a claim, he will pay 4 minas of silver.
20	**mu** *ᵈTišpak ù [Da-d] u-ša* **lugal** *it-mu-ú*	They swore the oath of Tišpak and Daduša the king.
21	**igi** *I-ge-e-eḫ-lu-ma* **[gìr]nita** *Za-ra-lu-lu*ᵏⁱ	(Before Ige-eḫ-luma high official of Zara-lulu)
22	*ù ši-bu-ut a-li-šu*	(and the elders of the city)
23	**igi** *Gu-da-su-um* **[gìr]nita** *A-ta-*šumᵏⁱ	(Before Guda-sum high official of Atašum)
24	*ù ši-bu-ut a li-šu*	(and elders of the city)
25	**igi** *Ba-di-du-um* **dumu** *Qí-iš-ti-*ᵈ**en-líl**	(Before Badidum son of Qíšti-Enlil)
26	*ᵐ*Ìl-šu-*i-bi*-šu **dumu** *Be-el*-šu-*nu*	(Ìlšu-ibi-šu son of Belšunu)
27	*ᵐSa-bu-lum* **dumu ᵈEn-líl**-*da-su*	(Sabulum son of Enlil-dasu)
28	*ᵐIṣ-ru-pa-an-ni* **dumu ᵈEn-zu**-*re-me-ni*	(Iṣru-pani son of Šin-remeni)

110 Transliteration and translation by Ellis *idem*: 142-143 as Text D. My translation is in parentheses. See Ellis *idem*: 152 – the plate of the tablet [IM 52624: D].

29	ᵐ**An**-*na-ṣir* **dumu** *Pu-ra-ki*	(An-naṣir son or Pu-raki)
30	ᵐ*Qú-du-um* **dumu** Í-lì-ia	(Qúdum son of Ília)
31	ᵐ*Ib-ni-*ᵈ*Tišpak* **dumu** Áš-*qa*-**an**	(Ibni-Tišpak son of Áš-qan)
32	ᵐ*Ìr-*ᵈ*Tišpak* **dumu** *Zi-mi-ia*	(Ìr-ᵈTišpak son of Zi-mia)
33	**ᵐᵈEn-zu**-*e-ri-ba-am* **dumu** *Sin-mu-ba-lí-iṭ*	(Sin-eribam son of Sin-mubaliṭ)
34	ᵐ*E-ri-ib-*ᵈ**En-zu dumu Dingir**.*lam-bi*-x	(Erib-Sin son of Ilu-lambi-x)
35	ᵐ*Ar-ši-ḫu-um* **dumu** *Da-ak-ki-ia*	(Aršiḫum son of Dakakia)
36	**ᵈEn-zu**-*na-ṣir* **dumu** *Sin-e-ri-ba-[am]*	(Sin-naṣir son of Sin-eribam)

BIBLIOGRAPHY

Bottéro, Jean (1992) *Mesopotamian Writing, Reasoning and the Gods* (Chicago)

Charpin, Dominique (2010a) *Reading and Writing in Babylon* (London)

Charpin, Dominique (2010b) *Writing, Law and Kingship in OB Mesopotamia* (Chicago)

Charpin, Dominique (2013) *Hammurabi of Babylon* (New York)

Claassens, Susandra J (2012) "Family Deceased Estate Division Agreement from OB Larsa, Nippur and Sippar" vols 1 and 2 (D Litt et Phil dissertation, University of South Africa)

Claassens-van Wyk, Susandra J (2013) "OB Nippur solutions between beneficiaries in a deceased estate division agreement" *J for Semitics* 22(1): 56-89

Ellis, Maria de Jong (1973) "OB economic texts and letters from Tell Harmal" *J of Cuneiform Studies* 24(3): 43-69

Ellis, Maria de Jong (1974) "The division of property at Tell Harmal" *J of Cuneiform Studies* 26(3): 133-153

Ellis, Maria de Jong (1975) "An OB adoption contract from Tell Harmal" *J of Cuneiform Studies* 27(3): 130-151

Goetz, Charles J & Scott, Robert E (1977) "Liquidated damages, penalties and the just compensation principle: Some notes on an enforcement model and a theory of efficient breach" *Columbia Law Review* 77(4): 554-594

Goetze, Albrecht (1958) "Fifty OB letters from Ḥarmal" *Sumer* 14: 3-78

Greengus, Samuel (1969) "The Old Babylonian marriage contract" *J of the American Oriental Society* 89: 505-532

Greengus, Samuel (2001) "New evidence on the OB calendar and real estate documents from Sippar" *J of the American Oriental Society* 121(2): 257-267

Harris, Rikva (1955) "The archive of the Sin temple in Khafajah (Tutub)" *J of Cuneiform Studies* 9(2): 31-58

Harris, Rikva (1975) *Ancient Sippar: A Demographic Study of an Old-Babylonian City, 1894-1595 BC* (Istanbul)

Hibbits, Bernard J (1992) "'Coming to our senses': Communication and legal expression in performance cultures" *Emory LJ* 41(4): 873-960

Jursa, Michael (2010) *Aspects of the Economic History of Babylonia in the First Millennium BC: Economic Geography, Economic Mentalities, Agriculture, the Use of Money and the Problem of Economic Growth* (Münster)

Langdon, S (1912) "Babylonian proverbs" *The American J of Semitic Languages and Literatures* 28(4): 217-243

Leemans, WF (1986) "The family in the economic life of the Old Babylonian period" *Oikumene* 5: 15-22

Magnetti, Donald L (1979) "'Oath functions' and the 'Oath process' in the civil and criminal law of the ANE" *Brooklyn J of International Law* 5(1): 1-28

Malul, Meir (1988) *Studies in Mesopotamian Legal Symbolism* (Neukirchen-Vluyn)

O'Sullivan, Dominic, Elliott, Steven & Zakrzewski, Rafal (2008) *The Law of Rescission* (New York)

Obermark, PR (1992) Adoption in the Old Babylonian Period (published doctoral thesis, Hebrew Union College, University Microfilms International)

Oppenheim, AL (ed) (1961) *The Assyrian Dictionary of the Oriental Institute of the University of Chicago* (CAD) Z vol 21 (Chicago)

Postgate, J Nicholas (1992) *Early Mesopotamia: Society and Economy at the Dawn of History* (London)

Potts, Daniel T (1997) *Mesopotamian Civilization: The Material Foundations* (Ithaca, NY)

Powell, Marvin A (1989-1990) "Masse und Gewichte" (Measures and Weights article in English), *Reallexikon der Assyriologie* 8: 457-517

Powell, Marvin A (1996) "Money in Mesopotamia" *J of the Economic and Social History of the Orient* 39(3): 224-242

Reiner, Erica (ed) (1992) *The Assyrian Dictionary of the Oriental Institute of the University of Chicago* (CAD) Š vol 17 Part 2 (Chicago)

Renger, Johannes (1994) "On economic structures in Ancient Mesopotamia" *Orientalia* 63: 157-208

Simmons, Stephen D (1959) "Early OB tablets from Ḥarmal and elsewhere" *J of Cuneiform Studies* 13(3): 71-93

Simmons, Stephen D (1960) "Early OB tablets from Ḥarmal and elsewhere (continued)" *J of Cuneiform Studies* 14(4): 117-125

Sjöberg, ÅAke W (1984) *Sumerian Dictionary* vol 2B (Philadelphia)

Stone, Elizabeth C (1982) "The social role of the Nadītu women in Old Babylonian Nippur" *J of Economic and Social History of the Orient* 25(1): 50-70

Stone, Elizabeth C & Owen, David I (1991) *Adoption in Old Babylonian Nippur and the Archive of Mannum-mešu-liṣṣur*, Mesopotamian Civilizations Series 3 (Winona Lake: Eisenbrauns)

Suurmeijer, Guido (2010) " 'He took him as his son.' Adoption in old Babylonian Sippar" *Revue d'assyriologie et d'archéologie orientale* 104: 9-40

Tinney, Steve J (ed) (1984) "The Pennsylvania Sumerian Dictionary", *University of Pennsylvania, Museum of Archaeology and Anthropology* (online *http://psd.museum.upenn.edu/epsd/nepsd-frame.html* [cited 24 Feb 2014])

Van Wyk, Susandra J (2013a) "Old Babylonian family division agreement from a deceased estate – analysis of its practical and theoretical mechanisms" *Fundamina* 19(1): 146-171

Van Wyk, Susandra J (2013b) "Content analysis: A new approach in the study of the Old Babylonian family division agreement in a deceased estate" *Fundamina* 19(2): 413-440

Van Wyk, Susandra J (2013c) "A new translation of an Old Babylonian Sippar division agreement between brothers and a sister regarding their communally-shared inheritance" *J for Semitics* 22(2): 302-342

Van Wyk, Susandra J (2014a) "Contractual maintenance support of a priestess-sister in three Old Babylonian Sippar division agreements" *J for Semitics* 23(1): 195-236

Van Wyk, Susandra J (2014b) "Lost in translation: Present-day terms in the maintenance text of the *nadiātu* from OB Nippur" *J for Semitics* 23(2): 443-483

Van Wyk, Susandra J (2015) "Prostitute, nun, or 'man-woman': Revisiting the position of the Old Babylonian *nadiātu* priestesses" *J of Northwest Semitic Languages* 41: 95-122

Van Wyk, Susandra J (2018) "Inheritance feuds in the Ur-Pabilsag archive from Old Babilonian Nippur" (in press)

Veenhof, Klaas R (2003) "Before Ḫammu-rāpi of Babylon: Law and laws in Early Mesopotamia" in Ferdinand Joseph Maria Feldbrugge, *The Law's Beginnings* (Leiden): 137-161

Veldhuis, Nic (1997) "Elementary Education at Nippur: The Lists of Trees and Wooden Objects" (Doctoral dissertation, University of Groningen)

Von Soden, Wolfram (1965-1981) *Akkadisches Handwörterbuch* vols 1-3 (Wiesbaden)

Werr, Lamia al Gailani (1978) "A note on the seal impression IM 52599 from Tell Harmal" *J of Cuneiform Studies* 30(1): 62-64

Westbrook, Raymond (1991a) "The phrase 'his heart is satisfied' in Ancient Near Eastern legal sources" *J of the American Oriental Society* 111: 219-224

Westbrook, Raymond (1991b) *Property and Family in Biblical Law* (Sheffield)

Westbrook, Raymond (ed) (2003) *A History of Ancient Near Eastern Law* vol 1 (Leiden)

Gábor Hamza, *Studies on Legal Relations between the Ottoman Empire / the Republic of Turkey and Hungary, Cyprus and Macedonia. Selected Essays in Hungarian, English, German and Turkish*

(Klaus Schwarz Verlag, Berlin 2017, pp 189, 48 Euro)

1. This book contains a selection of essays in Hungarian, English, German and Turkish by Gábor Hamza, Professor at the Eötvös Loránd University dealing with legal relations in Southeast Europe from a legal historian's point of view. The foreword of the book is written by Kinga Hazai, co-editor of the book, and the author of the epilogue is János Hóvári, historian, turkologist and former ambassador of Hungary in Ankara. A dedication to the author of the volume is written by the late György Hazai, professor and turkologist.

2. Although the title of the book refers only to essays dealing with legal relations, quite a few other interesting topics are also dealt with. The connecting „bridge" between these topics is the „Turkish party", as the reader can always find the Ottoman Empire / the Republic of Turkey on one side of the investigated (sometimes multilateral) legal relations. This link is especially appropriate as the Ottoman Empire / the Republic of Turkey always had a strong legal and political influence in the area, and its private law also developed considerably during the last two centuries.

The book is divided into five parts, which will now be reviewed briefly.

3. The first part deals with the development of private law in Cyprus from the fourth to the twenty first century. Throughout its history, the island was ruled by many states which obviously also had an influence on its legal system. Noteworthy is the period between 1878 and 1959. During the first half, until 1914, Cyprus belonged to the Ottoman Empire, and according to agreements between the Sublime Porte and Great Britain „the Sultan transferred the right of publishing laws and other regulations to

Fundamina
Volume 24 | Number 1 | 2018
pp 198-200

DOI: 10.17159/2411-7870/2018/v24n1a8
Print ISSN 1021-545X/ Online ISSN 2411-7870

the Queen of the United Kingdom and Ireland in the name of the British sovereign". During the second half, from 1914, Great Britain annexed Cyprus which eventually became independent in 1959 pursuant to the Treaty of Cyprus. In July 1974 the island split into two *de facto* states. The essays conclude with the accession of the Republic of Cyprus to the European Union in 2004 and with a brief review of its constitution.

Essays in the second part of the volume deal with the multiple relations between Islamic and Hungarian law. The author divides this „long-term story" into three periods, namely (1) from earliest times until the end of the thirteenth century; (2) from 1541 until 1687; and (3) from 1878 until 1918, and then he discusses the relationship between the Hungarian people, namely ethnicity and the Islam, from a legal-historical point of view. The most interesting period is undoubtedly the second one which deals with the history and legal system of Hungary under the Ottoman rule. Having dealt with the first and third periods, the author thereupon discusses and analyses the status of Muslims in Hungary and the (necessary) legal regulations regarding their presence in the country.

The third part of the book is an overview of the development and codification of private law of the Ottoman Empire / the Republic of Turkey during the nineteenth and twentieth centuries. A fundamental result of this process was the *Mecelle*, a compilation also containing Turkish private law. Thereafter important policies of this progress were reformed, gradually replacing this compilation which ended with the enactment of the Turkish Civil Code in 1926. This mainly reflected the influence of the French version of the Swiss Civil Code (*Schweizerisches Zivilgesetzbuch*). Furthermore, the reader can gain valuable information from this part about both the latest developments of Turkish private law during the twentieth century and the foundation of modern Turkish legal education.

The next part of the book, which contains an historical essay, deals with the so-called „Macedonian Question". It provides invaluable knowledge, depicting the exciting political history, since the author does not only discuss historical facts, but (as far as possible) also reveals the underlying political motivations from a legal historian's point of view. This historical-political-legal trio of the composition makes this fourth part of the book – which is divided into two chapters – invaluable.

A brief but sound analysis of the medieval grounds of this question follows thereupon. The first chapter focuses mainly on the events of the nineteenth century, for instance the Macedonian Revolution of 1875, the Russo-Turkish War of 1877-1878, and the activities of the Internal Macedonian Revolutionary Organization (VMRO). As a result of these events, the Ottoman Empire lost its influence in this area, and although these territories were *de iure* part of the Ottoman Empire, *de facto* it could not influence the settlement of affairs in the Balkans during the first decade of the twentieth century.

In the second chapter, the author analyses the impact of the Revolution of Young Turks and other events preceding the First World War, as well as events during the interwar period and later developments of the post-World War II era. For instance, consequences of the demise of the Ottoman Empire, conflicts between the Kingdom of Serbs, Croats and Slovenes (after 1929 the Kingdom of Yugoslavia) and Bulgaria, and the declaration of independence of the Republic of Macedonia (or, as used in diplomatical phrasing, the former Yugoslav Republic of Macedonia) in 1991.

4. It might be surprising that a collection of essays focusing on legal relations between countries also deals exclusively with a section about a jurist, namely András Bertalan Schwarz (1886-1953). However, taking his life and scientific œuvre into consideration, it becomes clear that this book is the most obvious place to highlight his character and personality.

The selected essays of the author (a review of the outstanding scientific œuvre of Schwarz, excerpts of a lecture held by the author on the one hundredth anniversary of the birth of András Bertalan Schwarz) and the publication of a number of copies of interesting documents in connection with the jurist (*inter alia* two manuscripts of his scholarly curriculum, correspondence deserving particular interest, etc) is satisfactory from two views. First, they also focus on the importance of this section from a perspective of the history of science. Second, the reader gets a harmonic image about the œuvre and life of András Bertalan Schwarz regarding his role in Turkish legal education and the codification of private law in the Republic of Turkey. Thus the readers are reminded of this outstanding Hungarian jurist, born more than 130 years ago.

5. This book will be of interest to everyone doing research either regarding the history of the codification of private law in countries of Southeast Europe or the history of the nineteenth and twentieth century Balkan Peninsula. It also provides valuable information about the role of Islamic law in medieval as well as the modern history of Hungary, and – in conclusion – about András Bertalan Schwarz, former Hungarian professor of Roman law and private law at the Istanbul University.

As stated earlier, it is no easy task to enumerate all the important issues dealt with in this book. And it will also be difficult to list everyone who will be interested in this book. For this, and for acknowledging the importance of this book in the development of Turkish-Hungarian legal relations, I would like to join to János Hóvári who states as follows in the epilogue: „We hope that even more Turkish students will apply to law faculties at Hungarian Universities, and it would be wonderful to see Hungarian law students at Turkish universities. These students can be encouraged by this book and inspired by Prof Gábor Hamza's research."

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